THE EVIDENCE OF CHRISTIAN NATIONALISM IN FEDERAL INDIAN LAW: THE DOCTRINE OF DISCOVERY, *JOHNSON v. McINTOSH*, AND PLENARY POWER

STEVEN T. NEWCOMB*

* Steven T. Newcomb (Shawnee-Delaware) is enrolled at the Cherokee Nation of Oklahoma and is presently the director of the Indigenous Law Institute. A frequent public speaker on indigenous legal and political issues, Mr. Newcomb currently has a book in progress entitled PAGANS IN THE PROMISED LAND: RELIGION, LAW, AND THE AMERICAN INDIAN (forthcoming).

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PREFACE

The *Johnson v. McIntosh* decision,[1] handed down by Chief Justice John Marshall in 1823, has long been heralded as one of the first federal Indian law cases to define the nature of land title for American Indians.[2] Complex and ambiguous in content and style, and now layered with over a century and a half of judicial application, the *Johnson* ruling has left a legacy that most scholars and Indian law practitioners unquestioningly refer to as the beginning point of federal Indian law.[3]

This Article contends that *Johnson* was premised on the ancient principle of Christian dominion and a distinction between paramount rights of "Christian people" and subordinate rights of "heathens" or non-Christians.[4] The Christian/heathen distinction found in *Johnson* constitutes the tacit, underlying basis of "all subsequent determinations of Indian right[s]."[5] For example, the Tennessee Supreme Court explained:

> We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to *assume sovereignty over, and to govern the unconverted natives* of Africa, Asia, and North and South America, has been recognized as a part of the national law, for nearly four centuries, and that it is now so recognized by every Christian power, in its political department, and its judicial, unless the case of Worcester has formed an exception in these states. That, from Cape Horn to Hudson Bay, it is acted upon as the only known rule of sovereign power, by which the native Indian is coerced; for conquest is unknown in reference to him in the international sense. Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution, this continent never could have been inhabited by our ancestors. To

1. 21 U.S. (8 Wheat.) 543 (1823).

2. Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 47 (1947).

3. Two earlier Supreme Court rulings, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), and New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812), also concerned the issue of Indian land title, although they, like *Johnson*, did not involve Indians directly. In neither case did the Court clearly define Indian title or United States/Indian relations. In *Fletcher*, however, the Court did say that Indian title "is certainly to be respected by all courts, until it be legitimately extinguished." 10 U.S. (6 Cranch) at 142-43. Justice Johnson dissented and stated that the Indians west of Georgia retained a limited sovereignty and therefore held the absolute proprietorship of the soil. *Id.* at 146.

4. *Johnson*, 21 U.S. (8 Wheat.) at 577. *The Oxford English Dictionary* defines "heathen" as a word of "Christian origin" that is "applied to persons or races whose religion is neither Christian, Jewish, nor Moslem." OXFORD ENGLISH DICTIONARY 75 (2d ed. 1989). Thus, "heathen" is a *religious* concept. While these are Christian-dominating words, for ease of reading they are not placed in quotation marks throughout this Article.

5. WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 66 (1971); *see* RUSSELL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 49 (1980).

> abandon the principle now, is to assert that they were unjust usurpers; and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground.[6]

Similarly, in *Johnson* the Court found Indian rights "impaired"[7] simply because the indigenous peoples of North America were not Christians at the time of European arrival.

Revealing the Christian/heathen distinction as the basis of Marshall's reasoning in *Johnson* makes it possible to understand why the relationship between the United States and native peoples has been almost impossible to define.[8] Although the Court used early Christian attitudes toward heathens and infidels to build the conceptual foundation of federal Indian law, this fact has become obscured over time. Today these attitudes exist in Indian law at a level that is seldom, if ever, explicit.[9] Such attitudes remain out of sight, below the level of conscious awareness. With few exceptions, they are never brought into contemporary discussions of federal Indian law.[10]

Making the distinction between Christians and heathens explicit in federal Indian law identifies the nonconstitutional basis of the United States' plenary power over Indian peoples.[11] Although the standard interpretation of the plenary power doctrine erroneously traces its source to the United States

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6. State v. Foreman, 16 Tenn. (8 Yer.) 256, 277 (1835) (emphasis added).

7. *Johnson*, 21 U.S. (8 Wheat.) at 574.

8. *See* Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461-62 (1991) (noting the difficulty of defining the relationship between Indians and the federal government).

9. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF THE CONQUEST 60 (1975) (identifying this aspect of the *Johnson* ruling, when he observes of Marshall that, "[T]he chief justice of a country espousing separation of church and state could show no official concern about Indians' *lack of Christianity as criterion of [their] legal status.*" (emphasis added)); *see generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

10. Apparently no contemporary legal scholar other than Williams, *supra* note 9, has focussed on the Christian/heathen/infidel distinction in federal Indian law scholarship. *See* Geoffrey Lester & Graham Parker, *Land Rights: The Australian Aborigines Have Lost A Legal Battle, But . . .*, 11 ALTA. L. REV. 189, 196-200 (1973) (discussing the Christian/infidel distinction in early English crown law).

11. *See* Comment, *Federal Plenary Power in Indian Affairs After* Weeks *and* Sioux Nation, 131 U. PA. L. REV. 235, 247-50 (1982) (discussing how the assertion of plenary power over Indians falls outside the enumerated powers of the Constitution); *see also* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. IND. L. REV. 1, 57-118 (1991) (documenting the lack of a constitutional basis for federal plenary power over Indian nations); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 59 (finding that there is no valid basis in the Constitution for the federal government's exercise of plenary power over Indians).

Constitution,[12] in reality the doctrine of plenary power is a logical extension of John Marshall's theoretical construct of Christian dominion,[13] which is found in the subtext of the *Johnson* ruling.[14]

This Article brings to the forefront an issue that has not been articulated previously: should the United States continue to assert a plenary dominion over Indians and an underlying vested property right in Indian lands based on the historical fact that Indian people were not Christians at the time of European arrival? Should Indian nations and peoples be denied under United States law their rights to "complete sovereignty"[15] and an exclusive right of territory in their lands[16] on the basis of Christianity?

INTRODUCTION

Vine Deloria, a highly regarded scholar of Indian affairs, has urged scholars and federal Indian law practitioners to uncover the "historical mythologies" that have dominated federal Indian law since the time of the *Johnson*

12. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 170 (1st ed. 1942) ("The effective meaning of the term 'wardship,' in the sense of special subjection [of Indians] to congressional power, is to be found entirely in the realm of constitutional law.").

13. In this Article, I use the word "dominion" in its Latin sense "*dominium*," as explained by William Brandon in *New Worlds for Old*.

> The Old World idea of property was well expressed by the Latin *dominium*: from 'dominus' which derived from Sanskrit 'domanus'—'he who subdues'. 'Dominus' in the Latin carried the same principal meaning, 'one who has subdued,' extending naturally to signify 'master, possessor, lord, proprietor, owner'. 'Dominium' takes from 'dominus' the sense of 'absolute ownership' with a special legal meaning of property right of ownership (So says Lewis and Short, A LATIN DICTIONARY (1669 ed.)). 'Dominatio' extends the word into 'rule, dominium,' and . . . 'with an odious secondary meaning, *unrestricted power, absolute dominium, lordship, tyranny, despotism.' Political power grown from property—dominium—was, in effect, domination.*

WILLIAM BRANDON, NEW WORLDS FOR OLD 121 (1986) (emphasis added).

Thus, the concept of "dominion," traced back to its Latin origin, provides another dimension to the *Johnson* decision that should be taken seriously. It has been asserted that Marshall's reference to dominion in the ruling

> extend[ed] only to an interest in land. . . . [Therefore] it did not extend any legal status to the Indians as political communities. With the single exception of the right of alienability of land, the original, indeed aboriginal sovereignty of the Indian nations is unimpaired by, and not included in, the concept of discovery.

Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 650 (1978). While Berman may be correct, the courts have construed "discovery" as conferring on the "discovering" nation, or its successor, both governmental authority over Indian nations and a radical fee title to their lands. *See* the discussion of United States v. Rogers, 45 U.S. (4 How.) 567, 570-71 (1846), *infra* text accompanying note 104.

14. *See infra* text accompanying notes 151-76.

15. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

16. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 285 (1955) ("Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.").

decision.[17] He observed that the "mythical, doctrinally determined history which is now entrenched in federal Indian law will be replaced with a more accurate history only with exceptional difficulty and hardship."[18] Often, however, the new metaphors and terminology that emerge over the years prevent a more accurate portrayal of history. Describing the past in terms of contemporary metaphors can occasionally erect a linguistic facade that validates antiquated principles by allowing them to go unchallenged. For example, replacing the word Christian with the metaphor European when referring to the Age of Discovery obscures the religious basis of the discovery principle. One commentator has noted that:

> The principle that lands inhabited by infidels were open to acquisition by Christians, a principle which, as we have seen was for a long time held by jurists and theologians, was acted upon by the European powers *in extending their dominion* over the lands that were discovered in the fifteenth and sixteenth centuries . . . . Later on the distinction was drawn between lands already occupied by Europeans and lands not so occupied, although in effect this was the same as the earlier distinction between Christian and non-Christian lands.[19]

Thus the obscurity that has been created makes it difficult to challenge the discovery principle on religious grounds.

Many scholars today also characterize dealings between Europeans and indigenous peoples during the early colonial period as having been governed by international law principles existing at the time. Coulter and Tullberg provide a prime example of the secularization of the discovery doctrine; the authors use the word "European" to refer to the Age of Discovery even though the relevant documents of that time used the term Christian:

> The doctrine of discovery came into existence with the rapid expansion of European empires in the fifteenth century. Its basic tenet—that the European nation which first 'discovered' and settled lands previously unknown to Europeans thereby gained the exclusive right to acquire those lands from their occupants—became part of the early body of international law dealing with aboriginal peoples.[20]

But when the term "international law" is employed to refer to the discoveries made by the monarchies or nations of Western Europe during the fifteenth and sixteenth centuries, what is actually being referred to is Christian

17. Nell J. Newton, *Introduction*, 31 ARIZ. L. REV. 193, 194 (1989) (summarizing Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989)).

18. Deloria, *supra* note 17, at 223.

19. MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORIES IN INTERNATIONAL LAW 24-26 (1926) (emphasis added).

20. Robert T. Coulter & Steven M. Tullberg, *Indian Land Rights*, *in* THE AGGRESSIONS OF CIVILIZATION 185, 190 (Sandra L. Cadwalder & Vine Deloria, Jr. eds., 1984).

international law.[21] By omitting the word Christian from our description of that period in Western legal history, the relationship between the origins of federal Indian law and Christianity is secularized and obscured.[22]

By highlighting the connection between Christianity and the law of discovery, this Article will demonstrate that the Christian subjugation of non-Christian peoples is the underlying premise of the *Johnson v. McIntosh* ruling.[23] Indeed, once this premise is revealed, the relationship between the United States and Indians can be characterized accurately as the relationship between a "Christian nation" (or the legal successor of a "Christian nation") and historically "heathen," non-Christian peoples. Ever since *Johnson*, the

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21. *See* THEODORE D. WOOLSEY, INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW (New York, Charles Scribner's Sons, 5th ed. 1879):

> [W]e define international law to be the aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects. The rules also which they unite to impose on their subjects, respectively, for the treatment of one another, are included here, as being in the end rules of action for the states themselves. Here notice,—
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> 1. That as Christian states are now controllers of opinion among men, their views of law have begun to spread beyond the bounds of Christendom, as into Turkey, China, and Japan.
>
> 2. The definition cannot justly be widened to include the law which governs Christian states in their intercourse with savage or half-civilized tribes; or even with nations on a higher level, but lying outside of their forms of civilization.

