

4-15-2011

The Doctrine of Discovery and the Elusive Definition of Indian Title

Blake Watson

University of Dayton, bwatson1@udayton.edu

Follow this and additional works at: https://ecommons.udayton.edu/law_fac_pub



Part of the [Indian and Aboriginal Law Commons](#), and the [Property Law and Real Estate Commons](#)

eCommons Citation

Watson, Blake, "The Doctrine of Discovery and the Elusive Definition of Indian Title" (2011). *School of Law Faculty Publications*. 71.
https://ecommons.udayton.edu/law_fac_pub/71

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in School of Law Faculty Publications by an authorized administrator of eCommons. For more information, please contact frice1@udayton.edu, mschlange1@udayton.edu.

THE DOCTRINE OF DISCOVERY AND THE ELUSIVE
DEFINITION OF INDIAN TITLE

by
*Blake A. Watson**

On April 15, 2011, the Lewis & Clark Law Review hosted its Spring Symposium, entitled “The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States.” While the Symposium participants agree that the doctrine of discovery should be rejected, they disagree on the impact of the discovery doctrine on native land rights in the United States. This Article examines the differing views of Indian title. Specifically, it contrasts the “limited owner” view of Indian title, under which Indian tribes retained nearly all of their proprietary rights, subject only to the government’s exclusive right of preemption, with the “limited possessor” view of Indian title, under which Indian tribes lost ownership of their lands by virtue of European discovery. The Article concludes that, although the “limited owner” view of Indian title is preferable to Indian nations, the Supreme Court has nonetheless adopted the “limited possessor” view. The Article further concludes that there is little downside to acknowledging that the Supreme Court has adopted the harsher “limited possessor” conception of Indian title, and that by doing so, opponents of the doctrine of discovery may be better positioned to secure its repudiation.

I.	INTRODUCTION	996
II.	INDIAN TITLE FROM <i>FLETCHER</i> TO <i>SHERRILL</i>	1002
	A. <i>Fletcher v. Peck (1810)</i>	1002
	B. <i>Johnson v. McIntosh (1823)</i>	1004
	C. <i>Worcester v. Georgia (1832)</i>	1006
	D. <i>Tee-Hit-Ton Indians v. United States (1955)</i>	1007
III.	DISCOVERY “GAVE TITLE” AND THE RIGHT TO EXTINGUISH THE INDIAN RIGHT OF OCCUPANCY.....	1010
	A. <i>The Argument for the “Limited Owner” Conception of Indian Title</i>	1011
	B. <i>The Argument for the “Limited Possessor” Conception of Indian Title</i>	1014
IV.	INDIAN TITLE CANNOT BE ANALOGIZED TO COMMON LAW PROPERTY RIGHTS.....	1019

* Professor of Law, University of Dayton School of Law. J.D., 1981, Duke University School of Law; B.A., 1978, Vanderbilt University.

I. INTRODUCTION

On April 15, 2011, the Lewis & Clark Law Review hosted its Spring Symposium, entitled *The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States*. The focus on the impact of international law on indigenous affairs is certainly timely. In 2007 the United Nations approved the Declaration on the Rights of Indigenous Peoples, which includes the statement that indigenous peoples “have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”¹ The General Assembly adopted the Declaration over the opposition of Australia, Canada, New Zealand, and the United States. All four countries, however, subsequently endorsed the UN document, with certain qualifications.² The United States and Canada will revisit the issue of indigenous rights when the Organization of American States (OAS) finalizes its proposed American Declaration on the Rights of Indigenous Peoples.³

The historic doctrine of discovery is also a topical subject. The doctrine—which was developed by European nations to justify the process of colonization and dominion—provides “that newly arrived

¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 26, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

² See Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 547–49 (2011) [hereinafter Watson, *The Impact of the American Doctrine of Discovery*]. In April 2009, Australia reversed its prior position and endorsed the Declaration. A year later, on April 19, 2010, New Zealand announced its qualified support. Several months thereafter, on November 12, 2010, the Canadian government gave its qualified endorsement. Finally, on December 16, 2010, President Obama announced that the United States “is lending its support” to the Declaration. *Id.* at 549.

³ See Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Record of the Current Status of the Draft American Declaration, PERM. COUNCIL OF THE OAS: COMM. ON JUD. & POL. AFF. (Sept. 24, 2011), <http://www.oas.org/consejo/cajp/Indigenous%20documents.asp#Record>. As reported by the Indian Law Resource Center, “[i]ndigenous leaders from 25 countries met in Washington D.C. in January 2011 seeking consensus on a proposed legal framework to protect economic, cultural and political rights of indigenous peoples of the Americas.” OAS: Indigenous Leaders Work to Protect Economic, Cultural, and Political Rights, INDIAN L. RESOURCE CTR., <http://www.indianlaw.org/content/oas-headline>. See also Gale Courey Toensing, Draft American Declaration on the Rights of Indigenous Peoples Moves Forward, INDIAN COUNTRY TODAY, Jan. 9, 2009, available at <http://www.indianlaw.org/sites/default/files/resources/Draft%20American%20Declaration%20on%20the%20Rights%20of%20Indigenous%20Peoples%20moves%20forward.pdf>. (“The American Declaration will complement the U.N. Declaration on the Rights of Indigenous Peoples. Whereas the U.N. Declaration makes a universal and broad statement of rights, the American Declaration will address the particular needs of the indigenous peoples of the Americas.”).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 997

Europeans immediately and automatically acquired legally recognized property rights in native lands and also gained governmental, political, and commercial rights over the inhabitants without the knowledge or the consent of the Indigenous peoples.⁴ The discovery doctrine remains a foundational legal principle in the United States, New Zealand, Australia, Canada, and elsewhere. However, in recent years indigenous peoples, legal scholars, religious institutions, and nongovernmental organizations have called for its repudiation.⁵ In April of 2010, Special Rapporteur Tonya Gonnella Frichner, a member of the United Nations Permanent Forum on Indigenous Issues, concluded her “preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery.”⁶ Frichner contends that the discovery doctrine “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.”⁷ In recognition of the importance of this issue, the theme of the 11th Session of the United Nations Permanent Forum on Indigenous Peoples, which will convene in 2012, is “The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests.”⁸

In 1974, Vine Deloria, Jr., inaugurated the modern era of scholarship on native land rights by including a critique of the doctrine of discovery in his book, *Behind the Trail of Broken Treaties: An Indian Declaration of Independence*.⁹ Since that time, numerous articles and books have examined the legal, economic, religious, and racial underpinnings of the discovery doctrine. In fact, the participants in the 2011 Spring Symposium have written five books and several articles about the

⁴ ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 2 (2010).

⁵ 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.” *Episcopal Church Repudiates Doctrine of Discovery, Calls on US to Do Same*, THE PROGRESSIVE CHRISTIAN GUIDE TO PUB. POL’Y (July 29, 2009), <http://weiweng.blogspot.com/2009/07/episcopal-church-repudiates-doctrine-of.html>; Marites N. Sison, *Reality Check: Landmark Resolution Renounces Doctrine of Discovery*, ANGLICAN JOURNAL, June 9, 2010, <http://www.anglicanjournal.com/nc/news-update-items/article/reality-check-9220.html>.

⁶ Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, U.N. Econ. & Soc. Council, U.N. Doc. E/C.19/2010/13 (Feb. 4, 2010) (by Tonya Gonnella Frichner). See also Tonya Gonnella Frichner, *The “Preliminary Study” on the Doctrine of Discovery*, 28 PACE ENVTL. L. REV. 339, 339–40 (2010).

⁷ Special Rapporteur, *supra* note 6.

⁸ Press Release, U.N. Econ. & Soc. Council, Permanent Indigenous Forum Discusses Provisional Agenda for 2011 Session, Including Proposed Special Theme ‘The Doctrine of Discovery,’ U.N. Press Release HR/5063 (May 26, 2011).

⁹ VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 85–111 (1974).

doctrine of discovery.¹⁰ The symposium participants all agree that the doctrine of discovery should be rejected. It is evident, however, that the symposium participants do not share identical views regarding the impact of the discovery doctrine on native land rights in the United States.¹¹ The purpose of this Article is to examine the differing views of Indian title.

In my own scholarship, I have suggested that the rights of ownership, possession, and disposition in native lands can be aggregated or diffused, leading to four different conceptions of indigenous land rights:

- (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.”
- (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

¹⁰ See INDIAN LAW RESOURCE CENTER, NATIVE LAND LAW PROJECT: DRAFT GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES (Robert T. Coulter gen. ed., lawyers ed. 2010) [hereinafter DRAFT GENERAL PRINCIPLES]; ROBERT J. MILLER ET AL., *supra* note 4; 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); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: JOHNSON V. MCINTOSH AND A HISTORY OF NATIVE LAND RIGHTS (forthcoming 2012) [hereinafter WATSON, BUYING AMERICA FROM THE INDIANS]; 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 (2004); 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 (2009); Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005); Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery*, Johnson v. McIntosh, and Plenary Power, 20 N.Y.U. REV. L. & SOC. CHANGE 303 (1993); Lindsay G. Robertson, *John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine*, 13 J.L. & POL. 759 (1997); 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); Watson, *The Impact of the American Doctrine of Discovery*, *supra* note 2. Lindsay Robertson was unable to attend the symposium.

