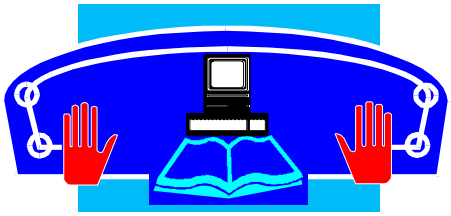

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5

Aboriginal Land Rights:

Some Notes on the Historiography of English Claims in North America

Geoffrey S. Lester

Canadian Arctic Resources Committee

Working Paper 5

August 1988

Aboriginal Land Rights: Some Notes on the Historiography of English Claims in North America

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Foreword

Since the early 1970s, the issue of aboriginal land rights has dominated the northern policy agenda. Dene, Northwest Territories Inuit, and Quebec Crees and Inuit have all resorted to court action--with some success--to assert rights based on their traditional use and occupation of northern lands. All northern aboriginal groups have entered into on-again, off-again "land claims" negotiations with the federal government in an effort to find out-of-court compromises. In two cases--the James Bay and Northern Québec Agreement of 1975 and the Inuvialuit Final Agreement of 1984--negotiations have led to signed settlements. Most of the North, however, remains a question mark.

There are a number of reasons why the land rights of aboriginal peoples at common law is a topic of key importance in the North and in those parts of southern Canada--for example, British Columbia--where land cession treaties have never been negotiated.

First, Canadian law remains ambiguous as to what legal rights aboriginal occupiers continue to enjoy in the absence of negotiated agreements. Many Canadians may find it disconcerting that such an important area of the law is still up in the air almost 500 years after the voyage of Columbus; none the less, it is so. The ambiguity surrounding aboriginal title presents

genuine risks--not academic ones--to all those who contemplate development projects in areas subject to aboriginal title.

Second, current federal land claims policy obliges aboriginal peoples to give up their aboriginal title when they enter into land claims agreements. Clearly, it is essential for aboriginal peoples, as well as for the federal government and interested Canadians, to have as complete an understanding as possible about the nature of aboriginal title and how the courts may choose to define it in any future litigation.

Third, "existing aboriginal and treaty rights" have been recognized and affirmed in the Canadian Constitution since 1982. Although the import of this form of constitutional protection is itself subject to debate, the constitutional connection gives added incentive to seek a better understanding of the underlying issues of aboriginal title.

Fourth, the demographic weight of aboriginal peoples in the North gives them a unique influence over the course of regional political development. In the case of the Northwest Territories in particular, it is possible that considerations of aboriginal title will secure a guaranteed degree of aboriginal control over many decision-making processes dealing with the management and development of northern lands and resources. Aboriginal title, whether or not it is replaced or modified by land claims settlements, may have a political impact that derives from, but is not confined to, its legal content.

It is for these reasons that CARC decided to reproduce the following paper on the historiography of English claims in North America. It is CARC's hope that this paper will assist those elected leaders and officials, both aboriginal and non-aboriginal, who must make difficult policy choices based on their assessment of the history and contemporary legal status of aboriginal title. Nowhere will those decisions be more difficult or more important than in the North. It is also CARC's hope that the paper will be of use to all those in Canada and abroad who struggle for a better understanding of the difficult issues of law, politics, and morality that couple indigenous and newcomer societies.

John Merritt
Executive Director
Canadian Arctic Resources Committee
Ottawa
October 1988

Preface

This essay is based on my work at the Centre for Northern Studies and Research, McGill University, where I was a Research Associate from 1977 to 1980. I am grateful to the Director of the Centre for allowing me to use the splendid facilities that were once offered to students of northern issues.

Among the welter of recent academic contributions to the debate over aboriginal territorial rights in Canada, no one has yet considered it necessary to advance the case for the Crown against the claims by the Indians and Inuit. What one can call the pro-native view has had the field to itself. Yet practically all of those academics and judges who have considered the problem of aboriginal territorial rights at common law have tended to assume that American doctrine is relevant to Canada. The leading case most heavily relied upon is the famous decision of Chief Justice John Marshall in ***Johnson v. M'Intosh*** in 1823. I believe that Marshall's judgment in ***Johnson v. M'Intosh*** is actually subversive of the case made by the Indians and Inuit and their academic spokesmen in support of their claims, and is not supportive. Be that as it may, it is rare to find good legal history in judgments delivered as a result of heated litigation.

