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# The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand

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## The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand

*Blake A. Watson*<sup>†</sup>

The landmark decision in the United States regarding Indian land rights is *Johnson v. McIntosh*, an 1823 decision authored by Chief Justice John Marshall. The Supreme Court in *Johnson* unequivocally rejected the most favorable view of indigenous land rights—that the native inhabitants own the land they occupy and are free to retain or sell their property.<sup>1</sup> Yet the Court did not adopt the least favorable view of Indian land rights either—that the tribes of America are trespassers without ownership or possessory rights. Instead, Marshall endorsed an intermediate position. On one hand, he declared the Indian nations “to be the rightful *occupants* of the soil, with a legal as well as just claim to retain *possession* of it, and to use it according to their own discretion . . . .”<sup>2</sup> On the other hand, Marshall proclaimed that European discovery of America “gave exclusive *title* to those who made it,” and that 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>

*Johnson v. McIntosh* sets forth a “limited possessor” conception of indigenous land rights. Eleven years after *Johnson*, the United States Supreme Court appeared to adopt a “limited owner” theory of native land rights in *Worcester v. Georgia*. In *Worcester*, Marshall wrote that Indians do in fact own the lands they occupy but are not free to sell their lands to whomsoever they please because the discoverer holds a preemptive right to acquire their property rights.<sup>4</sup> Michael Blumm describes the native right as a “fee simple [that is] subject to the government’s right of preemption” or, alternatively, as a “fee simple with a partial restraint on

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

2. *Id.* (emphasis added).

3. *Id.* (emphasis added).

4. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832).

alienation.”<sup>5</sup> Either description is consistent with the limited owner conception of indigenous land rights.

Most commentators consider the limited owner theory presented in *Worcester* to be “the best presentation of Marshall’s matured views on property foundations and Indian title.”<sup>6</sup> Yet *Johnson* remains the leading decision on native property rights in the United States. In 1955, Justice Stanley Reed relied on the “great case of *Johnson v. McIntosh*” to hold that Indian title may be terminated by the United States “without any legally enforceable obligation to compensate the Indians.”<sup>7</sup> More recently, in *City of Sherrill v. Oneida Indian Nation*, the Supreme Court reaffirmed the limited possessor conception of indigenous land rights by stating that under the doctrine of discovery, “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.”<sup>8</sup>

The *Johnson* discovery rule has not only diminished native rights in the United States, but has also influenced the definition of indigenous land rights in Australia, Canada, and New Zealand. In 1836, British lawyer William Burge cited *Johnson v. McIntosh* in support of his conclusion that a private purchase of some 600,000 acres from the Australi-

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5. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 741 & n.183 (2004).

6. Joshua L. Seifert, Comment, *The Myth of Johnson v. McIntosh*, 52 UCLA L. REV. 289, 330 (2004). See also John Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, 17 REVUE JURIDIQUE THÉMIS 403, 430 (1982–83) (*Worcester* marked “the culmination of [Chief Justice Marshall’s] thinking on the rights and status of indigenous peoples within the United States.”). The historical and legal treatment of Indian land rights in the United States has been the subject of numerous books and articles. See, e.g., STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005); ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006); STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY* (2008); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978); Blumm, *supra* note 5; J. Youngblood Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977); Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000); Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of ‘Universal Recognition’ of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481 (2006).

7. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

8. *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (quoting *Oneida Indian Nation v. County of Oneida, N.Y.*, 414 U.S. 661, 667 (1974)).

an Aborigines was invalid as against the Crown.<sup>9</sup> British land speculators, settlers, and government officials quoted American jurists in disputes concerning the annexation of New Zealand in the 1840s, and *Johnson* figured prominently in the colony's first judicial decision regarding Māori property rights.<sup>10</sup> Likewise, when the existence and scope of aboriginal title was finally litigated in Canada in the 1880s, the *Johnson* decision played a major role.<sup>11</sup>

This Article describes the impact of the American doctrine of discovery on native land rights in the former British colonies of Australia, New Zealand, and Canada. Part I briefly describes *Johnson v. McIntosh* and *Worcester v. Georgia*. Parts II, III, and IV describe the influence of *Johnson* on initial formulations of indigenous land rights by British authorities in Australia, New Zealand, and Canada. Parts V, VI, and VII examine the current status of native land rights in the aforementioned countries. Part VIII concludes with a brief discussion of the U.N. Declaration on the Rights of Indigenous Peoples—a movement away from the doctrine of discovery and towards a reconceptualization of indigenous rights.

*Johnson v. McIntosh* influenced the lawyers and jurists who first addressed the issue of indigenous rights in Australia, New Zealand, and Canada. On one hand, foreign courts used *Johnson* to limit the land rights of the original occupants. On the other hand, *Johnson* has been cited to acknowledge that the Australian Aborigines, the Māori of New Zealand, and the First Nations of Canada possess certain property rights entitled to judicial protection. Although *Johnson* did not adopt the least favorable view of native land rights, the American doctrine of discovery nonetheless remains a justification for the diminishment of indigenous rights. As the world moves towards re-conceptualizing the rights of indigenous peoples, it is time to reject the American doctrine of discovery, wherever it is applied. By endorsing the U.N. Declaration on the Rights of Indigenous Peoples, the United States, Australia, New Zealand, and Canada would take a significant step in the right direction.

## I. THE AMERICAN DOCTRINE OF DISCOVERY

Although American jurisprudence has influenced the definition of native land rights in Australia, New Zealand, and Canada, it would be a mistake to assume that the indigenous inhabitants of those countries hold the same legal rights—and status—as Indians in the United States. The

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9. JAMES BONWICK, PORT PHILLIP SETTLEMENT 378 (1883).

10. See discussion *infra* Parts II, III.

11. See *infra* Part IV.

“original Indian title” of American Indians is unique insofar as it is held by tribal groups that have been accorded the status of “domestic dependent nations.”<sup>12</sup> As Kent McNeil has pointed out,

[O]nly the United States acknowledged the internal sovereignty of the Indigenous peoples—the Indian tribes or nations—living within its borders. Canada, Australia and New Zealand all relied on the British constitutional doctrines of unity of the Crown and parliamentary sovereignty to deny official acknowledgement of even the internal sovereignty of their Indigenous peoples.<sup>13</sup>

While the United States may have acknowledged the internal sovereignty of the American Indians, the Supreme Court, in *Johnson*, created a strict limitation on this sovereignty as it applied to native land rights.

*Johnson v. McIntosh* 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> The plaintiffs relied on a 1775 deed, pursuant to which eleven Piankeshaw tribal chiefs deeded two large tracts of land along the Wabash River to twenty men from Virginia, Maryland, Pennsylvania, Great Britain, and the Illinois Country.<sup>15</sup> In 1805, the Piankeshaw Tribe ceded the same land to the United States.<sup>16</sup> William McIntosh subsequently purchased several tracts from the federal government, thus setting up a conflict in title.<sup>17</sup>

The defendant McIntosh argued that the 1775 purchase was invalid because Indian tribes lack the legal capacity to sell land to private individuals.<sup>18</sup> As restated by Chief Justice Marshall, the dispute in *Johnson v. McIntosh* concerned “the power of Indians to give, and of private individuals to receive, a title, which can be sustained in the courts of this

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12. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 14 (1831).

13. Kent McNeil, *Judicial Treatment of Indigenous Land Rights in the Common Law World*, in *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* 257, 258 (Benjamin J. Richardson et al. eds., 2009) (footnote omitted).

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

15. *Id.* at 555–56. In similar fashion, seven chiefs of the Illinois confederacy conveyed two large tracts of land in 1773 to twenty-two individuals from Great Britain, Pennsylvania, and the Illinois Country. *Id.* at 550–51. Five of the grantees in the Piankeshaw (or Wabash) purchase were also subscribers to the Illinois purchase. The two groups subsequently formed the United Illinois and Wabash Land Company. See, e.g., LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* 10–14 (2005). The plaintiffs in *Johnson* were heirs of Thomas Johnson, the first governor of Maryland and one of the original grantees in the Wabash purchase. *Id.* at 47.

16. *Johnson*, 21 U.S. (8 Wheat.) at 560.

17. *Id.*

18. *Id.* at 567.

country.”<sup>19</sup> To resolve this dispute, Marshall set forth the American version of the doctrine of discovery and denied the right of Indians to convey legal title to the lands they occupy:

They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that *discovery gave exclusive title to those who made it*.<sup>20</sup>

Under the *Johnson* discovery rule, Indians possess a right of occupancy but are “deemed incapable of transferring the absolute title to others.”<sup>21</sup> The discovering nation gained ownership to all native lands and acquired the “exclusive right to extinguish the Indian title of occupancy.”<sup>22</sup> The indigenous inhabitants thus held limited possessor rights: their right of occupancy was subject to the discoverer’s dual rights of ownership and preemption.

John Marshall and the Supreme Court reexamined the discovery doctrine in *Worcester v. Georgia*.<sup>23</sup> In the 1832 decision, Marshall announced that the Cherokee Nation was “a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .”<sup>24</sup> In dicta, the Chief Justice also offered a divergent view of the doctrine of discovery. In *Johnson*, Marshall noted that the “*absolute ultimate title* has been considered as acquired by discovery, subject only to the Indian title of occupancy.”<sup>25</sup> In *Worcester*, the Chief Justice dropped the limited possessor view of Indian title in favor of a limited owner conception:

This principle . . . gave to the nation making the discovery . . . the sole right of acquiring the soil and of making settlements on it. . . . It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession . . . . *It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell*.<sup>26</sup>

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19. *Id.* at 572.

20. *Id.* at 574 (emphasis added).

21. *Id.* at 591.

22. *Id.* at 587.

23. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

24. *Id.* at 561.

25. *Johnson*, 21 U.S. (8 Wheat.) at 592.

26. *Worcester*, 31 U.S. (6 Pet.) at 544 (emphasis added).

In other words, Indians continue to “own” their lands but are no longer free to sell to whomsoever they please because discovery created an exclusive right to acquire the property rights of the Indians. This concept marks a shift away from the limited possessor view of Indian title, whereby the Indians do not own the lands they occupy. Under the limited possessor view, the United States (or one of the original colonies) owns the land and can either extinguish the Indian possessory rights or transfer ownership *subject to* the native right of possession. In *Worcester*, the Chief Justice sought to return the ownership of native lands to the Indians, subject to the government’s exclusive right of preemption.

Although *Worcester* seemingly rejected the *Johnson* discovery rule, the Supreme Court ultimately endorsed the doctrine of discovery as articulated in *Johnson v. McIntosh*.<sup>27</sup> It is the “celebrated case of *Johnson v. M’Intosh*” that is featured by Justice Joseph Story in his *Commentaries on the Constitution of the United States*<sup>28</sup> and by New York Chancellor James Kent in his *Commentaries on American Law*.<sup>29</sup> Likewise, when the issue of indigenous land rights surfaced in Australia, New Zealand, and Canada, it was *Johnson*’s formulation of the American doctrine of discovery that had the greatest impact.

## II. BATMAN AND AUSTRALIA

Just thirteen years after Marshall and the Supreme Court decided *Johnson v. McIntosh*, British lawyers relied upon Marshall’s opinion to conclude that a private purchase of land from the Australian Aborigines was unauthorized and void. In *Johnson*, the putative purchasers formed the United Illinois and Wabash Land Company and argued that an Indian tribe could transfer a valid, lawful title to a private grantee. In similar fashion, a group of land speculators, led by John Batman, decided in 1835 to acquire land in Australia directly from the local inhabitants. British officials, however, refused to sanction the purchase. Over time, Australia adopted the legal fiction of *terra nullius*—the most extreme form of the discovery doctrine, which maintains that indigenous occupants of a “discovered” country have no enforceable property rights.

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27. See, e.g., *United States v. Cook*, 86 U.S. (19 Wall.) 591, 593 (1873) (the authority of *Johnson* “has never been doubted”); ROBERTSON, *supra* note 15, at 138–44 (describing the Supreme Court’s restoration of the *Johnson* discovery rule following the *Worcester* decision). The chief reason that the *Johnson* rule prevailed is that the composition of the Supreme Court underwent significant change after the death of John Marshall in 1835. By 1838, seven of the nine justices had been nominated by either Andrew Jackson or Martin Van Buren. The reconfigured Court proceeded to ignore Marshall’s statements in *Worcester* regarding Indian land rights.

28. JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 8, at 8 (1st ed. 1833).

29. JAMES KENT, 3 COMMENTARIES ON AMERICAN LAW 379 (2d ed. 1832).

John Batman was born in New South Wales in 1801, the son of a cutler who had been sent to Australia for receiving stolen goods.<sup>30</sup> After relocating to Van Diemen's Land (Tasmania), he married a former convict, with whom he had seven daughters and a son. In 1833, Batman was afflicted with syphilis, a malady that, along with the prescribed cure of mercury, eventually disfigured and killed him.<sup>31</sup> As the leading member of the Port Phillip Association, Batman negotiated the largest private purchase of aboriginal land in the history of Australia. The Port Phillip Association thus followed in the footsteps of the United Illinois and Wabash Land Company, and its attempt to acquire a "good" title from the indigenous inhabitants met a similar fate.

In the early 1830s, John Batman and other inhabitants of Van Diemen's Land became interested in acquiring large tracts of land in Port Phillip Bay, a large, shallow body of water next to present-day Melbourne.<sup>32</sup> When efforts to obtain a government land grant were unsuccessful, Batman and fourteen other men formed a syndicate and resolved to purchase land directly from the Aborigines.<sup>33</sup> On the tenth of May, 1835, Batman led a small party across the Bass Strait and, according to his diary, completed the transaction with the Dutigalla-Aborigines on the sixth of June: "I purchased two large tracts of land from them—about 600,000 acres, more or less—and delivered over to them blankets, knives, looking-glasses, tomahawks, beads, scissors, flour, etc., as payment for the land, and also agreed to give them a tribute, or rent, yearly."<sup>34</sup>

The Aborigines most likely did not understand the "treaty," and some scholars suspect that their marks on the deeds were forged.<sup>35</sup> In any event, Batman was heralded as the "Tasmanian Penn"<sup>36</sup>—a comparison that failed to appreciate that the Crown had authorized William Penn to purchase land in Pennsylvania.<sup>37</sup> The Dutigalla purchase, in contrast,

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30. RONALD T. RIDLEY, *MELBOURNE'S MONUMENTS* 29 (1996).

31. *See, e.g.*, ALASTAIR H. CAMPBELL, *JOHN BATMAN AND THE ABORIGINES* 16, 114–15, 222 (1987); RIDLEY, *supra* note 30, at 29–31; PERCIVAL SERLE, 1 *DICTIONARY OF AUSTRALIAN BIOGRAPHY* 59 (1949).

