

# John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of “Universal Recognition” of the Doctrine of Discovery

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## I. INTRODUCTION

John Marshall was a historian as well as a jurist. In 1804, in the introductory volume of his five-volume series entitled *The Life of George Washington*, Marshall sought to place Washington’s life in context by presenting a lengthy narrative “of the principal events preceding our revolutionary war.”<sup>1</sup> Almost twenty years later, when crafting the Supreme Court’s landmark decision in *Johnson v. McIntosh*,<sup>2</sup> Marshall relied heavily on his history of America “from its discovery to the present day” in order to proclaim “the universal recognition” of two legal principles: (1) that European discovery of lands in America “gave exclusive title to those who made it”; and (2) that

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<sup>1</sup> 1 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* xi (1804).

<sup>2</sup> *Johnson and Graham’s Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

such discovery necessarily diminished the power of Indian nations “to dispose of the soil at their own will, to whomsoever they pleased.”<sup>3</sup>

While the writings of theorists and the practices of colonizing nations lend support for Marshall’s conclusions, the Chief Justice’s claim of “*universal recognition*” of the principles underlying *Johnson v. McIntosh* is belied by the historical record.<sup>4</sup> The Illinois and Wabash purchases at issue in *Johnson v. McIntosh*, whereby native lands were sold in 1773 and 1775 to private individuals, were by no means unprecedented.<sup>5</sup> This Article presents a historical rejoinder to John Marshall’s claim of universal acceptance of the doctrine of discovery and the diminished nature of Indian land rights. Part II of this Article sets the stage with a brief description of *Johnson v. McIntosh*.

Part III demonstrates that Indians were viewed as early as the 1630s as the absolute and “true owners”<sup>6</sup> of America, and as such were empowered to retain or transfer title to their lands as they saw fit. The founder of Rhode Island, Roger Williams, is a case in point. Within six years after arriving in America, Williams found himself banished from the jurisdiction of the Massachusetts Bay Colony and a grantee—by virtue of a private transaction with the Narragansett Indians—of lands in present-day Providence.<sup>7</sup> In this brief period of time, Williams not only established “a rapport with and understanding of the native Americans unmatched by any of his countrymen in the New World,”<sup>8</sup> but also formulated the simple, yet profoundly radical, view that Europeans could “justly occupy lands in the Americas only by purchasing those lands from their rightful owners, the Indians.”<sup>9</sup>

Williams’ view, of course, was unacceptable to the colonizing nations.<sup>10</sup> However, as surveyed in Part IV of this Article, European views of Indian land rights during “the age of discovery” were by no means as uniform as Marshall intimates in *Johnson v. McIntosh*.<sup>11</sup> The Spanish, French, Dutch, Swedish, and English views of Indian land

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<sup>3</sup> *Id.* at 574.

<sup>4</sup> *See infra* Part II.

<sup>5</sup> *See infra* Part II.

<sup>6</sup> JAMES ERNST, ROGER WILLIAMS: NEW ENGLAND FIREBRAND 100 (AMS Press 1969) (1932).

<sup>7</sup> EDWIN S. GAUSTAD, LIBERTY OF CONSCIENCE: ROGER WILLIAMS IN AMERICA 48–49 (1991).

<sup>8</sup> *Id.* at 28.

<sup>9</sup> WILLIAM CHRISTIE MACLEOD, THE AMERICAN INDIAN FRONTIER 199 (1928).

<sup>10</sup> *See infra* notes 80–114, and accompanying text.

<sup>11</sup> *See infra* Part IV.

rights varied considerably in their emphasis on discovery, papal authority, royal grant, feudal right, possession, and purchase.

Finally, Part V examines a lesser known conflict over Indian land rights: the dispute between the “Newark purchasers,” who relied on Indian deeds obtained in the seventeenth century, and the Proprietors of New Jersey, who sought to collect the feudal quit-rents due them under their royal grants. This controversy is of historical importance as it foreshadowed the struggle of the Illinois and Wabash Land Company in *Johnson v. McIntosh* to overcome government resistance to its title claims. In both instances, ownership of land was contested on the basis of competing chains of title. In each of the respective cases, native land rights were championed not by the Indians themselves, but by the recipients of Indian deeds.<sup>12</sup> And in both instances, natural rights to property were opposed by the doctrine of discovery, feudal law, statutory prohibitions, and royal authority.<sup>13</sup>

## II. JOHNSON V. MCINTOSH

*Johnson and Graham’s Lessee v. McIntosh*, an 1823 United States Supreme Court decision authored by Chief Justice John Marshall, was “an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States.”<sup>14</sup> On October 18, 1775, in Vincennes, Indiana, eleven Piankeshaw chiefs “for good and valuable consideration” deeded an immense tract of land to Lord Dunmore, the royal governor of Virginia, his son, and eighteen other persons from Maryland, Pennsylvania, Great Britain, and the Illinois Country.<sup>15</sup> However, on December 30, 1805, the Piankeshaw ceded much of the same land to the United States in a treaty negotiated by William Henry Harrison, governor of the Indiana Territory.<sup>16</sup> Thereafter, Vincennes resident William McIntosh—according to the jointly submitted statement of the case—purchased a portion of the land in question from the federal government, thus setting up a conflict in title.<sup>17</sup>

The plaintiffs, who were the heirs of Thomas Johnson, one of the twenty original purchasers, appeared to have the upper hand. After all, if the Piankeshaw Tribe sold the property in 1775, the Tribe

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<sup>12</sup> See *infra* Part V.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 543 (1823).

<sup>15</sup> *Id.* at 555.

<sup>16</sup> 7 Stat. 100 (1805).

<sup>17</sup> *Johnson*, 21 U.S. (8 Wheat.) at 560.

had nothing left to cede to the United States in 1805, and therefore the government had nothing to sell to William McIntosh: *nemo dat qui non habet* (he who hath not cannot give).<sup>18</sup> Faced with these facts, the attorneys representing the defendant McIntosh were compelled to argue that the 1775 purchase was invalid on the ground that Indian tribes lacked the legal capacity to sell land to private individuals.<sup>19</sup> Hence, in Chief Justice Marshall's words, the issue to be decided in *Johnson v. McIntosh* was "the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."<sup>20</sup>

On behalf of a unanimous Supreme Court, Marshall announced that, following "the discovery of this immense continent,"<sup>21</sup> Indians in America no longer enjoyed the "power to dispose of the soil, at their own will, to whomsoever they pleased"<sup>22</sup> and that, consequently, "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States."<sup>23</sup> The decision in *Johnson v. McIntosh* was a crushing defeat for the Illinois and Wabash Land Company, which in 1779 had united the investors in the Piankeshaw (or Wabash) purchase with an overlapping group of individuals who had acquired a similarly large tract of land in 1773 from the Illinois Indians.<sup>24</sup> The quixotic pursuit of fortune by the speculators in the Illinois-Wabash purchase, sustained for a half century, ended in complete and unequivocal failure.

The Illinois and Piankeshaw Indians did not participate in the *Johnson v. McIntosh* litigation, and, consequently, "no Indian voices were heard in a case which had, and continues to have, profound effects on Indian property rights."<sup>25</sup> Indeed, Wilcomb Washburn views Marshall's opinion as "the basis of all subsequent determinations of Indian right,"<sup>26</sup> and Kenneth Bobroff describes *Johnson v. McIntosh* as "one of the foundational Indian law cases" that "is at the root of title

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<sup>18</sup> *Id.* at 571.

<sup>19</sup> *Id.* at 572.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 574.

<sup>23</sup> *Johnson*, 21 U.S. (8 Wheat.) at 604–05.

<sup>24</sup> *Id.* at 572.

<sup>25</sup> Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 645 (1999).

<sup>26</sup> WILCOMB E. WASHBURN, *RED MAN'S LAND, WHITE MAN'S LAW* 66 (2d ed. 1995).

for most real property in the United States.”<sup>27</sup> Although the decision has been described as “a brilliant compromise,”<sup>28</sup> “pos[ing] little or no restrictions on the tribes,”<sup>29</sup> “not . . . purely inimical to tribal interests,”<sup>30</sup> and even as “one of the most pro-Indian decisions to come from the Supreme Court in the nineteenth century,”<sup>31</sup> the majority of commentators have severely criticized *Johnson v. McIntosh* and its endorsement of the doctrines of discovery and conquest.<sup>32</sup>

Robert Williams, Jr., concludes that “[f]or Marshall, the Doctrine of Discovery presented itself as a convenient fiction, one which masked the Revolutionary era political struggle by which Indian Nations were denied rights and status in their lands,”<sup>33</sup> and contends that “Indian people regard the ‘Doctrine of Discovery’ . . . as the ‘separate but equal’<sup>34</sup> and *Korematsu*<sup>35</sup> of United States race-oriented jurisprudence respecting their status and rights.”<sup>36</sup> David Wilkins asserts that “[t]he thrust of the Court’s message in *McIntosh* was that indigenous peoples did not have the natural right exercised by ‘civi-

<sup>27</sup> Kenneth H. Bobroff, *Indian Law in Property: Johnson v. McIntosh and Beyond*, 37 TULSA L.J. 521, 521 (2001).

<sup>28</sup> Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1223 (1980).

<sup>29</sup> Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 24 (1987).

<sup>30</sup> Kevin J. Worthen, *Sword or Shield: The Past and Future Impact of Western Legal Thought on American Indian Sovereignty*, 104 HARV. L. REV. 1372, 1384 (1991) (book review).

<sup>31</sup> June Carbone, *Back to the Future: Intellectual Property and the Rediscovery of Property Rights—and Wrongs*, 46 ST. LOUIS U. L.J. 629, 633 (2002).

<sup>32</sup> See *infra* notes 33–45 and accompanying text.

<sup>33</sup> Robert A. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, 29 ARIZ. L. REV. 165, 191 (1987) [hereinafter Williams, Jr., *American Indian Lands*].

<sup>34</sup> In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the United States Supreme Court upheld against Thirteenth and Fourteenth Amendment challenges a Louisiana statute requiring railroads to provide “equal but separate” accommodations for white and black passengers. The Court rejected the plaintiff’s argument that “enforced separation of the two races stamps the colored race with a badge of inferiority.” *Id.* at 551.

<sup>35</sup> In *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944), the United States Supreme Court held that it was within the war powers of Congress and the Executive branch to temporarily exclude Japanese-Americans from the West Coast during World War II.

<sup>36</sup> Williams, Jr., *American Indian Lands*, *supra* note 33, at 169. See also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 317 (1990) [hereinafter WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT] (“*Johnson’s* acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. . . . The Doctrine of Discovery’s underlying mediocally derived ideology—that normatively divergent ‘savage’ peoples could be denied rights and status equal to those accorded to the civilized nations of Europe—had become an integral part of the fabric of United States federal Indian law.”).

lized' nations to sell their property to whomever they wished,"<sup>37</sup> and that the doctrine of discovery, "when defined . . . to mean that the federal government holds the fee-simple title to all the Indian lands in the United States, is a clear legal fiction that needs to be explicitly stricken from the federal government's political and legal vocabulary."<sup>38</sup> Steven Newcomb posits 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."<sup>39</sup> Others have described the 1823 Supreme Court decision as "conquest by judicial fiat,"<sup>40</sup> "a tortured rationale,"<sup>41</sup> "a tool of efficient expropriation of Indian lands,"<sup>42</sup> "corrupt,"<sup>43</sup> "having both racist and colonial roots,"<sup>44</sup> and "an extra-constitutional fiction . . . developed . . . to rationalize the subjugation of the Indian nations as a matter of 'law.'"<sup>45</sup>

*Johnson v. McIntosh*, with its core pretension of "discovery" of inhabited lands, is doctrinally suspect.<sup>46</sup> It is also historically inaccurate. Chief Justice John Marshall's claim of "universal recognition" of the doctrine of discovery is fictive.<sup>47</sup> The discovery doctrine was always a controversial and controverted rationale.<sup>48</sup>

<sup>37</sup> David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159, 166 (1994).

<sup>38</sup> David E. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 315 (1998). See also G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 710 (1991) (Marshall's message in *Johnson v. McIntosh* was that "the natural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America.").

<sup>39</sup> Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 304 (1993).

<sup>40</sup> Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 648 (1978).

<sup>41</sup> Terry W. Frazier, *Protecting Ecological Integrity Within the Balancing Function of Property Law*, 28 ENVTL. L. 53, 79 n.94 (1998).

<sup>42</sup> Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1080 (2000).

<sup>43</sup> Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73, 94 (1988).

<sup>44</sup> Robert B. Porter, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor Lavelle*, 11 KAN. J.L. & PUB. POL'Y 629, 637 (2002).

<sup>45</sup> Alex Tallchief Skibine, *Braid of Feathers: Pluralism, Legitimacy, Sovereignty, and the Importance of Tribal Court Jurisprudence*, 96 COLUM. L. REV. 557, 565 (1996) (reviewing FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995)).

<sup>46</sup> See *supra* notes 25-45 and accompanying text.

<sup>47</sup> See *infra* Part IV.

<sup>48</sup> See *infra* Part III.

## III. ROGER WILLIAMS AND "THE SINNE OF THE PATENTS"

Roger and Mary Williams came to Massachusetts in February 1631.<sup>49</sup> At this time, there were three primary English settlements: Plymouth, Salem, and most recently, Boston. The Plymouth Colony was founded in December 1620 by the Mayflower Pilgrims, a separatist Puritan sect that had secured a land patent from the London Virginia Company.<sup>50</sup> The Pilgrims established their settlement in a location beyond the domain of the Virginia Company, but came to an agreement with the Plymouth Council for New England, which on November 3, 1620 had been granted a charter by King James I for the lands at issue.<sup>51</sup> Without any mention of Indians or Indian land rights, James granted to the Council, for their "sole . . . and proper Use" and to "their Successors and Assignes for ever,"<sup>52</sup> a patent, or exclusive title, to "all the . . . Lands and Grounds . . . of America" from 40 to 48 degrees northern latitude, "from Sea to Sea," together with "the Firme Lands, Soyles, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines, and Mineralls."<sup>53</sup>

Salem and Boston, located to the north of Plymouth, were settlements within the Massachusetts Bay Colony.<sup>54</sup> In 1629, Williams became acquainted with John Winthrop, who in that year had been elected the Colony's governor while still in England.<sup>55</sup> James I died in 1625 and was succeeded by Charles I, his son, "who ruled with little respect for either Parliament or the Puritans."<sup>56</sup> Nevertheless, a group of Puritan merchants in 1628 were granted land in Massachu-

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<sup>49</sup> GAUSTAD, *supra* note 7, at 24.

<sup>50</sup> *Id.* at 14.

<sup>51</sup> John T. Juricek, *English Territorial Claims in North America under Elizabeth and the Early Stuarts*, in 7 TERRAE INCOGNITAE, THE ANNALS OF THE SOCIETY FOR THE HISTORY OF DISCOVERIES 18–19 (1975); Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759, 762 (1997) [hereinafter Robertson, *John Marshall as Colonial Historian*].

<sup>52</sup> 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1834 (Francis N. Thorpe ed., 1909) [hereinafter 3 FEDERAL AND STATE CONSTITUTIONS].

<sup>53</sup> The Avalon Project at Yale Law School, The Charter of New England: 1620, <http://www.yale.edu/lawweb/avalon/states/mass01.htm> (last visited Dec. 26, 2005). The line for 48 degrees north latitude lies north of Maine and runs through Canada and northern Minnesota, North Dakota, Montana, Idaho, and Washington. The line for 40 degrees north latitude serves as north boundary of Kansas, and runs through California, Nevada, Utah, Colorado, Missouri, Illinois, Indiana, Ohio, West Virginia, Pennsylvania, and New Jersey.

<sup>54</sup> PETER C. HOLLORAN, HISTORICAL DICTIONARY OF NEW ENGLAND 284–85 (2003).

<sup>55</sup> GAUSTAD, *supra* note 7, at 20.

<sup>56</sup> *Id.* at 19.

setts and, on March 4, 1629, the grant was confirmed by a royal charter.<sup>57</sup> King Charles, also without any mention of Indians or Indian land rights, granted to the Massachusetts Bay Company “all that Parte of Newe England” described in the charter “and all Landes and Hereditaments whatsoever, lyeing within the Lymitts aforesaide, . . . from the Atlantick and Western Sea and Ocean on the Easte Parte, to the South Sea on the West Parte.”<sup>58</sup>

Although the 1620 and 1629 royal charters made no mention of the Indians who occupied the lands granted, John Winthrop and other Puritans were aware of the native presence. In a 1621 tract defending “the Lawfulness of Removing out of England into the Parts of America,” Pilgrim apologist Robert Cushman declared Indian lands to be “spacious and void,” and thus available to Englishmen.<sup>59</sup> Winthrop, who studied law at Gray’s Inn and became an attorney at the Court of Wards in London, advanced similar arguments eight years later, just prior to his departure for the New World:

As for the Natives in New England, they inclose noe Land, neither have any setled habytation, nor any tame Cattle to improve the Land by, and soe have noe other but a Naturall Right to those Countries, soe as if we leave them sufficient for their use, we may lawfully take the rest, there being more than enough for them and us.<sup>60</sup>

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<sup>57</sup> *Id.* at 20.

<sup>58</sup> 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 52, at 1849–50. *See also* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 70–71 (1983) (“In the case of the Massachusetts Bay Company’s charter, the King conferred the lands of the grant . . . ‘in free and common Socage.’ . . . [F]ree and common socage—in some senses, the least feudal of medieval tenures—conceived of land simply as property carrying an economic rent, a rent which was often negligible. In Massachusetts, the Crown’s only claim was to receive one-fifth of all the gold and silver found there. Given New England geology, the burden did not prove onerous.”); DOCUMENTS OF AMERICAN HISTORY 16–17 (Henry Steele Commager ed., 5th ed. 1949); GAUSTAD, *supra* note 7, at 32; The Winthrop Society, Charter of the Massachusetts Bay Company, 4 March, 1628/29, [http://www.winthropsociety.org/doc\\_charter.php](http://www.winthropsociety.org/doc_charter.php) (last visited Dec. 26, 2005) (rendered into modern English by John Beardsley).

<sup>59</sup> CRONON, *supra* note 58, at 56. *See also* JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY 117 (1991) (Cushman justified taking Indian land on the grounds that, “[b]ecause the Indians let the land lie ‘idle and waste . . . it is lawful now to take a land which none useth, and make use of it.’”).

<sup>60</sup> ALDEN T. VAUGHAN, NEW ENGLAND FRONTIER: PURITANS AND INDIANS, 1620–1675, at 110 (1965).



Most land in America, according to Winthrop, was *vacuum domicilium*, or empty space.<sup>61</sup> The “savage people” had not enclosed or improved it, and due to smallpox, “God hath consumed the natives with a miraculous plague, whereby the greater part of the country is left void of inhabitants.”<sup>62</sup> Consequently, “Christians have liberty to go and dwell amongst them in their waste lands and woods (leaving them such places as they have manured for their corn) as lawfully as Abraham did among the Sodomites.”<sup>63</sup> John Cotton, a Boston minister and contemporary of Winthrop and Williams, also embraced the emergent international law doctrine of *vacuum domicilium*, writing that, “[i]n a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is.”<sup>64</sup>

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<sup>61</sup> Samuel Hugh Brockunier, *The Irrepressible Democrat: Roger Williams, reprinted in ROGER WILLIAMS AND THE MASSACHUSETTS MAGISTRATES* 44 (Theodore P. Greene ed., 1964).

<sup>62</sup> CHARLES DEANE, *ROGER WILLIAMS AND THE MASSACHUSETTS CHARTER* 7 n.† (1873). See also MICHAEL LEROY OBERG, *DOMINION AND CIVILITY: ENGLISH IMPERIALISM AND NATIVE AMERICA, 1585–1685*, at 84 (1999) (Puritan John White, in 1630, noted that disease had “swept away most of the Inhabitants all along the Sea Coast, and in some places utterly consumed man, woman, & childe, so that there is no person left to lay claime to the soyle which they possessed.”) (citing JOHN WHITE, *THE PLANTERS PLEA* 14 (1630)). *Id.* at 85 (“Why, [Winthrop] asked, ‘should we stand striving here [in England] for places of habitation, etc. (many men spending as much labor & coste to recover or keepe an acre or twoe of Land, as would procure them many & as good or better in another Countrey) & in the meane time suffer a whole Continent as fruitfull & convenient for the use of man to lie waste w<sup>th</sup> out any improvement?’”).

Eric Kades notes that, to obtain Indian lands “at bargain prices,” the United States government was not required, in most instances, “to resort to violence or even threats to lower the price of Indian lands. Its most powerful alternative was breathtakingly simple: settlement on the frontier. Settlers killed relatively few Indians in raids, massacres, skirmishes and the like. They killed many more by spreading endemic diseases like smallpox.” Kades, *supra* note 42, at 1105. John Winthrop attributed a divine purpose to such epidemics, writing that “[t]he Natives are near all dead of the smallpox, so as the Lord hath cleared our title to what we possess.” OBERG, *supra*, at 85 (quoting Winthrop to Sir Nathaniel Rich, May 22, 1634).

<sup>63</sup> DEANE, *supra* note 62, at 7 n.†. See also VAUGHAN, *supra* note 60, at 110 (“Bolstered by innumerable Old Testament citations, the New England Puritans tried to convince themselves and others that land not being used by the heathen was open to any who would make use of it.”); Brockunier, *supra* note 61, at 44 (“Even before embarking from the homeland, Winthrop had dug into the Old Testament for the warrant of Higher Law. The cases of Ephron the Hittite, Jacob and Hamor’s land, and the relations of Abimelech’s servants with Isaac’s readily came to hand, and Winthrop concluded that the Indians had only a ‘natural right’ to the soil, the right of occupancy.”).

<sup>64</sup> CRONON, *supra* note 58, at 56–57. See NEAL SALISBURY, *MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500–1643*, at 176–77 (1982) (describing the *vacuum domicilium* doctrine as spelled out by John Winthrop).

The legalities of colonization appeared settled: Massachusetts belonged to England by virtue of discovery; and the King's right to grant the lands by issuing patents was justified—in the minds of the Puritans—by the doctrine of *vacuum domicilium*.<sup>65</sup> Patent and possession sufficed; acquiring title to land by purchase from the Indians was unnecessary.

Nevertheless, even prior to Williams' arrival in 1631, Englishmen were transacting with Indians in both public and private capacities. In 1625 New England colonists asked the Pemaquid tribe to give them 12,000 acres of Pemaquid land, which the tribe did in "the first deed of Indian land to English colonists."<sup>66</sup> A month later, in May 1629, John Wheelwright and others, by private purchase, were deeded lands in upper New England by the Pisquataqua Indians.<sup>67</sup> In fact, John Winthrop himself transacted with natives in 1642 for 1,260 acres along the Concord River.<sup>68</sup> These purchases, however, were based on expediency rather than a change in legal principle. In April 1629 the Salem Colony was instructed from London that "[i]f any of the savages *pretend* right of inheritance to all or any part of the land granted in our patent, we pray you endeavor to purchase their title, that we may *avoid the least scruple of intrusion*."<sup>69</sup> Indian title was never officially acknowledged as equivalent or superior to title to lands held under royal patent.

The question of Indian land rights was not foremost on Roger Williams' mind as he arrived in Boston. Williams resolved to seek in New England the liberty of conscience denied him in the England of

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<sup>65</sup> Chester E. Eisinger, *The Puritan's Justification for Taking the Land*, 84 ESSEX INST. HIST. COLLECTION 131 (1948).

<sup>66</sup> Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39, 54 (1994) (quoting DEE BROWN, BURY MY HEART AT WOUNDED KNEE 3 (1970)). The doctrine of *vacuum domicilium* is sometimes denominated the doctrine of *terra nullius*.

<sup>67</sup> Lindsay G. Robertson, *Johnson v. M'Intosh* Reargument, *Brief for the Appellants*, 9 KAN. J.L. & PUB. POL'Y 852, 865 (2000) [hereinafter Robertson, *Brief for the Appellants*].