¹¹ Although the symposium focused on the impact of the doctrine of discovery on indigenous rights in Australia, Canada, New Zealand, and the United States, this Article focuses only on the American discovery doctrine and the nature of Indian (or aboriginal) title in the United States.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 999

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 rights. 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.¹²

In the United States, the most favorable and least favorable conceptions of Indian title have been rejected.¹³ The Supreme Court, however, has subscribed at different times to the two intermediate definitions of Indian title. In *Johnson v. McIntosh*, an 1823 decision authored by Chief Justice John Marshall, the Court adopted a “limited possessor” notion of native land rights, proclaiming 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.”¹⁴ Nine years later, however, the Court in *Worcester v. Georgia* endorsed the “limited owner” view of Indian title. Chief Justice Marshall again spoke for the Court, but now held that the discovery doctrine was a European agreement that “gave to the nation making the discovery . . . the sole right of acquiring the soil,” but did not “annul the previous rights of those who had not agreed to it.”¹⁵ According to *Johnson*, the Indian tribes retained possession of their lands after discovery, but no longer owned the land and no longer held unlimited disposition rights. According to *Worcester*, the Indian tribes retained ownership *and* possession of their lands after discovery, but no longer held unlimited disposition rights.

Michael Blumm and Robert “Tim” Coulter are proponents of what I have (inelegantly) called the “limited owner” view of Indian title set forth in *Worcester*. Professor Blumm argues that the discovery doctrine “left Indian tribes with nearly all of their proprietary rights,” and has described Indian title as a “fee simple subject to the government’s right

¹² Watson, *The Impact of the American Doctrine of Discovery*, *supra* note 2, at 516–17.

¹³ The United States Supreme Court has never stated that native rights were “unaffected” by discovery. On the other hand, the Supreme Court never adopted the *terra nullius* doctrine, which holds that indigenous peoples have no property rights. In contrast, the British Crown relied on the *terra nullius* doctrine to claim absolute ownership of Australia. However, in *Mabo v Queensland*, the High Court of Australia finally acknowledged that “[t]he lands of this continent were not *terra nullius*” and held instead that “the common law of this country recognizes a form of native title.” *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 15, 109 (Austl.).

¹⁴ *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823).

¹⁵ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832).

of preemption,” or a “fee simple with a partial restraint on alienation.”¹⁶ Tim Coulter, the executive director of the Indian Law Resource Center, likewise contends that the discovery doctrine did not diminish the ownership rights of the tribal nations, but rather only gave the United States “the pre-emptive right to purchase.”¹⁷ In other words, Blumm and Coulter argue that Indian tribes retained ownership and possession rights following discovery, and only suffered a limitation on their right of disposition (by virtue of the discovering nation’s self-proclaimed right of preemption).

Lindsay Robertson, on the other hand, subscribes to the “limited possessor” conception of Indian title, stating that Indian tribes in America “lost ownership of their lands by virtue of discovery.”¹⁸ Based on the Supreme Court cases decided after *Worcester v. Georgia*, I agree with Professor Robertson. Although I would prefer that the Supreme Court adopt the “limited owner” view of Indian title, I believe the Court has instead opted for the “limited possessor” definition.

In Part II of this Article, I describe the different views of Indian title (and Discoverer’s title) set forth by the Supreme Court, starting with *Fletcher v. Peck*¹⁹ and ending with *City of Sherrill v. Oneida Indian Nation*.²⁰ Although the effect of the discovery doctrine has been addressed in numerous Supreme Court decisions, I will focus on four cases: *Fletcher*, *Johnson*, *Worcester*, and *Tee-Hit-Ton Indians v. United States*.²¹

¹⁶ Blumm, *supra* note 10, at 718, 741 & n.183.

¹⁷ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 14 (“Our general conclusion . . . is that there is no sound legal authority either in international or domestic law that the ‘doctrine of discovery’ as a matter of law diminished the ownership rights of the Native owners or that it gave to the United States, as successor to the ‘discovering’ nations, any actual ownership interest in Indian lands apart from the preemptive right to purchase.”).

¹⁸ ROBERTSON, *supra* note 10, at 144. *See also id.* at 99 (“Preemption historically had meant no more than the exclusive right to engage in a particular purchase transaction. The preemption right had not carried with it title to the land to which the right was claimed. Marshall’s language [in *Johnson*] ‘that discovery gave title to the government by whose subjects . . . it was made, . . . which title might be consummated by possession,’ thus worked a significant, if subtle, expansion . . .”).

Two other symposium participants, Robert Miller and Tracey Lindberg, have stated that the discovery doctrine gave the discovering nation an “ownership right” that was “limited by the natives’ right to continue to occupy and use their land, which ostensibly could last forever.” MILLER ET AL., *supra* note 4, at 3. Miller, Lindberg and their co-authors, however, equate the “European title” with “the power of preemption,” and conclude that “[d]iscovery granted to the discovering European country the right of preemption.” *Id.* at 5. Although there is some caselaw to support this view, *see infra* notes 50–57, 106, and accompanying text, I believe the better view is that the discovery doctrine granted title *and* the right of preemption, to wit, the exclusive right to purchase or otherwise extinguish the remaining native right of occupancy.

¹⁹ 10 U.S. (6 Cranch) 87 (1810).

²⁰ 544 U.S. 197 (2005).

²¹ 348 U.S. 272 (1955).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1001

In Part III of the Article, I respond to the argument that Indian title is more than a limited occupancy right. Aboriginal Indian title—as conceived by the Supreme Court—cannot be equated to a fee simple subject to a partial restraint on alienation, as suggested by Michael Blumm, because it may be terminated by the United States “without any legally enforceable obligation to compensate the Indians.”²² While I support the *Draft General Principles of Law* set forth by Tim Coulter and the Indian Law Resource Center, I unfortunately cannot agree that the *Principles* “state what the federal law *really* is concerning Native lands” as opposed to what “the federal law *ought to be*.”²³

In Part IV of the Article, I address whether Indian title can be analogized to common law property rights. The Supreme Court, lower courts, jurists, scholars, and others have compared Indian title to the following property rights: tenancy at sufferance, tenancy at will, license, usufructuary right, leasehold interest, term for years, life estate, fee simple subject to an executory limitation, fee simple subject to a partial restraint on alienation, fee simple subject to the right of preemption, full beneficial ownership, and absolute proprietorship (fee simple absolute). Likewise, the discoverer’s title has been variously characterized as a mere possibility of ownership, an expectancy, an exclusive option, a right of first refusal, a right of preemption, a reversion, a contingent remainder, a vested remainder, an executory interest, a “naked fee,” seisin in fee, and fee simple absolute. Given the unique nature (and illegitimate basis) of Indian title, all analogies ultimately fail.

The authors of the most recent *Cohen’s Handbook on Federal Indian Law* believe that “the *Tee-Hit-Ton* rule has little relevance in modern Indian law.”²⁴ Does it make any difference that the Supreme Court has rejected the preferable view of Indian title set forth in *Worcester* and adopted the “limited possessor” version set forth in *Johnson* and *Tee-Hit-Ton*? In Part V of the Article, I argue that, because “Indians have rights of occupancy to their lands as sacred as the fee-simple,”²⁵ there is little downside to acknowledging that it is nevertheless the law of the United States that Indian nations do *not* own their lands in fee simple. On the other hand, by pointing out that the Supreme Court has endorsed this more extreme version of the discovery doctrine, opponents of the doctrine may be better positioned to secure its repudiation. The “limited possessor” version of Indian title is particularly difficult to justify in view of contemporary norms of international indigenous rights and should be rejected along with the fallacious doctrine of discovery.

²² *Id.* at 279.

²³ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 5.

²⁴ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 15.09[1][d], at 1025 (Nell Jessup Newton et al. eds., 2005).

²⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831).

II. INDIAN TITLE FROM *FLETCHER* TO *SHERRILL*A. *Fletcher v. Peck (1810)*

Fletcher v. Peck is best known as the first instance in which a state law was struck down by the Supreme Court as contrary to the Constitution. Land speculators had arranged the “feigned case” to obtain a ruling on the constitutionality of the 1796 Georgia rescinding act, which was enacted to nullify the infamous 1795 “Yazoo” land sales authorized by corrupt legislators. The Court adopted an expansive interpretation of the Contract Clause and held that Georgia could not pass legislation that impaired the vested property rights of the Yazoo purchasers and their transferees.²⁶

Fletcher is notable for another reason: the majority and dissenting opinions set forth vastly different definitions of Indian title. The dispute required the Court to determine who owned the Yazoo lands: the state of Georgia (pursuant to its charter), the United States (pursuant to the “devolution of sovereignty” doctrine),²⁷ or the southern tribes (by virtue of prior and continued occupancy). Both parties argued that the Indian tribes did not hold a proprietary fee simple title to the lands they occupied. Luther Martin, on behalf of Fletcher, argued that the Yazoo lands “belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the state of Georgia.”²⁸ After asserting that the title was in the Crown, and then the United States, Martin equated the title with “a right of pre-emption”: “The title of the lands was in the crown. . . . It was only a right of pre-emption which the crown had. . . . There was only a possibility that the United States would purchase for the benefit of Georgia. But a mere possibility cannot be sold or granted.”²⁹ Robert Goodloe Harper and (future Supreme Court Justice) Joseph Story represented Peck, and argued that Georgia

²⁶ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810). See also U.S. CONST. art. I, § 10, cl. 1 (Contract Clause); Lindsay G. Robertson, “A Mere Feigned Case”: *Rethinking the Fletcher v. Peck Conspiracy and Early Republican Legal Culture*, 2000 UTAH L. REV. 249, 252–55 (2000).

²⁷ Proponents of the “devolution of sovereignty” doctrine contended that, as a result of independence, title to trans-Appalachian lands passed directly from the British Crown to the national government. For example, in his 1780 pamphlet entitled *Public Good*, Thomas Paine argued that the boundaries of Virginia were reduced by the Royal Proclamation of 1763, and title to the western lands upon independence was transferred to the United States “for the benefit of all.” 8 THOMAS PAINE, *Public Good*, in *LIFE AND WRITINGS OF THOMAS PAINE* 120, 152 (Daniel Edwin Wheeler ed., 1908).