Id. at 3-4; *see also* EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS at xlix n.1 (Joseph Chitty ed., Philadelphia, T. & J.W. Johnson Co., Law Booksellers, 1859) (1758) ("In cases of doubt arising upon what is the Law of Nations, it is now an admitted rule among all European nations, that our common religion, *Christianity*, pointing out the principles of *natural justice, should* be equally appealed to and observed by all as an unfailing rule of construction."); 1 JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES 113 (Edinburgh, William Blackwood & Sons, 1883-84) (observing that in international law "[p]lenary political recognition has hitherto obtained only between Christian nations").

22. *See generally* PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 89 (1966):

> Reification is the apprehension of human phenomenon as if they were things, that is, in non-human or possibly suprahuman terms. Another way of saying this is that reification is the apprehension of the products of human activity *as if* they were something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will. Reification implies that man is capable of forgetting his own authorship of the human world, and further, that the dialectic between man, the producer, and his products is lost to consciousness. The reified world is, by definition, a dehumanized world. It is experienced by man as a strange facticity, an *opus alienum* over which he has no control rather than as the *opus proprium* of his own productive activity.

When we historically lose sight of the fact that the people of Christendom created the doctrine of Christian discovery, we have reified, and thus obscured, that aspect of history. Papal bulls and royal charters of the discovery era used the terms "Christendom" and "Christian," and *not* the terms "Europe" and "European." Replacing the word "Christian" with the word "European" prevents an accurate telling of history by placing a more modern and secular term in the place of the word that was actually in use in the fifteenth and sixteenth centuries. The end result is to replace the actual, religiously based, conceptual framework of Christendom with a contemporary conceptual framework more characteristic of our time.

23. 21 U.S. (8 Wheat.) 543 (1823).

federal government has used the Christian religion as a rationale to maintain its dominance over Indian nations—denying them their rights to complete sovereignty and territorial integrity—on the basis of a historic distinction between Christians and non-Christians.[24] Indian nations have been denied their most basic rights to sovereignty and territorial integrity simply because, at the time of Christendom's arrival in the Americas, they did not believe in the God of the Bible, and did not believe that Jesus Christ was the true Messiah. This basis for the denial of Indian rights in federal Indian law remains as true today as it was in 1823.

I
CHRISTIANITY AND "DISCOVERY"

A. The Christian Discovery of Heathen Lands

During the fifteenth and sixteenth centuries, when the seafaring nations of Christendom (now Europe) began to "discover" indigenous nations and their lands, these Christians believed they had the moral and legal right to take possession of any lands they were able to locate that were not possessed by any Christian prince.[25] Thus, "discovery," when used alone, is a metaphor in need of the modifier "Christian." Accurately stated, the centuries-old right of discovery was the right of any Christian nation to locate and take possession of non-Christian lands.[26]

The nations of Christendom did not separate law and religion when they discovered non-Christian lands.[27] Christians looked upon non-Christians as enemies of the faith, and thus saw themselves as providentially assigned, in

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24. When the Court used Christian ideology as the foundation of what would later be called "federal Indian law," it legitimized the persecution of Indian peoples on the basis of religion, simply because their traditional religions were historically regarded as heathen, pagan, or infidel.

25. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 62, 63 (Frances G. Davenport ed., 1917) [hereinafter TREATIES].

26. George G. Wilson, *International Law and the Constitution*, 13 B.U. L. REV. 234 (1933).

> There were inhabitants on this continent when the Europeans arrived, but the Europeans while recognizing that these Indians had a right of occupancy of the land, affirmed that this right did not imply dominion on which might rest the power to convey title. England, France, Holland, Portugal, and Spain alike maintained *that discovery of lands previously unknown to Christian people gave the Christian discoverer the right to take possession.*

Id. at 254 (emphasis added). Wilson's explanation implicitly argues that the Christian discoverer held dominion over the discovered heathen lands, for "the right to take possession" is one of the precise definitions of the word "dominion." *See infra* notes 156, 160 and accompanying text.

27. *See* JAMES MULDOON, POPES, LAWYERS, AND INFIDELS 139 (1979) (describing the influence of medieval canon law on the Spanish and Portuguese expansion of the fifteenth and sixteenth centuries. Because European rulers justified their conquests as programs to extend the influence of the Church, any such conquests "based on spiritual motives belonged to the spiritual sphere, and so the pope as the supreme judge in spiritual matters was an essential part of Spanish and Portuguese overseas expansion.").

the spirit of a crusade, to locate and wage war against the infidel.[28] Thus, discovery and conquest were tied together.[29] Consequently, "conquest" meant the establishment of dominion over land and people by force of arms in order to extend the boundaries of "Christendom and the dominions of Christian kings at the expense of infidels and pagans."[30] Of course, an equally important factor was greed and "the extraction of tribute and booty from the conquered."[31]

The Catholic church was an active player in the enterprise of discovery and conquest. It devised political theories to rationalize Christendom's expansion and issued papal directives that sanctioned crusading activities in distant lands.[32] In 1455, Pope Nicholas V issued a bull to King Alfonso V of Portugal, giving the Portuguese monarch the authority "to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies,"[33] to put them into perpetual slavery, and to take all their possessions and property.[34] Similarly, in 1493 Pope Alexander VI granted Spain any lands that Christopher Columbus had discovered, and any that the Spanish might discover in the future, provided they were "not previously possessed by any Christian owner."[35]

Neither of these papal documents stated that the discovered heathen or infidel peoples would be allowed to maintain their own national existence. The papal bull of 1493 specifically expressed the pope's desire that the "barbarous nations be overthrown and brought to the faith itself"[36] as a means of expanding the Christian Empire.[37] These papal bulls morally and legally sanctioned the subjugation of non-Christian peoples.[38]

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28. *See generally* C. Raymond Beazley, *Prince Henry of Portugal and the African Crusade of the Fifteenth Century*, 16 AM. HIST. REV. 11 (1910) (discussing the constant purpose of establishing the supremacy of the Catholic faith in America); *see also* LYLE N. MCALISTER, SPAIN AND PORTUGAL IN THE NEW WORLD 1492-1700, at 47-103 (1984) (describing the similar goals of Spain and Portugal); for England, *see infra* note 41 and accompanying text.

29. Castile (and later, Spain), Portugal, and England, all assumed that upon discovering non-Christian lands, they had the right to subdue (conquer) the inhabitants of those lands. *See* Beazley, *supra* note 28, at 11; MCALISTER, *supra* note 28, at 47-103; JAMES A. WILLIAMSON, THE CABOT VOYAGES AND BRISTOL DISCOVERY UNDER HENRY VII 53 (1962).

30. MCALISTER, *supra* note 28, at 89-90.

31. *Id.* at 90.

32. *Id.*; *see generally* TREATIES, *supra* note 25.

33. TREATIES, *supra* note 25, at 23.

34. *Id.*

35. *Id.* at 56.

36. JOHN B. THACHER, CHRISTOPHER COLUMBUS 125 (1903).

37. *Id.* at 127.

38. See Friedrich A.F. von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT. L. 448, 451-52 (1935) (citing WALTER FUGLSANG, DER STREIT UM DIE INSEL PALMAS VOR DEM STANDIGEN SCHIEDSHOF IM HAAG 83 (1931)), for the proposition that at the time of the *Inter Caetera* bull of 1493 "a conversion of heathens to the Christian faith seemed highly improbable without effective possession and dominion over the territory in question. The pope awarded his donations only in order to further the conversion of the inhabitants of the discovered territories by means of occupation by Spain and Portugal." What is not said here is that the pope had expressed in the bulls of 1493 his "desire" that

The Cabot charter, issued to John Cabot and his sons in March of 1493 by King Henry VII of England, imitated the language of papal bulls, and gave Cabot the authorization to "seek out, discover, and find whatsoever islands, countries, regions or provinces of the heathens and infidels, whatsoever they be, and in what part of the world soever they be, which before this time have been unknown to all Christians."[39] Cabot was also instructed to "subdue, occupy and possess" the discovered lands "as our vassals and lieutenants, getting unto us the rule, title, and jurisdiction of the same."[40] Cabot was given this authority because it was "at that time accepted as a fundamental law of Christendom that all Christians were in a state of war with all infidels."[41]

The Bible also influenced the attitudes of Christendom during the Age of Discovery. Christian Europeans viewed themselves as a "chosen people" commissioned by God to take possession of a great inheritance.[42] In *Psalms* 2:8, Yaweh (the Lord of the Old Testament) tells his chosen people (through King David), "I shall give to thee the heathen for thine inheritance, and the uttermost parts of the earth for thy possession."[43] The discovering nations of Christendom construed this and other biblical passages to mean that they had the divine right to extend their dominion world-wide.[44]

B. The Independence of American Indian Nations

At the time of Christian European arrival to the Western Hemisphere, the indigenous nations and peoples of the Americas were as free and independent as any other nations on earth to govern their own affairs and to determine their own way of life without external interference.[45] They lived within their own territorial boundaries according to their own laws, customs, and traditions.[46] While Christendom's discovery doctrine bound those nations of Europe that agreed with its mandate, the doctrine could not affect, diminish, or

"the barbarous nations be subjugated" so that they could be "brought to the faith itself." THACHER, *supra* note 36, at 125.

39. Heydte, *supra* note 38, at 453.

40. *Id.*

41. WILLIAMSON, *supra* note 29, at 53.

42. Beazley, *supra* note 28, at 11-23 (discussing the role of the Catholic Church and Prince Henry of Portugal in the colonization of Africa).

43. *Psalms* 2:8; *see also infra* notes 85-89 and accompanying text.

44. *See* Thomas R. Bacon, *The Character of Columbus*, 1 YALE REV. 245 (1892); WASHINGTON IRVING, THE LIFE AND VOYAGES OF CHRISTOPHER COLUMBUS 296 (New York, G. & C. Carvill 1828); *see also* James W. Tuttleton, *Introduction* to WASHINGTON IRVING, VOYAGES AND DISCOVERIES OF THE COMPANIONS OF COLUMBUS at xvii (James W. Tuttleton ed., 1986) (1831) (showing that much of Irving's own research was done in Spain and was also based on MARTIN FERNANDEZ DE NAVARRETE, COLECCIÓN DE LOS VIAGES Y DESCUBRIMIENTOS QUE HICIERON POR MAR LOS ESPAÑOLES DESDE FINES DEL SIGLO XV [COLLECTION OF SEA VOYAGES AND DISCOVERIES, MADE BY THE SPANIARDS FROM TOWARD THE CLOSE OF THE FIFTEENTH CENTURY] (Madrid, Imprenta Real 1825, 1827)).

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

46. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 212 (1989).

reduce the rights of the indigenous peoples who did not participate in its formation.[47]

However true this observation, the non-Christian possession of a specific territory was not regarded by the Christian nations of Europe as barring their own intrusions into those territories for the purpose of possessing them.[48] That heathens and infidels had possession of specific territories was seen as sufficient reason for invading those lands and possessing them.[49]

Therefore, while some legal scholars contend that mere "discovery" in and of itself failed to confer anything more than an inchoate title on the "discovering" nation,[50] it does not follow that the original non-Christian possessors were regarded as being entitled to the same degree of territorial sovereignty that Christian nations held in their own home countries.[51] If Christian nations had respected the territorial possessions of heathen peoples, they would have considered themselves entitled only to take possession of lands entirely devoid of human inhabitants.[52] Discovery dissolved the territorial sovereignty of non-Christian peoples, thereby rendering their lands subject to Christian invasion, conquest, and possession.[53]

When Columbus and other early explorers journeyed to unknown lands, Christendom recognized indigenous nations as inferior in rank to Christian nations.[54] Even Fray Bartolomé de Las Casas, an early advocate of Indian

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47. *Worcester*, 31 U.S. (6 Pet.) at 544. Chief Justice Marshall observed in *Worcester* that the principle of discovery was not a principle:

> which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discovers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.