<sup>68</sup> Olive P. Dickason, *Concepts of Sovereignty at the Time of First Contacts*, in THE LAW OF NATIONS AND THE NEW WORLD 236 (L.C. Green & Olive P. Dickason eds., 1989). See also Francis Jennings, *Virgin Land and Savage People*, 23 AM. Q. 519, 522 (1966), reprinted in INDIANS AND EUROPEANS: SELECTED ARTICLES ON INDIAN-WHITE RELATIONS IN COLONIAL NORTH AMERICA 103 (Peter Charles Hoffer ed., 1988) ("New England's records abound with deeds attesting to purchases by 17th century Englishmen from stipulatedly rightful Indian landlords. These documents, including a deed in the name of John Winthrop himself, testify that Winthrop's doctrine of *vacuum domicilium* was quietly abandoned after 1633.").

<sup>69</sup> DEANE, *supra* note 62, at 10 n.\* (emphasis added).

King Charles and Bishop William Laud.<sup>70</sup> He embraced the principle of Separatism, and consequently declined an invitation to serve as pastor in Boston because the church, in his view, had not broken sufficiently with Anglicanism. In April 1631, Williams and his wife left for Salem, but stayed only for a few months, leaving the jurisdiction of the Massachusetts Bay Colony in August 1631 to settle at Plymouth.<sup>71</sup> They remained in the Plymouth Colony for two years.

While in Plymouth, Williams served as assistant to the pastor and became acquainted with the neighboring Indians. He became “great friends” with Massasoit, sachem of the Wampanoags, and also was on friendly terms with Canonicus, aged leader of the Narragansetts.<sup>72</sup> By letter to John Winthrop, Williams declared that “I am no Elder in any church . . . nor ever shall be, if the Lord please to grant my desires that I may intend what I long after, the natives souls.”<sup>73</sup> Already familiar with Latin, Greek, French, and Dutch (which he had taught John Milton in exchange for Hebrew lessons), Williams soon became conversant in local languages, particularly the Narragansett dialect.<sup>74</sup> In fact, Roger Williams’ first published book focused not on the theological positions for which he is most famous, but rather on anthropology, linguistics, and native customs. The book, *A Key into the Language of America*, was published in 1643 during a visit to England, but was primarily based on observations made while in Plymouth.<sup>75</sup> In Chapter VII (“Of their Persons and parts of body”), Williams expressed his views in verse:

*Boast not proud English, of thy birth & blood,  
Thy brother Indian is by birth as Good.  
Of one blood God made Him, and Thee & All,  
As wise, as faire, as strong, as personall.*<sup>76</sup>

With respect to Indian land rights, Williams’ empirical observations, set forth in Chapter XVI (“Of the earth and the fruits thereof”), chal-

<sup>70</sup> GAUSTAD, *supra* note 7, at 20–21.

<sup>71</sup> Brockunier, *supra* note 61, at 40.

<sup>72</sup> *Id.* at 42. See also DONALD A. GRINDE, JR. & BRUCE E. JOHANSEN, EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY 74 (1991). Massasoit was the father of Metacom, called King Philip by the English.

<sup>73</sup> Brockunier, *supra* note 61, at 42.

<sup>74</sup> GAUSTAD, *supra* note 7, at 28. As a youth, Williams was the protégé and scribe of Sir Edward Coke, the famous jurist and Lord Chief Justice of England, and was educated at Cambridge University. *Id.* at 5.

<sup>75</sup> *Id.*

<sup>76</sup> ROGER WILLIAMS, A KEY INTO THE LANGUAGE OF AMERICA 133 (Wayne State Univ. Press 1973) (1643). Williams also noted that “[n]ature knowes no difference between *Europe* and *Americans* in blood, birth, bodies, &c. God having of one blood made all mankind, *Acts* 17. and all by nature being children of wrath, *Ephes.* 2.” *Id.*

lenged the doctrine of *vacuum domicilium* and the accompanying notion that Europeans were entitled to appropriate native property without purchase because Indians made insufficient use of such lands:

The Natives are very exact and punctuall in the bounds of their Lands . . . And I have knowne them make bargaine and sale amongst themselves for a small piece, or quantity of Ground: notwithstanding a sinfull opinion among many that Christians have right to *Heathens* Lands: but of the delusion of that phrase, I have spoke in a discourse. . . .<sup>77</sup>

The “discourse” referenced in *A Key into the Language of America* was a treatise written by Williams in 1632 while at Plymouth. Governor William Bradford apparently asked Williams—whom he deemed “a man godly and zealous”<sup>78</sup>—to express his views on the right of Puritans to be in America.<sup>79</sup> Williams presented his ideas in “a large book in quarto,”<sup>80</sup> prepared for the governor and council’s private consideration. At some point thereafter, Williams carried the treatise to Governor John Winthrop of the Massachusetts Bay Colony, who had heard of the writing and inquired about it.<sup>81</sup> Instead of burning it upon completion, as requested,<sup>82</sup> Winthrop passed along the manuscript to his Council and to the “most judicious ministers”<sup>83</sup> in Boston, including John Cotton.<sup>84</sup>

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<sup>77</sup> ROSMARIE WALDROP, *A KEY INTO THE LANGUAGE OF AMERICA* xvii (New Directions Publ’g 1994). See also SALISBURY, *supra* note 64, at 198 (“Williams recognized that Indian hunting and burning were not the random activities assumed in the law of *vacuum domicilium* but systematic, rational uses of land in the same sense that cultivation was for Europeans.”). Prior to Roger Williams, John Smith of Virginia observed that the natives encountered by the Jamestown settlers “lived with the understanding of precise boundaries demarcating the land of each tribe.” Kathy Squadrito, *Locke and the Dispossession of the American Indian*, 20 AM. INDIAN CULTURE & RES. J. 145, 151 (1996).

<sup>78</sup> GAUSTAD, *supra* note 7, at 27.

<sup>79</sup> GRINDE, JR. & JOHANSEN, *supra* note 72, at 74 (“Asked by William Bradford to compose a paper on the compact which established the Puritan colony in America, Williams began by declaring that the agreement was invalid.”).

<sup>80</sup> 1 CHARLES M. ANDREWS, *THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS* 472 n.4 (1934).

<sup>81</sup> DEANE, *supra* note 62, at 3.

<sup>82</sup> *Id.* at 4.

<sup>83</sup> ERNST, *supra* note 6, at 101.

<sup>84</sup> ANDREWS, *supra* note 80, at 472 n.4; Edmund S. Morgan, *The Puritan Dilemma: The Story of John Winthrop* (1958), reprinted in ROGER WILLIAMS AND THE MASSACHUSETTS MAGISTRATES, *supra* note 61, at 89. See also GAUSTAD, *supra* note 7, at 28 (“Toward the end of 1633, he fell ‘into some strange opinions,’ Governor Bradford reported, ‘which caused some controversy between the church and him.’”).

Roger Williams' treatise is not extant, and was likely destroyed by Massachusetts officials. It is evident, however, that Williams, the "dissenter extraordinaire,"<sup>85</sup> denounced the royal patents of 1620 and 1629 as illegal expropriations,<sup>86</sup> and questioned the right of Plymouth (and, by extension, all colonies), to Indian lands possessed but not purchased.<sup>87</sup> Simply put, if the rights to land in the New World had not yet been voluntarily transferred, complete ownership remained with the Indians, "from whom alone a valid title could be derived," and therefore colonists should "repent of receiving title by patent from a king who had no right to grant it."<sup>88</sup> Neither possession of "waste" lands (*vacuum domicilium*) nor patent sufficed; purchase alone justified occupation.<sup>89</sup> Williams laid down the gauntlet: if Europeans wished to own America, they must buy America from the Indians. In the words of his biographer Edwin Gaustad,

Williams questioned the very right of the English to occupy land that properly belonged to the Indians. What was it about Christendom, Williams wondered, that empowered Christian kings to give away land that wasn't even theirs? English colonization was nothing more than "a sin of unjust usurpation upon others' possessions." Indians owned the land before Europeans arrived; they would continue to own the land until appropriate purchases or agreements had been made.<sup>90</sup>

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<sup>85</sup> Nathan O. Hatch, *Introduction to GAUSTAD*, *supra* note 7, at x.

<sup>86</sup> DEANE, *supra* note 62, at 8 ("He seems to have included in his denunciations the grand patent of King James, of Nov. 3, 1620, and that of Charles I., to Massachusetts.").

<sup>87</sup> ERNST, *supra* note 6, at 80. Wilcomb Washburn characterizes Williams as "one of the few Englishmen who dared to dismiss European claims to American soil as unjustified and illegal if the prior right of the Indian were not recognized." Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossessing the Indians*, in SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 25 (James Morton Smith ed., 1959). Samuel Brockunier more succinctly describes the founder of Rhode Island as "one of the few Englishmen who demanded equal justice for the natives." Brockunier, *supra* note 61, at 43. Massachusetts native John Quincy Adams, on the other hand, once referred to Williams as "a polemical porcupine." Hatch, *supra* note 85, at ix.

<sup>88</sup> Washburn, *supra* note 87, at 25. See also BARBARA ARNEIL, JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM 82-84 (1996); Eisinger, *supra* note 65, at 131-43.

<sup>89</sup> VAUGHAN, *supra* note 60, at 119.

<sup>90</sup> GAUSTAD, *supra* note 7, at 32. See also I THE CORRESPONDENCE OF ROGER WILLIAMS, 1629-1653, at 15 (Glenn W. LaFantasie ed., 1988) (setting forth Williams' argument that the English kings had unjustly used Christianity as a rationale for depriving Indians of their rights to lands).

Not surprisingly, the arguments of Roger Williams “against the King’s Patent and Authority”<sup>91</sup> were viewed with much trepidation by Massachusetts officials, insofar as “they struck at the very foundations of the colonial governments which drew their authority from grants by the Crown.”<sup>92</sup> On January 3, 1633, John Winthrop wrote to John Endicott, his predecessor as governor of the Massachusetts Bay Colony, and outlined an initial response to Williams’ treatise:

But if our title be not good, neither by Patent, nor possession of these parts as *vacuum Domicilium* nor by good liking of the natives, I mervayle by what title Mr. Williams himselfe holdes. & if God were not pleased with our inheritinge these partes, why did he drive out the natives before us? & why dothe he still make roome for us, by diminishing them as we increase? . . . If we had no right to this lande, yet our God hathe right to it, & if he be pleased to give it us (takinge it from a people who had so longe usurped upon him, & abused his creatures) who shall controll him or his terms?<sup>93</sup>

Williams returned to the jurisdiction of the Massachusetts Bay Colony in August 1633 when he moved back to Salem to assist the town’s minister. By year’s end, Governor Winthrop and his assistants met in Boston and determined that “Mr. Williams . . . should be con-

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<sup>91</sup> DEANE, *supra* note 62, at 4 (“William Coddington, in a letter published [in a book dated 1678] says that Williams’ book [was] ‘against the King’s Patent and Authority.’”).

<sup>92</sup> MACLEOD, *supra* note 9, at 199. *See also* CYCLONE COVEY, *THE GENTLE RADICAL: A BIOGRAPHY OF ROGER WILLIAMS* 94 (1966) (Winthrop complained that Williams “provoked our Kinge against vs, and putt a sworde into his hande to destroye vs.”); JOHN GARRETT, *ROGER WILLIAMS: WITNESS BEYOND CHRISTENDOM* 15 (1970) (“Danger threatened all the Bay Colonies during the early 1630’s because of the attempts of James I and his advisers to forestall the development of a Puritan transatlantic stronghold against the homeland’s policies. People like [John] Cotton and [John] Winthrop did not want their colony to appear in blacker colours than it really wore—as a nest of Separatism. They sought further reforms of the Church of England, all in loyal spirit. Williams, more radical, was condemning the Church of England as in league with the anti-Christ.”); JAMES KENT, *3 COMMENTARIES ON AMERICAN LAW* 495 (George F. Comstock ed., 11th ed. 1867) (“[Williams’] essay, in which he maintained that an English patent could not invalidate the rights of the native inhabitants of this country, [was] condemned by the government in Massachusetts, in 1634, as sounding like treason against the cherished charter of the colony.”); Morgan, *supra* note 84, at 89 (“In order to appreciate the shock which this document must have given the magistrates of Massachusetts, one must remember that the English Civil War had not begun and that the Massachusetts Bay Company had gained its control over the colony by virtue of a patent from the King.”).

<sup>93</sup> DEANE, *supra* note 62, at 7. Deane points out in a footnote that “Mr. Williams owned a house in Salem, which he mortgaged about the time of his removal from the Colony.” *Id.* at 7 n.\*.

vented at the next court, to be censured, etc.”<sup>94</sup> In his journal, Winthrop noted that Williams “concluded that, claiming by the king’s grant, they could have no title, nor otherwise, except they compounded with the natives,” and “chargeth King James to have told a solemn public lie, because in his patent he blessed God that he was the first Christian prince that had discovered this land.”<sup>95</sup> At the next Court, on March 4, 1634, Williams appeared penitently and, according to Winthrop, “gave satisfaction of his intention and loyalty.”<sup>96</sup> On this same date, the General Court<sup>97</sup> enacted a law regulating the purchase of Indian lands, ordering “that no Person whatsoever, Shall henceforth buy land of any Indians without License first had and obtained of the General Court, and if any offend herein, such Land so bought shall be forfeited to the Country.”<sup>98</sup>

Williams’ penitence was short-lived. Back in Salem, he protested the “sinfulness” of the patent in his sermons and “conducted days of public humiliation among his parishioners for their having used it to usurp land from the natives.”<sup>99</sup> On November 27, 1634, Governor Winthrop duly noted in his journal that the Council was informed

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<sup>94</sup> *John Winthrop’s Journal* (Dec. 27, 1633), reprinted in ROGER WILLIAMS AND THE MASSACHUSETTS MAGISTRATES, *supra* note 61, at 2.

<sup>95</sup> *Id.*

<sup>96</sup> ERNST, *supra* note 6, at 104.

<sup>97</sup> The General Court was an “amalgam of the governor and his assistants that functioned as a legislative, judicial, and executive body all in one . . . .” GAUSTAD, *supra* note 7, at 32–33.

<sup>98</sup> JEAN M. O’BRIEN, DISPOSSESSION BY DEGREES: INDIAN LAND AND IDENTITY IN NATICK, MASSACHUSETTS, 1650–1790, at 71 (1997). See also VAUGHAN, *supra* note 60, at 114 (“During the first few years of its existence, Massachusetts Bay imposed no restrictions on the purchase of land from the natives; both towns and individuals freely contracted for land. Then, in the spring of 1634, the General Court, following a Plymouth precedent, decreed that no one could buy Indian lands without the Court’s permission.”); KADES, *supra* note 42, at 1079 (“Massachusetts apparently adopted the first such official law [requiring government approval of Indian purchases] in 1634 . . . .”). Other sources state that the General Court first prohibited the purchase of lands from Indians without license from the government in 1633. See KENT, *supra* note 92, at 496; J.P. KINNEY, A CONTINENT LOST—A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA 6–7 (Octagon Books 1975) (1937); 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 111–12 (Nathaniel B. Shurtleff ed., 1968); James Muldoon, *Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America*, in THE MANY LEGALITIES OF EARLY AMERICA 43 (Christopher L. Tomlins & Bruce H. Mann eds., 2001). See also Jennings, *supra* note 68, at 519, reprinted in INDIANS AND EUROPEANS: SELECTED ARTICLES ON INDIAN-WHITE RELATIONS IN COLONIAL NORTH AMERICA 115 (Peter Charles Hoffer ed., 1988) (“The General Court responded with a series of new laws, the first of which was a ban on the purchase of Indian lands except when such purchase had prior approval from the court.”) (citing Minutes, Mar. 4, 1634 (Old Style 1633), Recs. of Mass. 1:112).

<sup>99</sup> SALISBURY, *supra* note 64, at 195.

“that Mr. Williams of Salem had broken his promise to us, in teaching publicly against the king’s patent, and our great sin in claiming right thereby to this country, etc.”<sup>100</sup> The General Court declined to take immediate action, but Williams persisted in claiming that “the Natives are true owners of all they possess or improve,”<sup>101</sup> and as a result he “stood once more before the bar of Massachusetts justice.”<sup>102</sup> On October 9, 1635, the General Court declared that Williams “hath broached & divulged diverse new & dangerous opinions,” and ordered “that the said Mr. Williams shall depart out of this jurisdiction within six weeks.”<sup>103</sup>

In January 1636 a Captain Underhill was instructed to put Roger Williams on board his ship for England.<sup>104</sup> However, when Underhill arrived in Salem, Williams was gone. John Winthrop quietly advised him to leave the colony, and Williams left his wife and children and “journeyed by land, during an inclement winter season and through forests largely unknown to the white man, until he found a refuge among the Indians.”<sup>105</sup> Both Massasoit and Canonicus aided Williams as he made his way southward, beyond the jurisdiction of both the Massachusetts Bay Colony and the Plymouth Colony. In June, Williams and a few of his followers reached present-day Rhode Island:

When he arrived at the headwaters of Narragansett Bay, he decided to stop. Here he would occupy land only by agreement with the Indians (no patent from King Charles); here he would bring family and send for friends and neighbors; here he would name

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<sup>100</sup> *John Winthrop’s Journal* (Nov. 27, 1634), reprinted in ROGER WILLIAMS AND THE MASSACHUSETTS MAGISTRATES, *supra* note 61, at 2.

<sup>101</sup> ERNST, *supra* note 6, at 100.

<sup>102</sup> GAUSTAD, *supra* note 7, at 37. Williams’ view on Indian land rights was not the only basis for his banishment; for example, he regarded fellowship with the Church of England as grievous sin. See ANDREWS, *supra* note 80, at 472 (“The causes of [the banishment of Roger Williams] were in part political and in part a matter of church polity.”); GARRETT, *supra* note 92, at 198 (quoting Cotton Mather [1663–1728] in saying, “his banishment proceeded not against him, or his, for his own refusal of any worship, but for seditious opposition against the Patent and against the oath of fidelity offered to the people.”).

<sup>103</sup> GAUSTAD, *supra* note 7, at 37.

<sup>104</sup> Williams’ sojourn from Massachusetts to Rhode Island is described in GRINDE, JR. & JOHANSEN, *supra* note 72, at 76; GAUSTAD, *supra* note 7, at 45–46; 2 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY: THE SETTLEMENTS 4–5 (1936).

<sup>105</sup> ANDREWS, *supra* note 104, at 4. “As Williams himself later recounted, Winthrop had ‘many high and heavenly and public ends’ in directing him to Narragansett Bay, particularly ‘the freeness of the place from any English claims or patents.’” SALISBURY, *supra* note 64, at 213 (letter, dated June 22, 1670, from Roger Williams to Major John Mason and Governor Thomas Prencce).



his village Providence, “in a Sense of God’s merciful Providence to me in my distress.”<sup>106</sup>

The grant of land was put into legal form in 1638 when Canonicus and Miantonomo declared in a deed that, “having two years since sold unto Roger Williams the land and meadows, upon . . . Mooshasuc and Woonasquatucket, do now by these present establish and confirm the bounds of these lands.”<sup>107</sup> However, Massachusetts and Plymouth asserted claims to this territory, and in 1643 Williams went to England—then in the midst of civil war—and secured from the *de facto* government a charter for “Providence Plantations.”<sup>108</sup> Williams presumably considered the charter “as only a confirmation of his Indian purchases and not as a grant of land from a higher authority in England.”<sup>109</sup> Indeed, the 1643 charter makes no mention of any prior right of the crown to the soil,<sup>110</sup> and the subsequent 1663 Charter of Rhode Island and Providence Plantations explicitly states that the lands in question “are possessed, by purchase and consent of the said natives, to their full content.”<sup>111</sup> Thus, in contrast to other colonial charters, the royal charter of Rhode Island—secured from King Charles II following the Restoration—“acknowledged the original rights of the Indians to the soil.”<sup>112</sup>

In Chapter XXV of *A Key into the Language of America* (“Of buying and selling”), Roger Williams foretold much of the history of Indians and Indian land rights in America:

Oft have I heard these Indians say,  
These English will deliver us.  
Of all that’s ours, our lands and lives.  
In th’ end, they will bereave us.<sup>113</sup>

On another occasion, in 1652, Williams decried “the *sinne* of the *Pattents*, wherein *Christian Kings* (so calld) are invested with Right by

<sup>106</sup> GAUSTAD, *supra* note 7, at 46.

<sup>107</sup> ERNST, *supra* note 6, at 185.

<sup>108</sup> DEANE, *supra* note 62, at 17. *See also* GAUSTAD, *supra* note 7, at 58 (noting that when Williams arrived in England in 1643, “Charles had fled London, Laud was in the Tower, and Puritan Roundheads were fighting Royalist Cavaliers.”).

<sup>109</sup> ANDREWS, *supra* note 104, at 25.

<sup>110</sup> *Id.*

<sup>111</sup> 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211 (Francis N. Thorpe ed., 1909).

<sup>112</sup> ERNST, *supra* note 6, at 399. *See also* *Greene v. Rhode Island*, 289 F. Supp. 2d 5, 7 (D.R.I. 2003) (“In contrast to other colonies’ charters, the Rhode Island Charter [of 1663] provided that the Indians had title to Indian lands . . .”).

<sup>113</sup> WILLIAMS, *supra* note 76, at 167. To “bereave” is to “deprive ruthlessly or by force.” RANDOM HOUSE COLLEGE DICTIONARY 127 (1973).

virtue of their Christianitie, to take and give away the Lands and Countries of other men.”<sup>114</sup> This unswerving position of Roger Williams—that “the *sinne* of the *Pattents*”<sup>115</sup> was “a sin of unjust usurpation upon others’ possessions”<sup>116</sup>—stands as one point of rebuttal to John Marshall’s claim, in *Johnson v. McIntosh*,<sup>117</sup> of “universal recognition” of the view that European discovery of lands in America “necessarily diminished” the power of Indian nations “to dispose of the soil at their own will, to whomsoever they pleased.”<sup>118</sup> Roger Williams believed, as did the shareholders of the Illinois and Wabash Land Company, that Indians owned the lands they occupied and could sell their land rights to any purchaser.

#### IV. EUROPEAN VIEWS OF INDIAN LAND RIGHTS DURING “THE AGE OF DISCOVERY”

John Cotton, on the other hand, believed with equal fervor that the “dangerous opinions” of his friend Roger Williams “subverted the state and government of this country, and tended to unsettle the kingdoms and commonwealths of Europe.”<sup>119</sup> It is evident that the international law of the seventeenth century, which was “created by world powers and designed for their ends,” for the most part “sanctioned the practice which Williams protested.”<sup>120</sup> However, the degree of emphasis placed on discovery, patent, possession, and purchase varied among the colonizing nations. A survey of European

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<sup>114</sup> Eisinger, *supra* note 65, at 131. Williams’ denunciation of “the *sinne* of the *Pattents*” is found in *The Bloody Tenent yet more Bloody: by Mr. Cotton’s Endeavor to wash it white in the Blood of the LAMBE; Of whose precious Blood, spilt in the Blood of his Servants; and of the Blood of Millions spilt in former and later Wars for Conscience sake, THAT Most Bloody Tenent of Persecution for cause of Conscience, upon, a second Tryal is found now more apparently and more notoriously guilty*, etc. (London 1652) in 4 THE COMPLETE WRITINGS OF ROGER WILLIAMS 461 (Samuel L. Caldwell ed., 1963). Williams in general decried the acquisitive nature of the New England colonists, and “feared that ‘God Land will be (as now it is) as great a God with us English as God Gold was with the Spaniards.’” MARTIN, *supra* note 59, at 118.

<sup>115</sup> Eisinger, *supra* note 65, at 131.

<sup>116</sup> *Id.*

<sup>117</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>118</sup> *Id.* at 574. See Robertson, *John Marshall as Colonial Historian*, *supra* note 51, at 761–62. Compare *Johnson*, 21 U.S. (8 Wheat.) at 573 (“[D]iscovery 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.”) with MARSHALL, *supra* note 1, at 368 (“In settling this continent, the European powers estimated at nothing the right of the natives. Among themselves, it was recognised, as a ruling principle, that those, who first discovered and took possession of any particular territory, became its rightful proprietors.”).

<sup>119</sup> ERNST, *supra* note 6, at 445.

<sup>120</sup> Brockunier, *supra* note 61, at 44.

views of Indian land rights during “the age of discovery” reveals divergent opinions on the issues which controlled the outcome of the Illinois-Wabash purchase and the *Johnson v. McIntosh* litigation: whether native Americans owned the lands they occupied, and, if so, whether such ownership rights could be sold or otherwise transferred to private individuals.