²⁸ *Fletcher*, 10 U.S. (6 Cranch) at 115. Luther Martin served nearly three decades as Attorney General of Maryland, and argued for the state in *McCulloch v. Maryland*. He participated in the 1805 impeachment trial of Supreme Court Justice Samuel Chase and Aaron Burr’s 1807 trial for treason. See BILL KAUFFMAN, *FORGOTTEN FOUNDER, DRUNKEN PROPHET: THE LIFE OF LUTHER MARTIN* 117, 140–41, 150–51, 159 (2008).

²⁹ *Fletcher*, 10 U.S. (6 Cranch) at 124.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1003

held title to the Yazoo lands, and that its concomitant power to transfer title “extends to lands to which the Indian title has not been extinguished”:

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. It is a right not to be *transferred* but *extinguished*.³⁰

The question was raised during oral argument “whether the right which Georgia had before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple?”³¹ In response, Harper and Story denied that the Indian tribes owned the lands they inhabited:

They had no idea of property in the soil but a right of occupation. . . . The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege which does not affect the allodial right.³²

The Supreme Court in *Fletcher* determined that Georgia held title to the Yazoo lands. In the concluding sentences of his decision, Chief Justice Marshall stated that the “majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.”³³ The nature of Indian title was not further defined. However, by declaring that Georgia held “seisin in fee,” Marshall concluded that the state held an ownership interest in the Yazoo lands that could be transferred even while the native occupants remained in possession.³⁴

³⁰ *Id.* at 121 (citations omitted). Robert Goodloe Harper appeared in more Supreme Court cases than any other lawyer between 1800 and 1815, and in 1823 would represent the private purchasers (along with Daniel Webster) in *Johnson v. McIntosh*. See 3 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 289 (1988).

³¹ *Fletcher*, 10 U.S. (6 Cranch) at 122.

³² *Id.* at 122–23.

³³ *Id.* at 142–43.

³⁴ See Blumm, *supra* note 10, at 774 (“Had the Chief Justice not embraced a dual tenurial system in *Fletcher v. Peck*—which made Indian title a kind of *sui generis* property right that could be interpreted by other courts unrestrained by Anglo-American property rules—the Indians’ property interest would have been described as a fee simple subject to a right of preemption of the government because, functionally, that is what it was.”); and Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637, 641 (1978) (“[T]he use of the concept of fee simple to express a right of preemption set forth an idiom of discourse that would later serve, of itself, as a serious qualification of aboriginal land rights.”). New York Chancellor James Kent, in the 1832 edition of his

Justice William Johnson dissented, stating that Georgia had “nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell,” and thus “had *not a fee-simple* in the lands in question.”³⁵ The South Carolina jurist claimed that the southern tribes retained “the absolute proprietorship of their soil,” and reasoned that, “if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it.”³⁶ Georgia held “nothing more than . . . a right of conquest or of purchase, exclusively of all competitors within certain defined limits.”³⁷ Although Luther Martin equated the “right of pre-emption” with “title,” Johnson pointed out the fallacy of this argument:

It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. . . . *If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell?*³⁸

Milner Ball claims that Justice Johnson’s dissent “argued for absolute tribal property rights.”³⁹ Although Johnson refers to “absolute proprietorship” and “an absolute right of soil,” he also acknowledges that the native right of disposition is constrained by the European right of preemption. It follows, therefore, that Justice Johnson actually subscribed to the “limited owner” view of Indian title.

B. *Johnson v. McIntosh (1823)*

In *Johnson and Graham’s Lessee v. McIntosh*, the Supreme Court addressed whether an Indian tribe could sell its lands to private individuals. In the words of Chief Justice John Marshall, the dispute concerned “the power of Indians to give, and of private individuals to

influential *Commentaries on American Law*, observed that Marshall’s characterization of Indian land rights in *Fletcher* was “a mere naked declaration, without any discussion or reasoning by the court in support of it.” 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 378 n.d (2d ed. 1832).

³⁵ *Fletcher*, 10 U.S. (6 Cranch) at 146–47 (first emphasis added).

³⁶ *Id.*

³⁷ *Id.* at 147.

³⁸ *Id.* (emphasis added). Thomas Jefferson, in notes written while serving as Secretary of State under President Washington, described his understanding of “our right in the Indian soil” in a similar fashion: “[a] right of preemption of their lands; that is to say, the sole and exclusive right of purchasing from them whenever they should be willing to sell.” Thomas Jefferson, Notes of a Conversation with George Hammond, June 3, 1792, in 17 THE WRITINGS OF THOMAS JEFFERSON 322, 328 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed. 1903).

³⁹ Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 38 n.171 (1987).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1005

receive, a title which can be sustained in the Courts of this country.”⁴⁰ The lawyers for William McIntosh argued that Indians “acquired no proprietary interest in the vast tracts of territory which they wandered over” and that the “Indian title” recognized in *Fletcher* was “a mere right of usufruct and habitation.”⁴¹ The Court agreed, and held that putative purchasers “do not exhibit a title which can be sustained in the Courts of the United States.”⁴² In support of this conclusion, Marshall invoked the doctrine of discovery and announced that “*discovery gave title* to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”⁴³

Discovery conferred not one, but two rights on the discovering nation. In addition to title, the discoverer also acquired “the sole right of acquiring the soil from the natives, and establishing settlements upon it.”⁴⁴ As a direct consequence, the rights of the native inhabitants were “necessarily diminished”:

They were admitted 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; 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.⁴⁵

Marshall makes clear in *Johnson* what is implicit in *Fletcher*: that the discovering nation holds “a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.”⁴⁶ The discoverer’s “absolute ultimate title” is “subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of

⁴⁰ *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823).

⁴¹ *Id.* at 569–70.

⁴² *Id.* at 604–05.

⁴³ *Id.* at 573 (emphasis added).

⁴⁴ *Id.* James Kent understood that discovery conferred both title and the exclusive right to extinguish the remaining native right of occupancy. See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 242 (1st ed. 1826) (“[T]he United States own the soil as well as the jurisdiction[] of the immense tracts of . . . unpatented lands, included within their territories[,] . . . and the Indians have only a right of occupancy, and the United States possess the legal title subject to that occupancy, and with an absolute and exclusive right to extinguish the Indian title of occupancy either by conquest or purchase.” (emphasis added)). See also MILLER ET AL., *supra* note 4, at 55 (acknowledging that *Johnson* held that the discoverer had both “clear title” and “the exclusive power to extinguish” the Indian right of occupancy).

⁴⁵ *Johnson*, 21 U.S. (8 Wheat.) at 574.

⁴⁶ *Id.* at 585. For a more detailed description of the *Johnson* decision, see WATSON, BUYING AMERICA FROM THE INDIANS, *supra* note 10, at ch. 15.

acquiring.”⁴⁷ The native occupancy right is “no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.”⁴⁸ Nevertheless, “the Indian inhabitants are to be considered *merely as occupants*, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.”⁴⁹

C. *Worcester v. Georgia* (1832)

In *Worcester v. Georgia*, John Marshall rejected his prior view that “discovery gave title,” and announced instead that discovery only conferred a right of pre-emption, that is, the right of purchasing lands that the natives were willing to sell.⁵⁰ Unfortunately, the Supreme Court did not expressly overrule *Johnson*, and soon thereafter state and federal courts returned to the “limited possessor” conception of Indian land rights. The “limited owner” conception of native land rights—first propounded by Justice Johnson in *Fletcher* and now accepted by Justice Marshall in *Worcester*—would give way after Marshall’s death in 1835 to the “limited possessor” view set forth in *Johnson*.

Marshall denigrates the discovery doctrine in *Worcester*, but refuses to repudiate it.⁵¹ However, rather than grant both title and the right of preemption, Marshall suggests that discovery simply conferred the right to acquire the native rights of property:

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.*⁵²

⁴⁷ *Johnson*, 21 U.S. (8 Wheat.) at 592.

⁴⁸ *Id.* A possessory leasehold is not incompatible with seisin in fee: the lease grants the tenant a present right of possession, and the landlord retains his ownership of the fee simple (now held as a reversion), which he can transfer or protect in a lawsuit claiming waste. Ejectment is the common law cause of action to recover the possession of land. The holder of a right of possession—such as the Indian title of occupancy or a common law term for years—would thus prevail in an ejectment lawsuit.

⁴⁹ *Id.* at 591 (emphasis added).

⁵⁰ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543–44 (1832).

⁵¹ *Id.* at 543 (“It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors. . . . But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”).

⁵² *Id.* at 544 (emphasis added).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1007

Pursuant to Marshall's revised views, Indian tribes retained rights of ownership and possession after discovery, but held only limited disposition rights in light of the discovering nation's "exclusive right to purchase." Marshall stated in *Johnson* that the colonial charters contained "an actual grant of the soil,"⁵³ but in *Worcester* he repudiates this notion:

[The charters] *purport*, generally, to convey the soil [But] [t]hey were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. . . . [T]hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.⁵⁴

As Lindsay Robertson has stated, "*Worcester* was intended to prove *Johnson's* undoing" by "overruling that part of the [discovery] doctrine assigning fee title to the discovering sovereign."⁵⁵ As it turned out, however, the *Johnson* version of Indian title prevailed.⁵⁶

D. Tee-Hit-Ton Indians v. United States (1955)

In *Tee-Hit-Ton Indians v. United States*, Justice Stanley Reed relied on the "great case of *Johnson v. McIntosh*" to hold that Indian "right of occupancy" may be terminated by the United States "without any legally enforceable obligation to compensate the Indians."⁵⁷ It is not surprising that the Court in *Tee-Hit-Ton Indians* followed the *Johnson* version of the discovery doctrine. Although scholars and advocates of indigenous land

⁵³ *Johnson*, 21 U.S. (8 Wheat.) at 603.

⁵⁴ *Worcester*, 31 U.S. (6 Pet.) at 544–46 (emphasis added). Justice John McLean concurred in *Worcester*, but remained an adherent of the "limited possessor" view of Indian title. *See id.* at 580 (McLean, J., concurring) ("Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called the right to the ultimate domain, but the Indians have a present right of possession.").