32. JOHN C. WEAVER, *THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900*, at 138 (2003).

33. SERLE, *supra* note 31, at 59–60.

34. C. P. BILLOT, *JOHN BATMAN: THE STORY OF JOHN BATMAN AND THE FOUNDING OF MELBOURNE* 97 (1979).

35. BAIN ATTWOOD & HELEN DOYLE, *POSSESSION: BATMAN'S TREATY AND THE MATTER OF HISTORY* 50–51 (2009).

36. BILLOT, *supra* note 34, at 108.

37. William Penn founded the colony of Pennsylvania pursuant to a charter granted in 1681 by King Charles II of England. The Quaker proprietor is known for his fair dealings with the native inhabitants of his colony. In his famous letter to the Indians, however, Penn stated that Charles II "hath given unto me a great Province . . . ." WILLIAM PENN'S OWN ACCOUNT OF THE LENNI

lacked government sanction.<sup>38</sup> Consequently, in his report to Lieutenant Governor George Arthur, John Batman argued that the Aborigines were “the real owners of the soil.”<sup>39</sup> This view was not universally condemned—in 1837, a select committee of the British House of Commons would go so far as to suggest that “native inhabitants of any land have an incontrovertible right to their own soil.”<sup>40</sup> It was possible, therefore, that the Aborigines would be recognized as the owners of their occupied lands. The Port Phillip Association nevertheless sought royal confirmation as a cautionary measure and formally petitioned the Crown “to grant to us such rights as . . . the justice of the case requires.”<sup>41</sup>

Government officials were not persuaded by the petition. John Montagu, the Colonial Secretary of Van Diemen’s Land, informed Batman that “it would be contrary to British practice to recognize the treaty.”<sup>42</sup> Lieutenant Governor Arthur expressed his doubts that “a migratory savage tribe . . . could . . . confer upon the purchaser any right of possession which would be recognised in our courts of law.”<sup>43</sup> Most significantly, when Richard Bourke, the Governor of New South Wales, was informed of the transaction, he officially proclaimed that “every such treaty, bargain, and contract with the Aboriginal Natives . . . is void and of no effect against the rights of the Crown . . . .”<sup>44</sup>

In order to overcome such opposition, the Port Phillip Association resorted to the time-honored tradition of seeking opinions from eminent lawyers with expertise in colonial law. The agent for the Port Phillip Association, George Mercer, solicited the views of William Burge, Dr. Stephen Lushington, Thomas Pemberton, and Sir William Follett.<sup>45</sup> Un-

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LENAPE OR DELAWARE INDIANS 60 (Albert Cook Myers ed., 1970) (letter, dated Oct. 18, 1681) (emphasis added). Penn transacted with the Indians but relied on his royal charter as the basis for his title.

38. SERLE, *supra* note 31, at 59–60.

39. BILLOT, *supra* note 34, at 117 (report, dated June 25, 1835, from Batman to Lt. Governor George Arthur, on Van Diemen’s Land).

40. 2 REPORT OF THE SELECT COMMITTEE ON ABORIGINES (BRITISH SETTLEMENTS), 1837 Imperial Blue Book No. VII. 425, at 5 (facsimile reprint 1966).

41. BILLOT, *supra* note 34, at 120.

42. JAMES BONWICK, JOHN BATMAN: THE FOUNDER OF VICTORIA 37 n.4 (1867) (reprint 1973).

43. BONWICK, *supra* note 9, at 332 (letter, dated July 4, 1835, from Lt. Gov. Arthur to T. Spring Rice, Colonial Minister).

44. BILLOT, *supra* note 34, at 153–54 (proclamation, dated Aug. 26, 1835, of Governor Bourke).

45. William Burge served in Parliament and as Attorney General of Jamaica, and in 1838, he published his influential *Commentaries on Colonial and Foreign Laws*. Dr. Stephen Lushington was a member of Parliament, and in 1838, he became a Privy Councillor. Thomas Pemberton was viewed as “one of the leaders of the Chancery bar,” and William Follett had been Solicitor General in Sir Robert Peel’s recent administration. EDWARD SWEETMAN, THE UNSIGNED NEW ZEALAND TREATY

fortunately for John Batman and his partners, the four English lawyers concurred that a private purchase from the Aborigines is invalid without the consent of the Crown. In contrast to Lushington, Pemberton, and Follett, who provided little or no analysis, William Burge prepared a detailed legal opinion that refers to the Swiss legal scholar, Emer de Vattel, the William Penn purchase, the American colonial charters, and—most significantly—*Johnson v. McIntosh*.<sup>46</sup>

Burge's legal opinion, dated January 16, 1836, may be the first instance of someone outside the United States using *Johnson* to define (and diminish) indigenous land rights. According to Burge, it was an accepted principle of law "that the title which discovery conferred . . . was that of the ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the aborigines."<sup>47</sup> This principle, Burge observed, was championed by Vattel.<sup>48</sup> It was also endorsed by the United States Supreme Court:

The judgment of Chief-Justice Marshall in the case of *Johnson v. M'Intosh*, contains the elaborate opinion of the Supreme Court, that the Indian title was subordinate to the absolute ultimate title of the Government, and that the purchase made otherwise than with the authority of the Government was not valid.<sup>49</sup>

Burge concluded that, as a matter of law, "the Crown can legally oust the Association from their possession."<sup>50</sup> On behalf of his client, however, he recommended that the Crown confirm the purchase, given "the respectability of the parties engaged in it . . . and the equitable and judicious manner in which they conducted the intercourse with the native tribes . . . ."<sup>51</sup>

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116 (1939); EDWARD L. PIERCE, 1 MEMOIR AND LETTERS OF CHARLES SUMNER, 1811–1838, at 337 n.2 (1877).

46. See BONWICK, *supra* note 9, at 376–79 (opinion, dated Jan. 16, 1836, of William Burge); COMMONWEALTH OF AUSTL., 18 HISTORICAL RECORDS OF AUSTRALIA, SERIES 1: GOVERNORS' DESPATCHES TO AND FROM ENGLAND 389–90 (1923) (opinion, dated Jan. 18, 1836, of Dr. Lushington); SWEETMAN, *supra* note 45, at 120 (joint opinion, dated Jan. 21, 1836, of Pemberton and Follett). Emer de Vattel, who died in 1767, believed that the doctrine of discovery applied not only to uninhabited land but also to vast territories such as the New World. In his view, "[W]hen 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." E. DE VATTEL, 3 THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS, § 209, at 85 (Charles G. Fenwick trans., 1916) (1758).

47. BONWICK, *supra* note 9, at 376 (opinion, dated Jan. 16, 1836, of William Burge).

48. *Id.* at 376–77.

49. *Id.* at 378.

50. *Id.*

51. *Id.* at 378–79; see also CAMPBELL, *supra* note 31, at 174.

Not surprisingly, the Colonial Office viewed the matter differently. In a letter to Richard Bourke written in April of 1836, Colonial Secretary Lord Glenelg communicated his approval of the Governor's edict that private purchases of the lands of the Aborigines were void. According to Glenelg, "[W]e should consult very ill for the real welfare of that helpless and unfortunate Race by recognising in them any right to alienate to private adventurers the Land of the Colony."<sup>52</sup> Almost as an afterthought, he added that "such a concession would subvert the foundation on which all [p]roprietary rights in New South Wales at present rest . . . ."<sup>53</sup>

John Batman's health quickly declined in the last years of his life, during which he wore a bandage across his face to conceal his decaying nose.<sup>54</sup> Although the purchase by the Port Phillip Association was held to be invalid as against the Crown, the members of the Association participated in the first auction of lands in 1838.<sup>55</sup> After losing his Australian lands to the Crown, and his nose to syphilis, John Batman lost his life on May 6, 1839.<sup>56</sup> In 1837, Governor Bourke rejected a proposal to name the fledgling settlement "Batmania." The honor went instead to William Lamb, Second Viscount Melbourne, Prime Minister of the United Kingdom from 1835 to 1841.<sup>57</sup> Today, Melbourne is the capital of the State of Victoria and the second most populous city in Australia.

The case of John Batman and the Port Phillip Association provides a useful vantage point from which to view how possessory, ownership, and disposition rights in native lands can be aggregated or diffused, leading to differing conceptions of land rights. Four possible outcomes—three of which played into the Port Phillip Bay contest—are restated below to encompass not only Australian Aborigines and American Indians but also other indigenous peoples:

1. The indigenous inhabitants own the lands they occupy and also hold the right of possession. In addition, the indigenous inhabitants are free to sell or transfer their property rights to whomsoever they please. Preexisting indigenous property rights were unaffected by European "discovery."

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52. COMMONWEALTH OF AUSTL., *supra* note 46, at 379 (letter, dated Apr. 13, 1836, from Lord Glenelg to Governor Richard Bourke).

53. *Id.* On July 29, 1836, the government of New South Wales enacted an "Act to Restrain the unauthorized occupation of Crown Lands." BILLOT, *supra* note 34, at 193.

54. ROBYN ANNEAR, BEARBRASS: IMAGINING EARLY MELBOURNE 9 (1995).

55. RIDLEY, *supra* note 30, at 31.

56. SERLE, *supra* note 31, at 60. Tragedy also befell Batman's immediate family: his son drowned in 1845 and his wife was murdered in 1852. RIDLEY, *supra* note 30, at 31–32.

57. ATTWOOD & DOYLE, *supra* note 35, at 199–200; CAMPBELL, *supra* note 31, at 97.

2. The indigenous inhabitants continue to *own* the lands they occupy but, after discovery, cannot sell their lands to whomsoever they please. The discoverer holds a “right of preemption,” giving the discoverer the exclusive right to acquire the property rights of the indigenous inhabitants.
3. The indigenous inhabitants continue to *possess* the lands they occupy but, after discovery, no longer own the lands they occupy. The discoverer owns the land subject to the native title, i.e., the right of possession (or occupancy). The discoverer/owner can transfer ownership notwithstanding the native title. The discoverer/owner has the exclusive (preemptive) right to extinguish the native title. Once the native title is extinguished, the discoverer/owner of the lands also has the right of possession.
4. The indigenous inhabitants have no property rights. The discoverer owns the land *and* holds the possessory right. The indigenous inhabitants are trespassers (or perhaps “tenants at will”). When the discoverer/owner makes payments to the indigenous inhabitants it does so to expedite their removal, not to acquire property rights.

The “unaffected” conception of indigenous land rights was only half-heartedly urged by the Port Phillip Association, which asserted that the Aborigines were “in fact the owners of the soil” but nonetheless sought a grant of “such rights as the Crown may be advised that *it possesses* to the tracts of land in question . . . .”<sup>58</sup> William Burge, in support of his view that the purchase was invalid, relied in part on *Johnson v. McIntosh*, where the Supreme Court adopted the limited possessor view of post-discovery indigenous property rights. Burge did not discuss *Worcester v. Georgia*, where John Marshall opted instead for the limited owner conception. Governor Bourke and the Colonial Office did not accept either the limited possessor or the limited owner view of indigenous land rights. Instead, by invoking the doctrine of *terra nullius*, the British government subscribed to the position that the Aborigines *never* held proprietary title and that Great Britain—upon settlement of the continent in 1788—acquired the rights of ownership and possession. The *terra nullius* doctrine can be traced back to Governor Bourke’s 1835 proclamation, which declared private transactions with the Aborigines to be void as against the rights of the Crown. As noted by William Wallace,

Bourke articulated the legal principle of “*terra nullius*” or literally translated, “no earth.” The Proclamation created the legal fiction

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58. BILLOT, *supra* note 34, at 120 (report, dated June 25, 1835, from Batman to Lt. Governor George Arthur of Van Diemen’s Land) (emphasis added).

that no title in fee existed with any person prior to that date. The effect of this pronouncement was to create, where it had not existed in fact, an opportunity for the Crown to claim title in fee to all of Australia based upon the discovery doctrine.<sup>59</sup>

In 1889, Lord Watson of the Judicial Committee of the Privy Council further entrenched the *terra nullius* doctrine by describing New South Wales as “practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions.”<sup>60</sup> The Crown not only asserted sovereignty over Australia, but also claimed absolute ownership of all the land. The doctrine of *terra nullius*—the most extreme application of the doctrine of discovery—would remain a cornerstone of Australian law until 1992, when it was finally overturned.<sup>61</sup>

### III. SYMONDS SAYS: THE MÂORI HOLD A “MODIFIED TITLE” TO NEW ZEALAND

In contrast to the acceptance in Australia of the legal fiction of *terra nullius*, British officials and jurists in New Zealand acknowledged that the indigenous inhabitants possessed limited property rights. Consequently, the discovery doctrine as applied in New Zealand more closely conformed to the American doctrine of discovery set forth in *Johnson v. McIntosh*. Just as in America and Australia, private purchasers of Mâori lands argued that they received a valid title, whereas government officials declared such transactions null and void. In 1847, the New Zealand Supreme Court steered a middle course and recognized a “modified” title retained by the Mâori. *The Queen v Symonds* is the first decision outside the United States to cite to *Johnson*, and it is evident that John Marshall’s views were accorded great weight.

By the time British explorer James Cook charted the coastline in 1769, the islands of New Zealand had been inhabited for some six centuries.<sup>62</sup> The Mâori, the indigenous occupants of Aotearoa (Land of the

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59. William D. Wallace, *M’Intosh to Mabo: Sovereignty, Challenges to Sovereignty and Reassertion of Sovereign Interests*, 5 CHI.-KENT J. INT’L & COMP. L. Art. 5, 22 (2005), available at [http://www.kentlaw.edu/jicl/articles/spring2005/s2005\\_william\\_wallace.pdf](http://www.kentlaw.edu/jicl/articles/spring2005/s2005_william_wallace.pdf); see also FRANK G. CLARKE, *THE HISTORY OF AUSTRALIA* 49 (2002); SIMON YOUNG, *THE TROUBLE WITH TRADITION: NATIVE TITLE AND CULTURAL CHANGE* 13 (2008).

60. *Cooper v. Stuart*, (1889) 14 App. Cas. 286 (P.C.) 291 (appeal taken from Wales) (The “advice” given to the Crown by the Judicial Committee of the Privy Council has the status of a court judgment.); see also ATTWOOD & DOYLE, *supra* note 35, at 72 (“[T]he legal doctrine of *terra nullius* was not formulated until the closing decades of the nineteenth century.”).

61. CHRISTIAN W. McMILLEN, *MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY* 94–95 (2007); PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM* 254–55 (2005).

62. TOM BROOKING, *THE HISTORY OF NEW ZEALAND* 11 (2004).

Long White Cloud), are a Polynesian people who migrated south around 1180 A.D. in large, double-hulled canoes.<sup>63</sup> Great Britain was not the first European nation to come upon New Zealand: the Dutch Republic claimed that honor in 1642 when explorer Abel Tasman sailed alongside the islands.<sup>64</sup> His attempt to go ashore, however, was repulsed by the Māori, who retained exclusive control of their lands for the next 150 years.<sup>65</sup>

The British eventually based their claim to New Zealand in part on discovery and in part on a treaty of cession. On May 21, 1840, Captain William Hobson issued a proclamation claiming the South Island and the smaller Stewart Island as a consequence of their discovery by Cook in 1769.<sup>66</sup> At the same time, however, Hobson issued another proclamation, claiming the North Island by virtue of a cession of sovereignty from the Māori.<sup>67</sup> The second proclamation was due to the fact that, on February 6, 1840, certain Māori chiefs from the North Island signed the Treaty of Waitangi, which—according to its English version—ceded sovereignty to Great Britain and gave the Crown the exclusive right to purchase Māori land.<sup>68</sup>

Although whalers, traders, and missionaries had begun to interact with the Māori by the end of the eighteenth century, the European population of New Zealand as late as 1840 was quite small (perhaps two thousand) in comparison to the estimated ninety thousand Māori inhabitants. In 1832, the Colonial Office appointed James Busby as “British Resident” and instructed him to promote commerce and reduce tensions between the settlers and the Māori. To prevent France from declaring sovereignty over New Zealand,<sup>69</sup> Busby in 1835, encouraged thirty-five chiefs on the North Island to sign a “Declaration of the Independence of New Zealand,” a document that had been drafted by Busby and included a request that Great Britain serve as “Protector.”<sup>70</sup>

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63. *Id.* at 11–12; *see infra* Part VII.

64. ANNE SALMOND, *TWO WORLDS: FIRST MEETINGS BETWEEN MAORI AND EUROPEANS, 1642–1772*, at 63–84 (1992).

65. *Id.* at 75–84.

66. Robert J. Miller & Jacinta Ruru, *An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand*, 111 W. VA. L. REV. 849, 879 (2009).