This is certainly true for the Marshall judgments dealing with the international aspect of the law of territorial acquisition during the Age Discovery. Treating these decisions as if they were Holy Writ is a serious error, and intellectually

indefensible in light of the criticisms that can be made of Marshall's arguments when later scholarship is considered. Why should the courts accept Marshall's views of legal history just because he spoke from the bench? What gives a judge greater authority on matters of historical controversy than, say, a professional historian? It was with these questions in mind that I considered it useful to investigate what other students of the international aspects of the law of territorial acquisition during the Age of Discovery had to say on this matter.

Since writing this essay, Brian Slattery, now of Osgoode Hall Law School, Toronto, has completed his important work, "The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories" (D. Phil. dissertation, Wadham College, Oxford, 1979). As I have discussed Dr Slattery's arguments and evidence elsewhere, I have not included his views in this work. The essay stands as originally edited 10 years ago. I have, however, updated some of the footnotes.

I am grateful to my friend, Alan Cooke, now of the Hochelaga Research Institute, Montreal, for editing this essay.

Geoffrey S. Lester
Ottawa
August 1988

Introduction

The argument from aboriginal territorial rights brings into sharp focus the problem of the relationship between the rights supposed to have been acquired by the Crown in new territories beyond the realm and the antecedent rights of the aboriginal inhabitants. The question at issue is whether or not the simple fact that the aboriginal inhabitants were using and occupying their traditional territories according to their own usages and customs or *lex loci*, before the assertion of rights in the nature of territorial sovereignty by various European powers, means that the aboriginal inhabitants have ***legal*** rights in their lands that the Crown must respect. Or is something more required? Must the sovereign have recognized those rights before they are enforceable in the courts at the suit of the aborigines?

An intelligent and comprehensive answer to this question cannot be arrived at simply by analysing the legal status of the aboriginal inhabitants of North America by reference to judicial utterances or to the opinions of publicists. Nor can it be answered by an examination of State practice. Instead, the historiography of European claims in general (and of English claims in particular) in the New World during the Age of Discovery must first be understood. In the beginning, there were two classes of parties with an interest in advancing claims to title or with various reasons for resisting them or their implications: European

discoverers and aboriginal inhabitants. Later, a third class of party, the colonists, appeared on the scene.

The Spanish, Portuguese, English, French, and Dutch, and (in a more minor way) the Swedes, all advanced claims to various sorts of rights in the New World and devised sets of arguments to support their respective positions and undermine those of their main rivals. European sovereigns mobilized these arguments against their opponents, and claims based on "discovery" or "possession" were quickly reduced to questions of degree. At the diplomatic and political level, offensive claims became negotiable, flexible, and pragmatic; rival claimants arranged agreements in the chancellories of Europe, often after violent and bloody conflict. These claims can be loosely described as "international" in a broad and extended sense, without prejudging the question of whether or not these agreements were between "states" and arrived at under the aegis of an "international law". In such conflicts, it was obviously good diplomatic practice to be unspecific, vague, and non-committal; any alteration in a fluid and changing situation might mean that the argument a party relied on today would be used against it tomorrow. This is not to imply that the struggle for empire was governed and controlled only by a sort of international balance of force or terror. Rather, during this early and formative period, there was no ready-made body of agreed principles that could regulate competition for territory beyond the realm. Such

agreement was not reached until the 19th century, when there was not much of the world left to be appropriated by European powers. Africa is the great exception to this generalization; the treaties of cession made with the Africans were on a quite unprecedented scale or the scramble for territory was regulated by agreements among the competing European powers.