⁵⁵ ROBERTSON, *supra* note 10, at 133. *See also* Berman, *supra* note 34, at 655 (The interpretation of the discovery doctrine set forth in *Johnson*—that "the European discovery of the continent instantly brought into being a fee simple property right in the common law sense to all the lands in the western hemisphere"—was "justly ridiculed" nine years later by Marshall in *Worcester*).

⁵⁶ *See, e.g.*, KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 264–65 (1989) ("If we ignore Chief Justice Marshall's dictum in *Worcester*. . . the Marshall Court position seems to be that the Crown, by discovery, acquired seisin for and title to a fee simple estate in demesne, subject to an Indian right of occupancy.").

⁵⁷ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). *See also id.* at 284–85 ("[T]he rule derived from *Johnson v. McIntosh* [is] that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment."). By contrast, the taking of "recognized title" is compensable. *See id.* at 277–78 ("Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking.").

rights prefer *Worcester*, the Supreme Court never accepted Marshall's revised "limited owner" view of Indian title. In 1846, the Court in *United States v. Rogers* stated that Indian tribes "have never been . . . regarded as the owners of the territories they respectively occupied."⁵⁸ In 1873, the Court in *United States v. Cook* ignored *Worcester* and announced that the *Johnson* discovery rule "has never been doubted."⁵⁹ In fact, the Court throughout the nineteenth century repeatedly invoked *Johnson* instead of *Worcester*.⁶⁰ Remarkably, the statement in *Worcester* regarding the limited effect of the colonial charters has never been quoted by the Court, and the assertion that discovery "could not affect the rights of those already in possession" has been quoted only once—in *Holden v. Joy*, a case that otherwise endorsed *Johnson* discovery rule.⁶¹

The issue finally came to a head in 1955, when the Tee-Hit-Ton Indians of Alaska urged the Court to hold that Indian title is a property right for purposes of the Fifth Amendment.⁶² In response, the United States argued that Indian title is "merely a usufructuary right or privilege" that is comparable to the right "of a mere licensee."⁶³ The United States further contended that Indian title is "a permissive right only" and that the title "is in the United States with the Indians having a temporary possessory right terminable at will by the United States without Constitutional liability."⁶⁴

⁵⁸ *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846).

⁵⁹ *United States v. Cook*, 86 U.S. (19 Wall.) 591, 593 (1873).

⁶⁰ *See, e.g.*, *Jones v. Meehan*, 175 U.S. 1, 8 (1899); *Shively v. Bowlby*, 152 U.S. 1, 14–15 (1894); *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 66–67 (1886); *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877).

⁶¹ *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). The statement in *Worcester* that discovery "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell," has been quoted just twice by the Supreme Court: in *Holden v. Joy, id.*, and *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946) (a case that was strongly criticized, if not overruled by *Tee-Hit-Ton Indians*, 348 U.S. at 282–84). *See also* *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938) (citing statements in *Worcester* concerning Indian land rights, but endorsing *Johnson's* "limited possessor" conception of native property); *Francis v. Francis*, 203 U.S. 233, 238 (1906) (same). *See generally* WATSON, *BUYING AMERICA FROM THE INDIANS*, *supra* note 10, at ch. 17.

⁶² The Tee-Hit-Tons sought compensation pursuant to the Just Compensation Clause of the Fifth Amendment for a taking by the United States of timber from lands occupied by the Indians. *Tee-Hit-Ton Indians*, 348 U.S. at 276–77.

⁶³ Brief for the United States, at 27, 31, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (No. 43). The government defined a "usufructuary right" as "the right or privilege of using and enjoying a thing which belongs to another, without impairing the substance—that is, the right to have the profits and use of the property but not its disposition or ownership," *id.* at 30, and cited several cases describing the Indian title as a usufructuary right. *See id.* at 28–31 (citing *E. Band of Cherokee Indians v. United States*, 117 U.S. 288, 294 (1886) (The Cherokee Trust Funds); *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 67 (1886); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850); *Blair v. Pathkiller's Lessee*, 10 Tenn. (2 Yer.) 407, 412 (1830); *Cornet v. Winton's Lessee*, 10 Tenn. (2 Yer.) 143, 144 (1826)).

⁶⁴ Brief for the United States, *supra* note 63, at 49.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1009

The Supreme Court agreed. Describing the Indian nations as “savage tribes,” Justice Reed held that Indian title was “not a property right,” but was rather “mere possession not specifically recognized as ownership by Congress.”⁶⁵ Although the decision has been harshly criticized,⁶⁶ it has not been overruled. In *Oneida Indian Nation of New York v. County of Oneida* (*Oneida I*), the Court in 1974 again acknowledged the “accepted doctrine” that “fee title to the lands occupied by Indians” became vested in the discovering nation, and that Indian title was “only a right of occupancy.”⁶⁷ Eleven years later, in *Oneida II*, the Court cited *Johnson v. McIntosh* at length in support of the proposition that—pursuant to the doctrine of discovery—the discovering nations held “fee title” to the lands inhabited by Indian nations, “subject to the Indians’ right of occupancy and use.”⁶⁸ Most recently, in *City of Sherrill v. Oneida Indian Nation of New York*, the Court quoted from both *Oneida I* and *Oneida II* and observed that “[u]nder 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.’”⁶⁹ Nowhere in *Tee-Hit-Ton*, *Oneida I*, *Oneida II*, or *City of Sherrill* does the Court refer to Chief Justice Marshall’s

⁶⁵ *Tee-Hit-Ton Indians*, 348 U.S. at 279, 289. Indian title was equated with “permission from the whites to occupy.” *Id.* at 279. See also MCNEIL, *supra* note 56, at 303 (“In the United States Indian title remained virtually undefined until 1955 when the Supreme Court finally concluded that it confers no proprietary interest at all—that the holders of this ‘title’ are merely permissive occupiers of government-owned land.”).

⁶⁶ See, e.g., DRAFT GENERAL PRINCIPLES, *supra* note 10, at 40–53 (citing statements in *Worcester* concerning Indian land rights, but endorsing *Johnson*’s “limited possessor” conception of native property); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 87 (1996); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 17–18 (1991); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

⁶⁷ *Oneida Indian Nation v. Cnty. of Oneida* (*Oneida I*), 414 U.S. 661, 667 (1974). At one point in his decision, Justice White equates “fee title to Indian lands” with the right of preemption. *Id.* at 670 (“It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State.” (emphasis added)). In my view, this statement is inconsistent with prior pronouncements of the Court, which state that discovery “gave title” and the exclusive right to extinguish the Indian title of occupancy. See *infra* notes 91–113 and accompanying text.

⁶⁸ *Cnty. of Oneida v. Oneida Indian Nation* (*Oneida II*), 470 U.S. 226, 234 & n.3 (1985).

⁶⁹ *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 n.1 (2005) (citations omitted) (quoting *Oneida II*, 470 U.S. at 234, and *Oneida I*, 414 U.S. at 667). The Court also noted that “[i]n the original 13 States, ‘fee title to Indian lands,’ or ‘the pre-emptive right to purchase from the Indians, was in the State.’” *Id.* (quoting *Oneida I*, 414 U.S. at 670 and citing *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1159–67 (2d Cir. 1988)). With respect to the statements equating fee title with the right of preemption, see *infra* notes 106–113 and accompanying text.

statements in *Worcester v. Georgia* regarding the doctrine of discovery and Indian title.

III. DISCOVERY “GAVE TITLE” AND THE RIGHT TO EXTINGUISH THE INDIAN RIGHT OF OCCUPANCY

Michael Blumm and Tim Coulter are both forceful and articulate proponents of the “limited owner” view of Indian title. Professor Blumm, who served as a moderator at the Spring Symposium, has written a law review article that makes two interconnected arguments: (1) Indian title includes “all ownership rights except the right to transfer alienable title to any person other than the discovering government”; and (2) “[a]ll the government obtained from discovery was an exclusive right of preemption: the right to purchase Indian title.”⁷⁰ In the same fashion, Tim Coulter and the Indian Resource Law Center contend that:

there is no sound legal authority either in international or domestic law that the “doctrine of discovery” *as a matter of law* diminished the ownership rights of the Native owners or that it gave to the United States, as successor to the “discovering” nations, any actual ownership interest in Indian lands apart from the preemptive right to purchase.⁷¹

Both arguments are restatements of the “limited owner” conception of Indian title, which is certainly preferable (from the viewpoint of indigenous peoples) to the “limited possessor” formulation. However, I remain convinced that the Supreme Court, if squarely faced with the issue, would hold instead that discovery *did* diminish the ownership rights of the Indian nations, and gave the discovering nation *not only* the right to purchase Indian right of occupancy, *but also* the “fee title” to the lands at issue.⁷²

⁷⁰ Blumm, *supra* note 10, at 773. *See also id.* at 758 (“Discovery gave discoverers *only* an exclusive right to purchase, excluding other European competitors. It simultaneously imposed a partial restraint on alienation on the Indian tribes, forbidding fee sales to anyone but the discovering sovereign or its successors.” (emphasis added)).

⁷¹ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 14.