Id. Marshall did not explain how a principle which could not affect Indians' rights could at the same time, as he put forth just nine years earlier in *Johnson*, be responsible for diminishing "their rights to complete sovereignty, as independent nations." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

48. *See* Leslie C. Green, *Claims to Territory in Colonial America*, *in* THE LAW OF NATIONS AND THE NEW WORLD 56 (Leslie C. Green & Olive P. Dickanson eds., 1989) ("Whether the religion of the writer is Catholic or Protestant, and whatever the terms in which his argument may be dressed, all are of opinion that it is just to wage war and so conquer those who reject the basic tenets of Christianity or behave in a way that Christians consider to be contrary to nature.").

49. *Id.*

50. *See* Heydte, *supra* note 38, at 454.

51. The discovery doctrine only applied to lands outside the bounds of Christendom. Thus, the Christian powers of Europe did not consider themselves to have the authority to simply "claim" and "take possession" of lands that were inhabited by Christians or that were in the possession of a Christian lord. Even though Christian thinkers such as Thomas Aquinas, Pope Innocent IV, Francisco de Vitoria, and others were willing to admit that infidels did possess "dominion," still, on some pretense or another, they usually found a way to rationalize the right of Christian nations to subjugate non-Christian peoples. *See infra* note 84.

52. *See* LINDLEY, *supra* note 19, at 6-9 (discussing right of "discovery" of uninhabited lands).

53. CHRISTOPHER VECSEY, HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 15-16 (1991).

54. The Christian discoverers of the New World considered the occupants to be heathens. The latter possessed no rights worthy of respect by their Christian conquerors, whose right to

rights, could do no more than to create a theory of empire in which Indians were deemed to be subjects of the Spanish Crown.[55] Las Casas did not believe that an indigenous nation could remain equal to the Crown in terms of dominion or sovereignty.[56]

Thus, with regard to the territories of the Western Hemisphere, Christian nations considered themselves to have a civilization and religion that was far beyond the level of development achieved by non-Christian peoples.[57] Treaties were made between Christian nations[58] without contemplating the status or territorial rights of the indigenous peoples living in the territories claimed by the discoverers.[59]

Nevertheless, the failure of Christian Europeans to recognize Indian rights to sovereignty and territorial domain did not mean that the indigenous nations lacked these rights.[60] It simply meant that the discovering nations considered themselves to hold a degree of dominion (as against heathen and infidel inhabitants) over the territories they claimed, which automatically outweighed whatever rights the Indian nations may have had.[61] It was in the best

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conquest was grounded in their Christian identity. *Id.* at 16. Francisco de Vitoria, considered to be one of the founders of international law, acknowledged that American Indians were the true owners of their lands, with "dominion in both public and private matters, just like Christians, and . . . neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners." Green, *supra* note 48, at 40. This substantiates the idea that indigenous nations of the Americas were considered equal to Christian nations. Nevertheless, Vitoria was not as liberal as some consider him to have been. Lecturing at the University of Salamanca in 1532, he said:

> These people [American Indians] are not unintelligent, but primitive; they are incapable of maintaining a civilized State according to the requirements of humanity and law; . . . their government, therefore should be entrusted to people of intelligence and experience, as though they were children . . . but this interference must not be for the profit of the Spaniards; for otherwise the Spaniards would be placing their own souls in peril.

Quoted in THE LAW OF NATIONS AND THE NEW WORLD 46-47 (Leslie C. Green & Olive P. Dickanson eds., 1989), *cited in* Felix S. Cohen, *Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 11 n.30 (1942).

55. JOHN H. PARRY, THE ESTABLISHMENT OF THE EUROPEAN HEGEMONY: 1415-1715, at 64-67 (1961).

56. *Id.*

57. Timothy J. Christian, *Introduction* to THE LAW OF NATIONS AND THE NEW WORLD at x-xi (Leslie C. Green & Olive P. Dickanson eds., 1989).

58. *E.g.*, Treaty of Tordesillas, June 7, 1494, Spain-Port., *in* TREATIES, *supra* note 25, at 93-100; *also in* Thacher, *supra* note 36, at 175-86.

59. VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES 88 (1985).

60. *See* S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, *in* 1989 HARVARD INDIAN LAW SYMPOSIUM: PAPERS PUBLISHED IN CONJUNCTION WITH A CONFERENCE 191 (Harvard Law School Publication Center ed., 1990); John H. Clinebell & Jim Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669 (1978).

61. *See* Cyrus Thomas, *Introduction* to INDIAN LAND CESSIONS IN THE UNITED STATES, (Charles C. Royce ed.), *in* EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1896-1897, H.R. DOC. NO. 736, 56th Cong., 1st Sess., pt. 2, at 527-644 (1899) [hereinafter INDIAN LAND CESSIONS].

interest of the discoverers to view themselves as superior to indigenous peoples, even when they later entered into treaties with Indian nations.[62]

This assumption of superior dominion is found in early papal bulls giving permission to invade, conquer, and possess the lands of non-Christians;[63] in the royal charters issued by Portugal and Castile (later Spain) authorizing the seizing of infidel lands;[64] and in English charters giving the Cabots and other grantees the authority to possess non-Christian lands.[65] These documents expressed religious rather than secular distinctions between Christians and indigenous nations,[66] and assumed that the Christians possessed a right to subjugate heathens and infidels and appropriate their lands.[67] As explained in the following section, Chief Justice John Marshall incorporated this same notion of Christian subjugation into the *Johnson v. McIntosh* decision.[68]

C. *The Supreme Court's Adoption of the Principle of Christian Discovery*

Johnson v. McIntosh dealt with the validity of a grant of land made by the Chiefs of the Illinois and Piankeshaw Nations to private colonial individuals.[69] The ruling, long acknowledged to have been based on the discovery doctrine,[70]

> The right of occupancy in the Indians, until voluntarily relinquished or extinguished by justifiable conquest; being conceded, it became necessary on the part of the Government to adopt some policy to extinguish their right to such territory as was not necessary for their actual use. As a natural corollary of this theory arose the question, With Whom shall the government treat? The Indians having no general government or regular political organization, but consisting of numerous independent tribes in a state of savagery, the usual policy of civilized nations in a case of conquest could not be adopted. As their claims were those of tribes or communities, and not individuals in severalty, it followed as a matter of necessity that the only policy which the Government could adopt was to recognize them as *quasi independent, distinct political communities, or nations, or half sovereign states and treat them as such* . . . It is doubtless true that the recognition of the Indian tribes as distinct nationalities, with which the Government could enter into solemn treaties, was a legal fiction which should be superseded by a more correct policy when possible."

Id. at 535 (emphasis added).

62. *See generally* LINDLEY, *supra* note 19.

63. *See generally supra* notes 32-38 and accompanying text.

64. *See generally supra* notes 27-28 and accompanying text.

65. *See generally supra* notes 39-41 and accompanying text.

66. Although words such as "savage," "primitive," "barbarous," and "ignorant," would appear to be secular, in the actual discourse of the time of discovery, these words were used as synonymous with the more specifically religious labels of "saracen," "pagan," "infidel," and "heathen." At that time, almost all of Europe was Christian. Thus, to speak of "European culture" was to speak of "Christian culture," and vice-versa. Moreover, international law is considered to have "originated within the Catholic Church." James B. Scott, *Editorial Comment: Francisco de Vitoria Association*, 22 AM. J. INT'L L. 136, 139 (1928). Thus, the tendency of the law of Christian nations was to place non-Christian heathen peoples outside the pale of the civilized world, which, of course, is just another way of referring to the world of Christendom.

67. *See* PARRY, *supra* note 55, at 193 (quoting Francisco de Vitoria).

68. 21 U.S. (8 Wheat.) 543 (1823).

69. *Id.* at 551-62.

70. Robert A. Williams, *Jefferson, The Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 168 (1987).

served as the conduit to place into United States law the concept of Christian discovery and dominion. Chief Justice Marshall introduced these concepts in an opaque fashion, carefully avoiding any explicit acknowledgment of the religious basis of the ruling. As a result, most jurists, legal scholars, and federal Indian law practitioners have overlooked the religious underpinnings of the *Johnson* decision.[71]

Supreme Court Justice Stanley Reed, however, directly acknowledged the religious aspect of *Johnson*. In *United States v. Alcea Band of Tillamooks*,[72] Reed argued that the majority wrongly awarded the Alcea Band monetary compensation for a federal taking of aboriginal title lands.[73] He based his argument on the theory put forth in *Johnson* "that discovery by Christian nations gave them sovereignty over and title to the lands discovered."[74]

In Reed's view, it followed that although the Indians "were permitted to occupy these lands under the Indian title [occupancy], the conquering [Christian] nations asserted the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss."[75] In other words, the Christian sovereign (or its successor) could legally appropriate its land following "discovery."[76]

Reed's assertion that *Johnson* was predicated on a legal theory regarding the rights of Christian nations is supported by Henry Wheaton's *Elements of*

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71. *But see* Williams, *supra* note 9. Williams alludes to the religious basis of the *Johnson* decision but states:

> While Marshall only made passing reference to the foundational premises supporting the Doctrine [of discovery] in *Johnson*—"the character and religion of . . . (America's) inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy"—Marshall and the other justices were well aware of the historical paternity of this bastardized principle sired by Europe's Law of Nations and legitimated by the Court.

Id. at 255-256. He then cites Joseph Story's comment that " '[a]s infidels, heathens, and savages, they [the Indians] were not allowed to possess the prerogatives belonging to absolute, sovereign, and independent nations.' " *Id.* at 256, quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 152 (Boston, Hillard, Gray 1833), *reprinted in* SIR MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 29 (1969). However, Williams does not acknowledge Marshall's recounting of the early English charters, emphasizing the Christian/heathen distinction, as part of the Court's explanation of the underlying basis of the discovery doctrine.

72. 329 U.S. 40, 55-57 (1946) (Reed, J., dissenting), *cert. granted in part*, 340 U.S. 873, *rev'd*, 341 U.S. 48 (1950).

73. *Alcea*, 329 U.S. at 57.

74. *Id.* at 58; *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288 (1954) (in which Justice Reed put forth the same view in the majority opinion, but deleted the word "Christian."). The *Tee-Hit-Ton* opinion, however, does cite authority using the word "Christian." *Id.* at 281 (citing Beecher v. Wetherby, 95 U.S. 517, 525 (1877)).

75. *Alcea*, 329 U.S. at 58.

76. This is my interpretation of Reed's dissenting opinion. *Cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (adopting a similar line of reasoning in the freedom of religion context).

International Law.[77] Chapter four, entitled "Rights of Property,"[78] traces the development of the principle of discovery. As Wheaton stated:

> The Spaniards and Portuguese took the lead among the maritime nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims.[79]

According to Wheaton, Christian nations gave the rights of non-Christians far less weight and validity than they accorded one another.[80] While the rights of Christian Europeans were well-recognized, the rights of heathen peoples were almost entirely ignored.[81] Because the Christian nations of Europe wanted to overtake the lands of heathens and infidels,[82] they regarded non-Christian lands as being open to possession.[83] Christians simply refused to recognize the right of non-Christians to remain free of Christian dominion.[84]

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77. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 217 (William B. Lawrence ed., Boston, Little, Brown, 6th ed. 1855); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 58 (Boston, Hillard, Gray 1833).

78. WHEATON, *supra* note 77, at 217.

79. *Id.* at 219; *see also* INDIAN LAND CESSIONS, *supra* note 61; JAY KINNEY, A CONTINENT LOST—A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA 1-5 (1937).

80. WHEATON, *supra* note 77, at 220.

81. *Id.*

82. Francisco de Vitoria, however, conceded that the Indians were "true owners, before the Spaniards came among them, both from the public and the private point of view." Green, *supra* note 48, at 40. In actual practice, however, the Indians' ownership of their lands was generally regarded as being subject to the overriding dominion of the Crown. An example of this attitude was expressed by Queen Isabella. In her will, Queen Isabella explained that the Spanish monarchs had requested a concession from the pope, wanting him "to grant to us the said concession so that we could gain and *takeover* their [the Indians'] homeland and convert them to our holy Catholic faith." *Quoted in* W. EUGENE SHIELS, KING AND CHURCH 99 (1961) (emphasis added). The term "takeover" refers of course to the eventual assertion of Christian dominion over Indian nations and their lands. The Crown assumed the Indians to be under its dominion, by virtue of discovery and conquest.