The aboriginal inhabitants of the New World had an obvious interest in contesting the right as well as the fact of European penetration into and occupation of their homelands. In this context, it is clear that discovery counted for nothing. Instead, all European sovereigns agreed during this early and formative period, that title against the Indians was to be acquired by conquest, preferably by a pacific conquest supported by a ***justa causans***, but violent if need be, if the Indians did not come to their senses and realize that it was in their own interests to co-operate with the invaders. Thus, during the 16th and into the 17th centuries, European claims against the Indians based on conquest were, by and large, abstract, absolutist, and non-negotiable. The aboriginal inhabitants were regarded as conquered people. In the end, then, whatever the legal status of those antecedent rights under the law of nations, of nature, or the ***jus gentium***, their legal significance had to be understood in the context of the particular European power's claim to rights, and how those claims were justified. There was disagreement and division, but, broadly speaking, the principle was the same: the European powers regarded the Indians as conquered peoples with

disabilities consequent from that status.

Finally, there were the colonists who settled in the New World. In many ways they were the most important of the parties involved, because, if the territories were supposed to have been acquired by conquest from the Indians, then the colonial immigrants had settled in a territory acquired by conquest. In terms of municipal law, discovery was irrelevant: the constitutional status of the new territorial acquisitions in the Americas was that of conquest. This status held for both the Indians and the colonists. And here is the rub. Did an Englishman who immigrated into the colonies lose his birthright and inheritance, the common law of England? Did he, on his arrival in one of the colonies, become subject to the arbitrary and despotic prerogative power of the Crown and to an administrative and constitutional system erected on the supposition that the colony had been acquired by conquest? The Americans said No, and American jurists, especially Chief Justice John Marshall and Joseph Story, gave an official and judicial blessing to a substantial re-interpretation of the legal bases of English rights in North America.

In this paper, I wish to draw attention to the fact that there is much furious debate and disagreement that have obscured the problem of how European sovereigns, and, in particular, English sovereigns, thought they could acquire and justify a valid legal title to new territory beyond the realm. The simple point, which should be noted at the beginning and carried away at

the end, is that the traditional explanation of this problem, which has been handed down to us by Chief Justice Marshall and Joseph Story, is contradictory and inconsistent, badly oversimplified, and blighted by serious errors. This work warns that the Marshall-Story explanation of what the sovereigns claimed, and how they justified their claims, is unreliable. Other views can be taken of this fundamental problem. If this warning be heeded, then we shall no longer be treated to a simplistic and uncritical appeal to the Marshall-Story explanation, which lies at the heart of both Mr Justice Judson's and Mr Justice Hall's judgments in ***Calder's Case***.[1]

Among the many questions associated with the argument from aboriginal territorial rights, one of the least understood is the international aspect of rival claims to title to new territories by European sovereigns. John T. Juricek, a U.S. scholar, has clarified several matters of fundamental importance in this question related to the argument from aboriginal rights. His contribution deserves to be more widely known.

The Various Schools of Thought on Territorial Acquisition

In the European rush for empire in the New World during the Age of Discovery, three schools of interpretation of the principles can be identified. Lawyers and legal historians dominate the first. Although the members of this school are by no means unanimous, they tend to believe that all European powers subscribed to a single code of "international law" that governed the acquisition of territory in the New World. The second school is dominated by historians. Where the lawyers see unanimity and conformity, the historians see only confusion and disagreement, denying that there was any single code or, indeed, that there was any code of "international law" at all. The historians consider that each power invented its own set of self-serving arguments and justifications, and what counted above all was force. Then there is a third view, advocated by Juricek. He sees merit in both of the extreme positions, but insists that the truth of the matter lies somewhere in between. Juricek holds that there were two rival, nascent, protean codes or points of view struggling for recognition. He goes further than either of the other two schools (in particular, the lawyers) by insisting that not much can be claimed for either code, because neither can be said to represent "law". So long as there is disagreement and dispute over what can be said to be "the law", one cannot claim that there is "law" in any but the most generalized and trivial sense. In addition, Juricek denies that the development of these two

rival codes had much legal relevance. They were, instead, relevant to international and intranational politics and diplomacy. Within each state, the main purpose of these codes was to provide officials with arguments essential for winning popular support for imperial goals and to assure persons who might invest their blood and treasure in the New World that the sovereign would stand behind their efforts.