⁷² It is interesting to note that no one appears to argue for the *most favorable* conception of Indian title: that indigenous inhabitants own and possess the lands they occupy, and are entirely free to sell or transfer their property rights. This was not always so. In 1781, Samuel Wharton of Philadelphia maintained (with self-interest) that Indian nations have “an indefeasible right freely to sell, and grant to any person whatsoever.” SAMUEL WHARTON, PLAIN FACTS: BEING AN EXAMINATION INTO THE RIGHTS OF INDIAN NATIONS 28 (1781). The Indian nations of the Northwest Territory took a similar position in 1793, informing American treaty commissioners that “we consider ourselves free to make any bargain or cession of lands, whenever & to whomsoever we please.” John Graves Simcoe, Message from the Western Indians to the Commissioners of the United States (Aug. 13, 1793), in 2 CORRESPONDENCE OF LIEUT. GOVERNOR JOHN GRAVES SIMCOE 17, 19 (E.A. Cruikshank ed., 1924) (emphasis added). Three years later, future Supreme Court Justice Brockholst Livingston wrote a private legal opinion endorsing the unqualified disposition rights of Indians. Legal Opinion

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1011

A. *The Argument for the “Limited Owner” Conception of Indian Title*

Michael Blumm contends that “the discovering nation” not only gained the sovereign right to exclude other Europeans, but also obtained the “exclusive right to obtain native lands,” which he describes as “the equivalent of an exclusive right of preemption” and characterizes as “a proprietary right.”⁷³ The government’s right of preemption imposed a “partial restraint on the ability of the natives to alienate their lands,” but otherwise the natives “retained what they previously had held.”⁷⁴ The property rights of the Indian nations were—as noted by the Supreme Court on several occasions—“as sacred and as securely safeguarded as is fee simple absolute title.”⁷⁵ Blumm does acknowledge that Chief Justice Marshall stated in *Johnson* that discovery “gave title” to the discovering nation, but contends that it is “hardly clear” what Marshall meant by “title.”⁷⁶ According to Blumm, Indian title and the discoverer’s title are *both* ownership (proprietary) interests: “the discovery doctrine created a kind of split estate, leaving the Indians with a present estate that Marshall called occupancy title and giving the discoverer a future interest: a right of preemption in Indian lands.”⁷⁷ In particular, Blumm contends that the

Concerning Indian Land Grants from Brokholst Livingston to J. Schieffelin (Sept. 1796), in 2 JOHN ASKIN PAPERS 60, 61 (Milo M. Quaife ed., 1931) (“I think Congress have no right to say, that the Indians shall grant no Lands without their permission.”). The Cherokee Nation, in their complaint filed with the Supreme Court in 1830, also argued that Indian nations held complete rights of disposition. RICHARD PETERS, THE CASE OF THE CHEROKEE NATION AGAINST THE STATE OF GEORGIA 4 (1831) (“[The principle] that the first European discoverer has the prior and exclusive right to purchase these lands from the Indian proprietors . . . [is] a principle to which the Indian proprietors have never given their assent, and which they deny to be a principle of the natural law of nations, or as in any manner obligatory on them.”). Justice Livingston, who died in 1823 shortly after the Supreme Court decided *Johnson v. McIntosh*, never authored a judicial opinion addressing the nature and scope of Indian title. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 469 (1996).

⁷³ Blumm, *supra* note 10, at 715.

⁷⁴ *Id.* at 715–16. See also David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 283 (1998) (The discovery doctrine “was merely an exclusive preemptive rule that limited the rights of the discoverers or their successors and entailed no limitation on the preexisting land title of tribes.”).

⁷⁵ Blumm, *supra* note 10, at 716 (quoting *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938), and citing *Oneida I*, 414 U.S. 661, 669 (1974); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)).

⁷⁶ *Id.* at 737. In support of this statement, Blumm quotes Marshall’s observation in *Worcester* that the only “title” granted by the colonial charters was “the exclusive right of purchasing such lands as the natives were willing to sell.” *Id.* at 737 n.156 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832)).

⁷⁷ *Id.* at 738. In support of this assertion, Blumm quotes Marshall’s statement in *Johnson* that “[t]he absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers

discoverer's "future interest" is a non-possessory executory interest (in fee simple), the Indian title is a possessory fee simple subject to an executory limitation, and the divesting condition placed on the possessory fee simple is the sovereign's exercise of the right of preemption; to wit, the acquisition of the native right.⁷⁸ Consequently, Blumm argues that statements in *Johnson* and subsequent cases—that the government possessed "ultimate title" or "seisin in fee"—are "at odds with the actual proprietary interests held by the Indians and the government."⁷⁹ But for "Chief Justice Marshall's mischaracterization of the Indian property rights," Indian title "would have been described as a fee simple subject to a right of preemption of the government because, functionally, that is what it was."⁸⁰

Tim Coulter and the Indian Law Resource Center also believe that the "discoverer's title" is nothing more than the exclusive "preemptive" right to purchase Indian lands. The Center, in its *Draft General Principles of Law Relating to Native Lands and Natural Resources*, addresses the discovery doctrine and Indian title in the following "General Principles of Law Relating to Native Lands and Natural Resources":

- (1) The legal rights of Indian or Alaska Native nations to the lands and resources they own by reason of aboriginal ownership, use and occupancy are the full rights of

possessed the exclusive right of acquiring." *Id.* at 738 n.164 (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 592 (1823)).

⁷⁸ *Id.* at 738 ("Federal grantees of Indian title lands received only a future interest, which would not become possessory until the federal government exercised its right of preemption. Such an interest is commonly known as an executory interest."). Executory interests are usually subject to the common law Rule Against Perpetuities, which states that no interest (subject to the Rule) is good unless it must vest, if at all, not later than twenty-one years after the death of some life in being at the creation of the interest. If the discovering nation (or its grantee) does in fact hold an executory interest, it is apparently exempt from the Rule Against Perpetuities, because otherwise it would violate the Rule. There is no time limit placed on the "vesting event" (the acquisition of the Indian title), and thus the executory interest could possibly vest at a point in time that is beyond the perpetuities period.

⁷⁹ *Id.* at 740. See *Johnson*, 21 U.S. (8 Wheat.) at 592 ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment."). See also *Jones v. Meehan*, 175 U.S. 1, 8 (1899) ("[T]he ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States, without the consent of the United States."); *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 67 (1886) (*Johnson* is "the origin of this doctrine of the ultimate title and dominion in the United States."); *United States v. Kagama*, 118 U.S. 375, 381 (1886) (The discovering nations and their successors "recognized in the Indians a possessory right to the soil But they asserted an ultimate title in the land itself."); *Doe v. Wilson*, 64 U.S. (23 How.) 457, 463 (1860) ("The United States held the ultimate title, charged with the right of undisturbed occupancy and perpetual possession, in the Indian nation, with the exclusive power in the Government of acquiring the right.").

⁸⁰ Blumm, *supra* note 10, at 774.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1013

ownership, management, control, and disposition recognized in law without any diminishment or discrimination based on the aboriginal origin of these rights.

- (2) The doctrine of discovery gave the “discovering” nation particular rights under international law as against other European or colonizing nations, namely the exclusive right to acquire land and resources from the Native or indigenous nations. The “doctrine of discovery” gave the “discovering” nation no legal right as against the Native nations or peoples.
- (3) Legal doctrines such as *terra nullius*, the doctrine of discovery, and other such doctrines are inconsistent with the United States Constitution to the extent that they are mistakenly applied to diminish or impair the rights that Indian and Alaska Native nations hold with respect to their lands and resources.⁸¹

According to the Center, “United States law has always conformed and continues to conform to Principles One, Two, and Three. . . . The doctrine of discovery under United States law merely gave the discovering nation a pre-emptive, that is, exclusive, right to purchase Indian and Alaska Native lands—it did not give ownership of those lands.”⁸² Although Chief Justice Marshall states in *Johnson* that “the Indian inhabitants are to be considered merely as occupants” and “incapable of transferring the absolute title to others,”⁸³ Tim Coulter and the Indian Law Resource Center contend that “it is clear that in substance he recognized and affirmed that this included all the rights of ownership except for the right to dispose of the land to any other European country.”⁸⁴

Not surprisingly, the Center quotes extensively from *Worcester v. Georgia*, particularly the passages in which Marshall disparages the discovery doctrine and states that the colonial charters could only convey “the exclusive right of purchasing such lands as the Natives were willing to sell.”⁸⁵ The Center also quotes at length from *Oneida Indian Nation v. New York*, in which the United States Court of Appeals for the Second Circuit states that “the concept of fee title in the context of Indian lands does not amount to absolute ownership, but rather is used

⁸¹ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 10.

⁸² *Id.* at 17.

⁸³ *Johnson*, 21 U.S. (8 Wheat.) at 591.

⁸⁴ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 21.

⁸⁵ *Id.* at 21–23, 25–26 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 545 (1832)). The Center cites the very passage in *Johnson* that states that “discovery gave exclusive title to those who made it” as support for its contention that the Indian nations *retained* ownership of their lands, and lost only the right to sell their lands to purchasers other than the discovering country. *Id.* at 23 (quoting *Johnson*, 21 U.S. (8 Wheat.) at 574).

interchangeably with ‘right of preemption,’ or the preemptive right over all others to purchase the Indian title or right of occupancy from the inhabitants.”⁸⁶

The terms “ultimate title” and “title” could not mean “fee simple title,” according to the Center, “because that would have been incompatible with the Indian title to the land.”⁸⁷ Rather, it is contended, Chief Justice Marshall “intentionally obscured” the meaning of “title” in his opinions to further his “self-interested aim of making [the discovering nation’s] contingent future interests in Indian land still held by the Indian owners cognizable legal interests in land.”⁸⁸ The Center does acknowledge that the Supreme Court in *Tee-Hit-Ton Indians v. United States* held that unrecognized Indian title is “not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties.”⁸⁹ In response, the Center declares that “all Native property is entitled to full constitutional protection,” and argues that “the Supreme Court’s non-sensical statement that aboriginal title lands are not property in the legal sense is wholly inconsistent with the uniform body of precedent establishing the very opposite rule.”⁹⁰

B. *The Argument for the “Limited Possessor” Conception of Indian Title*

In my view, proponents of the “limited owner” conception of Indian title are setting forth what federal law *ought to be* as opposed to what the current law *really is* concerning aboriginal lands in the United States. The Supreme Court, regrettably, has endorsed the notion that discovery conferred title along with the right to extinguish Indian occupancy rights. Because *Johnson* held that discovery “gave title” to the discovering nation, it does not follow that the right of preemption should be equated with “ownership” in fee simple. Nor should the right of preemption be understood as the right to acquire fee simple title. Rather, the right of preemption—according to the Supreme Court—is the government’s right to extinguish the (noncompensable) native right of occupancy.