83. If the Christian nations of Europe had respected the Indians' right of ownership in their lands, those nations would not have assumed the right to subdue the Indians and seize their territories.

84. *See* LORIMER, *supra* note 21, at 113; *see also* Green, *supra* note 48, at 39-64. While Francisco de Vitoria and other scholars did concede that infidels could possess property rights and dominion, nevertheless, they put forth a number of rationales by which Christian nations had the right to invade and subjugate non-Christian lands. The right of free-trade and the right to evangelize, among other rationales, allowed the Christians to wage a "just war" against the infidels and to seize their territories. *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 13-14 (New York, Harper and Bros. 1859):

> The Truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and *heathens*, whom, if they were not at liberty to extirpate, they were entitled to deem mere *temporary occupants* of the soil . . . . The right of discovery, thus asserted, has become the settled foundation, on which the European nations rest their title to territory in America; and it is a

This refusal to recognize the rights of heathens was consistent with some aspects of biblical theology.[85] Since the Bible was construed to mean that all the lands of the earth were destined to be brought under Christian dominion,[86] it was logically necessary to devise a principle by which non-Christian lands could be distributed among those Christian sovereigns who were willing to work toward the fulfillment of God's will.[87] The principle so devised was that every nation engaged in this work should be rewarded in proportion to its own enterprising efforts.[88] Thus, whatever lands one Christian sovereign was able to locate, which had been previously unknown to the peoples of Christendom, would belong to that sovereign by right of discovery.[89]

D. Christendom's Principle of Arbitration

There was, however, one central problem with carrying out the law of discovery. When the seafaring nations of Christendom began to prey upon non-Christian peoples and their lands, they were competing for possession of the same regions of the world.[90] The Christian religion provided all European powers with an identity that transcended ordinary boundaries of geography, language, culture, and politics.[91] The Christian identity served as the basis by which rival claims over heathen lands were settled.

The first Christian monarch to discover and claim a given region of non-Christian land had superior title vis-a-vis all other Christian nations, particularly when title was confirmed by the pope.[92] When conflicts arose among Catholic nations,[93] the pope was the most suitable arbiter for settling them.[94] With his spiritual powers of interdict and excommunication, the pope was the one person to whom Christian monarchs could appeal in the event of a territorial dispute.[95]

> right, which, under our governments, must now be deemed incontestable, however doubtful in its origin, or unsatisfactory in its principles. The Indians, indeed, have not been treated as mere intruders, but as entitled to a qualified right of property in the territory. They have been deemed to be the lawful occupants of the soil, and entitled to a *temporary possession* thereof, *subject to the superior sovereignty* of the particular European nation, which actually held the title of discovery.

(emphasis added).

85. ROUSAS J. RUSHDOONY, THE INSTITUTES OF BIBLICAL LAW 3-4 (1973).

86. *Id. See also supra* text accompanying notes 42-43.

87. Edward G. Bourne, *The Demarcation Line of Alexander VI: An Episode of the Period of Discoveries*, 1 YALE REV. 35 (1892).

88. *Id.* at 55.

89. *Id.*; *see* JENNINGS, *supra* note 9, at 132. "Belong" here means having an exclusive right to conquer and possess, that is, to dispossess those lands of indigenous inhabitants, and to seize and repopulate the conquered lands with Christian Europeans.

90. TREATIES, *supra* note 25, at 1-8, 9-11.

91. *See* JOHN M. ROBERTS, HUTCHINSON HISTORY OF THE WORLD 524 (1976).

92. *See* Bourne, *supra* note 87, at 35-45, 54.

93. *See* EDGAR PRESTAGE, THE PORTUGUESE PIONEERS 42-48 (1933).

94. TREATIES, *supra* note 25, at 11-12.

95. *Id.* at 11.

Eventually, as England, France, Holland, Sweden, and Russia began to sponsor their own voyages of exploration, the same principle of Christian discovery and dominion continued to be followed, with the additional understanding that " 'possession' instead of 'discovery' [is] the true basis of Christian right."[96] This principle apparently arose in 1619 when the "East Indies companies of England and the Netherlands temporarily abated their conflicts in the Mulucas by stipulating that each should keep the areas already possessed."[97]

The Dutch rationalized their moving into areas in North America already discovered by the British Crown by arguing that no monarch "could 'prevent the subjects of another to trade in countries whereof his people have not taken, nor obtained actual possession from the right owners, either by contract or purchase.' "[98] As a result of these Dutch actions, it became customary for colonial powers to purchase lands from Indian nations by treaty.[99] This custom, which began in the seventeenth century, constituted international diplomatic recognition of Indian sovereignty.[100] Although Indian peoples were thereby recognized as sovereign nations,[101] a status also supported by early diplomatic conduct of the United States,[102] eventually the notion that Indian nations were not entitled to remain independent prevailed in the United States government.[103] Indeed, the United States would later take the formal position that because of the early doctrine of Christian discovery, Indian nations were not entitled to be free and independent, despite European and United States treaty-making with them.[104]

In an 1844 report to Congress concerning the Oregon territory, attorney and former governor of Tennessee, Aaron V. Brown, discussed the discovery principle and its effects on people in the New World.[105]

> In its application to the primitive inhabitants of the New World, it is more questionable in its use, and more injurious in effects. When it began to be applied by Spain, Portugal, England, and other European states engaged in colonial enterprises, it was frequently associated with the idea of religion, as exemplified in the bull of Alexander VI defining the rights of Spain and Portugal, and the commission of

96. JENNINGS, *supra* note 9, at 132.

97. *Id.*

98. *Id.* at 133 (quoting West Indian Company to States General, May 5, 1632, *reprinted in* 1 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 52 (AMS Press 1969) (1856).

99. Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776, in* EXILED IN THE LAND OF THE FREE 126 (Oren R. Lyons & John C. Mohawk eds., 1992).

100. *Id.* at 129-35.

101. *Id.* at 187.

102. *Id.*

103. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15-17 (1831).

104. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 570-71 (1846).

105. H.R. REP. NO. 308, 28th Cong., 1st Sess. (1844) (report of Aaron V. Brown), *reprinted in* AARON V. BROWN, OREGON TERRITORY 11 (1967).

> Henry VII to the Cabots; *the concession being to take possession of countries not already occupied by Christians.* However defective, therefore, the rule may be in itself, and however destitute of all reason or justice when made the pretext of conquering and reducing to servitude organized communities like those of ancient Peru and Mexico, it is, nevertheless, the real foundation of the great European colonies in America. . . . And when a European people has become established in America, and has grown up to national power, the application of the rule is then a matter of absolute necessity; for the Indian tribes being, for the most part, migratory in their habits . . . and possessing in their barbarous state few or none of the social institutions essential to the preservation of their separate nationality,—*to treat them as independent nations, with all the international rights of such,* would be absolutely destructive to the civilized states of European stock in or adjoining which they happen to be found, by admitting within the natural limits of such state the intrusion of some other foreign, and perhaps hostile power.[106]

In support of his argument, Brown cited Supreme Court Justice Joseph Story as stating that the Indians' "right of occupancy or use of the soil" was "subordinate to the ultimate dominion of the discoverer."[107] He also referred to Chancellor Kent's observation that this

> assumed but qualified *dominion* over the Indian tribes, regarding them as enjoying no higher title to the soil than that founded by simple occupancy, and to be incapable to transfer their title to any other power than *the Government which claims the jurisdiction of their territory by right of discovery,* arose, in a great degree, from the necessity of the case.[108]

Buried in the subtext of the above quotations is the direct, but subtle, connection between the right of discovering nations to take possession of lands not occupied by Christians and the consequent assertion of dominion over the discovered lands. According to Fredrick Maitland, the concept of *dominium* (Latin for dominion) is a confused term in feudal law; thus, "[o]wnership is *dominium*; but governmental power, jurisdictional power, these are also *dominium*."[109]

The connection between the principle of Christian discovery and Christian dominion is vital to a complete understanding of the *Johnson* decision and

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106. *Id.* (emphasis added).

107. *Id.*

108. *Id.* (emphasis added). Notice that Brown considers the "rights" which "discovery" creates to include "claims" of "jurisdiction" over Indian lands.

109. FREDERIC W. MAITLAND, DOMESDAY BOOK & BEYOND 224 (1987). In addition, Cohen mentions that Marshall's decision in *Johnson* was written in such a way that "the needs of feudal land tenure theory were fully respected." Cohen, *supra* note 2, at 49. This suggests that the word "dominion" as used in the *Johnson* ruling should be interpreted in keeping with its application in feudal law theory.

proves the adage that what we focus upon determines what we miss. By reading the *Johnson* decision as primarily concerning the nature of Indian title,[110] attention has been diverted from the decision's underlying theme of dominion.[111] As the following section demonstrates, Marshall converted the discovering Christian sovereign's (or its successor's) right of possession into a right of ultimate dominion, which included both absolute authority over and absolute ownership of the discovered lands.[112]

II

THE ROOTS OF CHRISTIAN NATIONALISM IN FEDERAL INDIAN LAW

A. The Johnson *Ruling*

The *Johnson* decision dealt with two non-Indian parties.[113] In October of 1819, the plaintiffs, Joshua Johnson and Thomas J. Graham, inherited two tracts of land from Thomas Johnson, who had originally obtained those lands through two private purchases directly from the Illinois and Piankeshaw Nations in 1773 and 1775, respectively.[114] The conflict arose because the defendant, William McIntosh, had purchased in 1818 from the federal government 11,560 acres of land which were located in the state of Illinois and overlapped the lands claimed by the plaintiffs.[115] Johnson and Graham sued to eject McIntosh from the lands they had inherited. Thus, the question before the Court was which of the two parties held superior title to the lands under dispute.[116]

According to Chief Justice Marshall, the critical issue was whether the title that the Indians conveyed to private individuals would be recognized as valid by the courts of the United States.[117] As Marshall declared, the inquiry was "in 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."[118] This question regarding the power of a nation to dispose of its own lands, at its own will, to persons of its own choosing, was an inquiry into more than just the nature of its title; it was an inquiry into the very nature of that nation's sovereignty or dominion.[119]

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110. *See, e.g.,* James Y. Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977).

111. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, *passim* (1823). Milner Ball considers Marshall's use of the term "ultimate dominion" in *Johnson* to be an "abstraction" which "had no practical effect on tribes and, in any event, was certainly not imposed by conquest or implied by incorporation." *See supra* note 11, at 38 n.171; *see also* Berman, *supra* note 13 (arguing that "dominion" does not imply governmental authority over Indian nations or their lands).

112. *See* discussion *supra* note 13.

113. *Johnson*, 21 U.S. (8 Wheat.) at 561.

114. *Id.* at 553-55, 561.

115. *Id.* at 560.

116. *Id.* at 572.

117. *Id.*

118. *Id.*

119. VATTEL, *supra* note 21, at 97-98. Vattel regarded the rights of empire or sovereignty as coexisting with the right of domain. He defined empire as "the right of sovereign command, by which the nation directs and regulates at its pleasure everything that passes in the country."