67. *Id.* at 880.

68. *Id.*

69. *Id.* (noting that by 1839, “the French had a foothold in parts of the South Island”).

70. BROOKING, *supra* note 62, at 37; W. P. MORRELL, *BRITISH COLONIAL POLICY IN THE AGE OF PEEL AND RUSSELL* 103 (1930) (reprint 1966); GUY H. SCHOLEFIELD, *CAPTAIN WILLIAM HOBSON: FIRST GOVERNOR OF NEW ZEALAND* 61–62 (1934) [hereinafter SCHOLEFIELD, *CAPTAIN WILLIAM HOBSON*]; GUY H. SCHOLEFIELD, *THE PACIFIC: ITS PAST AND FUTURE AND THE POLICY OF THE GREAT POWERS FROM THE EIGHTEENTH CENTURY* 313 (1920) (full text of the Declaration).

At about this time, Edward Gibbon Wakefield formed the New Zealand Association.<sup>71</sup> The Association gave way in 1838 to the New Zealand Company, a joint-stock land company not unlike the Illinois and Wabash Land Company.<sup>72</sup> Beginning in May of 1839, the Company sent settlers to New Zealand with a promise that they would receive title to Company lands purchased from the Māori.<sup>73</sup> When the settlers arrived at Cook Strait in September, William Wakefield, Edward Gibbon Wakefield's younger brother, negotiated with local Māori chiefs to purchase large tracts of land.<sup>74</sup> He obtained deeds from the Ngati Toa and Te Ati Awa that purported to sell a considerable portion of New Zealand, including territory that did not belong to them.<sup>75</sup>

The private purchases of Māori land quickly became an enormous problem for the Crown. According to one estimate, by 1840, nine parties had laid claim to 56,654,000 acres.<sup>76</sup> Since the size of New Zealand was considered to be 56 million acres, a member of the House of Commons noted that the transactions had left "the Natives 654,000 acres less than nothing."<sup>77</sup> In 1839, the Colonial Office appointed Captain Hobson as British consul to New Zealand and instructed him to treat with the Māori for the recognition of British sovereignty over "the whole or any part of those islands which they may be willing to place under Her Majesty's dominion."<sup>78</sup> But because it was deemed "scarcely possible" to treat with the "wild savages in the Southern Islands," Hobson was also authorized to claim that portion of New Zealand "by right of Discovery."<sup>79</sup> The Colonial Office further instructed Hobson to inform British settlers in New Zealand "that Her Majesty will not acknowledge as valid any title to land which either has been, or shall be hereafter acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name and on her behalf."<sup>80</sup> The Māori signed the

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71. MORRELL, *supra* note 70, at 103.

72. *Id.* at 104.

73. *Id.* at 105.

74. *Id.* at 105–06.

75. HARRY C. EVISON, THE NGAI TAHU DEEDS: A WINDOW ON NEW ZEALAND HISTORY 39–40 (rev. ed. 2007).

76. A CORRECTED REPORT OF THE DEBATE IN THE HOUSE OF COMMONS ON THE 17TH, 18TH, AND 19TH OF JUNE ON THE STATE OF NEW ZEALAND AND THE CASE OF THE NEW ZEALAND COMPANY 84 (London: 1845) (remarks, on June 18, 1845, by Captain Rous, Member for Westminster).

77. *Id.*

78. MORRELL, *supra* note 70, at 105.

79. Miller & Ruru, *supra* note 66, at 880.

80. *Id.* See also SCHOLEFIELD, CAPTAIN WILLIAM HOBSON, *supra* note 70, at 75–76, 202–05; MORRELL, *supra* note 70, at 105 (instructions, dated Aug. 14, 1839, from Lord Normanby to Captain Hobson).

Treaty of Waitangi at the Bay of Islands on February 6, 1840, and Hobson issued his annexation proclamations on the twenty-first of May.<sup>81</sup>

New Zealand is situated more than twelve hundred miles from Australia and on the other side of the world from England. Consequently, as events unfolded in 1840, actions were taken in each location with imperfect knowledge of what was happening elsewhere. For instance, in January 1840, Governor George Gipps of New South Wales issued a proclamation, similar to the proclamation issued by Hobson, declaring that prior purchases of Māori land by British subjects would be deemed valid only if confirmed by the Crown and that all future unauthorized private purchases would be considered null and void.<sup>82</sup> The next month, Governor Gipps invited visiting Māori chiefs to sign a treaty similar to the Treaty of Waitangi.<sup>83</sup> The chiefs declined and instead went the next day to the office of Sydney lawyer William Charles Wentworth, where they proceeded to convey the South Island and most of the adjacent islands to five individuals.<sup>84</sup> The private purchase of approximately twenty million acres, which was contrary to Gipps's proclamation, was placed in further jeopardy in May when Gipps introduced a bill in the New South Wales legislature to invalidate unauthorized purchases of Māori land.<sup>85</sup>

Wentworth appeared before the Legislative Council and challenged the legality of the bill and Gipps's proclamation. He argued that private purchases made prior to the Treaty of Waitangi were valid and that Gipps's proclamation was issued without legal authority.<sup>86</sup> In response to the claim that the Māori lacked the capacity and authority to dispose of their lands, Wentworth noted that "the annals of America" contained "numerous instances of purchases made from the natives, sometimes by the Government and sometimes by individuals."<sup>87</sup> The government's self-proclaimed right of preemption, Wentworth further contended, was

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81. EIVSON, *supra* note 75, at 31–37; Mark Hickford, "Settling Some Very Important Principles of Colonial Law": Three "Forgotten" Cases of the 1840s, 35 VICTORIA U. OF WELLINGTON L. REV. 1, 9 (2003); Miller & Ruru, *supra* note 66, at 880–81; Peter Spiller, *Chapman J. and the Symonds Case*, 4 CANTERBURY L. REV. 257, 260 (1990).

82. EIVSON, *supra* note 75, at 31.

83. *Id.* at 44.

84. *Id.* The territory that was sold included lands previously purchased by William Wakefield from the Ngati Toa and Te Ati Awa. *Id.*; see also SWEETMAN, *supra* note 45, at 65.

85. The preamble to the proposed legislation stated that "no such individual or individuals can acquire a legal title to or permanent interest in, any such tracts or portions of land, by virtue of any gift, purchase, or conveyance, by or from the Chiefs or other individuals of such aboriginal tribes as aforesaid . . ." SWEETMAN, *supra* note 45, at 69.

86. *Id.* at 77–105.

87. *Id.* at 81 (remarks, on June 30, 1840, by William Charles Wentworth before the New South Wales Legislative Council). Governor Gipps conceded that "the early settlers of America did purchase land from the Indians" but argued that all such purchases were held to be invalid absent royal confirmation. *Id.* at 81–82.

the product of legislative enactment and, consequently, “until such a law is made and passed by this Council, the right of British subjects to buy land from the natives is as indisputable as the right of the natives to sell it to them.”<sup>88</sup>

Gipps replied eight days later, on July 9, 1840. He asserted that the Māori “have not the right of granting the soil to individuals because they themselves have not individual possession.”<sup>89</sup> What gives the right of disposition, Gipps argued, “is not independence, but civilisation,”<sup>90</sup> and when an uncivilized country is possessed by a civilized power, “the right of pre-emption of the soil belongs to that power; the titles of the native tribes are extinguished, and rest with the governing power.”<sup>91</sup> In support of his position, Gipps noted that “eminent” British lawyers had declared a similar transaction—the 1835 Port Phillip Association purchase—invalid without Crown consent.<sup>92</sup> Gipps also quoted passages from the *Commentaries* of Joseph Story and James Kent, and stressed that the subject at hand “was discussed at great length in the celebrated case of *Johnston v. McIntosh* [sic] . . . .”<sup>93</sup>

In his rebuttal, Wentworth described the right of preemption as an “arrogant claim,”<sup>94</sup> but had to concede Gipps’s main point: the United States Supreme Court had indeed held that, following European discovery, American Indians retained only a “qualified dominion or right of occupancy.”<sup>95</sup> Wentworth argued, however, that “in this enlightened age” the Legislative Council should reject the “principle of usurpation” that had diminished native land rights in the New World.<sup>96</sup> He also pointed out that Chief Justice Marshall expressed doubts, in *Worcester v. Georgia*, about applying the doctrine of discovery to inhabited lands.<sup>97</sup>

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88. *Id.* at 86 (remarks, on June 30, 1840, by William Charles Wentworth before the New South Wales Legislative Council); see also CLAUDIA ORANGE, *THE TREATY OF WAITANGI* 95 (1987) (Wentworth maintained that preemption “did not affect the actual rights of natives to their lands.”). Wentworth also argued that because the islands were “a country previously peopled,” the Crown could not claim New Zealand by virtue of discovery. SWEETMAN, *supra* note 45, at 97 (remarks, on July 1, 1840).

89. SWEETMAN, *supra* note 45, at 107 (remarks, on July 9, 1840, by Governor George Gipps before the New South Wales Legislative Council).

90. *Id.* at 128.

91. *Id.* at 108.

92. *Id.* at 116.

93. *Id.* at 109–11, 121–22.

94. *Id.* at 155.

95. *Id.* at 141.

96. *Id.* at 146.

97. *Id.* at 142. With regard to Gipps’s reliance on the legal opinions rendered against the Batman purchase, Wentworth attempted a more humorous rejoinder, suggesting that Dr. Lushington composed his views “after dinner, when the wine was in and the wit out.” *Id.* at 153.

Similar arguments appeared in New Zealand newspapers. The “old settlers” of New Zealand—who acquired their lands directly from the Māori—were naturally sympathetic to Wentworth’s arguments, although they distanced themselves from his involvement in the exorbitant purchase of the entire South Island.<sup>98</sup> On August 6, 1840, the editor of the *New Zealand Advertiser and Bay of Islands Gazette* exclaimed that “[d]iscovery may give one Nation a priority of claim to another, but it cannot establish an absolute claim, where there are aboriginal inhabitants.”<sup>99</sup> The *Gazette* took a different approach, arguing that the Crown admitted that the Māori possessed sovereign rights—including the power to alienate property—when government officials signed the Treaty of Waitangi.<sup>100</sup> On October 29, 1840, an individual using the pseudonym *Civis* published a letter in the *Advertiser*, arguing that quotations “from obsolete American writers” could not alter the fact that “our possessions have been acquired in a foreign country, at a time, too, when its independence was unequivocally recognised . . . .”<sup>101</sup> In another issue, *Civis* asserted (with undoubted self-interest) that “the rights of Native property . . . are as inviolable as the decrees of eternal truth.”<sup>102</sup>

Meanwhile, the meaning and relevance of *Johnson v. McIntosh*—and how it applied to the New Zealand context—was being discussed in England. In the summer of 1840, a select committee of the House of Commons investigated and reported on the state of affairs in New Zealand.<sup>103</sup> Edward Gibbons Wakefield testified that, if the Crown had claimed the entirety of New Zealand by right of discovery, it would have had “an absolute right of pre-emption to the land.”<sup>104</sup> The preemptive right of the European discoverer of new lands, Wakefield noted, was “a well-understood principle of law in America, where the subject has very

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98. See P.G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION 40–41 (2004); Miller & Ruru, *supra* note 66, at 883; N.Z. ADVERTISER AND BAY OF ISLANDS GAZETTE, Oct. 8, 1840; N.Z. ADVERTISER AND BAY OF ISLANDS GAZETTE, Oct. 29, 1840 (“We [do not] avow any connexion with the ‘Twenty Million Acre Wentworth,’ . . . but . . . we are determined to preserve our honestly acquired possessions to the last.”). The New Zealand newspaper articles are available on the web at <http://paperspast.natlib.govt.nz>.

99. N.Z. ADVERTISER AND BAY OF ISLANDS GAZETTE, Aug. 6, 1840.

100. N.Z. GAZETTE, Aug. 22, 1840. The *Advertiser* was published at Kororareka at the northern tip of the North Island, and the *Gazette* was published at Port Nicholson, the site of present-day Wellington.

101. N.Z. ADVERTISER AND BAY OF ISLANDS GAZETTE, Oct. 29, 1840.

102. N.Z. ADVERTISER AND BAY OF ISLANDS GAZETTE, Nov. 5, 1840; see also N.Z. GAZETTE, July 18, 1840 (“[T]he right of the New Zealanders to sell their land to whomsoever they please . . . will continue to exist, until put an end to by an act either of the imperial parliament or the provincial legislature of New South Wales.”).

103. SELECT COMMITTEE ON NEW ZEALAND, REPORT, 1841, H.C. (U.K.).

104. *Id.* at 48 (testimony, on July 16, 1840, of Edward Gibbon Wakefield).

often come before the courts . . . .”<sup>105</sup> To drive his point home, Wakefield returned the next day and presented the committee with the reported decision in the case of “Johnstone v. Mackintosh [sic].”<sup>106</sup>

Ultimately, in its report, the Committee stated that the United States Supreme Court had declared “as a principle of international law” that discovery gives title “as against all foreign powers,” as well as “the sole right to purchase the soil from the natives . . . .”<sup>107</sup> According to the Committee, when the British government acknowledged the independence of the Māori, it deviated from “the wisdom of this principle” and tacitly conceded the right of the natives to sell their lands to British subjects without Crown approval.<sup>108</sup> The Committee recommended that the Crown should claim “the exclusive right of pre-emption” over all lands that the Māori “may be disposed to alienate.”<sup>109</sup> This right of preemption had been previously granted in the English version of the Treaty of Waitangi.<sup>110</sup> Regardless, when Queen Victoria issued a royal charter in November 1840, New Zealand became a separate colony,<sup>111</sup> and in 1841 the New Zealand Legislative Council, following the Committee’s recommendation, enacted a Land Claims Ordinance that affirmed and codified the right of preemption.<sup>112</sup>

In the interval between Wakefield’s testimony and the issuance of the report of the select committee, the Colonial Office also examined the significance of *Johnson v. McIntosh*. The Colonial Secretary at this time was Lord John Russell, and his parliamentary under-secretary was Robert Vernon Smith. On July 28, 1840, the permanent under-secretary, James Stephen, prepared a legal memorandum for Smith that set forth

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105. *Id.*

106. *Id.* at 53 (testimony, on July 17, 1840, of Edward Gibbon Wakefield); *see also* MICHAEL BELGRAVE, HISTORICAL FRICTIONS: MAORI CLAIMS AND REINVENTED HISTORIES 67 (2005) (“Wakefield, appearing before a British House of Commons select committee, used the American precedent to argue for the application of pre-emption.”).

107. SELECT COMMITTEE ON NEW ZEALAND, *supra* note 103, at vii.

108. *Id.*

109. *Id.* at ix.

110. PETER SPILLER, JEREMY FINN & RICHARD BOAST, A NEW ZEALAND LEGAL HISTORY 290–92 (1995). The English and Māori versions of the Treaty of Waitangi are set forth in full. According to the English version, the Māori ceded “sovereignty” and granted the right of preemption in exchange for “full exclusive and undisturbed possession of their Lands and Estates . . . .” *Id.* at 290; *see also* Miller & Ruru, *supra* note 66, at 903. As explained by Siegfried Wiessner, however, the Māori version “characterizes the powers of the Crown as kawanatanga, signifying rights of government somewhat short of sovereignty, and calls the Māori’s retained rights rangatiratanga, the Native term for chiefs’ authority, i.e., their power to own, use and manage Māori lands and other resources according to Māori ways.” Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 70 (1999).

111. *See* Hickford, *supra* note 81, at 11.

112. *See The Queen v Symonds* (1847) NZPCC 387, 394; *see also* Evison, *supra* note 75, at 33.