⁸⁶ *Id.* at 32–33 (quoting *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1075 (2d Cir. 1982)). The Second Circuit, in support of its statement, cites to the Supreme Court’s observation in *Oneida I* that “in the original States [the] . . . fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State.” *Oneida I*, 414 U.S. 661, 670 (1974). *See also* *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (quoting the same statement from *Oneida I*); *Seneca Nation v. New York*, 206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002) (“Once aboriginal title is extinguished by the sovereign, the owner of the underlying fee title or right of preemption obtains fee simple absolute title to the land.” (citing *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1075 (2d Cir. 1982))).

⁸⁷ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 27.

⁸⁸ *Id.* at 28.

⁸⁹ *Id.* at 47 (quoting *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)).

⁹⁰ *Id.* at 41, 47.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1015

When Chief Justice John Marshall died on July 6, 1835, his statements in *Worcester* regarding Indian title soon passed into desuetude. Faced with competing versions of the doctrine of discovery, the Supreme Court preferred the “limited possessor” conception of Indian title set forth in *Johnson*.⁹¹ In 1846, Chief Justice Taney declared in *United States v. Rogers* that the Indian tribes “have never been . . . regarded as the owners of the territories they respectively occupied.”⁹² Just over a quarter-century later, the Court cited *Johnson* for the proposition that the “fee was in the United States, subject only to [the Indian] right of occupancy,” and stated that “[t]he authority of that case has never been doubted.”⁹³ Just one year after the Lakota, Northern Cheyenne, and Arapaho reasserted their independence at the Battle of the Greasy Grass (Little Bighorn), the Supreme Court in 1877 reaffirmed the *Johnson* “limited possessor” view of native land rights:

[T]he right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. . . . The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. It was so ruled in *Johnson v. McIntosh*⁹⁴

Other courts have acknowledged that the United States Supreme Court has accepted the “limited possessor” view of native land rights. As noted by Justice Stanley Mosk of the California Supreme Court, “Indian title is primarily a permissive right to occupy certain land but the fee title remains with the United States government.”⁹⁵ In similar fashion, the

⁹¹ See, e.g., *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850) (“Indian title consisted of the usufruct and right of occupancy and enjoyment”); *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839) (“The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the states of the Union afterwards, and subject to grant.”); *United States v. Fernandez*, 35 U.S. (10 Pet.) 303, 304 (1836) (“[E]very European government claimed and exercised the right of granting lands, while in the occupation of the Indians.”). In Tennessee, future Supreme Court Justice John Catron both praised and followed *Johnson*. See *State v. Foreman*, 16 Tenn. (8 Yer.) 256, 334–35 (1835); *Blair v. Pathkiller’s Lessee*, 10 Tenn. (2 Yer.) 407, 408 (1830).

⁹² *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846).

⁹³ *United States v. Cook*, 86 U.S. (19 Wall.) 591, 592–93 (1874).

⁹⁴ *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). See also *Jones v. Meehan*, 175 U.S. 1, 8 (1899) (“Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to anyone but the United States, without the consent of the United States.”); *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 66–67 (1886) (citing *Beecher* and *Johnson*).

⁹⁵ *In re Wilson*, 634 P.2d 363, 374 (Cal. 1981) (Mosk, J., dissenting) (citing *Oneida I*, 414 U.S. 661, 667 (1974)).

United States Claims Court has observed that Indian title “does not vest the titleholder with a fee simple interest in the land” because *Tee-Hit-Ton* held that Indian title “is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties.”⁹⁶ Most significantly, the Supreme Court has not wavered from its long-held position, and in 2005 observed in *City of Sherrill v. Oneida Indian Nation* that “[u]nder 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.’”⁹⁷ While it is true that the Supreme Court has stated that Indian title is “as sacred and as securely safeguarded as is fee simple absolute title,”⁹⁸ it is also evident that Indian title is not fee simple absolute. In *United States v. Cook*, the Court stated that “[t]he right of the Indians to their occupancy is as sacred as that of the United States to the fee, *but it is only a right of occupancy.*”⁹⁹ Furthermore, in its infamous *Tee-Hit-Ton* decision, the Court held that Indian title is an occupancy right that is not “property” for purposes of the Just Compensation Clause of the Fifth Amendment. The “fee simple” estate *is* a compensable property right,¹⁰⁰ and it therefore follows that Indian title is not a “fee” estate (whether absolute or subject to an executory limitation).

The Indian Law Resource Center, in its *Draft General Principles of Law Relating to Native Lands and Natural Resources*, makes the following argument:

If discovery had by law already conferred ownership upon the discovering country, there would have been no purpose in establishing the right of pre-emption, that is, the pre-emptive right to purchase or acquire the Native land. The discovering country would not have to purchase the land at all because it would already own it.¹⁰¹

This argument misconceives the reason for the right of preemption: it is not a right to acquire “the Native land”; rather it is right to extinguish the native *occupancy* right. As Chief Justice Marshall states in *Johnson*, the

⁹⁶ *Zuni Indian Tribe v. United States*, 16 Cl. Ct. 670, 671 (Cl. Ct. 1989) (quoting *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955)).

⁹⁷ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (quoting *Oneida II*, 470 U.S. 226, 234 (1985); *Oneida I*, 414 U.S. at 667).

⁹⁸ *United States v. Shoshone Tribe*, 304 U.S. 111, 117 (1938). *See also Oneida I*, 414 U.S. at 668–69; *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835)).

⁹⁹ *United States v. Cook*, 86 U.S. 591, 593 (1874) (emphasis added).

¹⁰⁰ *See, e.g., San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (“In the typical condemnation proceeding, the government brings a judicial or administrative action against the property owner to ‘take’ the fee simple or an interest in his property; the judicial or administrative body enters a decree of condemnation and just compensation is awarded.”).

¹⁰¹ DRAFT GENERAL PRINCIPLES, *supra* note 10, at 18.

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1017

discovering nation holds “a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish *that right*, was vested in that government which might constitutionally exercise it.”¹⁰²

The Supreme Court characterizes Indian title as a right of occupancy, and describes the discoverer’s title as the “ultimate fee.”¹⁰³ The assignment of the fee to the discovering nation—while based on the illegitimate doctrine of discovery—is not “at odds” with the Indian title of occupancy.¹⁰⁴ It is common to own a non-possessory fee simple absolute, subject to a possessory interest. Anglo-American property law utilizes “future interest” terminology to describe various ways by which one can own land but lack the right of possession. For example, during the period of time a tenant holds the right of possession, the landlord’s fee simple absolute is no longer possessory, but rather is a nonpossessory reversion in fee simple absolute. The landlord can sell his reversion in fee simple absolute, pass it at death, or retain it and bring suit against the tenant for waste. The landlord owns the property, subject to the tenant’s right of possession. In similar fashion, the Supreme Court in *Johnson* held that the discovering nation gained title to lands “yet in possession of the natives.”¹⁰⁵

In cases involving aboriginal title in New York, the Supreme Court and the United States Court of Appeals for the Second Circuit have made statements that seemingly equate the right of preemption with the fee title of discoverer.¹⁰⁶ The pre-emptive right is *not* itself title to land,

¹⁰² *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823) (emphasis added). See also *id.* at 592 (The discoverer’s “absolute ultimate title” is “subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 242 (1st ed. 1826) (“[T]he Indians have only a right of occupancy, and the United States possess the legal title subject to that occupancy, and with an absolute and exclusive right to *extinguish the Indian title of occupancy* either by conquest or purchase.” (emphasis added)).

¹⁰³ See, e.g., *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839) (“The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the states of the Union afterwards, and subject to grant.”).

¹⁰⁴ See Blumm, *supra* note 10, at 740 (arguing that the notion that the government possesses the “ultimate title” or “seisin in fee” is “at odds” with Indian title).

¹⁰⁵ *Johnson*, 21 U.S. (8 Wheat.) at 574.

¹⁰⁶ See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005) (“In the original 13 States, ‘fee title to Indian lands,’ or ‘the pre-emptive right to purchase from the Indians, was in the State.’” (quoting *Oneida I*, 414 U.S. 661, 670 (1974), and citing *Oneida Indian Nation v. New York*, 860 F.2d 1145, 1159–67 (2d Cir. 1988)); *Oneida I*, 414 U.S. at 670 (“It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State.”); *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1075 (2d Cir. 1982) (“[T]he concept of fee title in the context of Indian lands does not amount to absolute ownership, but rather is used

however, but rather a right to acquire the Indians' right of occupancy. As Justice William Johnson noted in his dissent in *Fletcher v. Peck*, if the government's interest is "nothing more than a pre-emptive right, how could that be called a fee-simple[?]"¹⁰⁷ In *Seneca Nation v. New York*, the United States District Court for the Western District of New York held that "[o]nce aboriginal title is extinguished by the sovereign, the owner of the underlying fee title or right of preemption obtains fee simple absolute title to the land."¹⁰⁸ The sentence is worth another look: the court states that the owner of "the underlying fee title" obtains "fee simple absolute title" when aboriginal title is extinguished! It is difficult to comprehend how the existing owner of the fee simple can subsequently obtain the fee simple. On the other hand, when a possessory right ends, the existing nonpossessory (underlying?) fee simple will become a possessory "unencumbered" fee simple.¹⁰⁹ As noted by the Supreme Court in *Clark v. Smith*:

The ultimate fee (encumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the states of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the Courts until extinguished; when the patentee took the unencumbered fee.¹¹⁰

As Russell Lawrence Barsh and James Youngblood Henderson once queried, "[s]omeone must have fee title, but who?"¹¹¹ As first-year law students are taught, "[a]ll present and future interests must add up to a

interchangeably with 'right of preemption,' or the preemptive right over all others to purchase the Indian title or right of occupancy from the inhabitants.") (citing *Oneida I*, 414 U.S. at 670); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 251 (E.D.N.Y. 2008) (Great Britain's "underlying fee title or right of preemption was good against all other discovering nations."); *Seneca Nation v. New York*, 206 F. Supp. 2d 448, 504 (W.D.N.Y. 2002), *aff'd*, 382 F.3d 245 (2d Cir. 2004), *cert. denied*, 547 U.S. 1178 (2006) ("Once aboriginal title is extinguished by the sovereign, the owner of the underlying fee title or right of preemption obtains fee simple absolute title to the land." (citing *Oneida Indian Nation v. New York*, 691 F.2d at 1075)). See also STUART BANNER, *HOW THE INDIANS LOST THEIR LAND* 160-65 (2005).