Juricek is the first scholar to present a convincing interpretation of two important but largely overlooked bodies of relevant evidence: the role and significance of symbolic acts of possession and the meaning and effect of the colonial charters. He also provides valuable insights into the original constitutional status of the American colonies, which the early Stuarts claimed were their own personal possessions, "dominions of the King", and not "dominions of the Crown". This latter point is of relevance in reassessing the famous McIlwain-Schulyler debate of the 1920s over the question of whether Parliament could legislate for the American colonies, a question which was of central importance to the American Revolution.[2]

In what follows, I do not claim to provide full or definitive interpretations or summaries of the works chosen for analysis, nor do I enter the argument on my own account. My main objective is to demonstrate that the Marshall-Story explanation of English rights, and the effect of these rights on the rights of the aboriginal inhabitants, is not the only possible explanation, nor is it the final one. If the Canadian courts

eventually decide that the Marshall-Story explanation is irresistible, then the courts should knowingly make this choice among the other possibilities available. My selection of monographs related to the subject is not exhaustive. I have chosen works that are representative of a particular point of view or that shed light on issues that are still controversial.

The international aspect of the problem of acquiring title to territory beyond the realm, and the understanding of how these claims have to be articulated for their implications in a municipal context, centre on seeking answers to two basic questions: What was being claimed? How were these claims justified?

The Marshall-Story Explanation

Most European sovereigns, but in particular the English and French sovereigns, were extremely reluctant to discuss just what they claimed in the New World and how they justified these claims in law. Herein lies the basic importance and the enduring significance of the Marshall-Story explanation. These matters had been shrouded in obscurity and mystery until Chief Justice Marshall and, after him, Joseph Story, undertook a detailed explanation of them. At last, the English-speaking world could understand how it all began. The influence of this explanation has been truly astonishing. The explanation has been followed in Australia, New Zealand, and Canada,[3] and the courts there have accepted it as authoritative.

Marshall's views are found in four judgments handed down between 1810 and 1832. The first two, ***Fletcher v. Peck*** (1810) and ***Johnson v. M'Intosh*** (1823) raise issues rather different from those in the second two, ***Cherokee Nation v. State of Georgia*** (1831) and ***Worcester v. State of Georgia*** (1832). His ***Life of George Washington*** (1804) provides another important source of information. Story's views may be found in his dissenting judgment in ***Cherokee Nation v. State of Georgia*** (a dissent written by Mr Justice Thompson, at the instigation of Marshall C.J.[4]), but he had abandoned those views when he came to write his ***Commentaries on the Constitution of the United States*** (1833).

Less useful for our purpose, but none the less revealing, is Story's argument when he appeared as counsel in ***Fletcher v. Peck***.

Marshall and Story's interpretative framework is essentially that of international law, and they understood the rights both of the discovering sovereigns and of the Indians primarily in this context. Story argued in ***Fletcher v. Peck*** that the Indian right "is a mere occupancy for the purpose of hunting...it is not a true legal possession...[but] is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right."[5] For Story, whatever rights the Indians had under municipal law had to be deduced from the framework of international law.

Both Marshall and Story thought that, when European sovereigns asserted that they had various sorts of rights in the New World, these rights were in the nature of a territorial sovereignty or "dominion". This conclusion was based on the assumption that a single code of international law regulated the struggle for empire, a struggle that took place, not between rival sovereigns in their capacities as personal lords of the new territories or as holders of some "crown", but between representatives of nation-states. The regulatory principle of this code was "discovery", an action that they regarded as simple, crucial, and definitive. Discovery conferred title; all European powers accepted that principle because it was in their interests to do so. As Marshall explained in ***Johnson v. M'Intosh***, "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."[6] For Marshall, symbolic possession was juridical possession. Rival discoverers might dispute who had title, but these disputes were not over the principle that discovery and symbolic possession conferred title; they were over the geographical extent of the rights that discovery bestowed. It was a dispute over the facts, not over the applicable principle of law.