Stephen's understanding of Marshall's decision.<sup>113</sup> Stephen noted that *Johnson v. McIntosh* held that a native grant "would confer on the grantee no valid Title in defiance of a Title derived under a grant from the United States."<sup>114</sup> Stephen did not agree with Marshall's opinion and argued that the *Johnson* rule should not constrain Māori property rights:

Such is American Law. The British Law in Canada is far more humane, for there the Crown purchases of the Indians *before* it grants to its own subjects.

Whatever may be the ground occupied by international jurists they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice, the most decorous veil which legal ingenuity can weave. . . . *Mr. Marshall, great as he was, was still an American and adjudicated against the rights of the Indians.*<sup>115</sup>

Stephen's reluctance to endorse *Johnson v. McIntosh* was not shared by all members of the House of Commons. In 1844, a new select committee recommended considering the ownership of unoccupied (or "waste") lands in New Zealand as vested in the Crown. The committee report stated that one of the "general principles" of colonial law is that "uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only . . . ."<sup>116</sup> The following year, Sir Howard

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113. The year "1839" is penciled at the top of the folio page in the Colonial Office records, causing most historians to assign the wrong year to Stephen's memorandum. Mark Hickford makes a compelling argument that the document was prepared in 1840. Hickford, *supra* note 81, at 16 n.70.

114. PAUL KNAPLUND, JAMES STEPHEN AND THE BRITISH COLONIAL SYSTEM, 1813–1847, at 89 (1953) (memorandum, dated July 28, 1840, from Stephen to Smith). Stephen joined the Colonial Office as an adviser in 1813 and became the permanent under-secretary in 1836.

115. *Id.* at 89–90 (emphasis added); *see also id.* at 90 ("[T]he decision of the Supreme Courts of the United States, though it may be very good American Law, is not the Law we recognize . . . ."); Hickford, *supra* note 81, at 4 ("[T]he jurisprudence of the United States Supreme Court on 'native title' was not as warmly endorsed amongst imperial policy-makers in London as some earlier legal-historical works might have implied.").

116. SELECT COMMITTEE ON NEW ZEALAND, REPORT FROM THE SELECT COMMITTEE ON NEW ZEALAND WITH THE MINUTES OF PROCEEDINGS, 1844, H.C. 556, at 3 (U.K.), *reprinted in* 2 BRITISH PARLIAMENTARY PAPERS: REPORT FROM THE SELECT COMMITTEE ON NEW ZEALAND TOGETHER WITH THE MINUTES OF EVIDENCE APPENDIX AND INDEX: COLONIES: NEW ZEALAND (Irish U. Press 1968). As noted by Micheal Belgrave, the New Zealand Company had initially argued that the Māori held an unqualified title to all of New Zealand (and thus could alienate property rights to the Company without Crown approval). In the early 1840s, however, the Company changed its views and contended that the Māori held *no* title to "waste" (unoccupied) lands. Enlisting Emmerich de Vattel in support of this position, the Company asserted that the Māori held rights only to cultivated lands and their villages. The 1844 select committee, Belgrave suggests, was a "stacked" committee that "listened with a ready ear to the company's new arguments." BELGRAVE, *supra* note 106, at 68–69. The committee chair, Earl Grey, became Colonial Secretary in 1846 and immediately instructed the Governor of New Zealand (George Grey) to claim all vacant land in New Zealand for

Douglas of Liverpool challenged the assertion during a debate in the House of Commons. Douglas argued that “this *new* fundamental principle of Colonial law” was based on “*certain adjudications*” that hold that the American Indians “have no other property to the soil . . . than that of mere occupancy; and that the complete title to their lands vests in the Government . . . .”<sup>117</sup> In his view, these “adjudications”—which certainly included *Johnson v. McIntosh*—were “totally inconsistent with a strict observance of the stipulations of the Treaty of Waitangi” and, if adopted, would “warrant a repetition of the worst atrocities of former times . . . .”<sup>118</sup>

While the House of Commons could not reach a consensus over the relevance and meaning of *Johnson v. McIntosh*, the case was endorsed in 1847 by the New Zealand Supreme Court in *The Queen v Symonds*.<sup>119</sup> The *Symonds* case was a feigned dispute designed to produce a judicial determination regarding indigenous land rights. In 1844, Robert Fitz-Roy, who had succeeded William Hobson as governor of New Zealand, issued two proclamations that purported to waive the Crown’s preemptive right to purchase Māori lands.<sup>120</sup> Pursuant to the second proclamation, individuals who obtained “waiver certificates” were authorized to purchase native land for a payment to the Crown of just one penny per acre.<sup>121</sup> Shortly thereafter, FitzRoy was replaced by Sir George Grey, who had been serving as the Governor of South Australia. Grey doubted the authority of FitzRoy to waive the right of preemption and questioned the validity of the resulting private purchases.<sup>122</sup> Consequently, a dispute was contrived to test the legality of the preemption “waiver” certificates. The former Secretary to the Land Commission, C. Hunter McIntosh, obtained a preemption certificate that enabled him to purchase a small tract of land from the Māori. Thereafter, Governor Grey deeded the same land by a Crown grant to his private secretary, Captain J.J. Symonds. With the Governor’s permission, C.H. McIntosh then used the name of

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the Crown. See generally PETER ADAMS, FATAL NECESSITY: BRITISH INTERVENTION IN NEW ZEALAND, 1830–1847, at 185–88 (1977).

117. A CORRECTED REPORT OF THE DEBATE IN THE HOUSE OF COMMONS ON THE 17TH, 18TH, AND 19TH OF JUNE ON THE STATE OF NEW ZEALAND AND THE CASE OF THE NEW ZEALAND COMPANY 124 (London: 1845) (emphasis added) (remarks by Sir Howard Douglas, delivered on June 18, 1845).

118. *Id.* Other members of Parliament endorsed the limited possessor conception of native land rights, including Charles Buller, who stated that “our law . . . recognises occupancy as the sole property which savages could possess.” *Id.* at 22.

119. *The Queen v Symonds* (1847) NZPCC 387.

120. Hickford, *supra* note 81, at 4.

121. *Id.* at 4–5.

122. *Id.* at 4; PAUL MCHUGH, THE MĀORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI 109 (1991).

the Queen to bring suit upon a writ of scire facias,<sup>123</sup> to set aside the grant.<sup>124</sup> Thus, whereas William McIntosh in *Johnson* relied on a patent deed, and challenged a prior purchase of native lands, C. Hunter McIntosh in *Symonds* was the prior purchaser of native lands who challenged a Crown grant.

Both members of the New Zealand Supreme Court, Justice Henry Samuel Chapman and Chief Justice William Martin, held that Governor FitzRoy's proclamations were unlawful, and Martin concurred with Chapman's statement that private purchases of Māori lands are "good as against the Native seller, but not against the Crown."<sup>125</sup> As Simon Young has noted, "[E]merging US principles played a central role in [Justice Chapman's] own reasoning, and [Chief Justice Martin] . . . quoted commentaries repeating the crucial passage from *Johnson v M'Intosh* which recognised the Native Americans' legal and just claim to retain possession of their lands . . ."<sup>126</sup> The *Symonds* decision thus "introduced the Marshall Court jurisprudence of the United States to imperial New Zealand . . ."<sup>127</sup>

The United States Supreme Court in *Johnson* could have simply held that the private purchases violated the Royal Proclamation of 1763, which prohibited British subjects from purchasing Indian lands west of the Allegheny Mountains without government approval.<sup>128</sup> Likewise, the

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123. Scire facias ("that you make known") has been defined as "a judicial writ founded upon some matter of record, and requiring the person against whom it is brought to *show cause* why the party bringing it should have the advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated." HENRY JAMES HOLTHOUSE & HENRY PENINGTON, *A NEW LAW DICTIONARY* 383 (1999) (1847).

124. The full title of the suit is *The Queen (On the Prosecution of C.H. McIntosh) v Symonds*. The land at issue was a small island near Auckland. See MCMILLEN, *supra* note 61, at 93 ("Like *Johnson*, *Symonds* involved no native people."); John William Tate, *Pre-Wi Parata: Early Native Title Cases In New Zealand*, 11 WAIKATO L. REV. 112, 139 n.60 (2003).

125. *Symonds*, (1847) NZPCC at 390. Henry Samuel Chapman was born in England but lived in Canada from 1823 to 1835, when he returned to England. He joined the legal profession in 1840, the same year he founded *The New Zealand Journal*. Chapman immigrated to New Zealand in 1843 and became a judge of the Supreme Court of New Zealand. Spiller, *supra* note 81, at 257; R. S. Neale, *Chapman, Henry Samuel (1803-1881)*, in 3 AUSTRALIAN DICTIONARY OF BIOGRAPHY, 1851-1890, at 380-82 (N. B. Nairn et al. eds., 1969). William Martin was born in England, educated at Cambridge, and called to the bar in 1836. He became the first Chief Justice of New Zealand in 1841. G. P. Barton, *Martin, William, 1807?-1880*, in 1 THE DICTIONARY OF NEW ZEALAND BIOGRAPHY, 1769-1869, at 277-79 (1990).

126. YOUNG, *supra* note 59, at 169 (footnotes omitted).

127. Hickford, *supra* note 81, at 2. Martin quoted Kent's *Commentaries on American Law*, which includes several passages from *Johnson v. McIntosh*. *Symonds*, (1847) NZPCC at 393-94. Chapman cited *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), referred to *Fletcher v. Peck*, 10 U.S. 87 (1810), and also cited James Kent's discussion of *Johnson* and the doctrine of discovery. *Symonds*, (1847) NZPCC at 388, 390, 392.

128. SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY, 1606-1775, at 267-72 (William MacDonald ed., 1914).

New Zealand Supreme Court could have resolved *Symonds* by holding that the purchase of Māori land violated the 1841 Land Claims Ordinance, which transformed the Crown's right of preemption into positive law.<sup>129</sup> Instead, Chapman and Martin followed the example set by Marshall and seized the opportunity to discuss the nature (and existence) of indigenous land rights. In light of the numerous land transactions with the Māori, and the promises exchanged in the Treaty of Waitangi, it was evident that the New Zealand Supreme Court would not invoke the *terra nullius* doctrine and hold that the Māori, like the Australian Aborigines, could not convey property rights because they lacked property rights.<sup>130</sup> On the other hand, Justice Chapman flatly rejected the unaffected conception of indigenous land rights, noting that the right of preemption—"though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects"—is nevertheless "incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee."<sup>131</sup> The Māori, following discovery, were *not* free to make any bargain or cession of lands whenever and to whomsoever they pleased.

Chapman wavered, however, between the limited possessor and limited owner conceptions of indigenous land rights. Without directly mentioning *Johnson v. McIntosh*, he acknowledged the former view that the discovering nation, as against its own subjects, has "the *full and absolute dominion* over the soil, as a necessary consequence of territorial jurisdiction."<sup>132</sup> On the other hand, Chapman described the Crown's ownership as "technical seisin" and stated that the Māori hold a "modified title" that "is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects."<sup>133</sup> After affirming Māori aboriginal title, Chapman did not further define the precise nature of the modified title of the natives:

Even abstaining from regarding the Queen's territorial right . . . as an actual seisin in fee . . . and regarding it in the view most favourable to the claimant's case, as . . . a mere possibility of seisin, I am of the opinion that it is not a fit subject to waiver either generally by

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129. The 1841 Land Claims Ordinance states that "all titles to land in the said Colony of New Zealand which are held or claimed by virtue of purchase . . . from the chiefs or other individuals . . . of the aboriginal tribes . . . which are not or may not hereafter be allowed by her Majesty . . . are . . . absolutely null and void." *Symonds*, (1847) NZPCC at 394.

130. EVISON, *supra* note 75, at 35 ("*terra nullius* was not applied to New Zealand").

131. *Symonds*, (1847) NZPCC at 391 (Chapman, J).

132. *Id.* at 387 (emphasis added).

133. *Id.* at 388, 391.

Proclamation, or specially by such a certificate as Mr. McIntosh holds.<sup>134</sup>

Aboriginal title was thus afforded judicial recognition in New Zealand only twenty-four years after *Johnson v. McIntosh*. There was no appeal of *Symonds* to the Judicial Committee of the Privy Council, yet the decision was added to a collection of New Zealand Privy Council Cases due to “its importance in New Zealand constitutional law.”<sup>135</sup> Although cognizant of the Treaty of Waitangi, the *Symonds* court “came to its decision not by interpreting the treaty but by referring to the general rights of aboriginal peoples in international law.”<sup>136</sup> Justice Chapman, in particular, was influenced by John Marshall’s “Indian” decisions: in his opinion he suggests at one point that the Māori are “under a species of guardianship,” and even echoes Marshall by acknowledging that the “rule laid down . . . may be apparently against what are called abstract or speculative rights.”<sup>137</sup> According to *Symonds*, the Māori of New Zealand retained their customary rights to use and occupy their lands, but their title was necessarily “modified” when Great Britain claimed sovereignty over the islands and acquired the preemptive right to extinguish the native title.<sup>138</sup>

#### IV. ABORIGINAL TITLE IN NINETEENTH-CENTURY CANADA: USUFRUCTUARY OR ILLUSORY?

The Royal Proclamation of 1763 required British subjects in North America to obtain the “special leave and licence” of the Crown in order to purchase native lands.<sup>139</sup> The Proclamation applied to native lands located west of the Appalachian Mountains, such as those of the Illinois and Piankeshaw tribes, and also to native lands in Canada both before

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134. *Id.* at 387–88, 392; see also Spiller, *supra* note 81, at 262 (discussing how Chapman did not decide whether the Crown held “an actual seisin in fee as against her European subjects” or a “mere possibility of seisin” prior to the extinction of the native title).

135. NEW ZEALAND PRIVY COUNCIL CASES, 1840–1932, at x (1938); see also Hamar Foster, *Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849–1927*, in 6 ESSAYS IN THE HISTORY OF CANADIAN LAW: BRITISH COLUMBIA AND THE YUKON 28, 38–39 (Hamar Foster & John McLaren eds., 1995).

136. BELGRAVE, *supra* note 106, at 70.

137. Compare *Symonds*, (1847) NZPCC at 388, 391, with *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831) (The Indians’ “relation to the United States resembles that of a ward to his guardian.”), and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (“We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.”).

138. McMILLEN, *supra* note 61, at 93; KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 190 (1989).

139. SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY, 1606–1775, at 267–72 (William MacDonald ed., 1914).

and after the American Revolution.<sup>140</sup> The geographic scope of the Proclamation in Canada, however, provoked debate, and its legal effect on native rights was controverted. Did the King, by his proclamation, grant rights or acknowledge preexisting rights? Is the Proclamation the source—or a source—of aboriginal land rights in Canada? In western Canada, government officials argued that British Columbia was not subject to the Proclamation and relied instead on the *terra nullius* doctrine to deny the existence of *any* native title.<sup>141</sup> In eastern Canada, the existence and scope of native property rights was addressed in the case of *St. Catherine's Milling & Lumber Co. v. The Queen*.<sup>142</sup> In *St. Catherine's Milling*, the judges pondered the meaning and relevance of both *Johnson v. McIntosh* and the 1763 Proclamation, and recognized an aboriginal land right that is “personal and usufructuary” in nature.<sup>143</sup> The result was two divergent views of the property rights of the First Nations of Canada.