¹⁰⁷ 10 U.S. (6 Cranch) at 147. This statement is not undercut by the fact that Justice Johnson's view of the case—that the Indian nation held the fee simple and the discoverer's title was nothing more than the right of preemption—was rejected by the Supreme Court in *Fletcher* and again in *Johnson*.

¹⁰⁸ 206 F. Supp. 2d at 504. See also *id.* at 510 ("Having extinguished Seneca title to the Niagara strip and the Niagara Islands in 1764, Great Britain, as the holder of the right of preemption, obtained fee simple absolute title to those lands.").

¹⁰⁹ If Anna conveys Blackacre to Ben for ten years, Ben holds a possessory term for years, and Anna holds a nonpossessory reversion in fee simple absolute. When the ten years conclude, Ben's possessory right terminates, and Anna's "underlying" reversion in fee simple becomes a possessory fee simple. Anna did not "obtain" the fee simple upon the expiration of the term for years; she owned the fee simple prior to, during, and after her conveyance to Ben.

¹¹⁰ *Clark v. Smith*, 38 U.S. (13 Pet.) 195, 201 (1839).

¹¹¹ RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 38 (1980).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1019

fee simple absolute.”¹¹² If the Indian nations, after discovery, held the right of occupancy, who held the fee title? The answer—according to the European colonizers—is the discovering nation or its successor. Because the fee title is vested in the discovering nation, the right of preemption is the right to acquire what the discovering nation lacked: the native possessory right of occupancy.¹¹³

The discovery doctrine, unfortunately, *did* diminish the ownership rights of the tribal nations. The doctrine, regrettably, gave the discovering nation *more* than a right of preemption: it conferred by fiat both title (in the form of a nonpossessory fee simple absolute) *and* the preemptive right to extinguish the Indian right of occupancy. Indian title is a “limited possessory” right: possession without ownership, and possession without complete power of disposition.

IV. INDIAN TITLE CANNOT BE ANALOGIZED TO COMMON LAW PROPERTY RIGHTS

Indian title has been analogized to different common law property rights, including a fee simple absolute;¹¹⁴ a fee simple subject to an executory limitation;¹¹⁵ a life estate;¹¹⁶ the non-freehold tenancies;¹¹⁷ a

¹¹² BARLOW BURKE & JOSEPH A. SNOE, PROPERTY: EXAMPLES AND EXPLANATIONS 117 (2001). *See also* SANDRA H. JOHNSON ET AL., PROPERTY LAW: CASES, MATERIALS AND PROBLEMS 141 (3d ed. 2006) (“[T]he principle of conservation of estates requires that all parts of the fee simple absolute, the perfect or most complete estate, be accounted for when a lesser estate is transferred.”); Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land as a Community-Based Resource*, 32 ENVTL. L. 773, 775 (2002) (“[T]he various estates must at all times add up to the whole bundle, a fee simple.”).

¹¹³ THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 47 (2d ed. 1984) (“If the owner of an estate in fee simple transfers any number of estates in fee tail, for life, or for years, or any combination of such estates, the transferor is deemed to have ‘kept’ a *future* estate in fee simple.”).

¹¹⁴ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831) (“Indians have rights of occupancy to their lands as sacred as the fee-simple . . .”).

¹¹⁵ Blumm, *supra* note 10, at 738.

¹¹⁶ *United States v. Cook*, 86 U.S. (19 Wall.) 591, 594 (1874) (comparing Indian title to a tenancy “for life”).

¹¹⁷ In *Johnson*, Marshall declared that Indian title “is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.” 21 U.S. (8 Wheat.) 543, 592 (1823). Indian title has been analogized to a fixed tenancy, *see, e.g.*, ROBERTSON, *supra* note 10, at 4 (“The indigenous owners were converted into tenants on their lands and denied the right to sell their ‘leases’ on the open market.”); McNEIL, *supra* note 56, at 252 (“[T]he Indians had something akin to leasehold possession.”); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 31 (1997) (landlord-tenant relationship); a tenancy at sufferance, *see, e.g.*, *Cornet v. Winton’s Lessee*, 10 Tenn. (2 Yer.) 143, 154 (1826); Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1097 (2000); and a tenancy at will, *see, e.g.*, 5 ANNALS OF CONG. 895 (1796) (statement by Representative James Holland of North Carolina that Indians “were tenants at will”); *Inupiat Cmty. v. United States*, 680 F.2d 122, 129 (Ct. Cl. 1982) (“The Inupiat argue . . . that their situation should

usufructuary privilege;¹¹⁸ and a revocable license.¹¹⁹ The discoverer's title, in turn, has been characterized, *inter alia*, as a future interest (a reversion or remainder in fee absolute);¹²⁰ an option;¹²¹ and the "naked" fee simple

be analogized to that of a tenant at will who, after his tenancy has been terminated, may maintain an action for trespasses committed before termination."); E. Nathaniel Gates, *Justice Stillborn: Lies, Lacunae, Incommensurability, and the Judicial Role*, 19 CARDOZO L. REV. 971, 1001 (1997) (noting that the Georgia Legislature characterized the Cherokee people, prior to their removal, as mere tenants at will).

¹¹⁸ E. Band of Cherokee Indians v. United States, 117 U.S. 288, 294 (1886) ("Their title was treated by the governments established by England, and the governments succeeding them, as merely usufructuary . . ."); *Buttz v. N. Pac. R.R.*, 119 U.S. 55, 67 (1886) ("Whilst thus claiming a right to acquire and dispose of the soil, the discoverers recognized a right of occupancy or a usufructuary right in the natives."); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850) ("This Indian title consisted of the usufruct and right of occupancy and enjoyment . . ."); *Blair v. Pathkiller's Lessee*, 10 Tenn. (2 Yer.) 407, 412 (1830) ("[T]he right of occupancy was a usufructuary privilege subject to extinction."); *Cornet*, 10 Tenn. (2 Yer.) at 144 ("And what is this Indian title? It has been called by the courts of this state, a usufructuary right . . .").

¹¹⁹ *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 356 (7th Cir. 1983) ("We concur with the general proposition that if the Indians' right of occupancy is temporary, their interest in the land is more similar to a 'revocable license' than it is to 'title.'"); MCNEIL, *supra* note 56, at 260 ("In [Justice Reed's] view [in *Tee-Hit-Ton*], original Indian title which has not been recognized is merely permissive occupation."); John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: The Battle for Recognition*, 69 UMKC L. REV. 311, 319 (2000) ("Aboriginal title, unrecognized by federal treaty or statute, is considered mere possession or license as against the dominant sovereign, and is subject to displacement without constitutional consequence."); Note, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 655 (1975) (Indian title is "essentially a revocable privilege granted by the United States."); and Brief for the United States, *supra* note 65, at 31 (Indian title "is comparable to that of a mere licensee, e.g., a squatter on the public lands.").

¹²⁰ *Cook*, 86 U.S. (19 Wall.) at 594 (comparing the discoverer's title to a remainder in fee simple); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 756 (1835) (describing the government's title as "the ultimate reversion in fee"); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 27 (1831) ("[Indians are not] able to alienate without permission of the remainder-man or lord . . . [And are] without land that they can call theirs in the sense of property . . ."); *Catawba Indian Tribe v. South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989) ("[W]here Indian title and fee simple title coexist, the fee simple interest operates merely as a reversionary right . . ."); Thomas Jefferson, Conversation with President Washington (Feb. 26, 1793), in 1 THE WRITINGS OF THOMAS JEFFERSON 330, 340 (Andrew A. Lipscomb & Albert Ellery Bergh eds., libr. ed. 1903) ("I consider[] our right of preemption of the Indians lands . . . in the nature of a remainder after the extinguishment of a present right . . ."); *Timber Unlawfully Cut on Indian Lands*, 19 Op. Att'y Gen. 710, 712 (1890) ("[T]he respective rights of the United States and the Indians to timber standing on the Indian lands are precisely the same as those of a reversioner or remainderman in fee and a life tenant . . .").

¹²¹ MILLER ET AL., *supra* note 4, at 5 ("The discoverer acquired an exclusive option to purchase tribal lands whenever tribes consented to sell."); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 209 (1984) ("[T]he early decisions of the Marshall Court viewed the government's property interest in land as a preemptive right to purchase, or a sort of glorified

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1021

absolute.¹²² Given the unique nature (and illegitimate basis) of Indian title, however, all analogies ultimately fail.

Indian title refers to “land claimed by a tribe by virtue of its possession and exercise of sovereignty rather than by virtue of letters of patent or any formal conveyance.”¹²³ Until Indian title is extinguished, “a tribe has the collective right to occupy and use its land as it sees fit.”¹²⁴ As previously noted, Indian title is not considered to be “property” subject to the Fifth Amendment’s Just Compensation Clause.¹²⁵ The United States holds the exclusive right to purchase or otherwise extinguish Indian title.¹²⁶ Until extinguished, the aboriginal title “entitles the tribes to full use and enjoyment of the surface and mineral estate, and to resources, such as timber, on the land.”¹²⁷

The reason Indian title cannot be equated with a common law fee title—whether absolute or defeasible—is because the Supreme Court squarely held in *Tee-Hit-Ton Indians* that “Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.”¹²⁸ Life estates and fixed-term leases are unlike Indian title not only because they are compensable interests when taken by eminent domain,¹²⁹ but also because they are of

option to buy the land . . .”). An “option” has been described as “a privilege given by the owner of property to another to buy the property at his election.” *W. Union Tel. Co. v. Brown*, 253 U.S. 101, 110 (1920).