#### A. *Spanish Views of Indian Land Rights*

Spanish views of Indian land rights, during the fifteenth and sixteenth centuries, were based largely on the pre-Columbian “Catholic conceptualization of the rights of non-Christian peoples.”<sup>121</sup> Robert Williams, Jr., in his book, *The American Indian in Western Legal Thought*, traced the western world’s “discourses of conquest” to at least the thirteenth century, when Pope Innocent IV (1243–1254) asked, referring to the Crusades, whether it is “licit to invade a land that infidels possess, or which belongs to them?”<sup>122</sup> Pope Innocent IV considered two opposing positions: that “infidels, by virtue of their nonbelief, possessed no rights to *dominium* that Christians were required to recognize” and on the other hand, that “infidels possessed the natural-law right to hold property and exercise lordship.”<sup>123</sup> Innocent IV adopted the position that wars could not be waged against

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<sup>121</sup> See Worthen, *supra* note 30, at 1375 (“As the Spanish and Portuguese spread Western European influence outside the Mediterranean region, they carried with them the Catholic conceptualization of the rights of non-Christian peoples.”).

<sup>122</sup> WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT*, *supra* note 36, at 44 (quoting *THE EXPANSION OF EUROPE: THE FIRST PHASE 191–92* (J. Muldoon ed., 1977)). See also Michael L. Tate, *Book Review*, 16 AM. INDIAN Q. 83, 83 (1992) (noting that Williams’ book “traces in detail the medieval antecedents that provided the rationale for the European conquest of America.”); Robert A. Williams, Jr., *Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. (Issue 2) 51, 56 (1991) [hereinafter Williams, Jr., *Columbus’s Legacy*] (“Columbus and the other Europeans who followed him from the Old World carried the firm belief that Christian European culture and its accompanying religious forms, patterns of civilization and normative value structure were all superior to the diverse ways of life practiced and lived by the indigenous tribal peoples they encountered in the New World. This Old World belief was part of a venerable legal tradition which justified denying the rights of self-rule to peoples whose cultures and religions were different from Christian Europeans that was already nearly 400 years old by the time Columbus reached the New World.”); Worthen, *supra* note 30, at 1373 (“According to Williams, Western legal concepts concerning Native Americans derive from notions developed by the medieval Church concerning the status of non-Christians.”).

The textual discussion of pre-Columbian views of non-Christians’ property rights is based in part on Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 444–45 (1998).

<sup>123</sup> WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT*, *supra* note 36, at 45.

infidels because of their non-belief, but held that the “pope possessed the authority to deprive infidels of their property and lordship in certain situations, such as . . . the failure to admit Christian missionaries peacefully or the violation of natural law.”<sup>124</sup> Otherwise, without this limitation, all rational creatures “had the right under natural law to own property and to exercise political authority in their own lands.”<sup>125</sup>

The opposing point of view was championed by Henrico de Segusio, cardinal of Ostia (d. 1271, generally known as Hostiensis), the most important canonist of the thirteenth century. Hostiensis argued that the pope had *de jure* jurisdiction over all infidels, and, “since the dominion of infidels could never be just, it was always permissible to wage war on them.”<sup>126</sup> Following the tradition of the British cleric Alanus Anglicus, an early thirteenth century advocate of absolute papal authority, Hostiensis contended that the pope possessed a “supreme and surpassing superiority and power and authority (which) has been granted him without reservation in all matters.”<sup>127</sup> As for non-Christian nations, Hostiensis concurred with Alanus Anglicus that, by rejecting the true God and Church, infidels “were presumed to lack rights to property and lordship.”<sup>128</sup>

As noted by Olive Dickason, it was Hostiensis’ assertion of papal authority over non-believers, as opposed to the natural rights philosophy of Innocent IV, that initially “fueled the ideological motor of Europe’s expansion.”<sup>129</sup> In the agreement dated April 30, 1492, and entitled “The Privileges and Prerogatives Granted by Their Catholic

<sup>124</sup> *Id.* Innocent IV was commenting on *Quod super his*, a papal decretal of Innocent III (pope, 1198–1216), who started the Fourth Crusade (1202–04) and called for the Fifth Crusade (1217–21) just prior to his death. A decretal is a decree or letter from the pope giving a decision on some point or question of canon law. *See id.*

<sup>125</sup> Dickason, *supra* note 68, at 151.

<sup>126</sup> *Id.* at 151–52.

<sup>127</sup> *Id.*

<sup>128</sup> WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 36, at 41 (“As for infidel nations, Alanus’s Crusading-era legal discourse denied any theoretical legitimacy to their *dominium*. By their rejection of the true God and his chosen vicar the pope, all pagans were presumed to lack rights to property and lordship.”).

<sup>129</sup> Dickason, *supra* note 68, at 242. *See also* JAMES MULDOON, THE AMERICAS IN THE SPANISH WORLD ORDER: THE JUSTIFICATION FOR CONQUEST IN THE SEVENTEENTH CENTURY 32 (1994) (observing that “because all mankind is subject to the pope in spiritual matters and he is responsible for the salvation of all mankind, the pope may authorize Christian rulers to enter the lands of infidels, even those who pose no direct military threat to Christians, in order to ensure that missionaries can preach there in safety.”); WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 36, at 65 (“Hostiensis’ own thirteenth-century commentary on *Quod super his* assumed prominence in Western legal thought and discourse as the standard response to Innocent’s more naturalistically inspired thesis on the rights of infidels.”).

Majesties to Christopher Columbus,” King Ferdinand and Queen Isabella of Spain expressed their hope to the explorer from Genoa that, “by God’s assistance, some of the said Islands and Continent in the ocean will be discovered and conquered by your means and conduct.”<sup>130</sup> Columbus subsequently inaugurated the “Age of Discovery” on October 12, 1492, by landing on an island inhabited by Arawak natives. He made no offer of purchase, but instead summarily announced, “with appropriate words and ceremony,” that the island was now the property of the Catholic sovereigns of Spain.<sup>131</sup> As depicted by a Columbus biographer:

The officers and crews came on shore and immediately took over the territory, making it out as a free gift to the King and Queen of Spain. They called this ‘taking lawful possession of Guanahani, now to be called San Salvador in honour of our Saviour.’ The natives from whom they took it watched the proceedings without resentment, for they had not the least idea what was happening. Having not yet arrived at the conception of property they were unable to conceive the idea of theft.<sup>132</sup>

Three days later, Columbus noted in his log book that “it was my wish to pass no island without taking possession of it. *Though having annexed one it might be said that we annexed all.*”<sup>133</sup> Notwithstanding such sentiments, mere discovery of land, without effective occupation, was considered in the fifteenth century to confer at best an inchoate, incomplete title.<sup>134</sup> Thus, to buttress its assertion of ownership of newly explored portions of the African coast, Portugal had turned to the Pope for “confirmation and completion” of title claims based at first

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<sup>130</sup> DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 1.

<sup>131</sup> Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 30 (1983) [hereinafter Williams, Jr., *Origins of the Status of the American Indian*].

<sup>132</sup> JOHN STEWART COLLIS, CHRISTOPHER COLUMBUS 81 (1977).

<sup>133</sup> THE FOUR VOYAGES OF CHRISTOPHER COLUMBUS 60 (J.M. Cohen ed., 1969) (emphasis added).

<sup>134</sup> MAX SAVELLE, THE ORIGINS OF AMERICAN DIPLOMACY: THE INTERNATIONAL HISTORY OF ANGLOAMERICA, 1492–1763, at 195 (1967); Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 32. See also Friedrich August Freiherr von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT’L L. 448, 452 (1935):

At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation. . . . Whenever statesmen deduced sovereign rights from the bare fact of discovery, it was not because they were convinced of the correctness of their argumentation, but because they had no better arguments to support their political claims.

upon discovery.<sup>135</sup> Likewise, to complete its title to the lands in America discovered by Columbus, Spain relied not only on discovery, but also sought the Pope's authorization in the form of a papal grant.<sup>136</sup>

Two months after the return of Columbus, by the Papal Bull *Inter Caetera* of May 4, 1493, Pope Alexander VI drew an imaginary line of demarcation one hundred leagues west of the Cape Verde Islands, and granted to King Ferdinand and Queen Isabella, and their descendants, "all and singular aforesaid countries and islands . . . hitherto discovered . . . and to be discovered . . . together with all their dominions, cities, camps, places, villages, and all rights, jurisdictions, and appurtenances of the same."<sup>137</sup> Lands located to the east of

<sup>135</sup> SAVELLE, *supra* note 134, at 195.

<sup>136</sup> *Id.* Prior to the Protestant Reformation of the sixteenth century, the Pope was recognized as having a decisive authority, both as an arbiter of international disputes and, most emphatically, as having authority to dispose of heathen, non-Christian peoples and their territories in the interest of bringing them to Christianity.

....

It was entirely in conformity with international practice, and with a reasonable expectation that the Pope's pronouncements might be respected as having the force of international law by the Western colonizing nations, . . . that Spain appealed in 1493 to papal authority for completion of its title to the lands in America discovered by Columbus . . . .

*Id.*

<sup>137</sup> WASHBURN, *supra* note 26, at 5. A "papal bull" is "the common term applied to documents stamped with a lead seal, and currently refer[s] to a form of papal document that affects matters for a substantial portion of the church." HARPERCOLLINS ENCYCLOPEDIA OF CATHOLICISM 201 (Richard P. McBrien ed., 1995). The Papal Bull *Inter Caetera* was the third of three Papal Bulls issued on May 3rd and 4th of 1493:

Pope Alexander VI, himself a Spaniard, granted the request to confer the lately discovered lands on the Crown of Spain by three Bulls issued on May 3 and May 4 1493 . . . .

....

Like the bull "Eximiae devotionis" of May 3, the bull "Inter Caetera" of May 4 is a restatement of part of the bull "Inter caetera" of May 3. Taken together the two later bulls cover the same ground as the bull "Inter caetera" of May 3, for which they form a substitute. The changes introduced into the bull "Inter caetera" of May 4, are, however, of great importance, and highly favorable to Spain. Instead of merely granting to Castile the lands discovered by her envoys, and not under Christian rule, the revised bull draws a line of demarcation one hundred leagues west of any of the Azores or Cape Verde Islands, and assigns to Castile the exclusive right to acquire territorial possessions and to trade in all lands west of that line, which at Christmas, 1492, were not in the possession of any Christian prince. The general safeguard to the possible conflicting rights of Portugal is lacking. All persons are forbidden to approach the lands west of the line without special license from the rulers of Castile.

the line—“so long as they had not already been seized by any other Christian Prince”—were awarded to Portugal.<sup>138</sup> The Pope and Spain viewed the *Inter Caetera* as a legal grant giving “full power of sovereignty and jurisdiction over the territories concerned, with the primary objective of spreading Christianity.”<sup>139</sup> Fearing the Pope’s ultimate sanction of excommunication, all European nations respected the legitimacy of the *Inter Caetera*.

The papal documents do not refer in any way to the property rights of the natives occupying the lands discovered by Spanish ex-

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PAUL GOTTSCHALK, *THE EARLIEST DIPLOMATIC DOCUMENTS ON AMERICA: THE PAPAL BULLS OF 1493 AND THE TREATY OF TORDESILLAS REPRODUCED AND TRANSLATED* (1927), cited in *Bulls Burning*, *The Papal Bulls as Pertaining to America*, <http://bullsburning.itgo.com/essays/Caetera.htm> (last visited Dec. 27, 2005). See also Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 33 (observing that “the newly elected Pope, Alexander VI (1492–1503), was the Spaniard Rodrigo Borgia. Borgia owed not only the papal throne, but also his family’s own considerable fortune to the favors of the Castilian Crown. For instance, Ferdinand legitimated Borgia’s bastard son, the famous cardinal and military leader Ceasar.”).

<sup>138</sup> L.C. Green, *Claims to Territory in Colonial America*, in *THE LAW OF NATIONS AND THE NEW WORLD* 4 (L.C. Green & Olive P. Dickason eds., 1989). The Treaty of Tordesillas, June 7, 1494, reset the line of demarcation at 370 leagues west of the Cape Verde Islands, giving Portugal its claim to Brazil. *DOCUMENTS OF AMERICAN HISTORY*, *supra* note 58, at 4. The Treaty of Tordesillas remained in force until January 13, 1750, when the Treaty of Madrid annulled the boundary line. GOTTSCHALK, *supra* note 137.

<sup>139</sup> Green, *supra* note 138, at 6. See also JULIUS GOEBEL, *THE STRUGGLE FOR THE FALKLAND ISLANDS: A STUDY IN LEGAL AND DIPLOMATIC HISTORY* 79 (Yale Univ. Press 1982) (1927) (observing that “the charge upon Ferdinand and Isabella to undertake the conversion of the natives was the real legal justification of the pope’s grant.”); MULDOON, *supra* note 129, at 32 (“The language of *Inter caetera* articulated in brief, in a kind of shorthand, the nature of Christian relations with non-Christian societies.”); MATTHEW RESTALL, *SEVEN MYTHS OF THE SPANISH CONQUEST* 68 (2003) (“Spaniards were the recipients of a divine grant of lands and peoples they had yet to find and see, let alone subdue. This permitted claims of possession to be seen as synonymous with possession itself.”); Ali Friedberg, *Reconsidering The Doctrine of Discovery: Spanish Land Acquisition in Mexico (1521–1821)*, 17 *WIS. INT’L L.J.* 87, 96 (1999) (“A series of papal bulls had granted ‘title’ to Spain over Columbus’ non-Christian discoveries in the New World, and over any such future discoveries, for the purpose of spreading Christianity.”); Newcomb, *supra* note 39, at 314 (stating that “[the] early papal bulls . . . expressed religious rather than secular distinctions between Christians and indigenous nations, and assumed that the Christians possessed a right to subjugate heathens and infidels and appropriate their lands.”); Patricia Seed, *Taking Possession and Reading Texts: Establishing the Authority of Overseas Empires*, in *COLONIAL AMERICA: ESSAYS IN POLITICS AND SOCIAL DEVELOPMENT* 37 (Stanley N. Katz et al. eds., 2001) (noting that the *Inter Caetera* “gave Spain the exclusive right to present the Gospel to the natives of the New World and guaranteed Spain’s right to rule the land in order to secure the right to preach.”).

plorers.<sup>140</sup> Martín Fernández de Enciso, lawyer, geographer, navigator, and author of a book on America published in 1519, reported the story that a group of natives, “upon being informed of the papal donation, laughed and wondered that the pope would be so liberal with what was not his.”<sup>141</sup> This view, which presaged Roger Williams’ characterization of the English royal patents, was not confined to those adversely impacted by the Papal Bull *Inter Caetera*. There was much discussion of Indian land rights during the first half of the sixteenth century in Spain, and Spaniard Domingo De Soto (1495–1560) similarly exclaimed that “the Pope did not grant, nor could he grant, our kings dominion over these peoples and their affairs, because he had no right to it (himself).”<sup>142</sup>

A more famous theorist, Francisco de Vitoria (or Victoria), likewise advocated that, because the Pope “has no temporal power over the Indian aborigines or over other unbelievers,”<sup>143</sup> a legitimate title to their lands cannot be traced “through the Supreme Pontiff.”<sup>144</sup> Vitoria (ca. 1480–1546), was a Dominican Basque, taking his name from his native town, who never visited the New World, but nevertheless penned a lengthy treatise on the legitimate, and illegitimate, claims of the Spanish to Indian lands.<sup>145</sup> As Primary Professor of Sacred Theology at the University of Salamanca, in a series of lectures delivered in 1532, Vitoria addressed the question of “whether the aborigines in question were true owners in both private and public

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<sup>140</sup> Green, *supra* note 138, at 6. Green goes on to note that, [w]hile there may occasionally have been reference to arrangements with the “savages/Indians” and even attempts to protect their rights insofar as their person or property was concerned, at no time were they considered as the owners of their land or as being entitled to any role in connection with its disposition.

*Id.* at 38.

<sup>141</sup> Dickason, *supra* note 68, at 232. The natives “also thought that the Spanish king must be poor because he was asking for land of others.” *Id.* For a variant of this story, see M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF THE BACKWARD TERRITORY IN INTERNATIONAL LAW* 127 (Negro Univ. Press 1969) (1926) (“The Peruvian Inca was not unreasonable when, hearing of the Pope and his commission to the Spaniards for the first time, he told Pizarro that the Pope ‘must be crazy to talk of giving away countries which do not belong to him.’”).

<sup>142</sup> BERNICE HAMILTON, *POLITICAL THOUGHT IN SIXTEENTH-CENTURY SPAIN: A STUDY OF THE POLITICAL IDEAS OF VITORIA, DE SOTO, SUÁREZ, AND MOLINA* 179 (1963).

<sup>143</sup> Francisci de Victoria, *De Indis Et De Ivre Belli Relectiones* (Ernest Nys, ed.), in *THE CLASSICS OF INTERNATIONAL LAW* 137 (James Brown Scott, ed., 1964). Francisco Victoria is also known as Francisco de Vittoria, Franciscus de Victoria, Francisci de Victoria, and Francis Vitoria.

<sup>144</sup> *Id.* at 134.

<sup>145</sup> ARNEIL, *supra* note 88, at 77; HAMILTON, *supra* note 142, at 171; Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 70.



law before the arrival of the Spaniards; that is, whether they were *true owners* of private property . . . .”<sup>146</sup> These lectures, known as *De Indis et de jure belli relectiones* or, alternatively, as *On the Indians Lately Discovered*, were published after his death through the efforts of his former students, and are the reason Vitoria is often described as the “founder of modern international law.”<sup>147</sup>

Vitoria asserted that “the aborigines undoubtedly had true dominion in both public and private matters, just like Christians, and that neither their princes nor private persons could be despoiled of their property on the ground of their not being true owners.”<sup>148</sup> He posited that the North American Indians “were neither chattels nor beasts, but human beings entitled to a modicum of respect as such, even from Catholics carrying the word of God.”<sup>149</sup> Consistent with Innocent IV’s natural law ideology, and Roger Williams’ poetry, Vitoria subscribed to the view that “certain basic rights inhere in men *as men*, not by reason of their race, creed, or color, but by reason of their humanity.”<sup>150</sup>

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<sup>146</sup> JAMES E. FALKOWSKI, *INDIAN LAW/RACE LAW: A FIVE-HUNDRED-YEAR HISTORY* 22 (1992) (emphasis added).

<sup>147</sup> Dickason, *supra* note 68, at 161; see also WASHBURN, *supra* note 26, at 9; Robert Yazzie, *Cherokee Nation of Indians v. Georgia, Appeal from the Supreme Court of the United States to the Supreme Court of the American Indian Nations*, 8 KAN. J.L. & PUB. POL’Y (Issue 2) 159, 159 (1999); Muldoon, *supra* note 98, at 28; Felix Cohen contended that “[o]ur concepts of Indian title . . . [i]n the main, . . . are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law.” Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43–44 (1947). See also Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 68 (noting that Vitoria’s “juridical system of a Law of Nations helped establish the foundations of modern international law.”).

<sup>148</sup> Vitoria, *supra* note 143, at 128. Vitoria noted that, insofar as the “Saracens and Jews, who are persistent enemies of Christianity,” are nonetheless deemed “true owners of their property,” it “would be harsh to deny” similar rights to the aborigines of the New World. *Id.* See also FALKOWSKI, *supra* note 146, at 22 (“Vitoria rejected the arguments that Indians were precluded from being true owners by reason of unbelief, heresy, unsoundness of mind, or any other mortal sin.”); NATIVE RIGHTS IN CANADA 14 (Peter A. Cumming & Neil H. Mickenberg eds., 2d ed. 1972) (“The Indians’ lack of belief in the Roman Catholic faith could not affect the question, as heretics in Europe were not denied property rights.”). Luis De Molina (1535–1600) agreed with Vitoria, contending there is nothing “to hinder infidels being masters of their own things and possessing things as private persons.” HAMILTON, *supra* note 142, at 120.

<sup>149</sup> Green, *supra* note 138, at 39.

<sup>150</sup> Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 73. See also John Fredericks III, *America’s First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL’Y 347, 354 (1999) (“Vitoria argued that the indigenous people of America possessed natural legal rights as free and rational people and had inherent rights under natural law to the territory they occupied.”); Friedberg, *supra* note 139, at 105 (“Central to Vitoria’s philosophy, which he derived

In addition to denying that title to lands in the New World could be claimed by papal grant, Vitoria rejected the notion that “mere discovery” could vest title in situations where the territory discovered was already inhabited:

[T]here is another title which can be set up, namely, by right of discovery; and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be an adequate title because those regions which are deserted become, by the law of nations and the natural law, the property of the first occupant (*Inst.*, 2, I, 12). . . .

Not much, however, need be said about this third title of ours, because, as proved above, the barbarians were true owners, both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the aforementioned passage of the *Institutes*. And so, as the object in question was not without an owner, it does not fall under the title which we are discussing. . . . [*This title by discovery*] in and by itself . . . gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.<sup>151</sup>

Interestingly, while Vitoria rejected patent and discovery as legitimate bases for title to the New World, he did not discuss purchase. This omission may be due to his focus on the circumstances in which

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from the humanistic philosophy of Thomas Aquinas, was that ‘certain basic rights inhere in men as men . . . by reason of their humanity.’”). Robert Williams, Jr., states that Vitoria is “the first Spanish thinker to systematically apply Thomistic natural law theory to the relations between states,” and that Vitoria’s “Humanist argument on the legal equality of Indians and Europeans . . . is regarded as his most enduring contribution to Western liberal Indian jurisprudence.” Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 68, 73.

<sup>151</sup> Vitoria, *supra* note 143, at 138–39 (emphasis added) (citing JUSTINIAN, *INSTITUTES* § 2.1.12 (535)). See also FALKOWSKI, *supra* note 146, at 23 (“Vitoria believed that only vacant land could be claimed by discovery, not land that was owned and occupied by Indians.”); GOEBEL, *supra* note 139, at 107; LINDLEY, *supra* note 141, at 12 (“Vitoria . . . maintained that the continent of America upon its discovery was not *territorium nullius* because the Indians were the veritable owners, private and public, of their lands; and the Spaniards acquired by their discovery no further title to the lands of the barbarians than would have accrued to the barbarians had they discovered Spain.”); NATIVE RIGHTS IN CANADA, *supra* note 148, at 14 (“Spain had no claim to the land through discovery, he said, because that notion only applied to unoccupied lands.”); Green, *supra* note 138, at 41 (“Moreover, any claim based on discovery is also discounted, for one can only acquire title by discovery over what is unowned and, for [Vitoria], the Indians were true owners.”). In Justinian’s *Institutes*, the sixth century Roman law treatise cited by Vitoria, the principle was laid down that “natural reason admits the title of the first occupant to that which previously had no owner.” Dickason, *supra* note 68, at 233 (quoting JUSTINIAN, *supra*, at § 2.1.12).

Spain could justly invade and subjugate aboriginal lands.<sup>152</sup> Vitoria argued that Spain could obtain lawful title to Indian lands without purchase if Indians transgressed “the law of nations” by, for example, denying Spaniards the “right to travel into lands in question and to sojourn there,”<sup>153</sup> preventing missionaries “from freely preaching the Gospel,”<sup>154</sup> or precluding Spanish merchants from lawfully carrying on trade and “making their profit.”<sup>155</sup> If the Indians breach their duty to give the Spaniards “a friendly hearing and not to repel them,” the Spaniards would be justified in “seizing the provinces and sovereignty of the natives, provided the seizure be without guile or fraud and they do not look for imaginary causes of war.”<sup>156</sup> Almost as an afterthought, Vitoria noted that “[a]lso, it is a universal rule of the law of nations that whatever is captured in war becomes the property of the conqueror . . . .”<sup>157</sup>

The influence of Vitoria on Spanish views of Indians and Indian land rights is debatable. On one hand, Felix Cohen and others claim

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<sup>152</sup> Newcomb, *supra* note 39, at 316 n.84 (“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.”).

<sup>153</sup> Vitoria, *supra* note 143, at 151.

<sup>154</sup> *Id.* at 157.

<sup>155</sup> *Id.* at 153. See also LINDLEY, *supra* note 141, at 12 (“Victoria thought that, if the Indians hindered the preaching of the Gospel, or obstinately refused the Spaniards such natural rights as the right to trade with them, then the Spaniards, as a last resort, had against the Indians all the rights of war, and might take possession of their lands.”).