Aboriginal land rights were denied in British Columbia in the nineteenth century. The Hudson Bay Company administered much of this part of British North America until the 1850s, when gold was discovered along the Fraser River.<sup>144</sup> The non-Indian population surged, and in August of 1858, the Crown created the colony of British Columbia.<sup>145</sup> The governor of the new colony, James Douglas, also served as governor of the colony of Vancouver Island.<sup>146</sup> Douglas came to western Canada in 1820 to work in the fur trade and soon thereafter married a woman with Cree Indian ancestry.<sup>147</sup> Between 1850 and 1854, he negotiated several treaties that acquired large portions of Vancouver territory from the native peoples.<sup>148</sup>

As governor of British Columbia, however, James Douglas stopped recognizing native land rights and instead instituted a policy whereby the

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140. *Id.*

141. FRANK JAMES TESTER & PETER KULCHYSKI, TAMMARNIT (MISTAKES): INUIT RELOCATION IN THE EASTERN ARCTIC, 1939–63, at 34 (1994).

142. The decisions of the Ontario Court of Chancery, Ontario Court of Appeal, Supreme Court of Canada, and Judicial Committee of the Privy Council in the *St. Catherine's Milling* litigation are collected in 4 CASES DECIDED ON THE BRITISH NORTH AMERICA ACT, 1867, IN THE PRIVY COUNCIL, THE SUPREME COURT OF CANADA AND THE PROVINCIAL COURTS 107–240 (John R. Cartwright ed., 1892) [hereinafter 4 CASES DECIDED ON THE BRITISH NORTH AMERICAN ACT, 1867].

143. *St. Catherine's Milling & Lumber Co. v. The Queen*, (1888) 14 App. Cas. 46 (P.C.) 54, 58 (appeal taken from Can.).

144. PAUL TENNANT, ABORIGINAL PEOPLES AND POLITICS: THE INDIAN LAND QUESTION IN BRITISH COLUMBIA, 1849–1989, at 17–25 (1991).

145. *Id.*

146. *Id.*

147. *Id.*

148. JOAN G. FAIRWEATHER, A COMMON HUNGER: LAND RIGHTS IN CANADA AND SOUTH AFRICA 46–47 (2006); DEREK PETHICK, JAMES DOUGLAS: SERVANT OF TWO EMPIRES 77–79 (1969).

Crown's lands were set aside as "reserves" for the indigenous inhabitants.<sup>149</sup> It is unlikely that local officials were aware that the United States Supreme Court had recognized Indian title, and there is no indication that Douglas felt constrained by the 1763 Proclamation.<sup>150</sup> For reasons that are not entirely clear, Douglas applied the *terra nullius* doctrine—the most extreme version of the doctrine of discovery—to British Columbia. As Stuart Banner points out, the land was deemed to be unowned by the native peoples and, "as in Australia, the government simply allocated the land to settlers without obtaining the consent of its previous occupants."<sup>151</sup>

In 1867, Canada was formed as a federal dominion pursuant to the British North America Act.<sup>152</sup> Four years later, British Columbia joined the federation as its sixth province.<sup>153</sup> Local officials, however, continued to deny the existence of aboriginal land rights. "British Columbia . . . appears to be treating its Indian subjects with great harshness," the Canadian Governor-General complained in 1874, and "does not recognize any obligation to extinguish the Indian title, before dealing with the Crown lands . . . ."<sup>154</sup> Three years later, the Governor-General restated his displeasure, noting that "the whites in British Columbia *have simply claimed the land as their own . . .*"<sup>155</sup> In 1886, the Chief Justice of the Supreme Court of British Columbia, Sir Matthew Baillie Begbie, held that Indians had no rights except as "the grace and intelligent benevolence of the Crown may allow."<sup>156</sup> The following year, when Nisga'a

149. TENNANT, *supra* note 144, at 29–30.

150. Foster, *supra* note 135, at 36; *see also* PETHICK, *supra* note 148, at 202–03; Wiessner, *supra* note 110, at 67. It is evident that British Columbia officials were aware that the native rights to land had not been extinguished by treaty or purchase. Sir Matthew Begbie, the judge of the colony of British Columbia, informed Governor Douglas in 1860 that, "the Indian Title is by no means extinguished. Separate provision must be made for it, and soon . . . ." DAVID R. WILLIAMS, " . . . THE MAN FOR A NEW COUNTRY": SIR MATTHEW BAILLIE BEGBIE 105 (1977) (letter, dated Apr. 30, 1860, from Begbie to Governor Douglas); *see also* David Ricardo Williams, *Sir Matthew Baillie Begbie*, in 12 DICTIONARY OF CANADIAN BIOGRAPHY, 1891 TO 1900, at 78 (1990) (Begbie "in old age . . . changed his mind on the subject.").

151. STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS, AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 195 (2007); *see also* CHRISTOPHER MCKEE, TREATY TALKS IN BRITISH COLUMBIA: NEGOTIATING A BENEFICIAL FUTURE 16 (1996); TENNANT, *supra* note 144, at 26–38.

152. FAIRWEATHER, *supra* note 148, at 1.

153. TENNANT, *supra* note 144, at 17.

154. DUFFERIN-CARNARVON CORRESPONDENCE, 1874–1878, at 112 (C. W. de Kiewiet & F. H. Underhill eds., 1955) (letter, dated Nov. 26, 1874, from Earl of Dufferin, Governor-General of Canada, to Earl of Carnarvon, Secretary of State for the Colonies); *see also id.* at 125 (letter, dated Dec. 21, 1874, from Dufferin to Carnarvon) (British Columbia residents "should be required to extinguish the Indian title before assuming possession of the lands . . . .").

155. *Id.* at 361 (letter, dated July 27, 1877, from Dufferin to Carnarvon) (emphasis added).

156. A.G. & I.B. Nash v. John Tait (4 Metlakatla Indians) (unpublished), Begbie Bench Books, Vol. 13, 28 Oct. 1886 (B.C. Archives and Records Service), *quoted in* Foster, *supra* note 135, at 66;

and Tsimshian chiefs met with the provincial Premier, William Smithe, Smithe declined to negotiate treaties that would recognize their rights to land and self-government.<sup>157</sup> Instead, he characterized the Indians prior to European contact as “little better than the wild beasts of the field” and declared that, as a consequence of discovery, the land “all belongs to the Queen.”<sup>158</sup> At a subsequent meeting with government officials, a Nisga’a chief retorted that the land “is ours to give to the Queen, and we don’t understand how she could have it to give to us.”<sup>159</sup>

In contrast to British Columbia, the *Johnson v. McIntosh* decision did have an impact on aboriginal land rights in eastern Canada. The leading nineteenth-century Canadian case on native title is *St. Catherine’s Milling & Lumber Co. v. The Queen*.<sup>160</sup> It is surprising that the issue was not litigated in Canada until the 1880s, some forty years after *Symonds* was decided in New Zealand and over sixty years after *Johnson* was handed down in the United States. It is not surprising, however, that when the Canadian courts and the Privy Council finally addressed the issue of Indian title, they gave no consideration to the views of the indigenous peoples of Canada. As in both *Johnson* and *Symonds*, *St. Catherine’s Milling* did not involve the putative tribal grantor.<sup>161</sup>

The dispute concerned an 1873 treaty between the Ojibway Indians and the Canadian (Dominion) government.<sup>162</sup> According to the Dominion, the Indians retained the right to hunt and fish but otherwise ceded their title to the land in the treaty, which thereafter enabled the Dominion to lease the land to the St. Catherine’s Milling and Lumber Company.<sup>163</sup> The Province of Ontario disagreed, arguing that it owned the land. According to the Province, the Ojibways only held a “usufructuary” right,<sup>164</sup>

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see also Foster, *supra* note 135, at 39 (“[B]y 1886 . . . Begbie was asserting that Indians had no right to the land before reserves were set aside . . .”).

157. TENNANT, *supra* note 144, at 57.

158. *Id.* at 58.

159. *Id.* at 61 (quoting a statement of a Nisga’a chief to a joint federal-provincial commission in October of 1887).

160. See 4 CASES DECIDED ON THE BRITISH NORTH AMERICA ACT, 1867, *supra* note 142, at 107–240.

161. McMILLEN, *supra* note 61, at 95 (“Like *Johnson* and *Symonds* before it, *St. Catherine’s Milling v. The Queen*, decided in 1888, did not directly involve any native people.”).

162. The British North America Act took effect on July 1, 1867, establishing the Dominion of Canada, which initially included the provinces of Nova Scotia, New Brunswick, Quebec, and Ontario. DAVID DEROCOCCO & JOHN F. CHABOT, FROM SEA TO SEA TO SEA: A NEWCOMER’S GUIDE TO CANADA 34 (2009).

163. Kent McNeil, *The Meaning of Aboriginal Title*, in ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR DIFFERENCE 142 (Michael Asch ed., 1997).

164. *Id.* In contrast, the Dominion government “argued that Aboriginal title amounted to a complete proprietary interest, limited only by a restriction on alienation other than by surrender to the Crown.” *Id.*

which allowed them to use the lands that were owned by the Province.<sup>165</sup> In the ensuing litigation, the lawyers and jurists on both sides argued that their view of indigenous land rights had been endorsed by the United States Supreme Court in *Johnson v. McIntosh*.<sup>166</sup>

The suit was brought in the Ontario Court of Chancery. Chancellor John Boyd agreed with the Province of Ontario that logging by the St. Catherine's Milling and Lumber Company would constitute a trespass. According to the Chancellor, Indians at the time of discovery were nomadic "heathens and barbarians" who lacked "any proprietary title to the soil . . ." <sup>167</sup> In support of this view, Boyd cited a 1675 legal opinion in which eminent English lawyers declared that the discovery of barbarian lands gave the discovering nation the "Right of Soyle & Governmt of place . . ." <sup>168</sup> Boyd then asserted that in *Johnson v. McIntosh*, Chief Justice Marshall "has concisely stated the same law of the mother country, which the United States inherited, and applied with such modifications as were necessitated by the change of government to their dealings with the Indians." <sup>169</sup>

The Ontario Court of Appeal (1886) and the Supreme Court of Canada (1887) agreed that the Province held legal title to the lands in question. In one of four opinions handed down by the Court of Appeal, Justice George Burton noted the "very interesting and instructive" discussion in *Johnson* of the relationship of "the Indian right of occupancy" to "the absolute title of the Crown." <sup>170</sup> Without mentioning *Worcester v.*

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165. MCHUGH, *supra* note 98, at 157.

166. Oliver Mowat, the Premier of Ontario as well as its attorney general, argued that *Johnson* had held that Indian title is only a moral claim and not a title that is recognized in law. See *St. Catherine's Milling & Lumber Co. v. R.* (1885), 10 O.R. 196, 199–201 (Can. Ont. Ct. Ch.); SIDNEY L. HARRING, *WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE* 132, 136 (1998). This interpretation of *Johnson*—which was similar to the position taken by Georgia politicians during the debate over the 1830 Indian Removal Act—was disputed by the attorney for St. Catherine's Milling and Lumber Company. See *St. Catherine's Milling*, 10 O.R. at 202.

167. *St. Catherine's Milling*, 10 O.R. at 206–09.

168. See *id.* In 1675, six prominent English lawyers were asked to render their legal opinion on "Wither the Grant from ye Indians be Sufficient to any planter without a Grant from ye King or his Assignes." The lawyers denied the validity of private purchases of Indians lands, arguing that "the Prince . . . who make ye Discovery hath ye Right of ye Soyle & Governmt of ye place & no people can plant there without ye Consent of ye Prince . . ." 13 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 487 (B. Fernow ed., 1881).

169. *St. Catherine's Milling*, 10 O.R. at 209. Chancellor Boyd quoted passages from *Johnson*, including the statement that "[a]ll our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right." *Id.* (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823)).

170. *St. Catherine's Milling & Lumber Co. v. The Queen* (1886), 13 O.A.R. 148, 160–61 (Can. Ont.) (Burton, J.) (quoting *Johnson*, 21 U.S. (8 Wheat.) at 588); see also Catherine Bell & Michael Asch, *Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation*, in *ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR*

*Georgia* by name, Burton acknowledged that other American decisions “would seem to place the so called Indian title on a higher footing” but argued that *Johnson* was better reasoned.<sup>171</sup> Justices Samuel Strong and Jean-Thomas Taschereau of the Supreme Court also cited *Johnson* with approval,<sup>172</sup> and Chief Justice William J. Ritchie quoted from Joseph Story’s discussion of the discovery doctrine in his *Commentaries on the Constitution of the United States*.<sup>173</sup> “I think the Crown owns the soil of all unpatented lands,” Ritchie held, “the Indians possessing only the right of occupancy, and the Crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase . . . .”<sup>174</sup>

The *St. Catherine’s Milling* dispute was appealed to the Judicial Committee of the Privy Council in London, which upheld the decision of the Supreme Court of Canada. On December 12, 1888, the Council affirmed the prior decisions and accepted Ontario’s contention that “before and after the treaty of 1873 the title to the lands in suit was in the Crown and not in the Indians.”<sup>175</sup> Lord Watson, on behalf of the Council, rejected the notion that the Ojibway had been “the owners in fee simple of the territory which they surrendered” and instead held that the Crown “has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.”<sup>176</sup> Rather than constituting an ownership right, “the tenure of the Indians was a *personal and usufructuary right*, dependent upon the good will of the Sovereign.”<sup>177</sup> As defined in Roman and civil law, a “usufruct” is the “right to use and enjoy the fruits of another’s property for a period without damaging or diminishing it . . . .”<sup>178</sup> In this regard, the Privy Council decision, as articulated by Lord Watson, defines Indian title in a manner consistent with the limited

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DIFFERENCE 47 (Michael Asch ed., 1997) (“[D]espite Marshall’s reasoning in *Worcester* and substantial academic commentary, Canadian courts still cite *Johnson v. McIntosh* to support the legal presumption of Crown sovereignty.”).

171. *St. Catherine’s Milling*, 13 O.A.R. at 148, 160–61.

172. *St. Catherine’s Milling & Lumber Co. v. The Queen* (1887), 13 S.C.R. 577, 610 (Can.) (Strong, J.); *id.* at 643 (Taschereau, J.); *see also* YOUNG, *supra* note 59, at 40 n.47 (“[Justice Strong] equated the Canadian doctrine of ‘Indian title’ with that formulated in the early US cases . . . .”).

173. *St. Catherine’s Milling*, 13 S.C.R. at 600 (Ritchie, C.J.) (quoting JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 6–7 (4th ed. 1873)).

174. *Id.* at 599–600.

175. *St. Catherine’s Milling & Lumber Co. v. The Queen*, (1888) 14 App. Cas. 46 (P.C.) 49 (appeal taken from Can.) (argument of the Province of Ontario as respondent).

176. *Id.* at 58. Lord William Watson was appointed Solicitor General for Scotland in 1874, Lord Advocate in 1876, Privy Councillor in 1878, and Ordinary Lord of Appeal in 1880.

177. *Id.* at 54 (emphasis added).

178. BLACK’S LAW DICTIONARY 1580 (8th ed. 2004).

possessor view of indigenous land rights set forth in *Johnson v. McIntosh*.<sup>179</sup>

With respect to the *source* of Indian title, however, Lord Watson parted ways with John Marshall and suggested it had been *granted* to the natives by the King in the 1763 Proclamation. “Their possession,” Watson observed, “can only be ascribed to the general provisions *made by the royal proclamation . . .*”<sup>180</sup> As noted by Kent McNeil, because “Lord Watson based his remarks respecting the nature of the Indians’ interest on the terms of the Royal Proclamation,” the Privy Council decision has “little bearing on the question of indigenous land rights in territories where the Proclamation has never applied.”<sup>181</sup> It was only in 1973 that the Supreme Court of Canada recognized aboriginal title as a legal right that was not dependent on the Royal Proclamation, but which instead was derived from historic occupation and possession of tribal lands.