When the Chief Justice dispensed with the most preliminary questions by acknowledging that the chiefs who made the conveyances were authorized by their people to sell the land, and by further acknowledging that the Indian nations were in rightful possession of those lands,[120] he was conceding two vitally important facts. It was well established at that time that a nation's possession of its territory contained "two elements: ownership and sovereignty,"[121] or "property and domain."[122] But if these principles of justice were extended to Indian nations, the Court knew that it would be cutting off the federal government's ability to engage in the profitable and expedient practice of selling grants of lands to which Indian nations still held unextinguished title.[123] If the Court recognized Indian nations as possessing rights of empire[124] and domain,[125] this would mean that the federal government could not grant Indian lands until the Indians' right of soil had first been fully extinguished.[126]

In his opinion, Marshall articulated three justifications for applying a double standard.[127] First, principles of "justice" were only to be invoked to determine the rights of "civilized nations," which the Court claimed, possessed "perfect independence." By viewing the Indian nations as uncivilized, the Court did not need to recognize them as possessing rights consistent with perfect independence. Determinations of Indian rights to sovereignty and property were thus to be made by applying principles different from the standard principles of justice. Second, the United States had the unquestionable right to make its own rules governing how it would acquire and hold property. Even if the rules it chose were in violation of standard principles of "abstract justice," the federal government's use of those rules could not be called into question by its own courts. Third, because the lands in question existed within the territorial boundaries claimed by the United States, it was, in the Court's view, the federal government which had the sole prerogative of defining the nature of the title to those lands. For these reasons, Marshall said that the Court would apply "those principles which our government has adopted to the particular case, and given us as the rule for our decision."[128]

Id. Together with this right of empire was the right of domain, "by virtue of which the nation alone may use the country for the supply of its necessities, *may dispose of it as it thinks proper*, and derive from it every advantage it is capable of yielding." *Id.* (emphasis added). Thus, to call into question a nation's right to dispose of its soil to people of its own choosing would be to call into question that nation's *exclusive* right to "direct and regulate at its pleasure everything that passes in" its country. In other words, it calls into question that nation's sovereignty.

120. *Johnson*, 21 U.S. (8 Wheat.) at 572.

121. BENJAMIN ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 44 (1939).

122. VATTEL, *supra* note 21, at 97-98.

123. Cohen, *supra* note 2, at 48.

124. VATTEL, *supra* note 21, at 97-98.

125. *Id.*

126. Cohen, *supra* note 2, at 48.

127. *Johnson*, 21 U.S. (8 Wheat.) at 572.

128. *Id.*

B. *Marshall's Definition of the Discovery Doctrine*

Marshall looked back to the Age of Discovery to introduce the origin of the federal government's principles that the Court used for its decision:

> 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 ascendency.[129]

Marshall explained that in order to justify their dominion[130] over the lands and peoples of the Americas 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."[131] This idea is connected with the Court's earlier acknowledgment of the perfect independence of civilized nations.[132] In other words, the discoverers gave themselves complete liberty in the Americas based on a unilaterally-imposed exchange: in return for conferring the Christian religion and a European lifestyle on the Indians, the Europeans would accord to themselves an "unlimited independence" in the New World.[133]

After explaining the basis of European dominion in the Americas, Marshall noted that the principle of discovery resolved the inevitable conflict that arose between the various nations of Europe competing for the same lands.[134] "[I]n order to avoid conflicting settlements, and consequent war with each other," the European nations established a principle of land regulation amongst themselves.[135]

Marshall explained the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[136] He continued: "[t]he exclusion of all other Europeans, necessarily gave to the nations making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."[137]

No other nation could interfere with the exclusive relationship between the discoverer and the Native Americans. The rights of the Native Americans

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129. *Id.* at 572-73.
130. *Id.* (the term "ascendency," as used by Marshall, means dominion).
131. *Id.* at 573.
132. *Id.* at 572.
133. *See* JENNINGS, *supra* note 9, at 81.
134. *Johnson*, 21 U.S. (8 Wheat.) at 573.
135. *Id.*
136. *Id.*
137. *Id.*

were therefore "impaired"[138] when the discoverers established relations with them. While Indian peoples were "admitted to be the rightful occupants of the soil," nevertheless "their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[139]

The above principles determined whether the Indians had the power to give a title to private individuals, legally recognizable in the courts of the United States.[140] These principles hinged on the nature of the discovering nation's dominion because the nation that held dominion over the soil had the power to convey the soil.[141] After discovery, said Marshall, the Indians no longer had the powers possessed by "completely sovereign, independent nations," and therefore could no longer convey the soil, except to the discovering sovereign.[142]

As Marshall put it:

> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to convey the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[143]

Thus, in Marshall's view, discovery left the Indians with only the power to convey to private individuals a title of occupancy, and not a title to the soil itself.[144]

Marshall's theory of property was nothing less than remarkable by any standard of property law applicable to European nations.[145] He had

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138. *Id.* at 574.

139. *Id.*

140. Marshall could have resolved the inquiry before the Court by pointing out that the common practice in those days was for Indian grantees "to be individually named in subsequent treaties of cession whenever their interests were agreed to be reserved." BARSH & HENDERSON, *supra* note 5, at 46. Instead, Marshall addressed the "power" of Indians to grant a title to private individuals. By implication, Marshall's theory included the notion that the discovering nation's power of dominion, including the power to convey the soil still in Indian possession, theoretically transcended not only the Indians' title, but Indian powers of sovereignty and dominion as well. *Johnson*, 21 U.S. (8 Wheat.) at 587.

141. *Johnson*, 21 U.S. (8 Wheat.) at 574.

142. *Id.*

143. *Id.*

144. *Id.*

145. Emmerich de Vattel, in discussing the ability of European nations to control property stated:

> The nation, being the sole mistress of the property in her possession, may dispose of it as she thinks proper, and may lawfully alienate or mortgage it. This right is a necessary consequence of the full and absolute domain: the exercise of it is restrained by the law of nature *only with respect to proprietors who have not the use of reason necessary for the management of their affairs*; which is not the case with a nation. Those who think otherwise, cannot allege any solid reason for their opinion; and it would

promulgated the notion that the discovering Christian European nation possessed dominion over the soil even *before* taking actual possession of the discovered lands, while those lands remained in the rightful possession of the indigenous nations.[146]

1. The Religious Underpinnings of Plenary Power and the United States' Absolute Right of Property in Indian Lands

Although it appears to have been overlooked by most scholars,[147] the connection between discovery and dominion is vitally important to the field of United States federal Indian law. It is, after all, this connection which serves as the historical basis of the federal government's assertion of plenary power

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follow from their principles that no safe contract can be entered into with any nation; a conclusion which attacks the foundation of all public treaties.

VATTEL, *supra* note 21, at 116 (emphasis added). Christian European nation-states regarded themselves as possessing "territorial jurisdiction," which Wilson and Tucker define as the proposition

> that a state has within its boundaries absolute and exclusive jurisdiction over all the land and those things which appertain thereto . . . [I]n other respects than those mentioned exemptions, the state may, as sovereign, exercise its authority at discretion within the sphere it has set for itself. . . . [A]s regards its own subjects, it has paramount title which is recognized as the right of eminent domain, or the right to appropriate private property [e.g., Indian lands] when necessary for public use."

GEORGE G. WILSON & GEORGE F. TUCKER, INTERNATIONAL LAW 107 (5th ed. 1910). It was apparently to prevent Indian nations from being recognized as possessing such powers within their boundaries, with or without treaty recognition, that Marshall defined their territorial possessions as constituting mere occupancy. To do otherwise would have forever cut off the federal government's ability to exercise powers of eminent domain over Indian land, and to appropriate Indian resources, if Indian peoples proved unwilling to relinquish their lands.

146. This is contrary to the standard rules of property in international law. *See* VATTEL, *supra* note 21, at 163-64. No nation would assert that it had the right to grant another nation's lands, for such an action would not only be null and void, but might also be considered a hostile action and therefore grounds for war. According to Vattel,

> the general domain of the nation is full and absolute, since there exists no authority upon earth by which it can be limited: it therefore excludes all right on the part of foreigners. And as the right of a nation ought to be respected by all others, none can form any pretensions to the country which belongs to that nation, nor ought to dispose of it without her consent, any more than of the things contained in the country.

Id. at 164. *See also* GEORG F. MARTENS, SUMMARY OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 67-68 (William Cobbett trans., Fred B. Rothman & Co. 1986) (1795):

> From the moment a nation have [sic] taken possession of a territory in right of first occupier, and with the design to establish themselves there for the future, they become the absolute and sole proprietors of it, and all that it contains; and have a right to exclude all other nations from it, to use it, and dispose of it as they think proper: provided, however, that they do not in anywise, encroach on the rights of other nations.
>
> It belongs to the possessors, of course, to make the distribution of their territory, and every thing attached to it. What is not, in this distribution, granted to individuals, or what afterwards ceases to belong to them, remains, or falls to the whole society, or to the person amongst them on whom they have conferred the right of acquiring.

147. *See* sources cited *supra* notes 9-10.

over Indian people (dominion and plenary power being synonymous terms).[148] Yet, not surprisingly, with some minor exceptions, the judiciary has been careful not to acknowledge explicitly the religious rationale behind the plenary power doctrine.[149]

Virtually without exception, legal scholars and judges have referred to the doctrine of discovery as if it were a secular principle.[150] This subterfuge is to be expected, since Chief Justice Marshall defined that principle without referring to religion.[151] He thus made the religious basis of the principle easy to overlook. However, the rhetorical pattern in *Johnson* reveals Marshall's reliance on the distinction between Christians and heathens. "No one of the powers of Europe," he wrote, "gave its full assent to this principle [of discovery] more unequivocally than England."[152] He continued:

> The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people,* and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery, the English trace their title.[153]

Marshall italicized the words "Christian people,"[154] and drew attention to King Henry VII's commission authorizing Cabot to "take possession" of

148. STORY, *supra* note 77, at 8. Story refers to the Crown's power—acceded to by the United States federal government—as "*plenum et utile dominium*," a concept which contains the basis for "plenary" and for "power." This being the basis of "plenary power" which the federal government inherited from the British Crown, it must include both "absolute fee title" in the territories claimed by the United States, including all Indian lands, and an "absolute sovereign authority" over all inhabitants within those territories, including nonconsenting Indian peoples.

149. *But see supra* notes 72-76 and accompanying text. Regarding the federal government's authority to interfere with the "occupancy of the Indians," the Court said that it "is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of a [sic] ignorant and dependent race." Beecher v. Weatherby, 95 U.S. 517, 525 (1877). The Court's use of the words "Christian people" was identical to the words "*Christian people*," which Marshall had italicized in the *Johnson* ruling. *See infra* notes 153-54, 158-59 and accompanying text.

150. *But see* discussion *supra* note 71.

151. *Johnson*, 21 U.S. (8 Wheat.) at 574.

152. *Id.* at 576.

153. *Id.*; *but see* VILHJAHMER STEFANSSON, GREAT ADVENTURES AND EXPLORATIONS FROM THE EARLIEST TIMES TO THE PRESENT, AS TOLD BY THE EXPLORERS THEMSELVES 154 (1947). Marshall's chronology traces England's title to North America back to the Cabot voyage of 1498, but Stefansson explains that Cabot's 1498 voyage was lost at sea. According to Stefansson, "it had not yet occurred to the Government of England to lay claim to a continent on the strength of the 1497 *Matthew* discovery." *Id.* (*Matthew* was the name of Cabot's ship, which set sail from Bristol on May 2, 1497, and returned on August 6, 1497). This fundamentally contradicts Marshall's assessment of the matter.