Vitoria also stated that “[i]t might . . . be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, . . . so long as this was clearly for their benefit.” Vitoria, *supra* note 143, at 161. The twin notions of a trust duty towards native peoples, and plenary power over native sovereignty and resources, are controversial aspects of federal Indian law in the United States. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Chief Justice John Marshall declaring the relation of Indian tribes to the United States “resembles that of a ward to his guardian”). See generally Watson, *supra* note 122, at 450–56.

<sup>156</sup> Vitoria, *supra* note 143, at 156. See also Green, *supra* note 138, at 42 (“Having more or less denied the validity of the basis normally put forward to assert the Spanish title over the Indians and their lands, Vitoria proceeds to explain how such a title could be acquired, and it may well be considered that his contentions to this effect are self-seeking and hypocritical, possessing no more validity than those he rejects.”); Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 77 (“Victoria was able to provide a secular, as opposed to theocentric, justification for Spanish colonial hegemony in the New World.”).

<sup>157</sup> Vitoria, *supra* note 143, at 155.

that the humanist approach ultimately held sway, pointing to the Papal Bull *Sublimis Deus* (1537), in which Pope Paul III echoed the position of Innocent IV by proclaiming that “the said Indians . . . are by no means to be deprived of . . . the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy . . . the possession of their property . . . .”<sup>158</sup> On the other hand, Max Savelle argues that Vitoria’s theories

were almost completely ignored by the Spanish government in its colonial policy. They also had little or no effect upon the practice of international relations relative to colonial possessions. . . .

In practice, the majority of the colonizing states did give a certain recognition to the title to new lands, however inchoate, achieved by a discovering state simply by reason of its discovery.<sup>159</sup>

The death of Vitoria in 1546 prevented him from participating in a historic debate over the nature of Indian rights, which took place four years later in Valladolid under the aegis of Charles V of Spain.<sup>160</sup> The two debaters were Juan Ginés de Sepúlveda (1490–1573), a lay jurist and royal historiographer, and Bartolomé de Las Casas (1474–1566), a Dominican who had considerable experience with native peoples. Sepúlveda, like Vitoria, never traveled across the Atlantic, but unlike Vitoria, contended that Spaniards had the right to rule in the New World because Indians were incapable of governing themselves:

Compare then those blessings enjoyed by Spaniards of prudence, genius, magnanimity, temperance, humanity, and religion with those of the little men (*hombrecillos*) in whom you will scarcely find even vestiges of humanity, who not only possess no science but who also lack letters and preserve no monument of their history except certain vague and obscure reminiscences of some things on certain paintings. Neither do they have written laws, but bar-

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<sup>158</sup> Cohen, *supra* note 147, at 45. See also FALKOWSKI, *supra* note 146, at 24, 25 (“Victoria’s ideas were given papal support by Pope Paul III . . . . *Sublimis Deus* . . . recognized the right of Indians to own land regardless of their race, religion, degree of civilization, or any other circumstance.”).

<sup>159</sup> SAVELLE, *supra* note 134, at 199–200.

<sup>160</sup> Dickason, *supra* note 68, at 203–04.

Charles V ordered a moratorium on New World conquests, and the hearings were convened “to determine as far as they could whether the atrocities reported to him were true, and to recommend a suitable plan by which such evils might be avoided, so that the Indians might be returned to their former freedom, and by which, at the same time, that New World, once it had been calmed by advantageous laws and careful instructions, might be governed in the future.”

baric institutions and customs. They do not even have private property.<sup>161</sup>

Las Casas did not disagree with Sepúlveda's observations regarding Indians' concepts of property: "[t]hey neither possess nor desire to possess worldly wealth,"<sup>162</sup> but vigorously contested the characterization of Indians as "barbaric," and rejected the argument that, since native peoples did not live in "civilized" society, they were incapable of enjoying legal rights of ownership.<sup>163</sup> Las Casas, who spent most of the first half of the sixteenth century in the New World, instead argued that natural law applied to Indians as it did to all human beings.<sup>164</sup>

In contrast to Puritan New England, land ownership was initially accorded less importance by Spanish colonists, since "tribute and labor were the preferred modes of economic control, and power was expressed at first in [the] *encomienda*."<sup>165</sup> The three principal methods by which Spaniards acquired land from Indians following the mid-sixteenth century were through purchase, royal grants, and forced usurpation.<sup>166</sup> Natives could, and did, sell land to private individuals:

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<sup>161</sup> LEWIS HANKE, *THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA* 122 (Little, Brown & Co. 1965) (1949). See also Dickason, *supra* note 68, at 204 (setting forth Sepúlveda's four main points). According to Robert Williams, Jr., Columbus "originated the idea that the Indians lacked the conception of privately held property," and "Amerigo Vespucci's widely read ethnography on Indian customs . . . furthered these perceptions." Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 81 n.358. See also COLLIS, *supra* note 132, at 88 ("Shortly before he eventually set sail back to Europe [Columbus] had this to say of the people of Hispaniola. 'These are the most loving people. They do not covet. They love their neighbour as themselves. They have the most gentle way of speaking. They have no greed whatsoever for the property of others.'").

<sup>162</sup> HANKE, *supra* note 161, at 11.

<sup>163</sup> Timothy J. Christian, *Introduction to THE LAW OF NATIONS AND THE NEW WORLD*, at ix (L.C. Green & Olive P. Dickason eds., 1989).

<sup>164</sup> *Id.*

<sup>165</sup> CHARLES GIBSON, *THE AZTECS UNDER SPANISH RULE: A HISTORY OF THE INDIANS OF THE VALLEY OF MEXICO, 1519-1810*, at 272 (1964). Under the *encomienda* system, conquistadors (the *encomenderos*) were granted the towns of the indigenous people they conquered, and were able to tax these people and summon them for labor. Although the *encomenderos* were expected to provide safety for the people through an established military and teachings in Christianity, the *encomienda* usually involved enslavement of the local population. The New Laws of 1542 were enacted to curb abuses of the *encomienda* system. *Id.* at 58-97. "After over a decade of willing participation in the activities of the conquistadors, Las Casas renounced his *encomienda* in 1514 and took up the cause of Indian rights." FALKOWSKI, *supra* note 146, at 26.

<sup>166</sup> Friedberg, *supra* note 139, at 97; GIBSON, *supra* note 165, at 274-75. See also CHARLES GIBSON, *SPAIN IN AMERICA* 154 (1966) ("The great haciendas of Spanish

[P]urchase from the Indian occupants or owners, was at first understood to be a legal preliminary to formal entitlement by colonial authorities, as outright usurpation in the absence of payment was not. . . . Official Spanish permission to purchase was sometimes granted, but purchase alone was ordinarily regarded as sufficient evidence of Spanish-Indian negotiation.<sup>167</sup>

Private purchases, however, were “readily liable to fraud,”<sup>168</sup> and the Spanish Crown, like the General Court of the Massachusetts Bay Colony, began to require that all purchases be made under judicial supervision.<sup>169</sup> Royal ordinances of 1571 and 1572, revised in 1603, provided, among other things, for an investigation into whether the Indian seller was the proper owner and retained enough land to support himself; public notice of the proposed purchase for thirty days; and judicial authorization of the sale.<sup>170</sup>

In discussing Spain’s views on Indian land rights in *Johnson v. McIntosh*, Marshall acknowledged that “Spain did not rest her title solely on the grant of the Pope,” but stated that Spain instead “placed it on the rights given by discovery.”<sup>171</sup> However, as Robert Williams, Jr. points out, Marshall’s understanding and application of the discovery doctrine conflicted with views of Vitoria and Spain:

Chief Justice Marshall’s assertion that European nations unanimously accepted the title by discovery doctrine was never accepted by Victoria as part of the Law of Nations . . . . At most, discovery may have been agreed on by European nations as vesting in the discoverer “an exclusive or ‘preemptive’ entitlement to deal with the natives as against other European crowns.” . . . Marshall’s assertion that discovery vested exclusive title in the discoverer deviated from the accepted principles of the Law of

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America came into being through land grant, purchase, usurpation, accretion, merger, and economic competition.”).

<sup>167</sup> GIBSON, *supra* note 165, at 274. See also Friedberg, *supra* note 139, at 97 (noting that “the Crown did not require Spaniards to obtain official permission to purchase from the Crown. As it became clear that purchase arrangements between Spaniards and Indians were susceptible to deceit, however, the Crown began to require that all purchases be made under judicial supervision.”).

<sup>168</sup> GIBSON, *supra* note 165, at 274.

<sup>169</sup> Friedberg, *supra* note 139, at 97.

<sup>170</sup> *Id.* See also *United States v. Jose Juan Lucero*, 1 N.M. (1 Gild.) 422 (N.M. Terr. 1869) (noting that, as far back as 1571, “Indians were allowed to sell their real estate and personal property in the presence of the judge,” but that “[i]n 1642, under Philip IV of Spain, a total prohibition existed, and the Indians could not sell”).

<sup>171</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

Nations, and probably was invented to solve expediently the difficult question raised in *McIntosh* . . . .<sup>172</sup>

*B. French Views of Indian Land Rights*

The Spaniards were unique with respect to the extent they reflected “on the morality or legality of what they were doing as they encountered the New World and its inhabitants.”<sup>173</sup> French writers, such as Michel de Montaigne (1533–1592),<sup>174</sup> Charles de Secondat, Baron de Montesquieu (1689–1755), and Jean-Jacques Rousseau (1712–1778),<sup>175</sup> wrote about the New World’s indigenous peoples, but

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<sup>172</sup> Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 71 n.300 (quoting RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 47 (1980)). See also Fredericks, *supra* note 150, at 354 (“Victoria’s writings, though persuasive to many, were in many ways at odds with the harshly stated law of discovery embraced by the Pope and England, and later the United States.”); Friedberg, *supra* note 139, at 89 (“Marshall’s conclusion not only departed from Spain’s colonial policies, it also deviated from the humanistic philosophy of Francisco de Vitoria, which underlay both Spanish law and the international law of Marshall’s era.”).

<sup>173</sup> MULDOON, *supra* note 129, at 4.

<sup>174</sup> Montaigne was seventeen years old when Las Casas debated Sepúlveda at Valladolid, and followed Las Casas in rejecting negative characterizations of Native Americans. See WILLIAM M. HAMLIN, *THE IMAGE OF AMERICA IN MONTAIGNE, SPENSER, AND SHAKESPEARE: RENAISSANCE ETHNOGRAPHY AND LITERARY REFLECTION* 37–68 (1995); *THE COMPLETE WORKS OF MICHEL DE MONTAIGNE* 693 (Donald M. Frame trans. 1958) (“I am much afraid that we shall have very greatly hastened the decline and ruin of this new world by our contagion . . . . Most of the responses of these peoples and most of our dealings with them show that they were not at all behind us in natural brightness of mind and pertinence.”).

<sup>175</sup> Montesquieu is cited twice by the defendants in *Johnson v. McIntosh* in the summary of their argument. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 567 (1823) (recounting the defendants’ assertion that “the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.”) (citing MONTESQUIEU, *ESPRIT DES LOIX*, vol. I, bk. 18, chs. 11–13). Further, Marshall asserted,

[i]t is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted, could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive.

*Id.* at 569–70 (citing MONTESQUIEU, *supra*). In Volume I, Book XVIII, Ch. 12 (“Of the Law of Nations Amongst People Who Do Not Cultivate the Earth”) of *The Spirit of the Laws*, published in 1748, Montesquieu observed that “[a]s these people . . . are not possessed of landed property, they have many things to regulate by the law of na-

did not focus at length on the legitimacy of French claims to Indian lands.<sup>176</sup> The Swiss diplomat and legal scholar Emeric de Vattel (1714–1767), while not French, wrote his 1758 classic treatise on the principles of natural law, *Le Droit des Gens* (Law of Nations), during a stay in France.<sup>177</sup> Vattel, in contrast to Vitoria, believed that the doctrine of discovery applied not only to uninhabited land, but also to “a vast territory” such as the New World, “in which are to be found only wandering tribes whose small numbers can not populate the whole country.”<sup>178</sup> Vattel found it “praiseworthy” that the Puritans and William Penn of Pennsylvania “bought from the savages the lands they wished to occupy,” but deemed such purchases legally unnecessary:

[T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.<sup>179</sup>

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tions, and but few to decide by the civil law.” BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 276 (Thomas Nugent trans., Hafner Publ’g Co. 1966).

<sup>176</sup> Rousseau asserted that man in a state of nature does not know good and evil, and is guided by emotions and not by his mind. He is associated with the term “noble savage,” although he apparently never employed it. *See generally* MAURICE WILLIAM CRANSTON, *THE NOBLE SAVAGE: JEAN-JACQUES ROUSSEAU, 1754–1762* (1991).

<sup>177</sup> ARNEIL, *supra* note 88, at 182 (“In France, Emeric de Vattel adopted Locke’s thesis on property for his own classic treatise on the principles of natural law.”).

<sup>178</sup> 3 EMERIC DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW] 85 (James Brown Scott ed., Charles G. Fenwick trans., Carnegie Inst. 1916). *See also* FALKOWSKI, *supra* note 146, at 30.

<sup>179</sup> VATTEL, *supra* note 178, at 85–86. The Puritans (with the exception of Roger Williams) and William Penn did not believe that purchase was a necessary prerequisite to valid title to Indian lands, relying instead on grants by royal charter. *See also* FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 486 n.128 (Bobbs-Merrill 1982) (“Vattel expressed the classical view, which influenced Chief Justice Marshall and other founders of American legal doctrine in this field. The conflicting claims of European powers to lightly populated areas in the new world were to be resolved, in Vattel’s view, in accordance with the precept of natural law that no nations can ‘exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate.’”); KENT, *supra* note 92, at 493 (“Vattel did not place much value on the territorial rights of erratic races of people, who sparsely inhabited immense regions, and suffered them to remain a wilderness, because their occupation was war, and their subsistence drawn chiefly from the forest.”); 1 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 14 (1984) (“The supremacy of the cultivator over the hunter . . . was given legal expression in the writings of the eighteenth-century Swiss jurist Emerich de Vattel.”); Berman, *supra* note 40, at 639 (“The writings of Vattel



Although Vattel certainly impacted John Marshall's conception of Indian land rights in America,<sup>180</sup> there is nothing to indicate that *Le Droit des Gens* especially influenced French thinking, and, in any event, the eighteenth-century treatise came too late to affect the formative views of France on Indian land rights.

Official French exploration of the New World lagged some thirty years behind Spain, beginning in the reign of Francis I (1515–1547).<sup>181</sup> In 1524, by the authority of King Francis, the Florentine explorer Giovanni da Verrazzano sailed along the east coast of North America, from Florida to Cape Breton, but established no settlements.<sup>182</sup> As a Catholic ruler, Francis was restricted by the *Inter Caetera*; however, an opening was provided when Pope Clement VII was persuaded in October 1533 to reinterpret the Bull and limit its meaning.<sup>183</sup> Shortly thereafter, Francis commissioned Jacques Cartier to “go to the New Lands” and discover “certain islands and lands, where it is said he should find rich quantities of gold and other rich things.”<sup>184</sup> By 1540, Francis I challenged not just the scope of the *Inter Caetera*, but its legitimacy, asserting that popes had no power to distribute lands among kings and asking “to see Adam’s will to learn

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concerning land tenures, in particular, were consistent with European designs of empire and the later notions of ‘manifest destiny.’”); Dickason, *supra* note 68, at 239 (“Vattel . . . wrote that nations were bound by natural law to cultivate the land, and those who ‘roamed’ rather than inhabiting their territories, thereby taking up more land than was their due, could be lawfully restricted within narrower territorial limits.”); Norgren, *supra* note 43, at 88 n.88 (“The language of justification for the taking of Native American land drew upon Vattel and others who stressed the supremacy of the pastoral-agricultural life over that of the hunter-gatherer and who usually misunderstood or did not mention the Native Americans who created towns.”); von der Heydte, *supra* note 134, at 461 (“Vattel. . . [declared that] ‘navigators who are invested with a commission from their sovereigns and going on a voyage of discovery come across islands or other vast lands, have always taken possession thereof on behalf of their nation; and usually that title has been respected, provided it has been followed later by actual possession.’”).

<sup>180</sup> Compare Vattel, *supra* note 178, at 85 (noting that “if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it.”); *with* Johnson v. McIntosh, 21 U.S. (8 Wheat.) at 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . .”).

<sup>181</sup> R.J. KNECHT, FRANCIS I, at 328 (1982).

<sup>182</sup> *Id.* at 329–30.

<sup>183</sup> *Id.* at 333. According to Clement VII, the Papal Bull *Inter Caetera* only applied to “known continents, not to territories subsequently discovered by other powers.” *Id.*

<sup>184</sup> *Id.*

how he had partitioned the world.”<sup>185</sup> Having rejected papal grants as a basis for a valid title, Francis also discounted discovery without settlement, stating that ““passing by and discovering with the eye was not taking possession.””<sup>186</sup>

John Marshall states in *Johnson v. McIntosh* that France, like Spain, “founded her title to the vast territories she claimed in America on discovery”:

However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her *exclusive right to acquire and dispose of the soil which remained in the occupation of Indians*. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery.<sup>187</sup>

By describing France’s title as the “exclusive right to acquire and dispose of the soil which remained in the occupation of Indians,” Marshall clearly indicates that something remained to be acquired. Rather than obtaining an absolute and complete title by discovery, France at most claimed “an exclusive or ‘preemptive’ entitlement to deal with the natives as against other European crowns.”<sup>188</sup> Rights of

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<sup>185</sup> *Id.* See also MULDOON, *supra* note 129, at 35–36 (stating that “even a Catholic ruler, King Francis I of France, expressed doubts about the power of the pope to grant the newly found lands to Castile and Portugal and to exclude the rest of Christian Europe from entering them without permission.”); DESMOND SEWARD, *PRINCE OF THE RENAISSANCE: THE GOLDEN LIFE OF FRANÇOIS I*, at 177 (1973) (“It is said that when he heard of Pope Alexander VI’s apportioning the New World between the Kings of Spain and Portugal, François cried out, ‘The sun shines for me too—what clause is there in Adam’s will which cuts me off from a share?’”).

<sup>186</sup> KNECHT, *supra* note 181, at 340. See also SAVELLE, *supra* note 134, at 196 (observing that “title by mere discovery alone was soon found to be insufficient, and had to be completed by some other title, such as occupation, while the authority of the Pope to dispose of non-European lands and peoples was challenged, both by Protestant countries such as England and by Catholic countries such as France, and both in theory and practice.”); JURICEK, *supra* note 51, at 10 (observing that “northern powers, notably France, England, and the Dutch provinces . . . [contended] that ‘discovery’ and ‘possession’ were not separate phenomena; rather, ‘possession’ was an inseparable part of ‘discovery.’ . . . Simple priority counted for little, for unless visual discovery were quickly followed by legitimate possession, later explorers could begin the process of discovery anew.”); von der Heyde, *supra* note 134, at 458 (noting that France and England “were inclined to deny the validity of symbolic annexation and laid stress upon the necessity of actual occupancy.”).

<sup>187</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574–75 (1823) (emphasis added).

<sup>188</sup> BARSH & HENDERSON, *supra* note 172, at 47.

preemption recognized by (European) international law certainly impacted Indian land rights—by limiting potential purchasers—but preemptive rights were rights *to acquire* Indian soil, not rights *to* Indian soil. Moreover, such preemptive rights appear to only exclude “other European crowns,” leaving open—at least arguably—the possibility that private individuals could purchase Indian lands.

Cartier’s exploration of Canada was followed by Samuel de Champlain’s establishment of a French settlement at Quebec at the beginning of the seventeenth century, and by subsequent exploratory journeys in the Great Lakes region and Mississippi Valley by Father Jacques Marquette, Louis Jolliet, and Robert Cavalier, sieur de La Salle. According to historian Francis Parkman, La Salle proclaimed at the mouth of the Mississippi River, on April 9, 1682, that

I . . . do now take, in the name of his Majesty and of his successors to the crown, possession of this country of Louisiana, . . . and all the nations . . . within the extent of the said Louisiana, . . . upon the assurance we have had from the natives of these countries that we are the first Europeans who have descended or ascended the said river . . . .<sup>189</sup>

The proclamation was not accompanied by either a deed or bill of sale.

In the years that followed, up to the 1763 Treaty of Paris, the French endeavored to join Canada and Louisiana by maintaining military outposts along the major river routes.<sup>190</sup> The French focused on trade with the Indians in the Upper Mississippi and Ohio country, as opposed to settlement, and the Indians in general “found the Frenchmen less race-conscious and less covetous of Indian land.”<sup>191</sup> The natives were able to find a “middle ground” with the French in the *pays d’en haut*, or upper country, as noted by Richard White:

[W]hereas exchanges between the French and the Algonquians had strengthened the connections between the two peoples, exchanges between the British and the Algonquians bred conflict. The French took wives from the Indians and produced children of mixed descent; the British took land and threatened the well-

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<sup>189</sup> FRANCIS PARKMAN, *LA SALLE AND THE DISCOVERY OF THE GREAT WEST* 306–07 (Charles Scribner’s Sons 1915) (1897).

<sup>190</sup> HOWARD H. PECKHAM, *THE COLONIAL WARS: 1689–1762*, at 122 (1964).

<sup>191</sup> James Roger Tootle, *Anglo-Indian Relations in the Northern Theatre of the French and Indian War, 1748–1761*, at 20 (1972) (unpublished Ph.D. dissertation, Ohio State University) (on file with Ohio State University) (quoting WILLIAM T. HAGAN, *AMERICAN INDIANS* 17 (1961)). See also CLARK WISSLER, *INDIANS OF THE UNITED STATES* 94 (1966) (arguing that French success with Indians “in the Upper Mississippi and Ohio country was chiefly because they did not form colonies and because they had a common enemy in the advancing English frontier”).

being of Algonquian children. The French were friends and relatives; the British often seemed enemies and thieves.<sup>192</sup>

There are relatively few instances of grants of Indian lands to Frenchmen, either in public or private capacity.<sup>193</sup> A reputed transaction, however, involved the Piankeshaw Indians—the tribe that sold the lands at issue in *Johnson v. McIntosh*. In 1742, the Piankeshaw—by a deed or treaty that was subsequently lost—supposedly granted the French at Vincennes (Indiana) a large amount of land located “along the Wabash from the mouth of White River to Pointe Coupee, a distance of about seventy-five miles, and of equal width.”<sup>194</sup> For the most part, however, French America was sparsely settled, concentrated along major rivers, and focused on trade. Both France and England claimed the Ohio Valley, and the French attempted to bolster their claim in 1749 by sending an expedition down the Ohio River led by Pierre-Joseph Céleron, Sieur de Blainville.<sup>195</sup> At several points during the journey, Céleron nailed to trees, or buried, lead plates on which French claims to the region were recorded. The engraved inscription described

the renewal of possession which we have taken of the said river Ohio and of all those that therein fall, and of all the lands on both sides as far as the sources of the said rivers, as enjoyed or ought to be enjoyed by the preceding kings of France and as they

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<sup>192</sup> RICHARD WHITE, *THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815*, at 342 (1991). According to White, “[t]he middle ground is the place in between: in between cultures, peoples, and in between empires and the nonstate world of villages.” *Id.* at x.

<sup>193</sup> See W.J. Eccles, *French Imperial Policy for the Great Lakes Basin*, in *THE SIXTY YEARS’ WAR FOR THE GREAT LAKES, 1754–1814*, at 25 (David Curtis Skaggs & Larry L. Nelson eds., 2001) (observing that “some of those nations [in the Great Lakes region] made it plain to the French that they were on their lands only on sufferance.”); General Synod of the Anglican Church of Canada, *Doctrine of Discovery & Terra Nullius*, <http://generalsynod.anglican.ca/gs2001/rr/presentations/terranullius.html> (last visited Dec. 27, 2005) (stating that “the French regime never entered into any land treaties with Amerindian peoples. It simply assumed sovereignty and title to the land in virtue of the doctrine of discovery.”). *But see* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 31 (2001) (describing early French purchases of land in Illinois).