#### V. CANADA TODAY: ABORIGINAL TITLE AS A COMMON LAW AND CONSTITUTIONAL RIGHT

William Smithe’s 1887 declaration that “the land all belongs to the Queen” did not dissuade the Nisga’a Nation from seeking vindication of its rights. In 1967, Frank Calder and other Nisga’a leaders sued for “a declaration that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancient tribal territory . . . has never been lawfully extinguished.”<sup>182</sup> In the 1973 decision of *Calder v. British Columbia (Attorney General)*, the Supreme Court of Canada declared that the indigenous inhabitants of Canada held an aboriginal title at the time the Crown acquired sovereignty.<sup>183</sup> Contrary to statements by Lord Watson in *St. Catherine’s Milling*, aboriginal title was *not* dependent upon the 1763 Proclamation; it rested instead—as noted by Justice Wilfred Judson—on the fact that “when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries.”<sup>184</sup> Whereas *St. Catherine’s Milling* is “the most sig-

179. FAIRWEATHER, *supra* note 148, at 61 (“Chief Justice Marshall’s . . . approach to aboriginal title was formally adopted by the Canadian government in 1880 on the approval of the British Privy Council in Westminster.”).

180. *St. Catherine’s Milling*, 14 App. Cas. at 49 (emphasis added).

181. MCNEIL, *supra* note 138, at 273–74; *see also* TENNANT, *supra* note 144, at 214; YOUNG, *supra* note 59, at 25 (“The reasoning in the *St. Catherine’s* decisions left some uncertainty as to whether the Aboriginal interest had a source beyond the imperial *Royal Proclamation of 1763 . . .*”).

182. *Calder v. British Columbia (Att’y Gen.)*, [1973] S.C.R. 313, ¶ 80 (Can.).

183. *Id.* ¶ 26.

184. *Id.*; *see also* Bell & Asch, *supra* note 170, at 48; MCHUGH, *supra* note 122, at 127. Although the Nisga’a Nation established the existence of aboriginal title, it did not prevail in the litiga-

nificant early Canadian case on the question of the legal status of aboriginal title," *Calder* is "[t]he foundation case on common law aboriginal title in Canada."<sup>185</sup>

The impact of *Johnson v. McIntosh* on the *Calder* case is evident. At various points in his opinion, Justice Emmett Hall described *Johnson* as "the outstanding judicial pronouncement on the subject of Indian rights," the case "most frequently quoted with approval dealing with the nature of aboriginal rights," and "the *locus classicus* of the principles governing aboriginal title."<sup>186</sup> Justice Hall summarized the "dominant and recurring proposition" of Marshall's opinion as follows:

[T]hat on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.<sup>187</sup>

Hall and the other justices in *Calder* also cited prior decisions, such as *Symonds* and *St. Catherine's Milling*, that likewise considered Marshall's views in *Johnson*.<sup>188</sup>

Like *Johnson*, the *Calder* decision recognized a preexisting aboriginal title but held that the "exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation."<sup>189</sup> In *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, however, Justice Patrick Mahoney of the Federal Court of Canada cited *Johnson* and other cases to expand on the subject of aboriginal title in Canada, holding that, in order to establish an aboriginal title "cognizable at common law," the indigenous peoples must prove that (1) their ancestors were members of an organized society; (2) the peoples occupied the specific territory over which they assert the aboriginal title; (3) the occupation was to the exclusion of other organized societies; and (4) the occupation was an established fact at the time sovereignty was asserted by

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tion. The British Columbia Supreme Court had held that any and all aboriginal land rights held by the Nation were extinguished when British Columbia became the sixth Canadian province in 1871. This judgment was upheld, for different reasons, by a majority of the Supreme Court of Canada. See FAIRWEATHER, *supra* note 148, at 98.

185. SHAUNNAGH DORSETT & LEE GODDEN, A GUIDE TO OVERSEAS PRECEDENTS OF RELEVANCE TO NATIVE TITLE 77 (1998).

186. *Calder*, [1973] S.C.R. ¶ 121.

187. *Id.* ¶ 124.

188. *Id.* ¶ 8 (Judson, J.), ¶ 117 (Hall, J.), ¶ 185 (Pigeon, J.).

189. *Id.* ¶ 96 (Hall, J.).

England.<sup>190</sup> Thus, although *Calder* did not identify the source of aboriginal title, Justice Mahoney in *Baker Lake* viewed aboriginal title as a common law right. Shortly thereafter, in 1982, the Canadian Constitution was amended to provide that “the existing Aboriginal and treaty rights of Canada’s Aboriginal peoples are . . . recognized and affirmed.”<sup>191</sup> In contrast to the United States, where Indian title may be terminated “without any legally enforceable obligation to compensate the Indians,”<sup>192</sup> equivalent indigenous land rights in Canada now enjoy constitutional protection.<sup>193</sup>

Although Canadian courts have endorsed *Johnson* and related decisions of the United States Supreme Court, the two countries have devel-

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190. *Hamlet of Baker Lake v. Minister of Indian Affairs & N. Dev.* (1979), 107 D.L.R. 3d 513, 542 (Can. Fed. Ct.).

191. Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.); *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 66 (2001).

192. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

193. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 954 (5th ed. 2005) (“Commentators agree that section 35 of the Canadian Constitution is a substantive guarantee of the aboriginal as well as treaty rights of the aboriginal peoples of Canada. Compare this constitutional protection of aboriginal rights with the United States’ approach to aboriginal rights as set out in the United States Supreme Court’s decision in *Tee-Hit-Ton Indians v. United States* . . .”). Despite *Baker Lake*’s recognition of aboriginal title as a common law right—and the subsequent constitutional amendment articulating this right—Canadian courts in subsequent decisions have continued to look to *Johnson v. McIntosh* for guidance in defining the nature and scope of aboriginal title. In *Guerin v. The Queen*, for example, Justice Robert Dickson noted that *Calder* was consistent with “the leading American cases” of *Johnson v. McIntosh* and *Worcester v. Georgia*. *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 377 (Can.); *see also* MCNEIL, *supra* note 138, at 287–88; YOUNG, *supra* note 59, at 40 n.48. The Canadian Supreme Court in *Guerin* endorsed *Johnson*’s limited possessor conception of indigenous land rights, holding that “Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown.” *Guerin*, [1984] 2 S.C.R. at 382. In addition, the Court reaffirmed that Indian title is a property right independent of the 1763 Proclamation and also held that a fiduciary relationship exists between the Crown and the Indians that “has its roots in the concept of aboriginal, native or Indian title.” *Id.* at 375, 378; *see also* TENNANT, *supra* note 144, at 222. Twelve years later in *Van der Peet v. The Queen*, the Canadian Supreme Court again cited *Johnson*, noting once more that “[t]he view of aboriginal rights as based in the prior occupation of North America by distinctive aboriginal societies, finds support in the early American decisions of [Chief Justice Marshall].” *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, ¶ 35 (Can.) (Lamer, C.J.). Speaking for the Court, Chief Justice Antonio Lamer acknowledged that Canadian aboriginal law “has developed in unique directions” but nevertheless approved of Professor Brian Slattery’s statements that the Marshall decisions provide “structure and coherence to an untidy and diffuse body of customary law based on official practice” and are “as relevant to Canada as they are to the United States.” *Id.* (quoting Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 739 (1987)). Most recently, in *Roberts v. The Queen*, the Canadian Supreme Court once more acknowledged *Johnson*’s influence on the historic *Calder* decision, which “recognized for the first time in the modern era that the Indian interest in their ancestral lands constituted a legal interest that predated European settlement.” *Wewaykum Indian Band v. Canada (Roberts v. The Queen)*, [2002] 4 S.C.R. 245, ¶ 75 (Binnie, J.).

oped different views of the rights of indigenous peoples to property and sovereignty. As noted by Kent McNeil, whereas American Indian tribes have “both residual sovereignty and land rights in the territories occupied by them, . . . the Canadian Supreme Court has determined that Aboriginal title is a property right arising from occupation of land that is separate from governance rights.”<sup>194</sup> McNeil observes, however, that some courts in Canada have “acknowledged that Aboriginal nations have decision-making authority over their collectively held lands . . . .”<sup>195</sup> It appears, therefore, that Canada is moving cautiously towards the American model where aboriginal land rights and native sovereignty are treated as related issues.

#### VI. NEW ZEALAND TODAY: “THE CROWN HAS NO PROPERTY RIGHT IN CUSTOMARY LAND”

The New Zealand Supreme Court, in *Symonds v The Queen*, held that the Māori retained “modified” rights to use and occupy their lands after the Crown acquired sovereignty and the right of preemption.<sup>196</sup> Subsequent legislation and judicial pronouncements, however, were less respectful of indigenous land rights. In *Wi Parata v Bishop of Wellington*, Chief Justice James Prendergast declared that the Māori had “no regular system of territorial rights nor any definite ideas of property in land” and characterized the cession of sovereignty in the Treaty of Waitangi as “a simple nullity.”<sup>197</sup> It was not until the New Zealand Supreme Court’s 1986 decision in *Te Weehi v Regional Fisheries Officer* that New Zealand unequivocally rejected *Wi Parata* and returned to the views expressed in *Symonds*.

A comprehensive study of New Zealand indigenous land policy is beyond the scope of this Article. A brief survey, however, shows that the legislative and judicial response to the Māori in the nineteenth century was not unlike what was taking place in the United States during the same time period. In the last half of the nineteenth century, the United States ended treaty making with Indians and enacted the General Allotment Act, which was designed to transfer communally owned tribal lands to individual Indians who, by virtue of their land ownership, would be assimilated into the mainstream society.<sup>198</sup> Indian reservations were reduced in size, and by 1934, approximately two-thirds of native lands in

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194. Kent McNeil, *supra* note 13, at 282.

195. *Id.*

196. *The Queen v Symonds* (1847) NZPCC 387, 390 (N.Z.).

197. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (N.S.) 72 (SC) 77–78 (N.Z.).

198. Treaty-making ended pursuant to the Act of March 3, 1871, 16 Stat. 544 (1871). The General Allotment Act, 24 Stat. 388 (1887), was passed on February 8, 1887.

the United States were converted to non-Indian ownership.<sup>199</sup> In comparison, by characterizing uncultivated lands as “waste lands of the Crown,” the amount of New Zealand subject to native title was significantly reduced, and by the late 1850s, the Crown had clear title to nearly all of the South Island and most of the lower part of the North Island.<sup>200</sup> In 1862 and 1865, the legislature enacted statutes that waived preemption and established a process whereby Māori lands were converted to individually held lands.<sup>201</sup> The result was “a disastrous free-for-all” and the sale of large amounts of land to the Pākehā (New Zealanders of European ancestry).<sup>202</sup>

During this same period, the United States Supreme Court asserted plenary control over Indian affairs in *United States v. Kagama* and *Lone Wolf v. Hitchcock*.<sup>203</sup> These decisions denigrate and dismiss indigenous sovereignty and thus serve as counterparts to Chief Justice Prendergast’s 1877 decision in *Wi Parata*.<sup>204</sup> Wi Parata, a noted Māori politician, sued the Bishop of Wellington over land that had been offered to the Church in exchange for a school that was never built.<sup>205</sup> Despite its failure to fulfill the agreement, the Church obtained a Crown grant without the knowledge or consent of the Ngati Toa tribe.<sup>206</sup> Wi Parata argued that the native title had not been extinguished in a proper manner, as required by the Treaty of Waitangi.<sup>207</sup>

Despite the undisputed failure to comply with the Treaty, the Court upheld the grant. In contrast to the “modified” rights language it espoused in *Symonds*, the New Zealand Supreme Court, in *Wi Parata*, held that “the supreme executive Government must acquit itself, as best it may, of its obligations to respect native proprietary rights, and of neces-

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199. GETCHES ET AL., *supra* note 193, at 171.

200. Miller & Ruru, *supra* note 66, at 886 (quoting Australian Colonies Waste Lands Act, 1842, 5 & 6 Victoria, c. 36 (U. K.)).

201. *Id.* at 886–87, 903.

202. SPILLER ET AL., *supra* note 110, at 139–41, 148–49.

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

204. The Supreme Court in *Kagama* eschewed reliance on the Constitution and upheld the 1885 Major Crimes Act, which granted jurisdiction to federal courts over certain crimes committed by Indians in Indian country, on the basis of a self-proclaimed federal “plenary” authority over internal tribal affairs. *Kagama*, 118 U.S. at 383–84. The Court in *Lone Wolf* sustained legislation that abrogated an Indian treaty, holding that “as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.” *Lone Wolf*, 187 U.S. at 568.

205. Miller & Ruru, *supra* note 66, at 889.

206. *Id.* at 888–89, 903.

207. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (N.S.) 72 (SC) (N.Z.).

sity must be the sole arbiter of its own justice.”<sup>208</sup> Chief Justice Prendergast then erroneously cited *Johnson v. McIntosh* in support of his view that “there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land.”<sup>209</sup> The most infamous statement in *Wi Parata*, however, was Prendergast’s assertion that because “no body politic” existed in New Zealand in 1840, the part of the Treaty of Waitangi that purported to cede Māori sovereignty “must be regarded as a simple nullity.”<sup>210</sup> With respect to “the proprietary rights of the natives,” Prendergast declared that “the so-called treaty merely affirms the rights and obligations which, *jure gentium* [by the law of nations], vested in and devolved upon the Crown under the circumstances of the case.”<sup>211</sup> With respect to the proprietary rights of the Crown, the Chief Justice again relied on the law of nations: “[T]he title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages.”<sup>212</sup> In the words of Paul McHugh, *Wi Parata* “went beyond Marshall’s doctrine of a subsisting but limited tribal sovereignty to a denial of any original sovereignty whatsoever.”<sup>213</sup>

Relying on both the principle of customary law and the Treaty of Waitangi, the Privy Council rejected *Wi Parata* on two separate occasions. In *Nireaha Tamaki v Baker*, the Council took issue with Prendergast’s opinion, observing that it was “rather late in the day” to contend that “there is no customary law of the Maoris of which the Courts of law can take cognizance.”<sup>214</sup> In support of its rejection of *Wi Parata*, the Council cited both *Symonds* and *Johnson* and noted that the decisions of John Marshall “are entitled to the greatest respect although not binding

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208. *Compare Wi Parata*, 3 NZ Jur (N.S.) at 78 (Prendergast, CJ), with *Lone Wolf*, 187 U.S. at 565 (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”).

209. *Wi Parata*, 3 NZ Jur (N.S.) at 77 (Prendergast, CJ). Marshall’s *Johnson* opinion was also cited by Prendergast to support the fact that the Crown in North America followed the practice of making “grants of territory whilst the Indian title was still unextinguished.” *Id.* at 80.

210. *Id.* at 78.

211. *Id.*

212. *Id.* In view of his remarks, it is evident that Chief Justice Prendergast disagreed not only with the reasoning of *Symonds*, but also with a more recent case, *In re ‘The Landon and Whitaker Claim’s Act, 1871’* (1872), decided by the New Zealand Court of Appeal. In the latter case, the court held that the Crown was bound “both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right.” *In re ‘The Landon and Whitaker Claim’s Act, 1871’* (1872) 2 NZCA 41, 49 (N.Z.) (Arney, CJ).