154. *Johnson*, 21 U.S. (8 Wheat.) at 576 (not all editions of 8 Wheaton show the italics. For example, see DAVID H. GETCHES, DANIEL M. ROSENFELT, & CHARLES F. WILKINSON, CASES AND MATERIALS IN FEDERAL INDIAN LAW 145 (1986)).

lands unknown to Christians. The Cabot charter, given by the king of England, was a royal assertion of a right, upon discovery, to take possession of discovered lands.[155]

In *Leviathan*, Hobbes stated that "the right of possession is called Dominion."[156] The definition provides an etymological illumination of Marshall's observation that the discovering nations, such as England, had the right to take possession of discovered lands. Thus, Marshall's language may be interpreted as simply another way of stating that discovery gave Christian people dominion (i.e., a right of subjugation) over non-Christian lands.[157]

As Marshall continued, he reiterated the right of "Christian people" to take possession of "discovered" countries, provided they were inhabited by "heathens":

> In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle [of discovery] which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to Christian people"; and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting *a right to take possession,* notwithstanding the *occupancy* of the natives, *who were heathens,* and at the same time admitting the prior *title* of any *Christian people* who may have made a previous discovery. The same principle continued to be recognised. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.[158]

With this passage, Marshall induced a conclusion about the discovery doctrine. He used the term "Christian people" or "Christian prince or people" three times, and used variations of the terms "possession" four times.[159] By employing repetition, Marshall explained how he had arrived at his definition of the principle of discovery; why he had concluded that the Indians only had a title of occupancy; and why the discovering nation had asserted the ultimate dominion to be in itself. The above history was Marshall's way of documenting the basis for the principles of the ancient law of discovery, which

155. Cabot's authorization to subdue the heathens and infidels he discovered was considered a prerequisite for taking possession of inhabited lands.

156. THOMAS HOBBES, LEVIATHAN ch. 15, at 81 (Prometheus Books 1988) (1651).

157. *Johnson*, 21 U.S. (8 Wheat.) at 576. One historian to grasp how the Christian/heathen distinction was used by Marshall in the *Johnson* ruling is Francis Jennings, who observes that "the chief justice of a country espousing separation of church and state could show no official concern about [using the] Indians' lack of Christianity as [the] criterion of [their] legal status." JENNINGS, *supra* note 9, at 60.

158. *Johnson*, 21 U.S. (8 Wheat.) at 576-77 (emphasis added).

159. *Id.*

the federal government argued to the Court and on which the Court relied for its decision.

The previously cited excerpts from the *Johnson* decision provide the rationale behind the Court's proposition that the discovering nation or monarch possessed dominion over the soil even *before* taking actual physical possession of the discovered lands. While technically it may have only been a theoretical dominion, it was a theory with very practical implications, allowing the discoverers to convey soil still in Indian possession. In Marshall's view, rights of dominion belonged to the first Christian people to discover a region of heathen lands. In addition, because dominion includes both absolute ownership and absolute authority,[160] the Crown had the power to convey the soil even before the Indian people had given up their possessory interests.[161]

As the successor nation to Great Britain's right of dominion (based on Christian discovery of non-Christian lands), the government of the United States possessed the absolute right of soil. This was all that was needed for it to have a plenary power, or absolute governmental authority, over all the lands and inhabitants within the geographical limits claimed by the United States.[162] This concept of territorial dominion has since been used in subsequent Supreme Court decisions to establish that the United States has an absolute legislative authority over Indian nations and peoples.[163]

2. *Further Clarification of Marshall's Principle of Discovery*

Further insights into the basis of Marshall's principle of discovery come from the writings of Joseph Story, one of Marshall's closest friends and also a member of the Supreme Court. In his *Commentaries on the Constitution of the United States*, Story clearly identified the laws of Christendom as the basis for the Court's opinion in *Johnson*.[164] Story explained:

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160. 4 THE OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989) (defining dominion as "the power or right of governing and controlling; sovereign authority; lordship, sovereignty; rule, sway; control, influence" and "[t]he lands or domains of a feudal lord;" but also as, "ownership; property; right of possession.").

161. *See* Delassus v. United States, 34 U.S. (9 Pet.) 117 (1835). Marshall here observed:

> [N]o principle is better settled in this country, than that an inchoate title to lands is property. Independent of treaty stipulation, this right would be held sacred. The sovereign *who acquires an inhabited territory, acquires full dominion over it;* but this dominion is never supposed to divest the vested rights *of individuals* to property . . . The people *change their sovereign*. Their right to property remains unaffected by this change.

Id. at 133 (emphasis added). This would help explain the theory put forth in the *Johnson* ruling that although the first Christian discoverer or its successor acquired the ultimate dominion over the soil (i.e., full territorial jurisdiction), the Indian title, as one of occupancy, would nevertheless be respected by the courts of the sovereign. *See also* American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1829).

162. *See* ZIEGLER, *supra* note 121, at 44.

163. *See* United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 533 (1903).

164. STORY, *supra* note 77, at 1-18, 132-38.

> [F]or the purpose of overthrowing heathenism, and propagating the Catholic religion, Alexander the Sixth, by a Bull issued in 1493, granted to the Crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.[165]

In the next sentence, Story made the connection between the *Inter Caetera* bull and Marshall's principle of "discovery":

> The principle, then [referring back to the papal bull], *that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments*, being once established, it followed almost as a matter of course, that every government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives.[166]

Thus, Story found the basis of Marshall's principle of discovery in the *Inter Caetera* bull issued by Pope Alexander VI in 1493. That document confirmed Spain's right to take possession of lands "not possessed by any Christian lord."[167] Story recognized that discovery of the New World was Christendom's justification for assuming dominion over the discovered lands.[168] As he observed, the colonizing nations of Europe "claimed an absolute dominion afterwards occupied by them, not in virtue of any conquest of, or cession by the Indian natives; but as a right acquired by discovery."[169] Furthermore, the nations of Europe refused to permit the Indian nations to be recognized as equal in status to themselves, for as he put it: "As infidels, heathens, and savages, they were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations."[170]

In his treatise on international law, Henry Wheaton concurred with Story's interpretation of discovery.[171] In the excerpt below, Wheaton places the same emphasis on Christian nationalism that, as we have seen, was employed by Chief Justice Marshall in the *Johnson* ruling. Whereas Marshall only mentioned the *Inter Caetera* bull in passing,[172] Wheaton, like Story, saw that papal decree as having played a pivotal role in the ideology of discovery. Explaining that the rights of "heathen nations" were almost "entirely disregarded," Wheaton observed:

> Thus the bull of Pope Alexander VI. [sic] reserved from the grant to Spain all lands, which had been previously occupied by any other

165. *Id.* at 7-8.
166. *Id.* at 8 (emphasis added).
167. *See* TREATIES, *supra* note 25.
168. STORY, *supra* note 77, at 135-36.
169. *Id.*
170. *Id.* at 134.
171. WHEATON, *supra* note 77, at 220.
172. *Johnson*, 21 U.S. (8 Wheat.) at 574.

> *Christian* nation; and the patent granted by Henry VII. [sic] of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels"; and "to subdue, occupy, and possess these territories, as his vassals and lieutenants." In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties." It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation.[173]

To document this passage, Wheaton cited *Johnson v. McIntosh*,[174] which he had transcribed as the official Supreme Court Reporter,[175] and which had been written by his friend, John Marshall.[176]

C. *Christian Discovery as Heathen Conquest*

In his essay, "Original Indian Title," Felix Cohen stated that the United States faced a great dilemma at the time of the *Johnson* ruling.[177] Two paths were open to the Court: "either Indians had no title and no rights [to their lands] or the Federal land grants on which much of our economy rested were void."[178] As Cohen saw the matter, "a realist would say that Federal 'dominion' or 'title' over land recognized to be in Indian ownership was merely a fiction devised to get around a theoretical difficulty posed by common law concepts."[179] What Cohen failed to point out, however, was that Marshall's "fiction" was predicated on the Christian discovery of non-Christian lands. Additionally, Cohen did not address Marshall's new rule by which the mere Christian discovery of heathen lands was converted into the conquest of the indigenous inhabitants.[180] However, the federal government's dilemma was

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173. WHEATON, *supra* note 77, at 220.

174. *Id.*

175. Wheaton was the Reporter of the Supreme Court of the United States from 1816-1827. *Id.* at xxxiv.

176. *Id.* at liv (Marshall's letter), xliii (Story's letter). Wheaton was a friend of both Story and Marshall, as can be seen in their correspondence.

177. Cohen, *supra* note 2, at 48.

178. *Id.*

179. *Id.*

180. Interestingly, Cohen said that Marshall had "neatly solved" the dilemma faced by the Court, with the theory that "the Federal Government and the Indians both had exclusive title to the same land at the same time." *Id.* This is a strange contention, for it is logically impossible for two parties to both simultaneously have a title which is exclusive. In fact, this theory is contradicted by Marshall himself:

> An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute

solved by the "extravagant . . . pretension of converting the discovery of an inhabited country into conquest."[181] Thus, the mere discovery of Indian lands by Christian people was equivalent to the conquest[182] of the heathens inhabiting those lands.

In *United States v. Perchman*,[183] Marshall elaborated on the concept of conquest and clarified its use in the *Johnson* ruling. As Marshall pointed out in *Perchman*, rules of justice made it the norm for "the conqueror . . . to displace the sovereign and assume dominion over the [conquered] country."[184]

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title of the crown, subject only to the Indian right of occupancy; and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

Johnson, 21 U.S. (8 Wheat.) at 588.

If an "absolute title must be an exclusive title," it stands to reason that what holds true for one, must hold true for the other. I take this to mean that an "exclusive" title (as is true for an "absolute" title) cannot exist, at the same time, in different persons, or in different governments. If this is the case, then the solution that Cohen attributed to Marshall is not found in the *Johnson* ruling. Thus, contrary to Cohen's interpretation, the ruling expressed the idea that "the Federal Government is not bound by the limitations of common law doctrine and is free to dispose of property that belongs to Indians" and further claimed "for the Federal Government a right to disregard rules of real property more sacred than the Constitution itself." Cohen, *supra* note 2, at 48.

181. *Johnson*, 21 U.S. (8 Wheat.) at 591. For a different position on this point, see Henderson, *supra* note 110, at 90-91.

182. *Johnson*, 21 U.S. (8 Wheat.) at 591-92:

> 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. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

Marshall noted that the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application" to the Indian nations. "The resort to some new and different rule, better adapted to the actual state of things, *was* unavoidable." *Id.* at 591 (emphasis added). The past tense "was" made it seem as though this new rule had already been created at some time in the past. But in the next sentence Marshall turns to the present subjunctive tense: "Every rule which *can be* suggested *will be* attended with great difficulty." *Id.* at 591 (emphasis added). In other words, Marshall was the author of this new rule that discovery by Christian people of lands inhabited by heathens was equivalent to the conquest of the non-Christians.

183. 32 U.S. (7 Pet.) 51, 86-87 (1833).

184. *Id.* at 86-87. Marshall also stated:

> It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.

When Marshall said that Christian discovery was equivalent to the conquest of non-Christian indigenous peoples, he was acknowledging that the United States would treat the Indians *as if* their "rights to complete sovereignty, as independent nations"—as against the federal government—had been displaced (diminished), and would also "assume dominion" over them.[185] The implications which followed from this theoretical framework of dominion over Indian nations and peoples could only be revealed as they were developed by the Court in later years.[186] Marshall simply left a legacy of those conceptual principles the Court would need in order to keep the rights of the republic paramount to those of "subordinate" Indian peoples.

Although the *Johnson* decision is generally viewed as a case primarily concerning the nature of aboriginal Indian title, the legal theory put forth in the decision carried powerful implications for Indian peoples that transcended the question of their title. In all subsequent cases involving Indian issues, the

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Id.

This would help to explain Marshall's definition of Indian possessory rights as occupancy. Although doctrines of Christian European international law regarded a Christian nation's territorial possessions as sacrosanct, regarding heathen nations as being entitled to the same degree of legal protection would significantly impede the ability of the United States to colonize Indian lands in the future. Defining Indian possessory rights as occupancy would appear to respect Indian rights, while at the same time protecting the United States' right to appropriate those lands as circumstances permitted.