<sup>194</sup> 1 JACOB PIATT DUNN, *INDIANA AND INDIANANS* 187 (1919). *See also* JACOB PIATT DUNN, *INDIANA: A REDEMPTION FROM SLAVERY* 99 n.1 (1905) (“Pointe Coupée is the abrupt bend of the Wabash five miles below Merom [Indiana]. It was reckoned to be twelve leagues above Vincennes, and the mouth of White River was estimated to be an equal distance below. The grant was intended to be twenty-four leagues square.”). According to Dunn, “[a]lthough this ancient writing was never found, there is little room to doubt that this grant was actually made.” *Id.* at 100.

<sup>195</sup> R. DOUGLAS HURT, *THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720–1830*, at 36 (1996).

therein have maintained themselves by arms and by treaties, especially by those of Riswick, of Utrecht, and of Aix-la-Chapelle.<sup>196</sup>

The Indians and English, however, were not particularly impressed.

### C. Dutch and Swedish Views of Indian Land Rights

The Netherlands based its claims to the New World not on discovery, nor on royal or papal patents, but instead on purchase of native lands. In terms of theory, scholar and lawyer Hugo Grotius (1583–1645) wrote two treatises in the seventeenth century that furthered Dutch interests in freely navigating the open seas and settling the New World. In 1608 he published, anonymously, *Mare Liberum* (Freedom of the Seas), in order to demonstrate “that the Dutch . . . have the right to sail to the East Indies.”<sup>197</sup> At the same time, Grotius rejected claims to the New World based on grant or mere discovery:

[D]iscovery *per se* gives no legal rights over things unless before the alleged discovery they were *res nullius*. . . . The Spanish writer Victoria . . . has the most certain warrant for his conclusion that Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels . . . .

. . . Surely it is a heresy to believe that infidels are not masters of their own property; consequently, to take from them their possessions on account of their religious belief is no less theft and robbery than it would be in the case of Christians.<sup>198</sup>

Grotius thus concurred with Vitoria that “the doctrine of discovery was applicable only to vacant land, and it was inapplicable to land occupied by Indians who ‘now have and always have had their own

<sup>196</sup> 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 610 (E.B. O’Callaghan ed., 1855).

<sup>197</sup> HUGO GROTIUS, *THE FREEDOM OF THE SEAS* 7 (R. Magoffin trans. 1916). Grotius had been retained by the Dutch East India Company to justify the capture by its ships, in 1602, of a Portuguese galleon located in the straits of Malacca, and wrote *Mare Liberum* to refute the claims of Spain and Portugal to exclude other countries from the high seas. *Id.* at vi–viii (introduction).

<sup>198</sup> *Id.* at 13. See also GOEBEL, *supra* note 139, at 114 (“Grotius proceeds to dispose of the claim that the Indies were *res nullius*, and he then demolishes with true Protestant fervor the claim to right emanating from the papal bulls.”); LINDLEY, *supra* note 141, at 13 (“Grotius followed Victoria in maintaining that the Spaniards had no right to take the Indians’ territory.”); MULDOON, *supra* note 129, at 29 (“Grotius composed the *Mare liberum* as part of an effort to deny the legitimacy, on the basis of Alexander VI’s bulls, of Castilian and Portuguese possession of the newly discovered lands.”); SAVELLE, *supra* note 134, at 202 (quoting Grotius as stating that “Infidels cannot be divested of public or private rights of ownership merely because they are infidels, whether on the ground of discovery, or in virtue of a papal grant, or on grounds of war.”).

kings, their own governments, their own lands, and their own legal systems.”<sup>199</sup> In 1625, in *De Jure Belli ac Pacis* (The Law of War and Peace), Grotius reiterated that “discovery applies to those things which belong to no one,” and decried as “shameless” efforts to claim “by right of discovery what is held by another, even though the occupant may be wicked, may hold wrong views about God, or may be dull of wit.”<sup>200</sup> As to what may be lawfully occupied, Grotius enumerated places hitherto uncultivated and animals not yet possessed, such as uninhabited islands, wild beasts, fishes, and birds.<sup>201</sup>

In terms of actual practice, the first Dutch settlement was Fort Nassau at present-day Albany, New York. In 1621 the Dutch West India Company (*West-Indische Compagnie*) was chartered and empowered to establish the colony of New Netherland. The Protestant Dutch—who could not rely on papal grants and lacked strong claims based on discovery—decided early on to purchase the lands they occupied from the Indians. As William MacLeod points out,

the Dutch . . . had little chance of sustaining a claim themselves on the basis of right of discovery, which the English at first rested their case on; or donation from the Pope, upon which the Spanish claim rested. So they had to find something else. They decided to argue, against the claims of Spanish and English, that the Indian tribes or nations were owners of the land—as of course

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<sup>199</sup> FALKOWSKI, *supra* note 146, at 29 (quoting GROTIUS, *supra* note 197, at 11). See also Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 32, n.127 (“The early writers on international law, such as Franciscus de Victoria and Hugo Grotius, all agreed that mere discovery of aboriginally occupied territory could not vest a recognizable title in the discoverer.”).

<sup>200</sup> 2 HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 550 (Francis W. Kelsey trans., Classics of International Law ed. 1964). Grotius did contend, however, that if within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take possession of such ground, for the reason that uncultivated land ought not to be considered as occupied except in respect to sovereignty, which remains unimpaired in favour of the original people.

*Id.* at 202.

<sup>201</sup> GOEBEL, *supra* note 139, at 115. First-year law students are customarily introduced to this concept by reading the famous case of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), which held that mere pursuit of a wild animal (e.g., a fox) without reduction to possession gave no legal property right to the pursuer. In the textbook I use, *Pierson v. Post* is the second case presented to students, preceded only by *Johnson v. McIntosh*. See SANDRA H. JOHNSON, PETER W. SALSICH, JR., THOMAS L. SHAFFER, MICHAEL BRAUNSTEIN, *PROPERTY LAW: CASES MATERIALS AND PROBLEMS* 1–23 (2d ed. 1998). Interestingly, Henry Brockholst Livingston, who—just prior to his death—joined in the Supreme Court’s unanimous opinion in *Johnson v. McIntosh*, served as a New York state judge prior to becoming a Supreme Court justice, and as such dissented in *Pierson v. Post*.

they were. This title could be obtained from the natives, they contended, only by conquest, or by gift or purchase.<sup>202</sup>

Thus, the records of the Dutch West India Company show that patents issued to Dutch settlers “conferred the ultimate right of ownership only after the grantees had first acquired title by individual purchase directly from the Indians.”<sup>203</sup> The most famous Indian sale of land to the Dutch took place in 1626, when Peter Minuet, director general of the Dutch West India Company, purchased Manhattan Island for goods valued at twenty-four dollars.<sup>204</sup> Three years later, the

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<sup>202</sup> MACLEOD, *supra* note 9, at 195. See also DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 259 (1965) (“The Dutch in North America, compared to the English, had only a flimsy ‘right of discovery’; . . . they had to find or build other legal foundations, and they therefore began the practice of ‘buying’ their lands from the Indians.”); BERMAN, *supra* note 40, at 653 (“The Dutch bolstered their claims to New Netherlands with formal agreements of purchase from the Indian nations. They argued against the Spanish and the English that the Indian nations were the owners of the land, and that title must be acquired by a purchase or grant from the natives.”); NEWCOMB, *supra* note 39, at 318 (“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.”’) (quoting FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF THE CONQUEST* 133 (1975)) (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)).

<sup>203</sup> I FRANCIS BAZLEY LEE, *NEW JERSEY: AS A COLONY AND AS A STATE* 107 (1902) (“This policy of purchase, instituted by the Dutch and adopted by the Quakers, was a recognition that the Indian had rights of life, liberty, opinion, and property.”); MACLEOD, *supra* note 9, at 194 (“In 1626 the West India Company instructed its New Netherlands agents formally to acquire title to lands from the Indians by purchase.”); GEORGINA C. NAMMACK, *FRAUD, POLITICS, AND THE DISPOSSESSION OF THE INDIANS* 5 (1969). See also Jennings, *supra* note 68, at 110 (explaining that “when the Dutch West India Company settled New Netherlands in 1625, the company instructed its resident Director that Indian claims to land should be extinguished by persuasion or purchase, ‘a contract being made thereof and signed by them [the Indians] in their manner, *since such contracts upon other occasions may be very useful to the Company.*’” (internal citations omitted)).

<sup>204</sup> BOORSTIN, *supra* note 202, at 259 (“In 1626, Peter Minuet, in charge of the Dutch settlement on Manhattan Island, paid the Indians sixty gulden for that twenty-thousand acre tract of woodland.”); LEE, *supra* note 203, at 107 (“Peter Minuet, in 1626, for the value of twenty-four dollars, secured the Indian title to Manhattan Island.”); MACLEOD, *supra* note 9, at 194 (“This first purchase was that of the island of Manhattan, now the site of much of New York City, then a twenty thousand acre tract of woodland. The price paid was goods valued at sixty gulden, the equivalent of twenty-four dollars in United States money of to-day but, in the then purchasing power of money, worth perhaps about the equivalent of two thousand dollars to-day.”); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-first Century*, 40 *ARIZ. L. REV.* 425, 435 (1998) (describing the “familiar painting of the Canarsie Indians’ bargain in 1626 that transferred Manhattan Island to Peter Minuet, Director of the Dutch West India Company, for twenty-four dollars in Indian trade goods, trinkets, and rum.”). See also Jennings, *su-*

laws of the Colony of New Netherland expressly provided that “[t]he Patroons of New Netherlands, shall be bound to purchase from the Lords Sachems in New Netherland, the soil where they propose to plant their colonies, and shall acquire such right thereunto as they will agree for with the said Sachems.”<sup>205</sup> In light of these early and consistent practices, the Dutch have been given “the credit for establishing the principle of purchasing Indian title to land” in North America.<sup>206</sup>

The policy of the Swedes was similar to that of the Dutch, and was set forth in the “Instructions to Governor Johan Printz,” written in Stockholm and dated August 15, 1642. The Governor of New Sweden was instructed to “bear in mind that the wild inhabitants of the country” are “its rightful lords.”<sup>207</sup> Accordingly, the Swedes—who also could not rely on papal grants and who had even weaker claims based on discovery than the Dutch—determined to purchase the lands they occupied from the Indians.<sup>208</sup> In 1638, Swedish settlers established Fort Christina (present-day Wilmington, Delaware), New Sweden’s first permanent settlement, by acquiring land from the Lenape Indians.<sup>209</sup> In 1655, the colony was lost to the Dutch,<sup>210</sup> who surrendered it to the English in 1664.<sup>211</sup>

#### D. *Early English and Colonial Views of Indian Land Rights*

Henry VII, who founded the Tudor dynasty and reigned from 1485 to 1509, was “a pious son of the Church, obedient to its decree

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*pra* note 68, at 110 (“On June 8, 1633, the New Netherland Dutch purchased a tract of land for a trading post where Hartford, Conn., now stands.”).

<sup>205</sup> Cohen, *supra* note 147, at 39–40 (citing New Project of Freedoms and Exemption, Article 27, reprinted in CHARLES C. ROYCE, INDIAN LAND CESSIONS IN THE UNITED STATES 577 (1900)).

<sup>206</sup> LEE, *supra* note 203, at 119.

<sup>207</sup> C. HALE SIPE, THE INDIAN WARS OF PENNSYLVANIA 62 (photo. reprint 2000) (1929).

<sup>208</sup> *Id.* at 65 (“Dr. William Reynolds, in the introduction to his translation of Acrelius’ ‘History of New Sweden,’ emphasizes a great historical truth when he says: ‘The Swedes inaugurated the policy of William Penn, for which he has been deservedly praised, in his purchase of the soil from the Indians.’”).

<sup>209</sup> Margareta Revera, *The Making of a Civilized Nation: Nation-Building, Aristocratic Culture, and Social Change*, in NEW SWEDEN IN AMERICA 25, 31 (Carol E. Hoffecker et al. eds., 1995).

<sup>210</sup> CAROL E. HOFFECKER, DELAWARE, THE FIRST STATE 34 (1988).

<sup>211</sup> BRENDAN MCCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY 12 (1999).



in any matter of religion.”<sup>212</sup> The exploration of the New World, however, was a different issue. At first, King Henry recognized the rights of Spain and Portugal in the southern seas, but took the position that “adventurers could reach the Indies by following a route to the north of that taken by Columbus.”<sup>213</sup> On March 5, 1496, by royal patent, John Cabot and his sons were authorized

to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels . . . which before this time were unknown to all Christians. . . . And that the before-mentioned John and his sons or their heirs and deputies may conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered . . . , acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so discovered; . . .<sup>214</sup>

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<sup>212</sup> JAMES A. WILLIAMSON, *THE CABOT VOYAGES AND BRISTOL DISCOVERY UNDER HENRY VII*, at 52 (Cambridge 1962) (1961). However, “[i]n political matters [Henry VII] did not admit the right of the Pope to order his decisions.” *Id.*

There is some evidence that England had in the past acknowledged the authority of the pope to grant title to lands. John of Salisbury, afterwards bishop of Chartres, wrote in 1159 that Pope Adrian IV (1154–1159)—the only Englishman to occupy the papal chair—had by the bull *Laudabiliter* “granted and given Ireland to the illustrious Henry II king of the English to be held by hereditary right. . . .” Anne J. Duggan, *Totius christianitatis caput. The Pope and the Princes, in ADRIAN IV: THE ENGLISH POPE (1154–1159)*, at 141 (Brenda Bolton & Anne J. Duggan eds., 2003) (quoting IOANNIS SARES BERIENSIS, *METALOGICON* 183 (J.B. Hall & K.S.B. Keats-Rohan eds., 1991)). English authorities relied upon this alleged papal grant as the basic legal justification of their sovereignty over Ireland. *See id.* at 139 (“*Laudabiliter* was cited, on both sides of the political divide, as the ‘title-deed’ of the English crown’s authority over Ireland”); GOEBEL, *supra* note 139, at 50. Anne Duggan, however, states that “there is considerable doubt about its status and authenticity,” and that, in any event, “there is nothing . . . in *Laudabiliter* . . . that [can] properly be seen as a ‘grant.’” Duggan, *supra*, at 141.

<sup>213</sup> J.D. MACKIE, *THE EARLIER TUDORS, 1485–1558*, at 226 (1966). *See also* S.B. CHRIMES, *HENRY VII*, at 229 (1972) (“Henry VII would respect Spanish rights to what Spain had already discovered, but was willing enough for enterprises under his patronage to stake a claim in any lands westward newly discovered. . . .”); WILLIAMSON, *supra* note 212, at 51 (“[H]e would not recognize in advance any Spanish right to prospective discoveries not yet accomplished: if the English could get first into these prospective regions, theirs was to be the right in them.”).

<sup>214</sup> WILLIAMSON, *supra* note 212, at 204–05. *See also* GOEBEL, *supra* note 139, at 100 (“In the first patent given to John Cabot, issued under circumstances similar to those existing at the time of Columbus’ first voyage, we find language strikingly like that in the patent of Columbus. Cabot is given authority to seek out, discover and find new islands and lands, and to conquer, occupy and possess them.”); Newcomb, *supra* note 39, at 314 (noting that “[the] English charters giving the Cabots and other grantees the authority to possess non-Christian lands . . . expressed religious rather than secular distinctions between Christians and indigenous nations, and assumed that the Christians possessed a right to subjugate heathens and infidels and appropriate their lands.”). John Cabot (Giovanni Caboto) was born in Genoa and later became a Venetian citizen. He came to England some time between 1484 and 1490. CHRIMES,

The precise location of Cabot's landfall, in 1497, is not known, and has been variously assigned to the Labrador coast, the Newfoundland area, Cape Breton Island, Nova Scotia, or Maine. In *Johnson v. McIntosh*, Marshall goes so far as to claim that Cabot "discovered the continent of North America, along which he sailed as far south as Virginia."<sup>215</sup> In any event, when the Spanish ambassador to England learned that a second voyage was authorized, he protested (to no avail) that the land Henry was in search of "was already in the possession of the King of Spain."<sup>216</sup> It became a moot point for the time being, as John Cabot did not return from his trip to America.

Other explorations authorized by King Henry were of less consequence. However, in his royal patent of December 9, 1502, the explorers were barred not simply from lands known to Christians, but from lands *first discovered* by the King of Portugal or other friendly princes *and now in their possession*.<sup>217</sup> By such language, England accorded even less respect to the papal grants: the pretensions of the Spanish and Portuguese to the New World were defensible "only in so far as these claims were supported by actual possession."<sup>218</sup>

Henry VII's Protestant granddaughter, Elizabeth I, who reigned from 1558 until 1603, also actively endorsed this concept of effective occupation. She authorized Sir Humphrey Gilbert, in 1578, to "hold, occupy, and enjoy" countries "not actually possessed of any Christian prince or people";<sup>219</sup> and in 1584 likewise commanded Gilbert's half-brother, Sir Walter Raleigh, to discover and occupy "such remote, heathen and barbarous lands, countries, and territories, not actually possessed of any Christian Prince, nor inhabited by Christian People."<sup>220</sup> Most famously, in reply to the Spanish ambassador Mendoza,

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*supra* note 213, at 228; DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 5. It is possible that Henry was unaware of the existence of the *Inter Caetera* when he authorized Cabot's exploration in 1496. See WILLIAMSON, *supra* note 212, at 52 ("How far such bulls were published seems to be an unsettled question.").

<sup>215</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 576 (1823). Marshall goes on to say, with respect to John Cabot's voyage, that it is "[t]o this discovery the English trace their title." *Id.*

<sup>216</sup> GLADYS TEMPERLEY, HENRY VII, at 321 (Greenwood Press 1971) (1914).

<sup>217</sup> WILLIAMSON, *supra* note 212, at 133.

<sup>218</sup> GOEBEL, *supra* note 139, at 58-59. See also WILLIAMSON, *supra* note 212, at 132 ("So early does the doctrine of effective occupation make its appearance on the colonial scene.").

<sup>219</sup> GOEBEL, *supra* note 139, at 101.

<sup>220</sup> DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 6; W. Stitt Robinson, *Conflicting Views on Landholding: Lord Baltimore and the Experiences of Colonial Maryland With Native Americans*, 83 MD. HIST. MAG. 85, 86 (1988). See also GOEBEL, *supra* note 139, at 102 ("The English crown, far from asserting a right to territory by discovery, seems to have laid great stress upon the fact of possession."); Juricek, *supra* note 51, at 12

who complained of Sir Francis Drake's circumnavigation, Queen Elizabeth unequivocally rejected the notion of title by virtue of papal grant, and further stated that "she would not persuade herself that the Indies are the rightful property of Spain . . . only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory, acts which cannot confer property."<sup>221</sup>

Although England rejected titles based on papal grants and mere discovery, Elizabeth's successors increasingly relied on royal grants, as John Juricek points out:

Englishmen began to contend that the king himself could take possession of overseas territories through the medium of royal charters. . . .

. . . The rationale behind English territorial claims thus became almost indistinguishable from that long maintained by the Iberian powers, though the English tended to emphasize discovery less and possession more. . . .

. . . The accession of a new dynasty in 1603 is certainly part of the explanation for the change in the English rationale for territorial appropriation. The early Stuarts were notoriously more receptive to legal doctrines which magnified royal authority . . . .<sup>222</sup>

King James I, who reigned from 1603 to 1625 chartered the Virginia Company of London on April 10, 1606, granting the Company's proprietors "license to make habitation, plantation, and to deduce a colony of sundry of our people into that part of America, commonly

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("The contemporary European consensus was that discovery conferred upon the discovering power a temporary preferential *right to acquire* such title, not title itself.") Juricek notes that Robert Johnson, in his *Nova Britannia* (1609), acknowledged the earlier discoveries of the Cabots, but stressed instead that English claims to America were grounded on the "more late Discoverie and actual possession, taken in the name and right of Queen Elizabeth, in Anno 1584." *Id.* at 19.

Gilbert sailed to Newfoundland in 1583 and disappeared at sea on his return voyage. Raleigh (or Raleigh) founded the ill-fated colony at Roanoke three years later in the territory later known as Virginia.

<sup>221</sup> von der Heydte, *supra* note 134, at 458–59. See also Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 35 n.142 ("By 1580, the English Crown . . . adopted an explicit policy of challenging Spanish territorial claims based solely on papal donation, insisting that only effective Spanish occupation of claimed territory could perfect a recognizable title.")

<sup>222</sup> Juricek, *supra* note 51, at 21–22. See also Muldoon, *supra* note 98, at 35 ("When we turn to the English in the New World, we find royal charters that parallel the papal bulls. Where the pope had granted authorization for exploration and conquest, the English monarchs now provided the sanction. In doing this, English monarchs were asserting jurisdiction derived from their role as Supreme Head of the Church of England.")

called Virginia . . . not now actually possessed by any Christian prince or people.”<sup>223</sup> As a proponent of the divine right theory of monarchy, James “relied on his personal authority . . . to grant letters patent to the Virginia Companies of London and Plymouth.”<sup>224</sup> This charter was followed, three years later, by a more definite grant “in absolute property” of the lands known as Virginia.<sup>225</sup> The new charter, issued in May 1609 to “The Treasurer and Company of Adventurers and Planters of the City of London for the First Colony of Virginia,” is directly relevant to the Illinois-Wabash land purchase, since its “Sea to Sea” grant arguably encompassed the lands purchased from the Illinois and Piankeshaw Indians in 1773 and 1775:

And we do also . . . give, grant and confirm . . . all those Lands, Countries, and Territories, situate, lying, and being, in that Part of *America* called *Virginia*, from the Point of Land, called Cape or *Point Comfort*, all along the Sea Coast, to the Northward two hundred Miles, and from the said Point of *Cape Comfort*, all along the Sea Coast, to the Southward two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up into the Land, throughout from Sea to Sea, West, and Northwest; . . .<sup>226</sup>

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<sup>223</sup> Williams, Jr., *Columbus's Legacy*, *supra* note 122, at 69 (quoting 1 SAMUEL ELLIOT MORISON, *ADMIRAL OF THE OCEAN SEA* 8 (1942)). “The sponsors of this enterprise were closely connected to the circle that had supported Raleigh’s colonizing activities two decades earlier.” OBERG, *supra* note 62, at 50. “The charter . . . provided for the incorporation of two companies: the London Company and the Plymouth Company. It was the London Company that established the first permanent English colony in America; the expedition of one hundred and twenty settlers who . . . planted a colony at Jamestown May 14[, 1607].” DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 8. The territory granted was “between 34° and 45° north latitude; that is, all the land from the Passamaquoddy Bay in Maine to the Cape Fear River in North Carolina, extending westward to the Pacific Ocean.” WARREN M. BILLINGS ET AL., *COLONIAL VIRGINIA: A HISTORY* 15 (Milton M. Klein & Jacob E. Cooke eds., 1986).

<sup>224</sup> PETER CHARLES HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 11 (1992). Hoffer argues that the 1606 charter “thus combined remnants of feudal vassalage and harbingers of nascent capitalism,” and that each Stuart charter “reflected a private transaction between the king, acting in his person as the owner of all land in the New World, and the company board of directors.” *Id.* at 11, 13.

<sup>225</sup> Robertson, *John Marshall as Colonial Historian*, *supra* note 51, at 762 (“Three years later, a new and enlarged charter granted a portion of the grantees ‘in absolute property’ the lands later comprising Virginia.”).

<sup>226</sup> DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 11. See also Herbert B. Adams, *Maryland's Influence on Land Cessions to the United States*, 3 *JOHNS HOPKINS UNIV. STUDIES IN HIST. & POL. SCIENCES* 10, 11 (1885) (describing the “extraordinary ambiguity” of the 1609 grant, and setting forth both the expansive “wedge” interpretation and the more restrictive “triangle” interpretation); Juricek, *supra* note 51, at 13–14 (“This patent contains the first grant of American territory from an English monarch to a colonizing agency, and this grant embodies the first more or less definite English claim in North America. But what exactly was granted here presents numerous prob-

Virginia became a royal province in 1624 upon the dissolution of the London Company; however, the boundaries first set forth in the 1609 charter remained.<sup>227</sup> Such grants of land from “Sea to Sea,” ultimately made to seven of the thirteen colonies (Connecticut, Georgia, Massachusetts, North Carolina, South Carolina, and Virginia), were “vast preemptive claims” designed to thwart the ambitions of other European powers, particularly Spain and France.<sup>228</sup>

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lems of interpretation. . . . Virginians later maintained that King James here intended to convey a gigantic 45° wedge of the continent, and this opinion has been endorsed by some modern scholars.”).