213. MCHUGH, *supra* note 98, at 171.

214. *Nireaha Tamaki v Baker* (1901) NZPCC 371, 382 (N.Z.) (Lord Davey).

on a British Court.”<sup>215</sup> Soon thereafter, in *Wallis v Solicitor General for New Zealand*, the Privy Council restated that the Treaty of Waitangi gave the Crown the right of preemption but otherwise guaranteed the Māori “the exclusive and undisturbed possession of their lands so long as they desired to possess them.”<sup>216</sup> The two decisions prompted a “Protest of Bench and Bar”—the only recorded instance of New Zealand judges publicly criticizing the Privy Council.<sup>217</sup> According to Chief Justice Robert Stout, the “root of title” was in the Crown and therefore “the Court could not recognize Native title.”<sup>218</sup> Remarkably, Stout cited *Symonds* as well as *Wi Parata* in support of his position.<sup>219</sup>

The Privy Council cases notwithstanding, the status of both the Treaty of Waitangi and Māori land rights remained uncertain throughout much of the twentieth century.<sup>220</sup> Starting in the 1970s, however, the legislature and the judiciary took steps to clarify the meaning of the Treaty and the extent of Māori customary rights. In 1975, New Zealand enacted the Treaty of Waitangi Act, which empowered a tribunal to investigate *future* government actions that were contrary to the “principles” of the 1840 Treaty.<sup>221</sup> Eleven years later, in *Te Weehi*, the High Court of New Zealand (Christchurch) held that a Māori charged with possessing undersized paua (sea snails) was lawfully exercising a customary fishing right.<sup>222</sup> In 1994, the New Zealand Court of Appeal, in *Te Runanganui o Te Ika Whenua Inc. Society v Attorney-General*, described the “nature and incidents of aboriginal title” as fact-based and variable: at one extreme they may approach “the full rights of proprietorship of an estate in fee recognised at common law,” and at the other extreme “they may be

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215. *Id.* at 384; see also MCHUGH, *supra* note 122, at 118 (“In *Nireaha Tamaki v Baker* the Board indicated that the title of the Māori tribes to the traditional lands was recognized both by statute and the common law.”).

216. *Wallis v. Solicitor Gen. for N.Z.*, [1903] A.C. 173 (P.C.) 179 (appeal taken from N.Z.) (Lord Macnaghten); see also SPILLER ET AL., *supra* note 110, at 160 (In *Nireaha Tamaki* and *Wallis*, “the Judicial Committee had found that aboriginal title was not inconsistent with the Crown’s radical title, nor did it exist only at the Crown’s sufferance.”).

217. *Wallis & Others v Solicitor Gen., Protest of Bench and Bar* (1903) NZPCC 730, 732 (N.Z.) (Stout, CJ).

218. *Id.*; see also EIVSON, *supra* note 75, at 34.

219. *Wallis & Others*, (1903) NZPCC at 732.

220. In *Tamihana Korokai v The Solicitor-General*, (1912) NZLR 32 CA 321, 354–55, the New Zealand Court of Appeal held that native title had been recognized by statute. In *Hoani Te Heuheu Tukino v Aotea Dist. Maori Land Bd.*, [1941] A.C. 308 (P.C.) 324–25 (appeal taken from N.Z.), the Privy Council stated that the Treaty of Waitangi was a valid treaty of cession but lacked enforceable status in municipal law until recognized by statute. *Id.* at 325.

221. SPILLER ET AL., *supra* note 110, at 170; see also David V. Williams, *Te Tiriti o Waitangi—Unique Relationship Between Crown and Tangata Whenua?*, in WAITANGI: MĀORI AND PĀKEHĀ PERSPECTIVES OF THE TREATY OF WAITANGI 77 (I. H. Kawharu ed., 1989); Wiessner, *supra* note 110, at 84.

222. *Te Weehi v Reg’l Fisheries Officer* [1986] 1 NZLR 680 (HC) (Williamson, J).

treated as at best a mere permissive and apparently arbitrarily revocable occupancy.”<sup>223</sup>

Although *Johnson v. McIntosh* was not mentioned in either *Te Weehi* or *Te Runanganui*, the Court of Appeal in *Attorney-General v Ngati Apa* did refer to *Johnson* in its discussion of whether customary Māori title extended to the foreshore and seabed; that is, lands that were either temporarily or permanently under saltwater. Judges Noel Anderson and Sir Kenneth Keith noted that *Johnson* recognized existing native rights, which were characterized as a “right of occupancy” and which remained a burden on title until extinguished.<sup>224</sup> Judge Dame Sian Elias cited *Johnson* for the proposition that native rights are “rights at common law, not simply moral claims against the Crown.”<sup>225</sup> The opinion of Judge Elias also contains statements that reaffirm Māori land rights in strong and unequivocal terms:

The radical title of the Crown is a technical and notional concept. It is not inconsistent with common law recognition of native property . . . . Māori customary land is a residual category of property, defined by custom. Crown land, by contrast, is defined as land which is not customary land and which has not been alienated from the Crown for an estate in fee simple. *The Crown has no property interest in customary land and is not the source of title to it.*<sup>226</sup>

*Ngati Apa* not only disposed of *Wi Parata*, but also was a victory for proponents of native title insofar as the Court of Appeal held that the Māori Land Court had jurisdiction to address customary claims to foreshore and seabed. The New Zealand government subsequently announced, however, that it would assert Crown ownership and accomplished the task in the Foreshore and Seabed Act of 2004.<sup>227</sup> The Māori brought the issue before the United Nations’ Committee on Elimination of Racial Discrimination, which concluded that the legislation discriminates against the Māori, “particular[ly] in its extinguishment of the possibility of establishing Māori customary titles over the foreshore and

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223. *Te Runanganui o Te Ika Whenua Inc. Soc’y v Attorney-General* [1994] 2 NZLR 20, 24 (CA); see also Miller & Ruru, *supra* note 66, at 892–93. The Court of Appeal employed a “frozen rights” approach and held that the Māori could not claim the value of hydroelectric generation because such use of rivers was not contemplated in 1840.

224. *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, ¶ 136 (CA) (Anderson & Sir Keith, JJ).

225. *Id.* ¶ 19. Judge Elias quoted *Amodu Tijani v. Secretary, Southern Nigeria*, a 1921 Privy Council decision in which Lord Haldane states that native title rights may “be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference.” *Id.* ¶ 31 (quoting *Amodu Tijani v. Sec’y, S. Nigeria*, [1921] 2 A.C. 399 (P.C.) 410 (appeal taken from Nigeria.) (Lord Haldane)).

226. *Id.* ¶¶ 13, 22, 30, 47 (emphasis added).

227. Miller & Ruru, *supra* note 66, at 895–96.

seabed . . . .”<sup>228</sup> The U.N. Committee also stated the legislation was contrary to New Zealand’s obligations under articles 5 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>229</sup> The U.N. Committee, unfortunately, lacks the authority to mandate a repeal of the Foreshore and Seabed Act.<sup>230</sup>

#### VII. AUSTRALIA TODAY: *TERRA NULLIUS* NO MORE

Because the continent was sparsely populated, because the natives did not cultivate the land in a manner similar to Europeans, and because it was convenient, the Crown considered Australia to be *terra nullius*—the land of no one. The doctrine endured as a legal fiction for over 150 years, yet its longevity did not lead to acquiescence. In 1964, an Aborigine named Joyce Mercy stepped forward at a National Aboriginal Rally in Sydney and informed the crowd that “Australia is the only country in the world which does not recognize that its Indigenous people have a right to land.”<sup>231</sup> The *terra nullius* principle was challenged—unsuccessfully—in 1971 in the Supreme Court of the Northern Territory<sup>232</sup> and again in 1979 before the High Court of Australia.<sup>233</sup> Due to the persistence of Eddie Koiki Mabo and other like-minded advocates, the High Court revisited the issue in *Mabo v Queensland (No. 2)*.<sup>234</sup> On June 3, 1992, the High Court held that “the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands . . . .”<sup>235</sup> In other words, Australia is *terra nullius* no more.

In order to place *Mabo (No. 2)* in proper context, it is necessary to briefly discuss prior efforts to dismantle the *terra nullius* doctrine. In 1971, Justice Richard Blackburn of the Supreme Court of the Northern Territory held that “[t]he doctrine of communal native title contended for by the natives did not form, and never had formed, part of the law of any

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228. Comm. On the Elimination of Racial Discrimination Decision 66/1, N.Z. Foreshore and Seabed Act 2004, 66th Sess., Feb. 21–Mar. 11, 2005, U.N. Doc. CERD/C/DEC/NZL/1 (April 27, 2005), available at <http://www.unhcr.org/refworld/docid/42de62ef4.html>.

229. *Id.*; see also Miller & Ruru, *supra* note 66, at 895–97.

230. See RUSSELL, *supra* note 61, at 145.

231. *Id.* at 151; see also BANNER, *supra* note 151, at 318; M.P.K. Sorrenson, *Treaties in British Colonial Policy: Precedents for Waitangi*, in SOVEREIGNTY & INDIGENOUS RIGHTS: THE TREATY OF WAITANGI IN INTERNATIONAL CONTEXTS 27 (William Renwick ed., 1991).

232. *Milirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141 (Austl.).

233. *Coe v Commonwealth* (1979) 53 ALJR 403 (Austl.).

234. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 15 (Austl.) (Mason, CJ & McHugh, J).

235. *Id.* The story of Eddie Koiki Mabo and the struggle to overturn the *terra nullius* doctrine is told in RUSSELL, *supra* note 61.

part of Australia.”<sup>236</sup> Blackburn was bound by prior precedent—“I *must* hold that these claims are not in the nature of proprietary interests”<sup>237</sup>—but nevertheless considered the issue in some detail. Prominent in his discussion of the doctrine of discovery are several references to *Johnson v. McIntosh*.<sup>238</sup> Marshall’s statements, Blackburn concluded, “do not affirm the principle that the Indian ‘right of occupancy’ was an interest which could be set up against the sovereign, or against a grantee of the sovereign, in the same manner as an interest arising under the ordinary law of real property.”<sup>239</sup> Blackburn further observed, following his discussion of *Tee-Hit-Ton Indians v. United States*, that “[i]f the doctrine of communal native title ever existed in the United States, it does no longer.”<sup>240</sup>

Although initially unsuccessful, litigation challenging the doctrine of *terra nullius* continued. In 1978, the Aboriginal lawyer Paul Coe filed suit on behalf of the entire Aboriginal community, alleging that British officials “wrongfully treated the continent now known as Australia as *terra nullius* whereas it was occupied by the sovereign aboriginal nation . . . .”<sup>241</sup> The High Court affirmed the dismissal of Coe’s motion to amend his statement of claim, holding that direct challenges to the validity of the Crown’s claim of sovereignty and sovereign possession were “not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged.”<sup>242</sup> The *Coe* litigation, however, drew attention to the injustice of the *terra nullius* doctrine. Advocates for Aboriginal rights gained another small victory in *Gerhardy v Brown*, when High Court Justice William Deane offered the following critical observation:

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236. *Milirrpum*, 17 FLR at 143. Blackburn described the Batman purchase as “simply a trespass on Crown land.” *Id.* at 257. The *Milirrpum* litigation is also referred to as the “Gove Land Rights Case” because it was brought by the Aboriginal people of Cape Gove, which is located on the coast of north-central Australia.

237. *Id.* at 273 (Blackburn, J) (emphasis added); see also RUSSELL, *supra* note 61, at 254–55.

238. See, e.g., *Milirrpum*, 17 FLR at 200–04, 211–14.

239. *Id.* at 213.

240. *Id.* at 218.

241. BAIN ATTWOOD & ANDREW MARKUS, THE STRUGGLE FOR ABORIGINAL RIGHTS: A DOCUMENTARY HISTORY 291 (1999) (amended statement of claim, 8A (also 21A), in *Coe v. Commonwealth of Australia* (the first defendant) and the Government of the United Kingdom of Great Britain and Northern Ireland (the second defendant), High Court of Australia, 1978). The applicant Coe, in section 6A of his amended statement of claim, alleged that “[c]lans, tribes and groups of aboriginal people travelled widely over the said continent now known as Australia developing a system of interlocking rights and responsibilities making contact with other tribes and larger groups of Aboriginal people thus forming a sovereign aboriginal nation.” *Id.* at 290.

242. *Coe v Commonwealth* (1979) 53 ALJR 403, 410 (Austl.) (Jacobs, J); see also Robert French, *The Constitution and the People*, in REFLECTIONS ON THE AUSTRALIAN CONSTITUTION 79 (Robert French, Geoffrey Lindell & Cheryl Saunders eds., 2003).

[T]he common law of this land has still not reached the stage of retreat from injustice which the law . . . had reached in 1823 when [Chief Justice] Marshall, in *Johnson v. McIntosh*, accepted that . . . the “original inhabitants” should be recognized as having “a legal as well as just claim” to retain the occupancy of their traditional lands.<sup>243</sup>

Finally, in 1992, Justice Deane joined with five other justices of the High Court of Australia to overturn the most extreme version of the doctrine of discovery—the doctrine of *terra nullius*. The historic decision, *Mabo (No. 2)*, contains several references to *Johnson v. McIntosh*. Marshall’s 1823 decision is cited on two occasions in the opinion handed down by Justice Deane and Justice Mary Gaudron and is both cited and quoted by Justice Daryl Dawson.<sup>244</sup> Although the High Court was careful to note the “special constitutional and historical considerations” that influence American cases, it also expressly acknowledged that “the notion of native or Indian title owes much to the celebrated judgment of [Chief Justice] Marshall in the case of *Johnson v. McIntosh*.”<sup>245</sup> Richard Bartlett has stated that “the rhetoric in *Mabo No. 2* was of justice and equality before the law, but the conclusions reflect the pragmatism employed by [Chief Justice] Marshall in 1823.”<sup>246</sup> Peter Russell, in his book on *Mabo (No. 2)*, reaches a similar conclusion:

The moral structure of the High Court’s decision in *Mabo (No. 2)* is reminiscent of the jurisprudence of Chief Justice John Marshall . . . who tried to square recognition of Indigenous peoples’ rights with acceptance of their colonization. . . . The same utilitarian subordination of the fundamental human rights of Indigenous

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243. *Gerhardy v Brown* (1985) 159 CLR 70, 149 (Austl.) (Deane, J) (The rights of natives were “subject to the assertion of ultimate dominion (including the power to convey title by grant) by the State.”).

244. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 88 n.40, 90 n.53 (Austl.) (Deane & Gaudron, JJ); see also *id.* at 135–36, 136 nn.84 & 85 (Dawson, J). Mary Gaudron became the first female Justice of the High Court of Australia in 1987. Sir William Patrick Deane became the Governor-General of Australia in 1995. Sir Daryl Dawson, who had served as the Solicitor-General of Victoria, was the only justice in *Mabo (No. 2)* to conclude that the plaintiffs had “no aboriginal title to the land . . .” *Id.* at 160 (Dawson, J).

245. *Id.* at 135 (Dawson, J); see also *id.* at 90 (Deane & Gaudron, JJ) (noting that, in cases from the United States, “special constitutional and historical considerations arguably apply”); *id.* at 135 (Dawson, J) (“[T]he course of history in [the United States] finds no real parallel elsewhere and the law in its detailed application is of limited assistance in a case such as the present one.”). Sir Gerard Brennan later served as Chief Justice of the High Court from 1995 to 1998. The opinions of all of the justices in *Mabo (No. 2)* are discussed in RUSSELL, *supra* note 61, at 247–78.

246. Richard H. Bartlett, *Native Title in Australia: Denial, Recognition, and Dispossession, in INDIGENOUS PEOPLES’ RIGHTS IN AUSTRALIA, CANADA, & NEW ZEALAND* 414 (Paul Havemann ed., 1999).

peoples to the interests of the settler majority is evident in the majority's position in *Mabo (No. 2)*.<sup>247</sup>

Although the High Court held that “a mere change in sovereignty does not extinguish native title to land,” it also held that the common law did not recognize a right of compensation for extinguishment of native title.<sup>248</sup> Australia is *terra nullius* no more, but the Crown is still acknowledged to be the owner of the underlying title to indigenous lands.<sup>249</sup>

The *Mabo (No. 2)* decision charts a new path for Australia, and both the government and the courts have taken subsequent steps in defining the scope of native title.<sup>250</sup> *Johnson v. McIntosh* played a role in this reconstruction. For example, in *Wik Peoples v Queensland*, the High Court cited *Johnson* for the proposition that a sovereign may extinguish native title but held (by a 4–3 vote) that the issuance of pastoral leases did not necessarily extinguish all incidents of native title.<sup>251</sup> Chief Justice John Marshall's views on the extinguishment of native title were also noted by the High Court in *Fejo v Northern Territory* and by the Federal Court of Australia in *Western Australia v Ward*.<sup>252</sup>

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247. RUSSELL, *supra* note 61, at 249.