¹²² *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877) (if the United States grants land subject to the native right of occupancy, the grantee “would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States”); *State v. Elliott*, 616 A.2d 210, 220–21 (Vt. 1992) (the “naked fee” is a reversionary interest that becomes possessory upon extinguishment of the native right of occupancy); Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 138 n.110 (1995) (“[T]he United States’ trust title is characterized as ‘naked fee,’ with the full beneficial interest vested in the tribes.”); Frederico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364, 1367 (1986) (defining the “naked fee” as “title to land without the rights that title customarily encompasses”).

¹²³ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 24, § 15.04[2], at 969.

¹²⁴ *Id.* at 970. *See also* *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (Tribes have a “legal as well as just claim to retain possession.”).

¹²⁵ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

¹²⁶ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 24, § 15.06[1], at 998.

¹²⁷ *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986).

¹²⁸ *Tee-Hit-Ton Indians*, 348 U.S. at 285.

¹²⁹ *See, e.g., Bajwa v. Sunoco, Inc.*, 320 F. Supp. 2d 454, 460 (E.D. Va. 2004) (“[L]essees of [condemned] property are entitled to compensation for the value of their leasehold interest.”); *Larrabee v. Town of Knox*, 744 A.2d 544, 546 (Me. 2000) (“The holder of a life estate . . . is entitled to compensation when the property is taken for public use.”); *State v. Tedesco*, 286 P.2d 785, 789 (Utah 1955) (in an

finite duration. A tenancy at sufferance is not a compensable property right,¹³⁰ but is still not analogous to Indian title because it arises “where the tenant wrongfully holds over after the expiration of his term.”¹³¹

The common law property rights most analogous to Indian title are the tenancy at will and the license. Both protect occupancy and use rights, both are revocable, and neither is compensable as a general rule.¹³² The difference between a tenancy at will and a license is that the former creates an estate (however ephemeral) in the tenant, whereas the latter confers no title or interest in the land.¹³³ Because a license is focused more on use than occupancy, and is often non-exclusive, Indian title is perhaps most akin to the tenancy at will, which typically gives the tenant the right of exclusive possession.¹³⁴ However, Indian title allows full use of surface and mineral resources, whereas such consumptive uses

eminent domain proceeding, compensation is due to “vested interests such as leaseholds having a fair rental value, life estates and the like”).

¹³⁰ *Whiteco Industries, Inc. v. City of Tucson*, 812 P.2d 1075, 1077 (Ariz. Ct. App. 1990) (“[T]he general rule [is] that the interest of a tenant at will or at sufferance upon condemned realty is not a compensable property interest.”).

¹³¹ *Thompson v. Baxter*, 119 N.W. 797, 798 (Minn. 1909).

¹³² *See, e.g., Acton v. United States*, 401 F.2d 896, 899 (9th Cir. 1968) (“A license does not constitute property for which the Government is liable upon condemnation, and passes to the licensee no estate or interest in the lands.”); *Santa Fe Trail Neighborhood Redev. Corp. v. W.F. Coen & Co.*, 154 S.W.3d 432, 439 (Mo. Ct. App. 2005) (licensee does not possess an interest in property for which he must be compensated in condemnation); *Okla. Transp. Auth. v. Tulsa Kampground, Inc.*, 57 P.3d 141, 143 (Okla. Civ. App. 2002) (“[A] tenant at will, occupying the property with the consent of the land owner, but without a lease, ordinarily has no right to a share of the owner’s condemnation award.”); 2 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.03[6][g] (3d ed. 2011) (“A license is permission to use property of another for a specific purpose. A license is generally revocable at will A mere license is not generally considered a compensable interest in land or eminent domain.”); *id.* at § 5.02[6][i] (“Tenants at will generally have no compensable interest if their property interest is taken by eminent domain.”).

¹³³ *Seven Lakes Dev. Co. v. Maxson*, 144 P.3d 1239, 1245 (Wyo. 2006) (“A license does not give any interest in the land, but means that one who possesses a license is not a trespasser.”); *Bernet v. Rogers*, 519 N.W.2d 808, 810–11 (Iowa 1994) (“A licensee has—with the permission of the owner—the right to use the property. . . . [But] has no interest in the property.”); *Bishop v. Stewart*, 106 So. 2d 899, 900 (Miss. 1958) (“[A] license confers no title or interest in the land.”); *Covina Manor, Inc. v. Hatch*, 284 P.2d 580, 582–83 (Cal. App. Dep’t Super. Ct. 1955) (“A license is an authority to do a particular act or series of acts upon the land of another, and conveys no estate in the land, whereas a tenancy at will is the permissive right to occupy and enjoy premises, and creates an estate in the tenant.”).

¹³⁴ Joseph M. Dodge, *Are Gift Demand Loans of Tangible Property Subject to the Gift Tax?*, 30 VA. TAX REV. 181, 255 (2010) (“The legal distinction between at-will tenancies and licenses is that a leasehold as a non-freehold estate gives the grantee the right of exclusive possession, whereas a license is only a permission for a certain use.”).

2011] DISCOVERY AND THE DEFINITION OF INDIAN TITLE 1023

would likely be deemed actionable waste if undertaken by a tenant at will.¹³⁵

Kent McNeil, who has written extensively on aboriginal title, concludes that the Indian title concocted by the United States Supreme Court is “not identical to any real property right known to English law.”¹³⁶ Justice Joseph Story, who sided with Chief Justice Marshall in both *Johnson v. McIntosh* and *Worcester v. Georgia*, observed in his influential Commentaries on the Constitution of the United States that the native right, “whatever it was, of occupation or use, stood upon original principles deducible from the law of nature.”¹³⁷ The New York Supreme Court (of Suffolk County) reached the same conclusion in 1910:

The relative rights of Indians and the sovereign states that assert and maintain ownership of the soil by discovery, conquest, or grant are not to be defined in terms of feudal tenures. *There is no feudal estate which furnishes analogies to the Indian rights. These rights are neither easements in gross, tenancies, nor licenses. They are simply Indian rights of occupancy.*¹³⁸

A precise definition of Indian title remains elusive, in large part because it is based on the suspect doctrine of discovery.¹³⁹

V. CONCLUSION

In *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, Robert Miller on four occasions describes pronouncements in *Tee-Hit-Ton Indians v. United States* as “false” statements.¹⁴⁰ I agree with Professor Miller (and the other symposium participants) that the doctrine of discovery should be repudiated. But the doctrine has *not yet* been rejected by the Supreme Court. Consequently, the holding of *Tee-Hit-Ton* is not a falsity, but remains “good law” in the same way that the

¹³⁵ As noted in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 n.12 (1980), the Supreme Court in the late nineteenth century held that “tribal members had no right to sell timber on reservation land unless the sale was related to the improvement of the land.” This position, however, was “overturned by Congress” and “repudiated” by the Supreme Court. *Id.* The current view is that “the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians.” *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939).

¹³⁶ MCNEIL, *supra* note 56, at 265.

¹³⁷ 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 5 (1833) (emphasis added).

¹³⁸ *Pharaoh v. Benson*, 126 N.Y.S. 1035, 1038 (N.Y. Sup. Ct. 1910) (emphasis added).

¹³⁹ See MCNEIL, *supra* note 56, at 236–37 (The Marshall Court created “an Indian interest unknown to the common law, the definition of which has understandably eluded judges ever since.”).

¹⁴⁰ MILLER ET AL., *supra* note 4, at 59–60.

“separate but equal” holding of *Plessy v. Ferguson*¹⁴¹ was “good law” until overturned by *Brown v. Board of Education*.¹⁴²

The *Plessy–Brown* saga can serve as a guidepost. John Dieffenbacher-Krall, the executive director of the Maine Indian Tribal State Commission, advocates “an all out effort to overturn *Johnson v. McIntosh* just as the NAACP legal defense fund and many civil rights activists worked strategically to overturn *Plessy v. Ferguson*.”¹⁴³ As David Wilkins and Tsianina Lomawaima have noted, the American discovery doctrine “is a clear legal fiction that needs to be explicitly stricken from the federal government’s political and legal vocabulary.”¹⁴⁴ If the doctrine of discovery is seen as only conferring the right of preemption, it will be easier for the United States to defend the doctrine in domestic and international arenas. By acknowledging that the Supreme Court has in fact endorsed the more extreme “limited possessor” version of the discovery doctrine, advocates for the rights of indigenous peoples will be better positioned to expose the injustices of the doctrine and secure its repudiation.¹⁴⁵

¹⁴¹ 163 U.S. 537 (1896).

¹⁴² 347 U.S. 483 (1954).

¹⁴³ *Episcopal Church Repudiates Doctrine of Discovery, Calls on US to Do Same*, THE PROGRESSIVE CHRISTIAN GUIDE TO PUB. POL’Y (July 29, 2009), <http://weiweng.blogspot.com/2009/07/episcopal-church-repudiates-doctrine-of.html>.

¹⁴⁴ DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 63 (2001).

¹⁴⁵ As Michael Blumm has noted, Indian title is in many ways functionally equivalent to a common law fee simple title (with limited disposition rights). Blumm, *supra* note 10, at 774. See also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 24, § 15.09[1][d], at 1025 (“Most tribal property has been recognized by treaty or statute, and the availability of equitable and legal remedies for breach of trust, not well-developed at the time *Tee-Hit-Ton* was decided, provides ample protection for most tribal land.”). Consequently, there is little downside to recognizing that the Supreme Court currently endorses the position that Indian nations do *not* own their lands in fee simple.