The 1609 charter separated the London and Plymouth companies, replaced the royal council with a company council, and vested control of the colony in the treasurer and his council. DOCUMENTS OF AMERICAN HISTORY, *supra* note 58, at 10. *See also* BILLINGS ET AL., *supra* note 223, at 37 (noting that “the London Company . . . by the winter of 1608–09, . . . undertook a review of their operation with an eye toward making it pay. Their reexamination led to a fundamental overhaul of the company, the provisions for which were embodied in a new charter which James I granted early in 1609.”); 15 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789: VIRGINIA AND MARYLAND LAWS, at 1 (Alden T. Vaughan & Deborah A. Rosen eds., 1998) [hereinafter 15 EARLY AMERICAN INDIAN DOCUMENTS] (noting that the 1609 charter “vested control of the colony in the London Company”); MARSHALL, *supra* note 1, at 43 (“Some of the first nobility and gentry of the country, and most of the companies of London, with a numerous body of merchants and tradesmen, were now added to the former adventurers.”).

<sup>227</sup> *See* Adams, *supra* note 226, at 11 (“No alteration appears to have been made at that time in the boundaries established by the charter of 1609, but the northern limits of Virginia were afterwards curtailed by grants to Lord Baltimore (1632) and William Penn (1681), and the southern limits by a grant to the proprietors of Carolina (1663).”). A third charter issued by King James in 1612 had consolidated local power in a governor appointed by the London Company. 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 226, at 1. “After Virginia became a royal colony in 1624, the governor and council represented the crown rather than the defunct Virginia Company.” *Id.* at 2. *See also* THOMAS DONALDSON, THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS 33 (photo. reprint 1970) (1884) (“In 1625, May 13, Charles I. was crowned, and in the same year he issued a royal proclamation for a commission to govern Virginia, alleging judicial repeal of the charters and transformed the colony into a royal province. After this, the chartered limits of the colony were reduced by including successive portions of it in other colonies.”); L.J. Priestley, *Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case*, 6 FED. L. REV. 150, 153–54 (1974) (Austl.) (stating that “the London Company . . . conducted the affairs of the colony until 1624 when the Crown took direct control into its own hands. The Company at all times acted on the basis that it had the right of absolute disposition of the land.”).

<sup>228</sup> Juricek, *supra* note 51, at 22 (“Over the next century and more the English continued to make vast preemptive claims in North America.”). *See also* B.A. Hinsdale, *The Right of Discovery*, 2 OHIO ARCHAEOLOGICAL & HIST. PUBLICATIONS 335, 359 (1888) (“It has been common to explain the grants of land extending from ocean to ocean, made . . . to certain of the English colonies, by referring them to ignorance of geography; but a committee of the Continental Congress, reporting on the claims of the United States, August 16, 1782, suggested that their majesties’ ‘principal object at

Tracing the title of lands in North America to royal grants—whether open-ended or not—presumably cohered with the “fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor . . . and the true and only source of title.”<sup>229</sup> The feudal system originated in medieval Europe and was predicated on the theory that “all the known property of the world was vested in an overlord, and that the dominion over it was exercised by him either mediately or immediately.”<sup>230</sup> Consequently, property rights “were privileges bestowed on an individual by his sovereign.”<sup>231</sup> In return, those who held property “of the king” were required to perform services, economic or otherwise.<sup>232</sup> In

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that time was to acquire by that of occupancy which originated in this western world, to-wit, by charters, a title of the lands comprehended therein against foreign powers.”) (quoting SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS, III, at 177 (Boston, 1821)).

<sup>229</sup> KENT, *supra* note 92, at 481. See also Muldoon, *supra* note 98, at 36 (“One might also ask why the English monarchs bothered with charters at all. Why not simply take what lands were available and forget about formal justification of the action? The obvious reason is that, by the sixteenth century, possession of property clearly required a formal, written record. If the English were to occupy part of North America, they would need a title deed.”).

<sup>230</sup> GOEBEL, *supra* note 139, at 64. See also Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 REAL PROP. PROB. & TR. J. 507, 516 (2003) (“Feudalism is ‘a vague and general word describing the social structure of Western Europe from the tenth century onwards.’ In England, feudalism signifies variously a form of government, a military system, a social organization, and a pattern of land ownership. As a system of land ownership, it is a pyramid with the king at the top beholden to no one, layers of lords in the middle beholden to their superiors, and serfs at the bottom beholden to everyone.”).

In early English history, conveyancing was accomplished by *feoffment by livery of seisin*, whereby the transferor (*feoffor*) orally proclaimed the transfer of the land to the transferee (*feoffee*), and “handed over a twig or clump of earth to symbolize the conveyance.” WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 807 (3d ed. 2000). English explorers carried this legal concept to the New World:

In 1583, Sir Humphrey Gilbert, in the first English effort at New World settlement, at St. John’s Harbor, gathered together the Portuguese, French, and English merchants and shipmasters trading and fishing off the banks of Newfoundland and informed them of his written authorization to possess the territory for England. He then “had delivered unto him (after the custom of England) a rod [small twig] and a turf of the same soil.”

Seed, *supra* note 139, at 20–21. Almost two hundred years later, Richard Henderson of North Carolina, when he purchased a large portion of present-day Kentucky in 1775 directly from the Cherokee Indians, likewise employed the ceremony of feoffment by livery of seisin, taking “possession of a bit of Kentucky turf in a moment of feudal pageantry.” JOHN MACK FARAGHER, *DANIEL BOONE: THE LIFE AND LEGEND OF AN AMERICAN PIONEER* 124 (1992).

<sup>231</sup> WILLIAM B. SCOTT, *IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY* 5 (1977).

<sup>232</sup> *Id.* at 5, 9.

the seventeenth century, land in British America was typically granted by royal charter in “free and common socage,” which required the payment of “quit-rents,” the annual rent that feudal law required an inferior to pay his superior.<sup>233</sup> Quit-rents, which can be seen as a land tax paid to the Crown, were often not collected.<sup>234</sup> However, as Beverley Bond points out, “[t]he supreme importance of the quit-rent system in the American colonies arises from its significance as a means of asserting the feudal position of the crown.”<sup>235</sup> Indeed, both John Adams and Thomas Jefferson, in their pre-Revolution publications, took issue with the feudal position of the crown by denying—or decrying—the transferral of British feudalism to America.<sup>236</sup>

In any event, the royal charters which granted lands “in free and common socage” were silent as to Indian rights in the lands granted. Nathan Dane, in his *General Abridgment and Digest of American Law*, published a year after the Supreme Court’s decision in *Johnson v. McIntosh*, declared without equivocation that “[e]very Englishman who came to America viewed his English patent as giving him the legal title to the land; and he settled with the Indians as of convenience, of equity, or humanity, and not as a matter in law essential to his title.”<sup>237</sup> Dane’s sweeping statement is incorrect, as evidenced by the debate with, and banishment of, Roger Williams in New England. But neither the Tudors nor the Stuarts ever suggested that the necessary—or even appropriate—course of action would be for the English to buy America from the Indians. As Patricia Seed noted:

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<sup>233</sup> *Id.* at 6, 13.

<sup>234</sup> See *id.* at 13; CRONON, *supra* note 58, at 71; HOFFER, *supra* note 224, at 11; JACK M. SOSIN, *THE REVOLUTIONARY FRONTIER, 1763–1783*, at 25 (1967); Jack M. Sosin, *Britain and the Ohio Valley, 1760–1775: The Search for Alternatives in a Revolutionary Era*, in *CONTEST FOR EMPIRE, 1550–1775*, at 65 (John B. Elliott ed., 1975); James Warren Springer, *American Indians and the Law of Real Property in Colonial New England*, 30 *AM. J. LEGAL HIST.* 25, 28 (1986).

<sup>235</sup> BEVERLEY W. BOND, JR., *THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES* 439 (Yale Univ. Press 1965) (1919). See also MARSHALL, *supra* note 1, at 26 (“Lands were to be holden within the colony, as the same estates were enjoyed in England.”); Matthew Aaron Zimmerman, *A Flicker in the Light: William Penn’s Motivations For a Peaceful Indian Policy, 1681–1718*, at 60 (June 1999) (unpublished M.S. thesis, Ohio State University) (on file with Ohio State University) (“By European tradition, land in North America belonged to the king, and he exclusively held the right to dispense it.”).

<sup>236</sup> See JOHN ADAMS & JONATHAN SEWALL, *NOVANGLUS AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS PUBLISHED IN THE YEARS 1774 AND 1775*, at 94–116 (photo. reprint 1968) (1819); THOMAS JEFFERSON, *A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA* 27–28 (photo. reprint 1971) (1774).

<sup>237</sup> 4 NATHAN DANE, *A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW* 69 (1824).

By what right did Elizabeth I authorize Gilbert and Raleigh to “have, hold, occupy and enjoy” with the additional “full power to dispose thereof . . . according to . . . the lawes of England” territories that she did not actually own? The patent lays out two “reasons” (or rationalizations) justifying English dominion over the New World: the authority of the crown and the eminent domain of Christian princes.

The authority invoked by Elizabeth originated first . . . from her own “especial grace, certaine science, and mere motion.” “Especial grace” designated the source of royal authority in medieval English thinking—the idea that royal authority derives from God and comes to the crown by grace. . . .

. . . The second source of the queen’s authority is the absence of dominion over the lands by any other Christian ruler.<sup>238</sup>

The English charters, with the exception of the Rhode Island charters, tacitly deny the property rights of the Indians. King James’ 1606 charter, “although granting away two vast areas of territory greater than England, inhabited by thousands of Indians, a fact of which the King had knowledge both officially and unofficially, do[es] not contain therein the slightest allusion to them.”<sup>239</sup> The Pennsylvania charter of 1681, which described the “commendable desire” of William Penn “to reduce the Savage Natives by gentle and just manners to the love of civill Societie and Christian Religion,” nevertheless assumed the right of Charles II to make “the said William Penn, his heires and Assignes, . . . *the true and absolute Proprietaries* of the Countrey aforesaid,” along with “full and absolute power . . . [to] assigne, alien, Grant, demise or infeoffe of the premisses . . . .”<sup>240</sup> In a memo-

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<sup>238</sup> Seed, *supra* note 139, at 24. See also Williams, Jr., *Columbus’s Legacy*, *supra* note 122, at 69 (“As head of the English Reformed Church, Elizabeth simply assumed the powers once held exclusively by Rome to extend the boundaries of the Christian faith to heathen and infidel held-lands. She issued her own colonizing charters of conquest to England’s Protestant brand of New World conquistadors.”).

<sup>239</sup> MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES* 375 (1973).

<sup>240</sup> CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA PASSED BETWEEN THE YEARS 1682 AND 1700, at 81–82, 88 (Staughton George et al. eds., 1879) [hereinafter CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA] (emphasis added). See also DONALD H. KENT, *HISTORY OF PENNSYLVANIA PURCHASES FROM THE INDIANS* 9 (1974) (observing that “there was nothing in the Pennsylvania Charter which compelled Penn or his successors to purchase land from the Indians. The granting of a royal charter for Pennsylvania was a clear, though tacit, denial of Indian sovereignty, and the only rights permitted to the Indians were as occupants and users of the soil.”); JANE T. MERRITT, *AT THE CROSSROADS: INDIANS AND EMPIRES ON A MID-ATLANTIC FRONTIER, 1700–1763*, at 24 (2003) (“In March 1681 . . . Quaker William Penn took legal possession as ‘true and absolute’ proprietor of a large region in the mid-Atlantic when he received a charter for the province of Pennsylvania from Charles II of England.”); Zimmerman, *supra* note 235, at 69 (“When Charles II



randum of "Additional Instructions" written in London on October 28, 1681, Penn announced his intention to "buy Land of the true Owners w<sup>ch</sup>. I think is the Susquehanna People."<sup>241</sup> However, just ten days earlier, in his famous letter to the Pennsylvanian Indians, Penn stated that "the king of the Countrey where I live, *hath given unto me a great Province* therein, but I desire to enjoy it with your Love and Consent, that we may always live together as Neighbours and freinds . . . ."<sup>242</sup> Thus, even the Quaker proprietor William Penn, who advised his deputy William Markham that the Indians "are true Lords of the Soil," assumed that his authority to be in the New World came from England, and consequently had no qualms about selling tracts in Pennsylvania before purchasing any land from the Indians.<sup>243</sup>

Appearing contemporaneously with the royal charters were various legal and moral theories propounded by Englishmen to justify the dispossession of the native occupants of America. At first, the focus was on the Indians themselves: they did not possess a right or title to the lands of America because of their barbarism and heathenism. Robert Gray, a promoter of the Virginia Company of London, contended in his *Good Speed to Virginia* (1609) that the Indians have "only a generall residencie there, as wild beasts have in the forest," and another pamphlet, published a year later, argued that "it is not unlawfull, that wee possesse part of their land, and dwell with them, and defend ourselves from them . . . because there is no other, moderate, and mixt course, to bring them to conversion, but by dailie conversation."<sup>244</sup> Reverend William Symonds defended the "sea to

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granted Penn his charter, the rights of the Indians did not concern either party. By accepting the charter and the title of 'true and absolute' proprietary, Penn clearly, though tacitly, denied the Indians' sovereignty. He accepted the notion that the monarchy had the right to dispense of North American land without consulting the native inhabitants.").

<sup>241</sup> WILLIAM PENN'S OWN ACCOUNT OF THE LENNI LENAPE OR DELAWARE INDIANS 58 (Albert Cook Myers ed., 1970).

<sup>242</sup> *Id.* at 60. See also *id.* at 64 ("William Penn's Letter to a Leading Pennsylvania Indian Chief," dated June 21, 1682, stating that "[t]he King of England who is a Great Prince hath for divers Reasons Granted to me a large Country in America which however I am willing to Injoy upon friendly termes with thee.").

<sup>243</sup> STEPHEN BOTEIN, EARLY AMERICAN LAW AND SOCIETY 9 (1983); Zimmerman, *supra* note 235, at 68, 74. See also MERRITT, *supra* note 240, at 25 ("Penn insisted on purchasing land from Indians to clear title for subsequent sale to white settlers. In reality, however, he often sold large tracts to potential settlers or land speculators before Indians agreed on treaty provisions."); Zimmerman, *supra* note 235, at 72 ("Unlike any other colonial proprietor, [Penn] recognized the Indians' title to the land on which they lived. However, recognizing the Indians' title and acting on that recognition were two quite distinct elements of an Indian policy.").

<sup>244</sup> OBERG, *supra* note 62, at 52 (quoting the Virginia Company's *A true declaration of the estate of the colonie in Virginia with a confutation of such scandalous reports as have*

sea” grant in the 1609 Virginia charter by noting that Psalm 72 contains a prayer that “*Thy dominion should be from sea to sea, and from the River to the end of the land.*”<sup>245</sup> Perhaps most significantly, Sir Edward Coke—the eminent jurist who helped write the 1606 charter and became a director of the London Company—laid down the rule in *Calvin’s Case* (1608) that “all infidels are in law perpetual enemies” and that, accordingly, “when an infidel country is conquered, there being no established law among infidels which a Christian people can recognize, the rules laid down by the king apply.”<sup>246</sup> Although *Calvin’s Case* did not directly concern Indian land rights, Coke maintained that in the event of a conquest of an infidel country, all of their laws ceased immediately, including property laws, and “if such a conquest were assumed—as was done in Virginia—it followed that the conqueror might regard such territory as absolutely vacant in law.”<sup>247</sup> In 1640, the town of Milford, Connecticut, passed three re-

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*tended to the disgrace of so worthy an enterprise* 10 (1610)). See also Christian, *supra* note 163, at xiii (noting that “the prevailing ideology of the age of European discovery and colonization gave no credence to the humanity of the Amerindians. As subhumans they were incapable of possessing rights—legal, natural, or divine.”).

Samuel Purchas, successor to Richard Hakluyt as promoter of English overseas colonization, argued in 1625 that “colonization was in keeping with God’s purpose that the Indian should hear the gospel before the Last Judgment, which was expected momentarily.” Loren E. Pennington, *Hakluytus Posthumus: Samuel Purchas and the Promotion of English Overseas Expansion*, in 14 EMPORIA STATE RES. STUDIES 5, 36 (William H. Seiler ed., Graduate Div. of the Kan. State Teachers Coll. 1966). See also Squadrito, *supra* note 77, at 158. Three years earlier, in 1622, the Virginia Company of London addressed the legality of a “Graunt of certaine Land passed vnto him [Mr. Barkham] by S<sup>r</sup> Geo: Yeardley vnder the Seale of the Colony vpon condicion that he compounded for the same with Opachankano and procured a confirmation thereof from the Companie here within two yeares after the said Graunt . . .” 2 RECORDS OF THE VIRGINIA COMPANY OF LONDON 94 (Susan Myra Kingsbury ed., 1906). The Company held that

by the King’s Letters Patents no other but the Company here . . . had power to dispose of land in Virginia . . . [and] this Grant of Barkham’s was held to be very dishonorable and prejudicial to the Company in regard it was limited with a Proviso to compound with Opachankano, whereby a Sovereignty in that heathen Infidel was acknowledged, and the Company’s Title thereby much infringed.

*Id.* at 94–95 (language modernized).

<sup>245</sup> Juricek, *supra* note 51, at 17 (quoting William Symonds, *Virginia: A Sermon Preached at White-Chappel* (April 25, 1609)).

<sup>246</sup> GOEBEL, *supra* note 139, at 105.

<sup>247</sup> Juricek, *supra* note 51, at 18 n.45. William Blackstone, whose four volumes of *Commentaries* appeared between 1765 and 1769, cited *Calvin’s Case* for the following proposition:

But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain,

solves which succinctly communicate these principles: “Voted, that the earth is the Lord’s and the fulness thereof; voted, that the earth is given to the Saints; voted, we are the Saints.”<sup>248</sup>

Other Englishmen focused instead on the Indians’ land usage to justify dispossession. As previously noted, John Winthrop and his fellow Puritans criticized the failure of natives to “improve the Land,” and developed the notion of *vacuum domicilium* to justify colonization.<sup>249</sup> Such ideas were articulated in greater detail by philosopher and political theorist John Locke (1632–1704), particularly in his *Two Treatises of Government* (1690).<sup>250</sup> In the fifth chapter of the Second Treatise, Locke developed the idea of a natural right to property and, in so doing, defended England’s claims over Indian land in America. As summarized by Barbara Arneil,

Until the end of the seventeenth century, when the English actually settled in the new world, property had been defined by occupation. However, this definition became a problem in America when the Amerindians and their English defenders claimed, by virtue of their occupation, proprietorship in certain tracts of land coveted by the English. A new definition of property, which would allow the English to supersede the rights claimed by virtue of occupation, was needed. The *Two Treatises of Government* provided the answer. Labour, rather than occupation, would begin property, and those who tilled, enclosed, and cultivated the soil would be its owners.<sup>251</sup>

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unless such as are against the law of God, as in the case of an infidel country . . .

WILLIAM BLACKSTONE, 1 COMMENTARIES \*108. Blackstone’s Commentaries were widely read and regarded by Americans in the late eighteenth and early nineteenth centuries. See Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 2 (1996) (“Partly because the Commentaries were more accessible to Americans than were other published sources of law, [a]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone’s Commentaries].”) (quoting ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11 (1984)).

<sup>248</sup> ALAN TAYLOR, AMERICAN COLONIES 192 (2001).

<sup>249</sup> VAUGHN, *supra* note 60, at 110.

<sup>250</sup> See *id.* at 112 (noting that “*vacuum domicilium* . . . was . . . partly a pre-Lockean expression of the English theory of property rights in a state of nature.”). John Locke, “as secretary to both the Lord Proprietors of Carolina (1668–1675) and the Council of Trade and Plantations (1673–1675), was immersed in the colonial debates of his day . . .” Barbara Arneil, *The Wild Indian’s Venison: Locke’s Theory of Property and English Colonialism in America*, 44 POL. STUDIES 60, 60 (1996).

<sup>251</sup> ARNEIL, *supra* note 88, at 18. See also CRONIN, *supra* note 58, at 79 (noting John Locke’s description of American Indians as a people “whom Nature having furnished as liberally as any other people, with the materials of Plenty, . . . yet for want of improving it by labour, have not one hundredth part of the Conveniences we

When Locke asserted that, “in the beginning all the World was *America*,”<sup>252</sup> he had in mind “Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting . . . .”<sup>253</sup> English claims to such “vacant” or “waste” lands, Locke theorized, were ultimately based not on papal or royal authority, but on natural right.<sup>254</sup> This notion had a particular appeal for persons settling in America. When Reverend John Bulkley of Colchester, Connecticut, delivered his Christmas Eve sermon in 1724, he paid homage to “Mr. Lock” and preached that “*the English . . . had . . . an Undoubted Right to Enter upon and Impropriate all such parts of [America] as lay Wast or Unimproved by the Natives and this without any consideration or allowance made to them for it.*”<sup>255</sup> The defendants in *Johnson v. McIntosh* also relied on John Locke to argue that the Illinois and Piankeshaw Indians had “acquired no proprietary interest in the vast tracts of territory which they wandered over . . . .”<sup>256</sup> John Marshall essentially agreed, declaring that “the tribes of Indians inhabiting this country were fierce

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enjoy. . . .”); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1120 (1996) (“As every student of political theory knows, traditional Lockean property theory is grounded on the basic axiom set forth in paragraph 27 of the *Second Treatise*: ‘Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labour with, and joined to it something that is his own, and thereby makes it his property.’”); Williams, Jr., *Origins of the Status of the American Indian*, *supra* note 131, at 3 n.4 (“John Locke reasoned that the Indians’ occupancy of their aboriginal lands did not involve an adequate amount of ‘labor’ to perfect a ‘property’ interest in the soil.”).

<sup>252</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 301 (Peter Laslett ed., Cambridge Univ. Press, student ed. 1988) (1690).

<sup>253</sup> *Id.* at 297. Locke argued that the “several Nations of the *Americans* . . . are rich in Land . . . yet for want of improving it by labour, have not one hundredth part of the Conveniencies we enjoy.” *Id.* at 296–97. *But see* CRONON, *supra* note 58, at 79 (“What Locke failed to notice was that the Indians did not recognize themselves as poor.”).

<sup>254</sup> ARNEIL, *supra* note 88, at 19. Locke’s characterization of America as “vacant” and “waste” land is essentially Puritan: “Colonists were both morally and legally justified in taking native waste land and subduing it, because God intended that land be cultivated.” Squadrito, *supra* note 77, at 156. *See also* ROBERT F. BERKHOFER, JR., THE WHITE MAN’S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT 120 (1978) (“*Terra nullius* was an ambiguous term, however, for it could mean lands totally vacant of people or merely not inhabited by peoples possessing those religions and customs that Europeans recognized as equal to their own under the international law arising in this era.”); BOTEIN, *supra* note 243, at 10 (“‘If the title of occupiers be good in land unpeopled,’ Raleigh had asked decades before permanent settlement began in North America, ‘why should it be bad accounted in a country peopled over thinly?’”).

<sup>255</sup> Rev. John Bulkley, *Preface to* ROGER WOLCOTT, POETICAL MEDITATIONS 53–54 (1725).

<sup>256</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 569–70 (1823).

savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . .”<sup>257</sup>

If the English could justly and legally claim title to lands in America by virtue of discovery, royal patent, and natural right, why was so much property purchased from the Indians, both in public and private transactions? In part it was a reaction to the Dutch policy of purchasing lands from Indians. In 1632, a dispute arose when a Dutch ship carrying furs from New Netherland was seized while harboring in Plymouth, England.<sup>258</sup> The Dutch argued that they had “acquired the property, partly by confederation with the owners of the lands, and partly by purchase,” and argued that no nation 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.”<sup>259</sup> The English denied “that the Indians were *possessors bona fidei* of those countries, so as to be able to dispose of them either by sale or donation, their residences being unsettled and uncertain . . . .”<sup>260</sup> Nevertheless, partly in response to Dutch expansion, the English colonies of New England began purchasing tracts from the Indians.<sup>261</sup>

A few examples should suffice. On July 15, 1636, William Pynchon purchased from the Agawam village a tract of land near present-

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<sup>257</sup> *Id.* at 590.