248. *Mabo (No. 2)*, 175 CLR at 57 (Brennan, J). Three justices (Deane, Gaudron, and Toohey) were of the view that, “in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.” *Id.* at 15. A majority of the High Court (Mason, Brennan, McHugh, and Dawson), however, disagreed. Although Brennan, Mason, and McHugh took the position that common law native title could be unilaterally extinguished without compensation, they noted that any actions taken in this regard after 1975 were subject to the operation of the Racial Discrimination Act. See GETCHES ET AL., *supra* note 193, at 998; RUSSELL, *supra* note 61, at 258–59 (2005).

249. See ROBERTSON, *supra* note 15, at 144 (“[T]he High Court of Australia cited *Johnson* in a remarkable opinion—*Mabo v. Queensland*—which, while recognizing for the first time land claims of indigenous Australians, nevertheless limited those claims under a variation of the discovery doctrine. There, too, the discovering European sovereign was recognized to be the owner of the underlying title to indigenous lands.” (footnote omitted)).

250. In 1993, the Australian federal government enacted the Native Title Act, which created a National Native Title Tribunal to hear claims and provide other forms of assistance to indigenous peoples. Amendments to the Act passed in 1998, however, limited the ability of indigenous peoples to claim native title. As in the case of the New Zealand Foreshore and Seabed Act of 2004, the government's decision to amend the Native Title Act was criticized by United Nations Committee on the Elimination of Racial Discrimination as being inconsistent with the International Convention on the Elimination of All Forms of Racial Discrimination. See Viniyanka Prasad, *The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations*, 9 CHI. J. INT'L L. 297, 306 (2008).

251. *Wik Peoples v Queensland* (1996) 187 CLR 1, 123 n.456 (Austl.) (Toohey, J); see also RUSSELL, *supra* note 61, at 316–19.

252. See *Fejo v Northern Territory* (1998) 195 CLR 96, 153 (Austl.) (Kirby, J) (“The concept of the extinguishment of the rights in land of indigenous peoples as a result of the advancing claims to legal title of the settlers appears to have originated in the decision of the Supreme Court of the United States in *Johnson v McIntosh*.”); *Western Australia v Ward* (2000) 99 FCR 316, 519 (North,

On February 13, 2008, Prime Minister Kevin Rudd stood in the Federal Parliament and formally apologized for the fact that—due to “calculated policies of the state”—up to 50,000 indigenous children were forcibly taken from their families between 1910 and 1970.<sup>253</sup> Similarly, the High Court’s decision in *Mabo (No. 2)* can be read as an apology to the Aborigines of Australia. Justice Brennan noted in the 1992 decision that the conventional wisdom—“that the indigenous inhabitants of a ‘settled’ colony had no proprietary interest in the land”—depended on “a discriminatory denigration of indigenous inhabitants, their social organization and customs,” which must be rejected as “false in fact and unacceptable in our society . . . .”<sup>254</sup> Justices Deane and Gaudron likewise acknowledged that “the dispossession and oppression of the Aborigines” was premised on legal fictions: that the continent in 1788 was *terra nullius* and that ownership of all the lands vested in the Crown, unaffected by any claims of the Aboriginal inhabitants.<sup>255</sup> By means of a simple declaration—that “*the lands of this continent were not terra nullius or ‘practically unoccupied’ in 1788*”—the Justices rejected the longstanding legal theories that had constituted “the darkest aspect of the history of this nation.”<sup>256</sup>

#### VIII. THE 2007 U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Indigenous peoples remain hopeful that emerging principles of international law will produce tangible benefits in terms of safeguarding rights to land and natural resources.<sup>257</sup> The most significant development in recent years has been the adoption of the U.N. Declaration on the

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J, dissenting) (“The decision of the Supreme Court of the United States in *Johnson v McIntosh* is regarded as the source of the concept of extinguishment of native title.”). In *Fejo*, the Court held that the grant of an estate in fee simple (as opposed to the lease in *Wik*) suffices to extinguish the native title. The *Ward* decision was taken to the High Court, which held in 2002 that native title does not include a right to sub-surface mineral or petroleum resources in Western Australia. See *Western Australia v Ward* (2002) 191 ALR 1 (Austl.); see also RUSSELL, *supra* note 61, at 377–78.

253. Kevin Rudd, Prime Minister, Apology to Australia’s Indigenous Peoples, House of Representatives, Parliament House, Canberra (Feb. 13, 2008), available at [http://www.pm.gov.au/media/Speech/2008/speech\\_0073.cfm](http://www.pm.gov.au/media/Speech/2008/speech_0073.cfm). The 50,000 children represented between ten and thirty percent of all indigenous children. *Id.*

254. *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 40 (Austl.).

255. *Id.* at 108.

256. *Id.*

257. See Anaya & Williams, *supra* note 191; Meghan Theresa McCauley, Comment, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, 41 ARIZ. ST. L.J. 1167, 1168 (2009) (“International tribunals are an important tool for Indigenous Peoples to use in fostering accountability for the United States.”).

Rights of Indigenous Peoples.<sup>258</sup> The Declaration contains several provisions that acknowledge the rights of indigenous peoples to their lands. Article 26 states that indigenous peoples “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,” and that nation states “shall give legal recognition and protection to these lands, territories and resources . . . with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”<sup>259</sup> Article 28 provides that indigenous peoples

have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.<sup>260</sup>

Other articles also address the rights of indigenous peoples to remain on their lands, make use of their lands, and be consulted about activities affecting their lands.<sup>261</sup>

The U.N. General Assembly voted to adopt the Declaration over the opposition of Australia, Canada, New Zealand, and the United States. In its statement in opposition to the Declaration, the United States emphasized that the Declaration is an aspirational document that does not provide a basis for legal claims in any international or domestic forum.<sup>262</sup> Nevertheless, Bolivia adopted the Declaration at the national level, and

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258. G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.unhcr.org/refworld/docid/471355a82.html>.

259. *Id.*

260. *Id.*

261. *Id.* See generally David Fautsch, Note, *An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform*, 31 MICH. J. INT'L L. 449 (2010); Prasad, *supra* note 250; Sarah M. Stevenson, Comment, *Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand*, 32 FORDHAM INT'L L.J. 298 (2008); see also WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 84 (2010) (“Article 28 seemingly repudiates the discovery doctrine of *Johnson v. McIntosh* and requires US law to recognize and protect Native American land rights and tenure.”).

262. Press Release, Robert Hagen, U.S. Advisor, Explanation of Vote on the Declaration on the Rights of Indigenous Peoples to the U.N. General Assembly, U.N. Press Release 204(07) (Sept. 13, 2007), available at <http://www.shunpiking.com/ol0406/0406-IP-positionofUS.htm> (“With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force.”). The United States rejected “any possibility that this document is or can become customary international law,” and stated that the Declaration “does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings.” *Id.*

the Supreme Court of Belize acknowledged the persuasive force of Article 26 in support of its recognition of customary Mayan land rights.<sup>263</sup>

In April 2009, Australia reversed its prior position and endorsed the Declaration, stating that the document “sets important international principles for nations to aspire to.”<sup>264</sup> A year later, on April 19, 2010, New Zealand reversed its position and announced qualified support for the Declaration.<sup>265</sup> Several months thereafter, on November 12, 2010, the Canadian government gave its formal endorsement, stating that “Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”<sup>266</sup> Finally, on December 16, 2010, President Barack Obama announced that the United States “is lending its support” to the Declaration.<sup>267</sup> According to the President, “[t]he aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one[s] we must always seek to fulfill.”<sup>268</sup> It remains to be seen whether the 2007 U.N. Declaration on the Rights of Indigenous Peoples will become an actual source of enforceable rights for indigenous peoples. If international norms of the nineteenth century are no longer accepted, the legal doctrines based on such norms—such as the doctrine of discovery—should be reconsidered. The High Court of Australia, in *Mabo (No. 2)*, ac-

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263. See Paul Joffe, *Global Implementation of the UN Declaration on the Rights of Indigenous Peoples—and Canada’s Increasing Isolation* (Sept. 2009) available at <http://www.cfsc.quaker.ca/pages/documents/UNDeclaration-2ndAnniversary-ReportFINAL-Sep2009.pdf>; *Cal v. Attorney General*, Claim no. 121/2007 (Sup. Ct., Oct. 18, 2007) (Belize), available at <http://www.elaw.org/node/1620>; Stevenson, *supra* note 261, at 326–27 (describing the Belize decision and noting that, “[a]t a minimum, the Declaration signifies a broad customary international law norm that indigenous peoples do have land rights”).

264. Jenny Macklin, Minister for Families, Hous., Cmty. Servs. and Indigenous Affairs, Speech Delivered in Parliament, Canberra, Austl. (Apr. 3, 2009), available at [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/print/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/print/un_declaration_03apr09.htm).

265. *New Zealand Supports the UN Declaration*, INDIAN COUNTRY TODAY (Apr. 19, 2010), <http://www.indiancountrytoday.com/internal?st=print&id=91543409&path=/home/content>.

266. Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, (November 12, 2010), available at <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>. In March 2010, Canada had stated that it would take action “to endorse this aspirational document in a manner fully consistent with Canada’s constitution and laws.” Speech from the Throne, Ottawa, Canada (Mar. 3, 2010), <http://www.discours.gc.ca/eng/media.asp?id=1388>.

267. Press Release, White House Office of the Press Sec’y, Remarks by the President at the White House Tribal Nations Conference, Dep’t of the Interior, Washington, D.C. (December 16, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

268. *Id.*

knowledged that the evolution of international law lent support to its rejection of the *terra nullius* doctrine.<sup>269</sup>

There are indications that a movement has begun to re-conceptualize indigenous land rights and that a new era is dawning. Indigenous peoples, legal scholars, religious institutions, and non-governmental organizations have all pressed for the official repudiation of the discovery doctrine.<sup>270</sup> For example, in 2009, delegates to the Parliament of the World's Religions met in Melbourne, Australia and called upon the Vatican "to publicly acknowledge and repudiate the papal decrees that legitimized the original activities that have evolved into the dehumanizing Doctrine of Christian Discovery and dominion in laws and policies."<sup>271</sup> Additionally, the Episcopal Church of the United States and the Anglican Church of Canada have both renounced the doctrine of discovery "as fundamentally opposed to the Gospel of Jesus Christ and our understanding of the inherent rights that individuals and peoples have received from God."<sup>272</sup> John Dieffenbacher-Krall, the executive director of the Maine Indian Tribal State Commission, has called for "an all out effort to overturn *Johnson v. M'Intosh* just as the NAACP legal defense fund and many civil rights activists worked strategically to overturn *Plessy v. Ferguson*."<sup>273</sup>

Although the discovery doctrine is not expressly mentioned in the 2007 Declaration,<sup>274</sup> it has been critiqued and criticized within the United

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269. The role played by international law in the *Mabo (No. 2)* decision is discussed in Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583 (2007) and Anaya & Williams, *supra* note 191.

270. See, e.g., DAVID E. WILKINS & K. TSINANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 63 (2001) ("The doctrine of discovery . . . is a clear legal fiction that needs to be explicitly stricken from the federal government's political and legal vocabulary.").

271. *Indigenous Delegates Ask Pope to Repudiate Doctrine of Discovery*, INDIAN COUNTRY TODAY, Dec. 21, 2009, <http://www.indiancountrytoday.com/home/content/79636552.html>.

272. See, e.g., Marites N. Sison, *Reality Check: Landmark Resolution Renounces Doctrine of Discovery*, ANGLICANJOURNAL.COM (June 09, 2010), <http://www.anglicanjournal.com/nc/news-items/article/reality-check-9220.html>. The Anglican Church of Canada also endorsed the 2007 U.N. Declaration on the Rights of Indigenous Peoples and called on the Canadian government to adopt the Declaration. *Id.*

273. *Episcopal Church Repudiates Doctrine of Discovery*, INDIAN COUNTRY TODAY, Aug. 17, 2009, <http://www.indiancountrytoday.com/home/content/51572857.html>.

274. The 1985 draft of the U.N. Declaration on the Rights of Indigenous Peoples declared that discovery and *terra nullius* "are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples." 1985 Draft of the U.N. Declaration on the Rights of Indigenous Peoples, THE AKHA HERITAGE FOUND, E/CN.4/Sub.2/AC.4/1985/WP.4/Add.4, at 6 (1985 draft declaration), available at <http://www.akha.org/content/humanrightsdocs/rightsofindigenouspopulations.html>. The 1988 and 1989 drafts also denounced discovery and *terra nullius*, but such references were removed from the 1993 draft, and the words do not appear in subsequent versions. See Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law*:

Nations. In April 2010, Special Rapporteur Tonya Gonnella Frichner, a member of the United Nations Permanent Forum on Indigenous Issues, released her “[p]reliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery,” which contends that the doctrine of discovery “has been institutionalized in law and policy, on national and international levels, and lies at the root of the violations of indigenous peoples’ human rights, both individual and collective.”<sup>275</sup>

Yet despite calls for repudiation, the Vatican Church, the nations of Europe, and the United States continue to recognize the discovery doctrine, and the principles and royal charters that legitimized the colonization of the New World remain in effect. For too long the United States, Australia, New Zealand, and Canada have invoked the American doctrine of discovery to diminish native land rights. By endorsing the U.N. Declaration on the Rights of Indigenous Peoples, however, the aforementioned countries have taken a significant step in the right direction. The United States declared in December 2010 that it “aspires to improve relations with indigenous peoples by looking to the principles embodied in the Declaration in its dealings with federally recognized tribes, while also working, as appropriate, with all indigenous individuals and communities in the United States.”<sup>276</sup> In his accompanying remarks, President Obama acknowledged that “[w]hat matters far more than words . . . are actions to match those words.”<sup>277</sup> It is time for the United States to take action and formally reject the discovery doctrine.

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*Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 689–90 (1990); U.N. Declaration on the Rights of Indigenous Peoples, (draft 1988) (on file with author); U.N. Declaration on the Rights of Indigenous Peoples, (draft 1989) (on file with author); *see also* U.N. Declaration on the Rights of Indigenous Peoples, (draft 1993) (on file with author); 1994 Draft Declaration on the Rights of Indigenous Peoples, UNIV. OF MINN. HUMAN RTS. LIBRARY, <http://www1.umn.edu/humanrts/instree/declra.html>; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/217 (III) (Sept. 13, 2007), *available at* <http://www.un.org/esa/socdev/unpfii/en/drip.html> (2007 final version of the Declaration).

275. *See* U.N. Econ. & Soc. Council, Document Submitted to Permanent Forum on Indigenous Issues on its 9th Sess., Apr. 19–30, 2010, U.N. Doc. E/C.19/2010/13 (Feb. 3 2010), *available at* <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf>.

276. U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 2 (Dec. 16, 2010), *available at* <http://usun.state.gov/documents/organization/153239.pdf>.

277. Press Release, White House Office of the Press Sec’y, Remarks by the President at the White House Tribal Nations Conference, Dep’t of the Interior, Washington, D.C. (December 16, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.