185. *Johnson*, 21 U.S. (8 Wheat.) at 574. James Youngblood Henderson maintains that the *Johnson* ruling "did not validate the European concept of conquest. It merely noted the potentiality of the conquest theory in law." Henderson, *supra* note 110 at 90-93. And Milner S. Ball states that,

> According to Marshall, no incorporation was effected. Indians and non-Indians were two people rather than one. Indian nations and the United States remained distinct. It followed that the chief benefit of incorporation to a conquered people—full property rights—did not accrue to the tribes. Indians could not transfer absolute title to property to any other than the successor to the European [sic] discoverer. This was, as I have noted, a fictitious limitation with no real impact.

Ball, *supra* note 11, at 29. Apparently these scholars do not view Marshall's language as concluding that the United States has any dominion over Indians on the basis of Christian discovery. But Marshall stated: "*So too*, with respect to the *concomitant principle*, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, *but to be deemed incapable of transferring the absolute title to others.*" *Johnson*, 21 U.S. (8 Wheat.) at 591 (emphasis added). Marshall, then, was referring to two principles which followed from discovery, and not one. The discovery-as-conquest doctrine was the principle that supposedly displaced Indian rights to complete sovereignty, as independent nations, and allowed the United States, as Great Britain's successor, to assume dominion over the entire country, regardless of the territorial possessions of Indian nations.

186. *See Johnson*, 21 U.S. (8 Wheat.) at 587:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; *and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.*"

(emphasis added). The theoretical dominion that Marshall articulated in the *Johnson* ruling was mitigated by the fact that many Indian nations would fight against any intrusion on their liberty. However, as the United States increased in power, and as the strength of Indian nations waned, the Court began to build on Marshall's theory of federal dominion.

Court continued to assume as a fundamental principle that Indian rights to "complete sovereignty, as independent nations" had, in a sense, evaporated after "discovery."[187] Future decisions would avoid mentioning Christian dominion, which Marshall had used to place Indian sovereignty under the ultimate dominion of the United States. Still, this was to become the true basis of later United States assertions of plenary power over the American Indian.[188] Under this fiction Indian nations are said to be subject to the legislative authority of the United States.[189]

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187. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831) (stating in dicta that Indians may "perhaps, be denominated domestic dependent nations"). The most recent case to cite this language from *Johnson* is Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-10 (1978). Writing for the majority, Chief Justice Rehnquist declared:

> Indian reservations are 'a part of the territory of the United States.' United States v. Rogers, 4 How. 567, 571 (1846). Indian tribes 'hold and occupy [the reservations] with the assent of the United States, and under their authority.' *Id.*, at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' Johnson v. McIntosh, 8 Wheat. 543, 574 (1823)[sic].

Id.

188. *See generally* United States v. Kagama, 118 U.S. 375 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

189. Choctaw Nation v. United States, 119 U.S. 1, 27 (1886). Based on this framework, although Indian nations made treaties with the United States, an act of nationhood and sovereignty, those nations still are treated today as "tribes," which are subject to the "power of Congress to govern Indian tribes by legislation and thereby to abrogate or supersede Indian treaties." United States *ex rel.* Lynn v. Hamilton, 233 F. 685, 687 (W.D.N.Y. 1915). Following from the background Christian/heathen conceptual framework which presumes Indian subjugation, one court has held, for example, that "an Indian tribe is sovereign to the extent that the United States permits it to be sovereign—neither more nor less." United States v. Blackfeet Tribe of Blackfeet Indian Reservation, 364 F. Supp. 192, 194, *reaf'd*, 369 F. Supp. 562 (D. Mont. 1973).

The Supreme Court expressed the same sentiment elsewhere by stating that because an Indian tribe is not a soveriegn nation, "the United States may exercise the power of eminent domain" in Indian territory. Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 656 (1890). Furthermore, the United States is said to have the right "to define the rights of the Indians with or without their consent." United States v. Santa Fe Pac. R.R. Co., 114 F.2d 420, 423 (9th Cir. 1940), *modified on other grounds*, 314 U.S. 329 (1941). And in Choctaw Nation v. United States, 119 U.S. 1 (1886), the Court made its distinction between "tribes" and "soveriegn nations" quite clear:

> The United States is a sovereign nation, not suable in any court except by its own consent, . . . and is not subject to any municipal law. Its government is limited only by its own Constitution, and the nation is subject to no law but the law of nations. On the other hand, the Choctaw Nation falls within the description in the terms of our Constitition, *not of an independent state or sovereign nation, but of an Indian tribe.* As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Consitution of entering into treaty relations with the government of the Untied States, although, from the nature of the case, *subject to the power and authority of the laws of the United States when Congress should choose*, as it did determine in the Act of March 3, 1871, embodied in § 2079 of the Revised Statutes, to exert its legislative power.

Id. at 27 (emphasis added).

Thus, I am making explicit a conceptual framework premised on the idea that "heathen" Indian nations have been forcibly put under the dominion of the federal government of the

Once the principle of Christian discovery and dominion became United States law as a result of the *Johnson* decision, the religious aspect of the original discovery doctrine was no longer needed. Thereafter, the Court dropped any explicit mention of the Christian/heathen distinction. Subsequent

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United States and are therefore wrongfully treated as being no longer entitled to recognition as nations with rights of complete sovereignty and territorial integrity. Vattel explained the result of one nation put under the dominion of another as follows:

> But a people that has *passed under the dominion of another* is no longer a state, and can no longer avail itself directly of the law of nations. Such were the nations and kingdoms which the Romans rendered *subject to their empire*; the generality even of those whom they honoured with the name of friends and allies no longer formed real states. Within themselves they were governed by their own laws and magistrates; but without, they were in everything obliged to follow the orders of Rome; they dared not of themselves either to make war or contract alliances, and could not treat with nations.
>
> The law of nations is the law of sovereigns; free and independent states . . . .

VATTEL, *supra* note 21, at 3 (emphasis added).

Based on this framework which follows from the premise of the *Johnson* ruling, the United States has deemed itself entitled to define Indian sovereignty, and the terms of Indian treaties, consistent with the underlying notion that Indian nations are under the dominion of the United States and subject to its assertions of imperialistic law, which has been defined as, "law imposed by force and having no validity other than coercive imposition." RUSHDOONY, *supra* note 85, at 17. From this logic the proposition follows that the United States, as supreme sovereign, may simply decide to abrogate or supersede the terms of an Indian treaty without regard to the wishes or consent of the Indians in question.

That this is indeed the case is supported by a statement made in United States v. City of Salamanca, in which the district court observed that the 1871 statute calling for an end to treaty-making with Indian nations, Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)), "expressly excepts from its provisions treaties theretofore made. Were this exception not included the United States *could abolish or change a treaty without approval of the tribe with whom [it was] made.*" 27 F. Supp. 541, 546 (W.D.N.Y. 1939) (emphasis added).

Turning to a specific example, the United States now purports to have stolen the sacred Black Hills from the Sioux Nation and its allied nations, purportedly through the Act of Feb. 28, 1877, 19 Stat. 254, in violation of the Treaty with the Sioux Indians (Fort Laramie Treaty), April 29, 1868, U.S.-Sioux, 15 Stat. 635, *reprinted in* 136 CONSOL. T. S. 92-101, and I would argue, in violation of the Constitution's provision that "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. Despite the Treaty Clause, the United States now assumes that when it made treaties of "peace and friendship" with Indian nations, it was under no obligation whatsoever to strictly honor the terms of such agreements. In the case of the Black Hills, even though the federal government has clearly violated the Sioux Nation's treaty rights, the proposed solution is not to uphold the terms of the Treaty with the Sioux Indians, which recognizes the Sioux Nation's territorial integrity and rightful possession of their sacred Black Hills, but to get the Sioux people to accept financial compensation for their lands. United States v. Sioux Nation of Indians, 448 U.S. 371, 423-24 (1980).

As Justice Blackmun said for the majority in the Black Hills case:

> In sum, we conclude that the legal analysis and factual findings of the Court of Claims fully support its conclusion that the terms of the 1877 Act did not effect "a mere change in the form of investment of Indian tribal property." *Lonewolf v. Hitchcock*, 187 U.S., at 568. Rather, the 1877 Act effected a taking of tribal property, property which had been set aside for the exclusive *occupation* of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

Supreme Court decisions considering the principle of discovery avoided mentioning the history of discovery as a principle originally created by Christian people.[190] Thus, in 1842, in *Martin v. Waddel*,[191] the Court used the secular term "European" instead of "Christian." This made it appear that the discovery principle had never been based on religious distinctions:

> The English possessions in America were not claimed by right of conquest, but by right of discovery. For according to the principles of international law, as understood by the then civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, as if it had been found without inhabitants.[192]

The Court made the same observation again four years later in *United States v. Rogers*:[193]

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448 U.S. at 423-24 (emphasis added). As seen through the conceptual prism of the Supreme Court, the Treaty with the Sioux Indians only recognized an Indian title of occupation, subject to the ultimate dominion of Congress to simply decide at its whim to take any part of the treaty lands, so long as it may later assert that the taking was made in good faith.

But treaties made between two sovereign nations, assuming the treaties are not fraudulent or coerced, are an exercise of sovereignty on the part of both nations. The United States did not acquire sovereignty or dominion over the Sioux Nation by way of the 1868 Treaty with the Sioux Indians. Therefore, there must be some other justification for the United States' action of simply "taking" (illegally occupying) the Black Hills. What could that justification be if not the doctrine of plenary power based historically on the Christian discovery of non-Christian lands? On what other possible basis is the Sioux Nation, or any other Indian nation for that matter, subject to the dominating authority of the United States to unilaterally take Indian lands, without the free consent of the Indians themselves to such authority or taking? This is, of course, entirely consistent with the conceptual framework put forth in the *Johnson* ruling.

I contend that when the United States violated its pledge of peace contained in the Treaty with the Sioux Indians, the land that the United States would have acquired on the basis of that treaty reverted back to the Sioux people, and therefore still rightfully belongs to the Sioux Nation. The Court of Claims process was simply a slick attempt on the part of the federal government to try and validate its supposed taking of the Black Hills, which at present are being illegally, unjustly, wrongfully, and immorally occupied by the United States.

If the United States cannot change or abolish an Indian treaty without the consent or approval of the Indian nation, it necessarily follows that the United States may not simply take some portion of that Indian nation's territory, against the will of the Indian people themselves. This means that the Black Hills could not have been taken by the United States unless the Sioux Nation gave the United States permission to do so. Without the approval of the Sioux Nation the United States does not have any legitimate claim to the Black Hills or any other part of the Sioux Nation's territory. The same may be said for countless other supposed congressional and presidential (executive order) takings of Indian lands.

190. *But see supra* notes 72-76.

191. 41 U.S. (16 Pet.) 367 (1842).

192. *Id.* at 409.

193. 45 U.S. (4 How.) 567 (1846).

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land, and the Indians continually held to be, and treated as, *subject to their dominion and control.*[194]

The Court's assertion in *Rogers* that the whole continent had been "divided and parcelled out, and granted by the governments of Europe as if it were vacant and unoccupied land," had its corollary in the *Johnson* decision. Marshall had stated that "so far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by Indians."[195] However, according to Benjamin Munn Ziegler in *The International Law of John Marshall*,[196] this returns the analysis to the Christian/heathen distinction. Ziegler observes that "[o]ne of the oldest means by which nations have acquired territory has been through the discovery of previously unoccupied lands,"[197] and notes in passing that: "The term 'unoccupied lands' refers of course to the lands in America which when discovered were 'occupied by Indians' but 'unoccupied' by Christians."[198]

CONCLUSION

The discovery doctrine, rather than being a "doctrine" as such, was more akin to a set of customary rules that guided the conduct of the nations of Western Europe as they endeavored to locate and to appropriate non-Christian lands. During the fifteenth and sixteenth centuries, law and religion were not clearly divided. Fundamentally, the discovery doctrine merely reflected aspects of Christian theology that became militaristic policy toward unconverted peoples and their territories. The discovery doctrine was predicated on the belief that one day all the lands of the earth would be placed under Christian sovereignty and dominion.