<sup>258</sup> Jennings, *supra* note 68, at 111.

<sup>259</sup> *Id.*: JENNINGS, *supra* note 202, at 133; Letter from West Indian Company to States General (May 5, 1632), in 1 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK, *supra* note 202, at 45, 50, 52. See also Norgren, *supra* note 43, at 78 (“Felix Cohen has argued that the Dutch practice of entering treaties for Native American land expressed three critical premises, articulated in the early seventeenth century document prepared for the Dutch West Indies Company, which declared: (1) that both parties to the treaty were sovereign powers; (2) that the Indian tribe had a transferable title to the land under discussion; and (3) that the acquisition of Indian lands could not be left to individual colonists but must be controlled by the larger institution of government, or the Crown itself.”).

<sup>260</sup> Answer to the Remonstrance presented to the King and the Lords, his Commissioners, by their Lordships the Ambassador and Deputy of the Lords States General of the United Provinces, in 1 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK, *supra* note 202, at 58.

<sup>261</sup> Berman, *supra* note 40, at 653. See also BOORSTIN, *supra* note 202, at 260 (“Not until the English had their first land disputes with the Dutch did they too begin ‘buying’ tracts from the Indians. The English, however, still treated such ‘purchase’ not as an essential of good legal title but simply as a matter of good conscience or appearance. . . . In the eyes of English law, an Indian ‘deed’ thus remained only an indication of Indian willingness to vacate lands to which the Indians had never had any legal title in the first place.”).

day Springfield, Massachusetts.<sup>262</sup> From Maine, over seventy Indian deeds survive from the seventeenth century, dating as far back as 1639.<sup>263</sup> On March 5, 1640, the Norwalk Indians sold part of their territory to Roger Ludlow, a resident of Fairfield, Connecticut.<sup>264</sup> In 1644, native occupants also sold the site of Harvard College.<sup>265</sup> Nannuddemance deeded land to John Parker on June 14, 1659, and “Jane the Indean of Scarbrough” sold land to Andrew and Arthur Alger on September 19, 1659.<sup>266</sup> In the summer of 1678, four Indians deeded an island in the Delaware River to Elizabeth Kinsey.<sup>267</sup> In 1683 “Shauk-a-num and Et-hoe sold one hundred acres of land ‘lying neer Cohanzev on Delaware-river’ to John Nicholls for a handful of trade goods.”<sup>268</sup> In 1725, Edmund Cartlidge purchased a “‘plantation Lyeing In a Turn of Conestogoe Creek Called by the name of the Indian Pointt’ from Wiggoneeheenah, a Delaware. . . .”<sup>269</sup> A year later, Betty Caco, queen of the Ababcos, and Permetasusk, queen of the Hatchswamps, deeded land in Maryland to Edward Norton for six pounds current money.<sup>270</sup> By 1676, Governor Josiah Winslow of Plymouth Colony remarked that “‘I think I can clearly say that . . . the English did not possess one foot of land in this colony but what was fairly obtained by honest purchase of the Indian proprietors.’”<sup>271</sup>

While many who purchased land from Indians did not consider the “Indian title” to be a legally recognizable title, there were exceptions. Quaker minister Thomas Chalkley in 1738 acknowledged the primacy of Indian land rights, asserting that “‘Nature hath given them, and their Fore-fathers, the Possession of this Continent’” and

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<sup>262</sup> CRONON, *supra* note 58, at 66. Cronon contends that, when Indians traded or sold lands, “what were exchanged were usufruct rights, acknowledgments by one group that another might use an area for planting or hunting or gathering.” *Id.* at 62. See also BILLINGS ET AL., *supra* note 223, at 20 n.\* (observing that “the idea of private tenure did not exist, although a concept nearer to the civil law doctrine of usufruct did. [I.e., the right to temporary possession or use of a property belonging to another without causing damage to it.]”).

<sup>263</sup> Emerson W. Baker, *A Scratch with a Bear’s Paw: Anglo-Indian Deeds in Early Maine*, 36 *ETHNOHISTORY* 235, 236 (1989).

<sup>264</sup> JOHN W. DE FOREST, *HISTORY OF THE INDIANS OF CONNECTICUT FROM THE EARLIEST KNOWN PERIOD TO 1850*, at 177 (Scholarly Press 1970) (1852).

<sup>265</sup> MACLEOD, *supra* note 9, at 200.

<sup>266</sup> THE WORLD TURNED UPSIDE DOWN: INDIAN VOICES FROM EARLY AMERICA 84–85 (Colin G. Calloway ed., 1994).

<sup>267</sup> Edwin B. Bronner, *Indian Deed for Petty’s Island*, 89 *PA. MAG. HIST. & BIOGRAPHY* 111, 111 (1965).

<sup>268</sup> MERRITT, *supra* note 240, at 36.

<sup>269</sup> *Id.*

<sup>270</sup> Robinson, *supra* note 220, at 92.

<sup>271</sup> MACLEOD, *supra* note 9, at 200.

arguing that “no People . . . ought to take away, or settle, on other Mens Lands or Rights, without Consent, or purchasing the same.”<sup>272</sup> A contemporary of Roger Williams, Thomas Copley of Maryland, acquired land directly from the Patuxent Indians, including land given in 1639 as a gift from an Indian chief.<sup>273</sup> Moreover, Copley and other Jesuit leaders challenged the absolute title of Lord Baltimore to the Province of Maryland.<sup>274</sup> Predictably, Thomas Copley’s arguments against the legitimacy of royal grants evoked a response from Lord Baltimore comparable to the reaction to Roger Williams by John Winthrop and the General Court of the Massachusetts Bay Colony:

After forcing the Jesuits to release title to the area obtained directly from the Indians, the proprietor took the additional step of prohibiting the purchase of lands from the natives. A restriction enacted by the governor with the assent of freemen in 1649 noted that various persons had either “purchased or accepted” land from Indians but without title derived from the proprietor under the great seal of the province, an action described as contemptuous of the proprietor’s “dignity & rights” and productive of “dangerous consequence if not timely prevented.” Consequently, all such purchases or acquisitions that had been made in the past or that would be made in the future were null and void.<sup>275</sup>

Eventually every colony regulated, at some point in time, the purchase of Indian lands. Although by no means uniform, such restrictions typically required government approval of purchases by individuals and declared transactions without government sanction to be null and void. For example, in the Colony of Connecticut, purchases of Indian lands were regulated by court order or legislation in 1663,<sup>276</sup> 1680,<sup>277</sup> 1687,<sup>278</sup> 1705,<sup>279</sup> 1706,<sup>280</sup> 1707,<sup>281</sup> 1710,<sup>282</sup> 1717,<sup>283</sup> and

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<sup>272</sup> WARREN R. HOFSTRA, *THE PLANTING OF NEW VIRGINIA: SETTLEMENT AND LANDSCAPE IN THE SHENANDOAH VALLEY* 122 (2004) (quoting Thomas Chalkley writing to the members of the Hopewell Meeting in 1738).

<sup>273</sup> Robinson, *supra* note 220, at 89.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 89–90 (footnote omitted).

<sup>276</sup> 1 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY, 1665, at 402 (J.H. Trumbull ed., Brown & Parsons 1850) (May 14, 1663).

<sup>277</sup> 3 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, MAY, 1678–JUNE, 1689, at 56–57 (J.H. Trumbull ed., Case, Lockwood & Co. 1859) (May 17, 1680).

<sup>278</sup> *Id.* at 422–23 (June 1, 1687).

<sup>279</sup> 4 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM AUGUST, 1689, TO MAY, 1706, at 526 (Charles J. Hoadly ed., Case, Lockwood and Brainard 1868) (October 1705).

1722,<sup>284</sup> suggesting that such purchases were commonplace—and government restrictions were ineffectual. One reason for government oversight was to minimize fraudulent and unfair dealings, which produced resentment and undermined Indian relations.<sup>285</sup>

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<sup>280</sup> 5 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM OCTOBER, 1706, TO OCTOBER, 1716, at 4 (Charles J. Hoadly ed., Case, Lockwood and Brainard 1870) (October 10, 1706).

<sup>281</sup> *Id.* at 30 (October 9, 1707) (repeal).

<sup>282</sup> *Id.* at 160 (May 1710) (proposed but not enacted).

<sup>283</sup> 6 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY 1717, TO OCTOBER, 1725, at 13 (Charles J. Hoadly ed., Case, Lockwood and Brainard 1872) (May 9, 1717).

<sup>284</sup> *Id.* at 355–56 (October 11, 1722). The 1722 “Act for preventing Trespasses on the Lands of this Colony, &c” is illustrative:

Whereas this Assembly have been informed that, notwithstanding the ancient laws of this Colony to the contrary, some persons have pretended to purchase of Indians their rights as natives, of many considerable tracts of land lying within this Colony; and altho all such deeds when obtained without the leave and consent of this Assembly are by the said law declared to be *ipso facto* void, yet under colour of such deeds persons unacquainted with the said laws may be imposed upon, deceived and greatly wronged, as well as the settlement of such lands in plantation, pursuant to the end expressed in our charter, hindered: For the prevention hereof,

*Be it enacted by the Governour, Council and Representatives, in General Court assembled, and by the authority of the same,* That whosoever shall presume to purchase any lands within the bounds of this Colony, of any Indians whatsoever, without the leave of this Assembly hereafter first had and obtained, under colour or pretence of such Indians being the proprietors of said lands by a native right, or shall, having purchased of any Indians lands in such manner, without leave of this Assembly first had, or the confirmation of this Assembly afterwards obtained, presume to make any sale of, or any settlements upon, any lands so purchased, every person who shall in any such manner transgress and be thereof convicted in the county court or in the superior court of that county where such lands shall lye, shall incur the penalty of fifty pounds to the treasury of this Colony. And whatsoever person or persons shall suffer any wrong, by means of such sale or settlement as aforesaid, shall recover in either of the said courts, upon proof of such wrong by him suffered, treble damages against the person or persons so wronging of him.

*Id.*

<sup>285</sup> For example:

[A] South Carolina act of 1739, forbidding purchases of land from Indians without the approval of the provincial authorities, bluntly stated the reason for the act to be that: “such purchases being generally obtained from Indians by unfair representations, fraud, and circumvention, or by making them gifts or presents of little value, by which practices great resentments and animosities have been created amongst the Indians toward the inhabitants of this province.”

KINNEY, *supra* note 98, at 15. See also WALTER HART BLUMENTHAL, AMERICAN INDIANS DISPOSSESSED: FRAUD IN LAND CESSIONS FORCED UPON THE TRIBES 14–17 (Arno Press



However, John De Forest, in his *History of the Indians of Connecticut*, observes that “it was not for the benefit of the Indians only that . . . [these regulations were] promulgated; but also, if not entirely for the purpose of asserting and preserving the jurisdiction power of the General Court over the unbought and unoccupied lands of the colony.”<sup>286</sup> More recently, Eric Kades argued that “[t]he universal and repeated enactment of laws barring purchases of land by private citizens from the Indians . . . makes perfect sense as a tool of efficient expropriation of Indian lands.”<sup>287</sup>

Because Virginia, by virtue of its “sea to sea” royal grant, asserted jurisdiction over the lands purchased from the Illinois and Piankeshaw Indians in 1773 and 1775, it is instructive to examine Virginia law concerning Indian purchases.<sup>288</sup> On November 25, 1652, Virginia passed the following law:

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1975) (1955) (describing the “Walking Purchase by which the Lenape . . . (Delawares) were deceived in 1737.”). Blumenthal notes that some tribes assigned “jocular nicknames for the whites who ousted them”:

The frontier invaders were called by the Cherokees—Econnaunuxulgee (People-greedily-grasping-after-land); the Governor of Georgia was dubbed Econnau-popohau (Always asking for land); the Governor of the Territorial Tennessee, William Blount, became Tuckemico (Dirt King).

*Id.* at 42. See also DANIEL R. MANDELL, INDIANS IN THE EIGHTEENTH-CENTURY EASTERN MASSACHUSETTS 134 (1996) (“The Mashpees complained in 1755 that their English neighbors ‘Doth bate [us] with Strong Licker’ to get them to sell their land: ‘It is a old saying that when the Drunk Is in the Wit is out.’”).

<sup>286</sup> DE FOREST, *supra* note 264, at 176–77.

<sup>287</sup> Kades, *supra* note 42, at 1079–80. See also Jennifer Roback, *Exchange, Sovereignty, and Indian-Anglo Relations*, in PROPERTY RIGHTS AND INDIAN ECONOMIES: THE POLITICAL ECONOMY FORUM 12 (Terry L. Anderson ed., 1992) (“The more effective the prohibition on individual land sales, the greater the value of the land to the government because the government would have exclusive rights to buy from the Indians, as well as exclusive rights to sell to the colonists.”).

<sup>288</sup> For a comparison of other states’ policies, see, for example, CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA, *supra* note 240, at 31, 143; COHEN, *supra* note 179, at 508; CRONON, *supra* note 58, at 70 (Massachusetts and Connecticut); DANE, *supra* note 237, at 67 (Massachusetts); 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 477–79 (E.B. O’Callaghan ed., 1856); 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 226, at 268 (Maryland); KENT, *supra* note 92, at 498–501; KINNEY, *supra* note 98, at 6–7, 11, 14–15 (Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, North Carolina, South Carolina, and Georgia); MACLEOD, *supra* note 9, at 202 (Pennsylvania, New Jersey, and Maryland); O’BRIEN, *supra* note 98, at 71–72, 80; FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834, at 6 (1962) (Massachusetts, New York, Pennsylvania, and South Carolina); PRUCHA, *supra* note 179, at 16, 22 (South Carolina and New York); JACK STAGG, ANGLO-INDIAN RELATIONS IN NORTH AMERICA TO 1763, AND AN ANALYSIS OF THE ROYAL PROCLAMATION OF 7 OCTOBER 1763, at 22–24 (1981) (Maryland, New York, and North Carolina); VAUGHAN, *supra* note 60, at 114 (Massachusetts); Robert N. Clinton

Whereas many Complaints have beene brought to this Assem-  
blye touchinge wrong done to the Indians in takeinge away their  
lands . . . for that it may be feared, that thereby they may bee Just-  
lye Driven to dispaire, and to Attempt some Desperate Course for  
themselves . . . be it heereby ordained, and Enacted that all the  
Indians of this collonye Shall, and may hold and keepe those  
seates of Land that they now have, And that noe person, or per-  
sons whatsoever be suffered to Intrench, or plant uppon Such  
places as the Indians Claime, or desire, untill full Leave from the  
governor, and Councill, or Commissioners of that place . . . And  
noe Indians to Sell their lands but at quarter Courts . . . and noe  
pattents Shall be adjudged sufficient, or vallid, which hath latelye  
passed, or Shall passe, Contrarye to the Sence of this Act, nor  
none to be of force which Shall Intrench uppon the Indians  
Lands to their discontents, without Expresse order for the  
Same.<sup>289</sup>

In 1654, Eastern Shore Indians were authorized by law to sell land to individuals; however, a 1656 law provided, with respect to other Indian lands, that “for the future no such alienations or bargaines and sales be valid without the assent of the Assembly, This act not to prejudice any Christian who hath land allready granted by patent.”<sup>290</sup> A similar law was passed by the General Assembly in March 1658.<sup>291</sup>

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& Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 20–22 (1979) (Massachusetts and New York); Roback, *supra* note 287, at 12 (South Carolina); Springer, *supra* note 234, at 35–36, 45 (1986) (Rhode Island, Massachusetts, and Connecticut).

<sup>289</sup> 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 226, at 43–44. Cf. VAUGHAN, *supra* note 60, at 114 (describing a similar policy in Massachusetts).

<sup>290</sup> 2 COLONY LAWS OF VIRGINIA, 1642–1660, at 396 (1978) [hereinafter 2 COLONY LAWS OF VIRGINIA]. See also 1 Stat. 393, 393–96 (Henig ed., 1823) (Congressional acts and resolutions, June 7–9, 1794), reprinted in 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 226, at 47–48; KINNEY, *supra* note 98, at 12; HELEN C. ROUNTREE, POCAHONTAS’S PEOPLE: THE POWHATAN INDIANS OF VIRGINIA THROUGH FOUR CENTURIES 92 (1990) (discussing 1654 law); STAGG, *supra* note 288, at 21; J. LEITCH WRIGHT, JR., THE ONLY LAND THEY KNEW: AMERICAN INDIANS IN THE OLD SOUTH 100 (Bison Books 1991) (1981) (noting that in light of the enacted restrictions, “colonists began ‘leasing’ lands or holding them until gambling debts had been satisfied.”).

“In the old style reckoning [Julian calendar], March 25 was the beginning of the year. After the adoption of the new style, or Gregorian calendar, January 1 was taken as the beginning of the year and double dates are often used to indicate the time between Jan. 1 and Mar. 25.” D.W. WELLS & R.F. WELLS, A HISTORY OF HATFIELD MASSACHUSETTS 22–23 (1910). An event that took place on March 10, 1656, according to the Old Style Julian calendar, would be dated March 10, 1657 by the Gregorian calendar and designated by historians as having happened on March 10, 1656/57.

<sup>291</sup> 2 COLONY LAWS OF VIRGINIA, *supra* note 290, at 468. “The 1661 General Assembly approved several sales of Indian lands to colonists. . . .” FREDERIC W. GLEACH,

Four years later, in 1662, the General Assembly undertook a codification of the colony's laws:

This Act recited that the laws prohibiting the purchase of Indian lands unless acknowledged at General Courts or Assemblies had proved fruitless and ineffectual, leading to great inconvenience. It enacted, *inter alia*, that for the future no Indian King or other should upon any pretence sell nor no English for any cause whatsoever purchase or buy any land then claimed or possessed by any Indian or Indians whatsoever and further declared that all such bargains and sales thereafter made were invalid, void and null.<sup>292</sup>

Virginia thereafter vacillated with respect to its regulation of Indian land purchases. Jack Stagg states that, "after a costly colonial-Indian war in 1675, the Assembly was much less committed to preserving Indian lands in Virginia and rescinded the 1655 statute, opening up all formerly protected lands to public and private purchase."<sup>293</sup> Lindsay Robertson contends that Virginia regulation of Indian land purchases, between 1705 and 1778, was controlled by a 1705 act which "declared it unlawful 'for an Indian king, or any other of the said *tributary Indians* whatever,' to sell or lease to non-Indians any lands 'now actually possessed, or justly claimed and pretended to by the *said Indians*,'" and further provided that "every bargain, sale, or demise hereafter made, contrary to this act,' was . . . 'null and void.'"<sup>294</sup>

If the 1705 Act applied only to "tributary" Indians, it had no effect on the sales by the Illinois and Piankeshaw Indians, who, as Robertson points out, "were not then and never thereafter tributary to the colony of Virginia."<sup>295</sup> In June 1776, the revolutionary Virginia Convention resolved "that no purchases of lands within the chartered limits of Virginia shall be made, under any pretence whatever, from *any Indian tribe or nation*, without the approbation of the Virginia legislature," and five days later the newly adopted state constitution

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POWHATAN'S WORLD AND COLONIAL VIRGINIA: A CONFLICT OF CULTURES 193 (1997) (citation omitted).

<sup>292</sup> Priestley, *supra* note 227, at 158. See also GLEACH, *supra* note 291, at 193; OBERG, *supra* note 62, at 188.

<sup>293</sup> STAGG, *supra* note 288, at 22.

<sup>294</sup> Robertson, *Brief for the Appellants*, *supra* note 67, at 866. See also MANN BUTLER, A HISTORY OF THE COMMONWEALTH OF KENTUCKY, FROM ITS EXPLORATION AND SETTLEMENT BY THE WHITES, TO THE CLOSE OF THE NORTHWESTERN CAMPAIGN, IN 1813, at lxvii (J.A. James & Co. ed., 1836) ("Again, in 1705, the same policy is confirmed."). In 1748, Virginia passed laws allowing two tributary tribes to sell land. 15 EARLY AMERICAN INDIAN DOCUMENTS, *supra* note 226, at 190-92 (setting forth laws, dated December 17, 1747, allowing the Pamunkeys and Nottoways to sell land).

<sup>295</sup> Robertson, *Brief for the Appellants*, *supra* note 67, at 866.

provided, in its twenty-first article, that “no purchase of lands should be made of the Indian natives but in behalf of the public by authority of the General Assembly.”<sup>296</sup> However, unless retroactive, these laws did not impact the Illinois-Wabash purchases of 1773 and 1775. Thus, with respect to the question of whether the land sales at issue in *Johnson v. McIntosh* were prohibited by Virginia law (assuming Virginia had jurisdiction), there was considerable doubt.<sup>297</sup>

#### V. “THE SINNE OF THE *PATENTS*” REDUX: INDIAN TITLE IN NEW JERSEY

Protest against “the *sinne* of the *Pattents*” did not die with Roger Williams.<sup>298</sup> The question resurfaced in the 1660s in the Province of New Jersey, where individual landowners questioned the legitimacy of title by royal grant and defended the validity of title by Indian purchase. This lesser known dispute, which lasted for over a century, was reminiscent of the Williams controversy: the assertion by individual purchasers that the Indians could convey a complete and lawful title was strenuously opposed by government officials, who viewed it as nothing less than a seditious challenge to Crown authority. The con-

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<sup>296</sup> *The Proceedings of the Convention of Delegates, Held at the Capitol, in the City of Williamsburg, in the Colony of Virginia, on Monday the 6th of May, 1776*, at 154 (Purdie, 1776) (emphasis added); see generally BUTLER, *supra* note 294, at lxvii (describing similar policies enacted throughout the colonial period); PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787*, at 83 (1983) (describing Convention resolution).

<sup>297</sup> Marshall also exclaimed in *Johnson v. McIntosh* that the 1763 Royal Proclamation constituted “an additional objection to the title of the plaintiffs.” 21 U.S. (8 Wheat.) 543, 594 (1823) (emphasis added). On October 7, 1763, King George III of Great Britain issued a proclamation which provided in pertinent part:

And whereas great frauds and abuses have been committed in the purchasing lands of the [American] Indians, to the great prejudice of our interests, and to the great dissatisfaction of the said Indians; . . . we do . . . strictly enjoin and require, that no private person do presume to make any purchase from the said Indians of any lands reserved to the said Indians within those parts of our colonies where we have thought proper to allow settlement; but that if at any time any of the said Indians should be inclined to dispose of the said lands, the same shall be purchased only for us, in our name . . . .

Proclamation of 1763 (Oct. 7, 1763), reprinted in 3 WILCOMB E. WASHBURN, *THE AMERICAN INDIAN & THE UNITED STATES: A DOCUMENTARY HISTORY* 2135, 2138 (1973). See generally Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

<sup>298</sup> In the fall of 1749, a Virginia trader named John Ellis told Catawba Indians in Carolina that colonists settling the area “had no right to the Lands by them possessed and that even his Majesty had no right to those Lands.” JAMES H. MERRELL, *THE INDIANS’ NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 167* (1989). Reminiscent of Roger Williams, the governor ordered that any person making such statements be arrested. *Id.*

flict is particularly noteworthy insofar as it presages *Johnson v. McIntosh*. In both instances, land ownership was contested on the basis of competing chains of title. As in *Johnson*, native land rights were championed not by the Indians themselves, but by recipients of Indian deeds. And in both instances, natural rights to property were opposed by the doctrine of discovery, feudal law, statutory prohibitions, and royal authority.

On September 24, 1664, the Governor of the New Netherland Colony, Peter Stuyvesant, surrendered New Amsterdam (New York City) to an English naval squadron commanded by Colonel Richard Nicolls. Nicolls was eager to encourage settlement, but insisted that land transfers must be preceded by Indian purchase.<sup>299</sup> Puritans seeking new lands quickly purchased lands from the Lenni Lenape Indians,<sup>300</sup> and they received land grants from Nicolls between the Hudson and Delaware Rivers near present-day Elizabeth and Monmouth, New Jersey.<sup>301</sup> Unbeknownst to Nicolls, the lands in question had been granted by Charles II to his brother James, Duke of York (and later King James II), who in turn had granted the proprietary rights to Sir George Carteret and Lord John Berkeley.<sup>302</sup>

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<sup>299</sup> JOHN E. POMFRET, *COLONIAL NEW JERSEY: A HISTORY* 12 (1973). See also THOMAS FLEMING, *NEW JERSEY: A BICENTENNIAL HISTORY* 6–8 (1977); OBERG, *supra* note 62, at 149–50 (“Nicolls quickly put into effect a body of laws for the governance of New York. A significant portion of this code, known as the ‘Duke’s Laws’ of 1664, dealt with the subject of Anglo-Indian relations. The Duke’s Laws . . . prohibited the purchase of land from Indians without the permission of the governor.”); JOHN E. POMFRET, *THE NEW JERSEY PROPRIETORS AND THEIR LANDS* 8 (1964) [hereinafter POMFRET, *THE NEW JERSEY PROPRIETORS*] (“Governor Nicolls in 1664, in behalf of the Duke, had issued a set of conditions upon which particular plantations would be created. First, the purchasers must obtain a clear title from the Indians; secondly, the inhabitants must agree to dwell together in a town; and thirdly, they must take an oath of allegiance to the king.”).

<sup>300</sup> See POMFRET, *THE NEW JERSEY PROPRIETORS*, *supra* note 299, at 9 (“On December 1, 1664, Nicolls issued [the Elizabethtown] patent [to four men]. . . . For £154 in cloth, guns, powder, lead, kettles, and coats they purchased from the Indians a large tract of land lying between the Raritan and the Passaic rivers.”).

<sup>301</sup> MCCONVILLE, *supra* note 211, at 13.

<sup>302</sup> *Id.* at 12–13. See also JOHN T. CUNNINGHAM, *NEWARK* 63 (1966) (“The story of New Jersey’s Proprietors began in 1664 when the province was given to Lord Berkeley and Sir George Carteret. The former sold his share in 1673 and Carteret’s holdings were sold after he died in 1680. Boards of the West and East New Jersey proprietors eventually included many men whose chief interest was real estate.”); FLEMING, *supra* note 299, at 13–14 (“In West Jersey the Quakers flourished so well that when Sir George Carteret died in 1680, twelve of the wealthiest Friends bought East Jersey from his widow. . . . [T]he Quakers . . . [sold some of the lands] to twelve other speculators, mostly Scotsmen. The new owners organized themselves into the East Jersey Board of Proprietors and began trying to attract immigrants and sell them land.”).

In May 1666, Puritans from Connecticut settled along the Passaic River, naming their town Newark.<sup>303</sup> Governor Carteret instructed the Puritans to purchase their land from the Indians, and on July 11, 1667, the Newarkers purchased, by treaty, a 20,000-acre tract in exchange for goods in kind, including “four barrells of beere.”<sup>304</sup> However, when the proprietors, and their successors, attempted to collect quit-rents from the Newark purchasers and the Puritans who received grants from Nicolls, the settlers resisted, relying in part on the fact that they had first purchased the land from the Indians.<sup>305</sup> In

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<sup>303</sup> DONALD L. KEMMERER, *PATH TO FREEDOM: THE STRUGGLE FOR SELF-GOVERNMENT IN COLONIAL NEW JERSEY, 1703–1776*, at 7 (1968). See also MCCONVILLE, *supra* note 211, at 15 (“The eighty yeomen and their families had fled their homes in the ultra-Congregationalist New Haven Colony after Charles II decreed that province would lose its autonomy and be joined to the Presbyterian Connecticut Colony; the migrants believed that mixing with ungodly Presbyterians could lead to damnation.”).

<sup>304</sup> CUNNINGHAM, *supra* note 302, at 24 (“[In all, the purchasers gave] ‘fifty double-hands of powder, one hundred barrs of lead, twenty Axes, twenty Coates, ten Guns, twenty pistolls, ten kettles, ten Swords, four blankets, four barrells of beere, ten paire of breeches, fifty knives, twenty howes, eight hundred and fifty fathem of wampum, two Ankors of Licquers or something Equivalent and three troopers Coates.’”). See also MCCONVILLE, *supra* note 211, at 17; POMFRET, *THE NEW JERSEY PROPRIETORS*, *supra* note 299, at 14–15 (“The boundaries of the [Newark] township were settled at two conferences, one in July 1667, with the Indians, the second in May, 1668, with the representatives of Elizabethtown. . . . [A] new instrument was drawn up with the Indians by which the boundaries of Newark were extended. . . . The Indians were paid in kind, principally powder, lead, weapons, implements, clothes, and beer.”).

<sup>305</sup> FLEMING, *supra* note 299, at 14. See also CUNNINGHAM, *supra* note 302, at 63 (“Ill feeling against the Proprietors could be traced back to 1670 when Berkeley and Carteret claimed rents due them under the terms of the grant giving them all New Jersey land.”); KEMMERER, *supra* note 303, at 7 (“Serious trouble began about 1670 when the first quitrents fell due.”); POMFRET, *THE NEW JERSEY PROPRIETORS*, *supra* note 299, at 18 (“Elizabethtown took a dim view of Carteret’s efforts to collect quitrents when they first came due in March, 1670. At Newark, although the town meeting agreed to pay the quitrents, it insisted that Newark derived its title from Indian purchase, not by proprietary patent; therefore the inhabitants were not obliged to pay one halfpenny per annum to the proprietors.”). The transplanted New Englanders continued to purchase lands from the Indians, while at the same time resisting the payment of quit-rents:

[Among the customs] these freeholders brought from the extinguished New Haven Colony was the practice of purchasing land directly from the Native Americans without the approval of English authorities and the holding of their property free of quitrents or other quasi-feudal obligations.

. . . The settlers insisted that their legal rights to the 20,000-acre township were derived solely from the purchases made from the Lenni Lenape, and that they had the right to make additional acquisitions without the proprietors’ consent. The townspeople engaged in further unauthorized native purchases in 1678, 1701, and 1744, adding some 30,000 acres to Newark and extending the township’s boundaries some fifteen miles west into the North Jersey interior. The county-sized Newark Tract became the nerve center of violent resistance to the

1675, six prominent English lawyers were asked to render their legal opinion on “Wither the Grant from ye Indians be Sufficent to any planter without a Grant from ye King or his Assignes.”<sup>306</sup> The lawyers (among them Sir Henry Pollexfen and Sir John Holt, who afterwards became Attorney General and Chief Justice of England, respectively) denied the validity of private purchases of Indians lands:

[B]y [the] Law of Nations if any people make Discovery of any Country of Barbarians the Prince of [that] people who make [the] Discovery hath [the] Right of [the] Soyle & Governmt of [that] place & no people can plant there without [the] Consent of [the] Prince or of Such Persons to whom his Right is Devoulved & Conveyed . . . and tho it hath been & Still is [the] Usuell Practice of all Proprietrs to give their Indians Some Recompence for their Land & So Seems to Purchase it of them yet [that] is not done for want of Sufficent title from [the] King or Prince who hath [the] Right of Discovery but out of Prudence & Christian Charity Least otherwise the Indians might have destroyed [the] first planters . . . & thereby all hopes of Converting them to [the] Christian faith would be Lost in tiffs . . . .<sup>307</sup>

Legislation prohibiting the purchase of Indian lands without license from the governor, and declaring improper purchases null and void, was passed in 1683<sup>308</sup> and—after New Jersey became a royal

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eighteenth-century proprietors’ property claims when the descendants of the original settlers refused to surrender the lands purchased from the Native Americans.

McCONVILLE, *supra* note 211, at 17. It should be noted that the Elizabethtown and Monmouth settlers placed more focus on the fact they received a confirmatory grant from Governor Nicolls than on the Indian purchases themselves. See KEMMERER, *supra* note 303, at 187 (“[A]s a general rule, the Elizabeth-Town people emphasized Nicolls’ patent rather than Indian titles as the basis of their land claims.”); EDWIN P. TANNER, *THE PROVINCE OF NEW JERSEY, 1664–1738*, at 60 (1967). This remained so even after the Duke of York in 1672 declared the patents from Nicolls to be null and void. *Id.* at 30.

<sup>306</sup> 13 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 487 (E.B. O’Callaghan ed., 1881).

<sup>307</sup> *Id.* See also *The Queen v. Saint Catharine’s Milling & Lumber Co.*, 10 O.R. 196, 206–09 (Ont. 1885), *aff’d*, 13 O.A.R. 148 (Ont. 1886), *aff’d*, 13 S.C.R. 577 (Can. 1887), *aff’d*, 14 App. Cas. 46 (P.C. 1888); KENT MCNEIL, *COMMON LAW ABORIGINAL TITLE* 222 (1989).

<sup>308</sup> See 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY (1738–1747), at 302 (William A. Whitehead ed., 1882) [hereinafter 6 HISTORY OF THE STATE OF NEW JERSEY] (noting that “the Governor, Council and Representatives of the People of East New-Jersey, in General Assembly met . . . in the Year 1683, to make an Act, ‘forbidding all Treaties with the Indians without Licence of the Governor, and the taking of any Deed from them, but in the Name of the Lords Proprietors of East New-Jersey, upon Pain of being prosecuted as seditious Persons, and as Breakers of the King’s Peace, and the publick Peace and Safety of the Province.’”); EDGAR JACOB FISHER, *NEW JERSEY AS A ROYAL PROVINCE, 1783 TO 1776*, at 185–

province—in 1703.<sup>309</sup> Nevertheless, settlers in New Jersey (and in Newark in particular) continued to follow in the tradition of Roger Williams and insist that they could hold property solely by their Indian purchase.

The controversy over title to lands in New Jersey and the right to collect quit-rents was revived in the 1740s when the proprietors filed numerous ejectment suits.<sup>310</sup> On March 30, 1742, two proprietors reported to their board that

they had good information that sundry of the members of the Assembly in private conversation in discourse on the titles of land in this Province, did express their sentiments, that the Indian titles were the best, which opinion if propagated, might tend to the ruin of the Proprietary titles of this Province . . . .<sup>311</sup>

Private conversation was followed by action when the Elizabethtown settlers in 1744 petitioned the King-in-Council, seeking recognition of lands that “for great and valuable Considerations, [they] did purchase . . . from certain Indians. . . .”<sup>312</sup> The proprietors countered in April 1745, filing a suit against the Elizabethtown claimants in the

86 (1967); JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY, 1683–1702, at 127 (Preston W. Edsall ed., 1937).

<sup>309</sup> See LEE, *supra* note 203, at 67; MACLEOD, *supra* note 9, at 202; POMFRET, THE NEW JERSEY PROPRIETORS, *supra* note 299, at 86. Fisher further described the 1703 Act as follows:

In the instructions to Lord Cornbury, the first royal governor, he was forbidden to allow any persons except the proprietors or their agents to purchase lands from the Indians. The first act of the legislature under the royal government was “for regulating the Purchasing of Land from the Indians.” It was provided that after December 1, 1703, no person could purchase land from the Indians except he had a right of propriety and obtained a license. . . . Unless the person obtained a grant from the proprietors within six months after the publication of the act, improper purchases were declared void.

FISHER, *supra* note 308, at 185–86 (footnote omitted). New Jersey was governed as two distinct provinces, West Jersey and East Jersey, between 1674 and 1702.

<sup>310</sup> See POMFRET, THE NEW JERSEY PROPRIETORS, *supra* note 299, at 109 (“During the [Governor Lewis] Morris administration, especially during the years 1741 to 1743, there was a spate of suits over the validity of Indian titles, which were invariably decided in favor of the proprietors.”). See also JOURNAL OF THE COURTS OF COMMON RIGHT AND CHANCERY OF EAST NEW JERSEY, 1683–1702, *supra* note 308, at 80 (“[T]he question of title was always germane to an Ejectment proceeding . . .”).

<sup>311</sup> 2 THE MINUTES OF THE BOARD OF PROPRIETORS OF THE EASTERN DIVISION OF NEW JERSEY FROM 1725 TO 1744, at 162 (Gen. Bd. of Proprietors of the E. Div. of N.J. 1960). In October 1742, the proprietors informed English officials that “sundry persons have at sundry times clandestinely called the Indians together, and made purchases of lands from them, without having any right to the soil under the Crown or any license to call the Indians together or to make such purchases . . . .” *Id.* at 219.

<sup>312</sup> MCCONVILLE, *supra* note 211, at 174.



Chancery of New Jersey, consisting of “a staggering folio of 1,500 handwritten sheets, comprising over 160 pages of text and maps when printed, and evidencing the labor of three years’ research and writing.”<sup>313</sup> A flash point finally occurred when Newark anti-proprietor leader Samuel Baldwin was arrested and jailed for cutting timber on a proprietary tract.<sup>314</sup> Baldwin adamantly denied that he was trespassing, claiming title by virtue of an Indian deed.<sup>315</sup> A mid-afternoon riot ensued on September 19, 1745, when 150 people “flooded into town armed with clubs, axes and crowbars, . . . brushed aside the sheriff, broke open the jail door and freed Baldwin, without the nicety of bail.”<sup>316</sup>

What followed was an escalating war of words. In February 1746, Griffin Jenkins published “*A Brief Vindication of the Purchasers Against the Proprietors, In A Christian Manner*,” and appealed to the royal conscience:

I do think our Gracious King . . . will do Justice amongst his Subjects, by giving every one his Right and Title; neither do I think that he will take away from these poor Inhabitants one Foot of Land, that they bought of the Natives; and I doubt not but he will Vindicate them in their Proceedings, for it does look reasonable that they are the right Owners, by Reason of their Fore-fathers went in Hazard of their Lives among them, if they had not bought these Lands, they could not have any Peace among them.<sup>317</sup>

The proprietors responded a month later by issuing a public statement which denounced the “setting up sham Deeds, procured from stroling Indians, in Place of the Title of the Crown of England . . . .”<sup>318</sup>

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<sup>313</sup> MILTON M. KLEIN, *THE AMERICAN WHIG: WILLIAM LIVINGSTON OF NEW YORK* 134 (rev. ed. 1993). “The Elizabethtown claimants engaged William Livingston and William Smith, two prominent attorneys, to prepare ‘An Answer to a Bill in the Chancery of New Jersey,’ which was completed in August, 1751, and published the next year.” POMFRET, *THE NEW JERSEY PROPRIETORS*, *supra* note 299, at 116. “[D]espite the immense labors that had gone into its preparation, the suit was never brought to trial.” KLEIN, *supra*, at 135.

<sup>314</sup> CUNNINGHAM, *supra* note 302, at 64.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* See also POMFRET, *THE NEW JERSEY PROPRIETORS*, *supra* note 299, at 109–10; 3 *THE MINUTES OF THE BOARD OF PROPRIETORS OF THE EASTERN DIVISION OF NEW JERSEY FROM 1745 TO 1764*, at 90 (Gen. Bd. of Proprietors of the E. Div. of N.J. 1960).

<sup>317</sup> 6 *HISTORY OF THE STATE OF NEW JERSEY*, *supra* note 308, at 284. See also McCONVILLE, *supra* note 211, at 168 (“Griffin Jenkins’s religiously charged pamphlet, the *Brief Vindication*, maintained that the original possession and improvement of the Newark lands by Native American owners established the later settlers’ legal title.”); *id.* at 170 (“Jenkins’s pamphlet teetered on defending the Indian purchases by way of universal natural law without clearly articulating that law’s character.”).

<sup>318</sup> 6 *HISTORY OF THE STATE OF NEW JERSEY*, *supra* note 308, at 319.

The proprietors argued that the purchases violated the Acts of 1683 and 1703 (ignoring that most transactions occurred earlier), but also contended that—even in the absence of statutory prohibitions—reliance on Indian title was misplaced, inconsistent with feudal law, and an affront to the Crown:

To pretend to hold Lands by an Indian Deed only, is not that declaring the Indian Grantor to be the Superior Lord of that Land, and disowning the Crown of England to be so? . . . [I]s not that an Overt Act of withdrawing the Allegiance due to the Crown of England? (from which all Lands within its Dominions must be held mediately or immediately). . . . And do not those Overt Acts or Endeavours in their Nature approach to High Treason?

. . . .  
 . . . [T]he *silly Position* aforesaid, [is] *false in it self*, as the Indians had no Notion of Property in Lands more than in Air, until the Christians came amongst them (except in the small Spots on which they planted their Indian Corn, and those Spots did not occupy so much as one Acre of a Thousand Acres; so that the remaining 999 Acres might properly be said to be void and uninhabited, and in the Power of the Crown absolutely to grant; and except as to Hunting.)<sup>319</sup>

Undeterred, the Newark rioters prepared two formal petitions, which were read to the assembly on April 17, 1746. Samuel Nevill moved to reject the petitions, declaring them to be “a Notorious Libel upon the Crown of England,”<sup>320</sup> and gravely warned that the issue presented—“whether the Property in the Soil of this Colony is vested in the Crown of England, or in the Indian Natives?”—was a “dangerous Dispute to be disputed . . . .”<sup>321</sup>

Nevertheless, the proponents of Indian title persevered, and indeed carried the dispute to even higher levels. In 1746, an unsigned letter published in a New York newspaper turned Lockean theory to the advantage of Newark purchasers by contending that Locke’s guiding principle, that vacant land is “made the Property of that Man, who bestowed his Labour on it,” legitimated native title to the lands

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<sup>319</sup> *Id.* at 321–23. See generally FISHER, *supra* note 308, at 189.

<sup>320</sup> 6 HISTORY OF THE STATE OF NEW JERSEY, *supra* note 308, at 325.

<sup>321</sup> *Id.* at 331. See also MCCONVILLE, *supra* note 211, at 166. Nevill further noted that “[b]y allowing . . . any other than the Crown of England and its Assigns, to be the true Owners and Proprietors, a perpetual Uncertainty would evidently follow who were the true Owners and Proprietors.” 6 HISTORY OF THE STATE OF NEW JERSEY, *supra* note 308, at 344.

in question, because the Indians allegedly worked the property prior to its sale.<sup>322</sup>

A year later, in their *Answer to the Council of Proprietor's two Publications; Sett forth at Perth-Amboy the 25<sup>th</sup> of March 1746, and the 25<sup>th</sup> of March 1747*<sup>323</sup> (hereinafter "the *Answer*"), the Newark settlers presented a comprehensive title defense, beginning with the contention that their purchases were fairly obtained and supported by ample consideration:

Our Predecessors (Inhabiting Newark, &c.) . . . Purchased, not of some Strolling Indians, or for some few Bottles of Rum, as is suggested by the Proprietors in their Publication, but of their Chiefs, at a dear Rate, and with a great Sum, for the then Times . . . .

. . . Who could Question our just Right to the Soil; considering the due measures our Ancestors took to obtain it.<sup>324</sup>

Then, in the true spirit of Roger Williams, the *Answer* questioned the right and authority of Charles II to grant the lands without first purchasing them from the native occupants:

We hope you'll give us leave to ask how he came by them, was it by Discovery, by Conquest, by Gift, or by Contract, was the Discovery made in his Day? . . .

. . . [C]an it be supposed [the Indians] had no Right unto . . . their Lands[?] Yes, Doubtless they had, from the Great and Absolute Proprietor of the Whole Universe . . . .

. . .  
. . . The Advantage any Nation hath over another, in Might & Power, in True Religion, or in the Acts of Government, War or Improvements, or other Arts & Sciences, doth not . . . give the Nation . . . a Right to the Possessions of another People . . . .<sup>325</sup>

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<sup>322</sup> KEMMERER, *supra* note 303, at 200 n.58. See also MCCONVILLE, *supra* note 211, at 167 ("As the property conflicts intensified, the disaffected turned to the theories of John Locke and other seventeenth-century writers to argue that property rights came from possession and labor rather than from institutional authority.")

<sup>323</sup> See *supra* note 290 (discussing the use of "double dates," i.e. "the 25<sup>th</sup> of March 1746, and the 25<sup>th</sup> of March 1747," to indicate the time between Jan. 1 and Mar. 25 after the adoption of the Gregorian calendar system).

<sup>324</sup> 7 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY (1746–1751), at 31–32 (William A. Whitehead ed., 1883) [hereinafter 7 HISTORY OF THE STATE OF NEW JERSEY]. The issue of fair dealing was also raised, and rejected, in *Johnson v. McIntosh*. See 21 U.S. (8 Wheat.) 543, 572 (1823) ("The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold.")

<sup>325</sup> 7 HISTORY OF THE STATE OF NEW JERSEY, *supra* note 324, at 34–36. The *Answer* also argues that "the Granting Lisences by the Governments to Purchase Lands of them, admits them, to have a Right to sell them," and that "the latter Act of 1703 . . .

The thesis of the Newark purchasers' 1747 *Answer* is as radical as the view espoused by Roger Williams a century earlier, and as straightforward as the position taken by the Illinois and Wabash Land Company three-quarters of century thereafter:

*We know not what Right the Crown had to those Lands before [we] Purchased of the Natives, but [as] the Owners of such Lands by and under such Purchase [we] do humbly insist and rely upon it, that by such Purchases [we] have a full Right and Property in the Lands so purchased.*<sup>326</sup>

The Newark purchasers' position is completely at odds with John Marshall's description of Indian land rights in *Johnson v. McIntosh*.

The dispute between the Newark purchasers and the proprietors was never resolved by judicial action (or otherwise),<sup>327</sup> yet it serves as a postscript to Williams' banishment by the General Court of the Massachusetts Bay Colony, and as a prelude to the United States Supreme Court's decision in *Johnson v. McIntosh*. Most of the basic arguments for and against Indian title were now in place. However, significant developments still lay ahead, such as the rise (and fall) of the speculative land companies, the regulation of Indian land sales by the Crown itself, the American Revolution, and the ensuing struggle between the national government and several states for control of the newly

cannot . . . Annul or Vacate any of the Purchases we are concerned in, or for, they being all made before said Act." *Id.* at 36, 40. See also MCCONVILLE, *supra* note 211, at 169 ("The Newark purchasers' *Answer* of 1747 . . . insisted that the Native Americans owned Newark by virtue of their original possession and improvement, and that the current occupiers' ancestors had peacefully purchased this property.").

<sup>326</sup> 7 HISTORY OF THE STATE OF NEW JERSEY, *supra* note 324, at 36 (emphasis added).

<sup>327</sup> In 1750, a petition to King George II was signed by over four hundred Newark settlers who "invoked natural law to protect property won by possession and improvement." MCCONVILLE, *supra* note 211, at 171. On June 1, 1750, the Board of Trade, headed by its president, George Montagu Dunk, Earl of Halifax, issued a report to "The Right Honorable the Lords of His Majesty's Most Honorable Privy Council" which stated, with respect to the Province of New Jersey:

This Country was first discover'd by Subjects of England whereby the Right to the Soil and Government thereof was vested in the Crown of England . . . .

. . .

. . . [A] great Number of Persons, chiefly the dregs of the People, and many of them Irish, some of which had seated themselves upon Lands under pretence of Purchases from the Indians . . . [began] denying His Majesty's Right to the Soil or Government of America, and insinuating that the Royal Grants thereof were void and fraudulent.

7 HISTORY OF THE STATE OF NEW JERSEY, *supra* note 324, at 467, 469-70. No definitive action, however, was taken by English authorities, or by the courts of New Jersey, and the matter was eventually mooted by the American Revolution.

acquired territory in the Ohio and Mississippi Valleys.<sup>328</sup> Central to this struggle for control of the trans-Appalachian west was the issue of native land rights. The shareholders of the combined Illinois and Wabash Land Company were not alone in contending that private individuals could directly acquire native lands. Puritan Roger Williams, Jesuit Thomas Copley, and Quaker Thomas Chalkley had insisted upon the primacy of Indian title. The Newark settlers, for perhaps more worldly reasons, also championed and relied upon Indian deeds.

It is evident that John Marshall's unyielding pronouncement in *Johnson v. McIntosh*, that Indian tribes are "incapable of transferring the absolute title to others,"<sup>329</sup> was by no means universally accepted prior to the Supreme Court's pivotal 1823 decision. Marshall's legal views were not shared by the Illinois and Piankeshaw Indians, the native grantors who in 1773 and 1775 sold most of their lands to the individuals comprising the Illinois and Wabash Land Companies. Nor should John Marshall's views on the diminished nature of Indian land rights be accepted today.

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<sup>328</sup> See generally THOMAS PERKINS ABERNATHY, WESTERN LANDS AND THE AMERICAN REVOLUTION (1959); SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES: THEIR INFLUENCE ON CORPORATE DEVELOPMENT (1968); ONUF, *supra* note 296.

<sup>329</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823).