The *Johnson* decision served to formalize the United States' own theoretical version of the age-old proposition that Christian nations had the divine right to take possession of and to assume dominion over non-Christian lands. In drafting the opinion, Chief Justice John Marshall necessarily applied the same Christian/heathen distinction from which the discovery doctrine originated. He could not adopt that doctrine into United States law without also adopting its theological basis. In this sense the *Johnson* decision embodies

194. *Id.* at 572 (emphasis added); *but see* WHEATON, *supra* note 77, at 54 (asserting that a "weak power does not surrender its independence and right to self-government, by associating with a stronger and taking its protection.").

195. *Johnson*, 21 U.S. (8 Wheat.) at 596; *see* ZIEGLER, *supra* note 121, at 46 n.12.

196. ZIEGLER, *supra* note 121, at 45-46.

197. *Id.*

198. *Id.* at 46 n.12.

the principle, expressed in generic form by John Locke, that the "Lord and Master" of all peoples—as understood in biblical terms—had, by a "manifest declaration of his will," set Christian nations over heathen, non-Christian ones.[199]

The deeper significance of the *Johnson* ruling is that it surreptitiously incorporated into United States law a doctrine of Christian dominion over the American Indian. John Marshall, Joseph Story, Henry Wheaton, and Chancellor Kent were well aware that this was the true basis of the *Johnson* ruling. However, subsequent legal scholars found irrelevant this aspect of the decision, and hence generally avoided mentioning it. Perhaps this explains why discussions relating to the historical development of federal Indian law assiduously avoid principles of justice and humanity.[200] Such discussions might ultimately reveal Marshall's use of the Christian/heathen distinction as the driving force behind the *Johnson* decision.

Some scholars believe that it is too late to question the foundations of federal Indian law.[201] They contend that, because so much time has elapsed and because the United States has amassed an overwhelming body of case law, precedent, and federal policy based on the *Johnson* ruling, any direct challenge to it, or to the notion of Congress' plenary power over Indian nations, would radically disrupt the legal and political fabric of the United States. While it is understandable that the federal government wants to protect the advantage that it has received from *Johnson*, it hardly seems reasonable to expect Indian people to freely accept the denial or diminishment of their rights on the basis of religion.

To argue that Indian people may not challenge the theoretical framework set forth by Marshall in the *Johnson* ruling is to say that they must simply acquiesce in a one hundred-and-seventy-year-old precedent predicated on the belief that the first Christian discoverer (or its legal successor) has a divine right to subjugate the heathens who were discovered. It is to contend that Indian nations ought to learn to accept a judicial pretention based on religious and cultural prejudice that asserts that their rights to complete sovereignty and to territorial integrity may be impaired, diminished, denied, or displaced simply because they were not Christian people at the time of European arrival to the Americas. It is to accept the preposterous idea that federal Indian law will forever rest on the foundation of a subjugating Christian ideology.

A future Article is necessary in order to explore further the implications of these findings and to discuss more contemporary case law. The purpose of

199. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., 2d ed. 1970) (1690) (stating that because we are all "Creatures of the same species and rank," only such a manifest declaration of the Master's will create an "Undoubted Right to Dominion and Sovereignty").

200. *See* Deloria, *supra* note 17, at 203.

201. *See generally* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 421-37 (1988); Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372, 1382-84 (1991).

this Article is simply to highlight the Christian/heathen distinction in United States federal Indian law that continues to serve today as the legal and political backdrop for federal Indian policy. Previously, the obscured religious aspect of the *Johnson* decision denied Indian people the opportunity to develop a successful challenge to the doctrine of Christian discovery.[202] It is hoped that this article will begin to set the record straight.

It is my contention that the *Johnson* decision must somehow be overturned and the Christian/heathen distinction stricken from United States law. When the federal government and the Supreme Court use Christianity as a criterion for determining the political and legal status of Indian nations, and then use that criterion as the rationale for unilaterally assuming coercive nonconstitutional legislative power over native nations and their lands, where is the supposed separation of church and state? Because *Johnson*'s discovery-as-conquest and Indian title of occupancy doctrines stem from a judicial pretension based on religious prejudice, those doctrines, as well as the pretension itself, should have no place in United States law.

In this instance therefore, the issue is not so much one of "conquering the rule of law" as it is an issue of needing to eliminate from the legal and political fabric of the United States a religiously premised judicial fiction which has been successfully disguised as law. It is now time to ask ourselves, by what stretch of the imagination does a judicial principle of Christian discovery and subjugation fall within the framework of the United States Constitution, or conform to the principles of liberty, justice, and the consent of the governed?

Finally, it is important to note why it is legitimate to challenge the *Johnson* ruling: the purported paramount dominion of the United States has subordinated Indian nations by unilaterally adopting the decision's theoretical framework. This violates the most fundamental human right and the proposition upon which the United States was founded: that governments derive just powers only from the consent of the governed.

Some will argue that the United States does not need the consent of Indian people in order to exert plenary dominion over them. This is an argument as much without merit as it is without honor.

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202. *See* TRADITIONAL COUNCIL OF INDIAN ELDERS AND YOUTH, COMMUNIQUE NO. 15: DISCOVERY—HEATHENS—SLAVERY—RELIGIOUS FREEDOMS 1492-1992 *passim* (1992) (on file with author), reprinted *infra* app.

APPENDIX

TRADITIONAL COUNCIL OF INDIAN ELDERS AND YOUTH COMMUNIQUE NO. 15 DISCOVERY—HEATHENS—SLAVERY—RELIGIOUS FREEDOMS 1492-1992

Sapa Dawn Center
Yelm, Washington
Aug. 1992

It is common knowledge that from time immemorial we the Indigenous Nations and Peoples of North America have lived in accordance with our original instructions given to us by the Creator. These instructions are rooted in the languages, cultures, communities, nations and lands of all our peoples. The common process of governance throughout North America with Indigenous Nations and Peoples is the oral tradition that embodies the democratic process of people's participation and control of representatives and Chiefs in council.

The separation of Church and State in the Constitution of the United States does not comprehend the spiritual reality of Indigenous Nations and Peoples. English terms, definitions and interpretations of Indigenous languages in North America have proven inadequate to deal with the spirit and values inherent in our languages and ways of life (religions). Invariably, attempts to interpret and codify the ways of life of Indigenous Peoples have resulted in the abridgement of our rights. The First Amendment of the Constitution clearly states that religious freedom of U.S. Constitutional Law and provides that:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and petition the government for a redress of grievances.

Why then was it necessary to pass an Act specifically for American Indians' religious freedom? The answer is clear. The "Christian Nations Theory" is in practice what denies our sovereignty, territorial integrity and religious freedoms. The history of the Americas since the landfall of Columbus carrying the banner of the Roman Catholic Church and the monarchy of Spain have resulted in the devastation and deaths of whole nations of Indigenous Peoples. Clearly the mandate of Christian churches to proselytize and convert our peoples to Christianity, and convert our property and lands to Christian church and state, has resulted in the destruction of many nations, cultures and peoples—and continues to do so.

The historical basis of the Federal Indian Law systems in North America is the dominance of the Christian nations over non-Christians, including Indigenous Peoples. This theory of Christian dominance was rooted in the

directive issued by Pope Nicholas V in 1452 in which he gave permission to King Alfonso of Portugal to

> Capture, vanquish and subdue the Saracens, pagans, and other enemies [and] to put them into perpetual slavery. (citation omitted).

This policy was continued and expanded upon by Pope Alexander VI in 1493 in the Inter Caetera Bull which provided that

> The Catholic faith and Christian religion be everywhere increased [and that] barbarous nations be subjugated and be brought to the faith itself. (citation omitted).

Few legal scholars have chosen this area of research. Some contemporaries of Chief Justice John Marshall were Story; Wheaton; and Woolsey. They were in agreement with the Christian Nations Theory. A recent publication has clarified this theory from the days of Christendom to the present:

> According to Christian international law lands which had no Christian owner were considered to be vacant lands, even though inhabited by non-Christians. The first Christian to "discover" lands inhabited by heathens and infidels (beasts of prey) had the absolute title to and ultimate dominion over those lands. Spain, Portugal, France, England, Holland and Russia all embraced and acted on this doctrine.
>
> In 1823 the same doctrine of "discovery" was formally written into the laws of the United States by the U.S. Supreme Court. In the case of *Johnson v. McIntosh* Chief Justice John Marshall said that "Discovery gave title to the government, by whose subject, or by whose authority, it was made against all other European governments."
>
> Marshall cited the various charters of England to document her acceptance of the discovery doctrine. "So early as 1496," wrote the Chief Justice, "Her monarch granted a commission to the Cabots to discover countries then unknown to *Christian people* and to take possession of them in the name of the King of England." The Christian European nations making such discoveries only had a legal obligation to recognize the "prior title of any Christian people who may have made a previous discovery." In short, Christians had dominion and title, heathens had subservience and occupancy.
>
> Few people realize that the United States Supreme Court's Christian/heathen distinction is still the Supreme Law of the Land. Based on that doctrine, Indian peoples are denied their rights simply because they were not Christians at the time of European arrival. On that basis the United States continues to deny that Indian peoples have a true vested right of property in their own ancestral homelands, and that they have "rights to complete sovereignty." (citation omitted).

Following the Johnson v. McIntosh decision of 1823, there was the now famous or infamous statement of Manifest Destiny of 1843, that declared that white man to be ordained by God to rule the world.

How consistent this attitude of "Manifest Destiny" remains in American thinking and law is embodied in the Supreme Court decision of 1955 called *Tee-Hit-Ton v. United States* (citation omitted) in which the Court held that:

> There is no particular form of Congressional recognition of Indian right of permanent occupancy of land, such as will entitle Indians compensation for its subsequent taking . . .

And that

> Permission granted to Indians to occupy portions of territory over which they had previously exercised sovereignty is not a property right, but a right of occupancy, which the sovereignty grants and protects against intrusion by third parties, but which may be terminated without any legal enforceable obligation to compensate Indians.

And further,

> Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States, and taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.

All this rests upon the Law of Christians Nations or the doctrine of discovery, which in turn rests upon the Papal Bulls of 1452 and 1493. If this is not enough evidence to convince you that this arrogance of Manifest Destiny continues today, there is now the infamous decision on 1991: *Gitksan v. Canada*, where the Supreme Court of British Columbia ruled that the Gitksan Indians had no standing because of the Law of Nations, better known as the Doctrine of Discovery. In this doctrine, religious triumphalism and the seizure of lands are intrinsically connected. Five hundred years of domination, exploitation, and self-serving law historically based upon these ideas are alive and well today.

For the above reasons we conclude that the Theory of Christian Nations continues up to this moment. This explains why the American Religious Freedom Act was necessary to begin with, and also why paradoxically it has failed to protect our rights since it was passed. When invoked, it has failed in each case to secure for Indian Peoples specific religious freedoms or access to sacred sites. We understand that the amendments to the American Indian Religious Freedom Act are being proposed in an attempt to rectify the inadequacies of the Act. Our conclusions are that the Christian Nations Theory and practice which is embodied in the Johnson v. McIntosh decision on 1823 is archaic, abhorrent, and has no place in contemporary law. It abridges our religious freedoms and practices and is contrary to the language of the U.S. Constitution on the separation of Church and State. It provides the basis of

Federal land-takings, the assumption of U.S. jurisdiction in Indian Country and the violation of our treaties.

We call on Pope John Paul II to issue a special message for this year of the 500th anniversary of the voyages of Columbus repudiating the Papal Bulls of 1453 and 1493. Also, the Johnson v. McIntosh decision, which still stands, must be overturned, thereby abolishing the Christian Nations Theory from contemporary U.S. law. We will then be recognized as equal, eliminating altogether the need for the American Indian Religious Freedom Act. Our religious practices, ways of life, sacred sites—including geographical and geophysical sites—will then be protected by the principles of the First and the Fifth Amendments of the United States Constitution.