England unequivocally acceded to the principle of discovery, and Henry VII authorized John Cabot to discover countries then unknown to Christian people and to take possession of them in the name of the King of England. Cabot "proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery, the English trace their title."[7] By this discovery, in 1497, England acquired a plenary and final title to the whole of North America. Henry did not openly announce this fact to the world at that time, Marshall explained, because he was then engaged in delicate diplomatic negotiations with the King of Spain.[8] Thus, for a variety of reasons (but mainly because all 16th-century efforts to colonize North America had ended in failure), it was not until the reign of James I that England took advantage of Cabot's achievement. England's first--and unsatisfactory--attempt to establish a colony in North America was the grant of territory under the first Virginia charter in 1606. There were

difficulties in establishing a settlement, and, in 1609, a second charter conveyed the territory therein described "in absolute property" to the grantees.[9] The Virginia charters and the others like it were not, therefore, an original assertion of title; they were the reassertion of an old title founded on discovery.

This title based on discovery was subject to what Marshall called an "Indian right of occupancy". This right was not, contrary to popular interpretation,[10] a legal right--far from it. This right was merely in the nature of a licence to occupy at the sufferance of the sovereign; it was a bare licence, and it did not carry with it any sort of proprietary interest in the soil.[11] Marshall explained in ***Johnson v. M'Intosh*** that absolute ultimate title was considered to have been acquired by discovery (subject only to the Indian right of occupancy), and the discoverer possessed the exclusive right of acquiring that occupancy title. "Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejectment."[12] And, most important, the discovering sovereign had the absolute and unfettered prerogative right to "extinguish" the Indians' right of occupancy either by "purchase" or "conquest".[13] There was, in short, no legal obligation imposed on a discovering sovereign to respect the Indians' right of occupancy, and, consequently, the extinguishment of this right raised political, not justiciable, issues. Being absolute, the courts could not review its exercise by the discovering sovereign.

A basic feature of the Marshall-Story explanation is that English rights in North America had nothing whatever to do with conquest, although, when the discovering sovereign came to extinguish the antecedent rights of the Indians, he had all the powers of a conqueror. Title flowed, not from conquest, but from discovery. When Marshall spoke of purchasing the Indians' rights, or of conquering the Indians, he clearly did not mean England had acquired her basic rights by conquest. Story, in his ***Commentaries***, denounced Sir William Blackstone for maintaining that the American colonies had been acquired by right of conquest.[14] Story wrote:

> There is great reason to doubt the accuracy of this statement in a legal view....[The] European Nations, by whom America was colonized, treated the subject in a very different manner. They claimed an absolute dominion over the whole territories afterwards occupied them, not in virtue of any conquest of, or cession by the Indian natives; but as a right acquired by discovery. Some of them, indeed, obtained a sort of confirmatory grant from the papal authority. -- But as between themselves they treated the dominion and title of territory as resulting from priority of discovery; and that European power, which had first discovered the country, and set up marks of possession, was deemed to have gained the right, though it had not yet formed a regular colony there.[15]

Story denied the necessity for a conquest, an action that presupposes a derivative acquisition from someone who already has a valid legal title. In his view, Indians had no valid legal title or any right "of propriety and dominion; but... [only] a

mere right of occupancy."[16] Conquest was, therefore, out of the question.

> There is not a single grant from the British crown from the earliest grant of Elizabeth down to the latest of George the Second, that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded to. And it is impossible, that is should have been; for at the time when all the leading grants were respectively made, there had not been any conquest or cession from the natives of the territory comprehended in those grants.[17]

Such was the case, he argued, even for the territories embraced by New York and New Jersey, which had been conquered from the Dutch. "England claimed this very territory", Story wrote, "not by right of conquest, but by the prior right of discovery"; the original grants made by the Duke of York in 1664 were founded upon the right of discovery, and the subsequent confirmation of his title did not depart from this original foundation.[18]

When Marshall was confronted with the political struggle between the Cherokee Nation and the State of Georgia in the 1830s, he must have felt anxious upon considering his earlier pronouncements in ***Fletcher v. Peck*** and ***Johnson v. M'Intosh***. In the Cherokee cases, he radically revised his views on the consequences of Cabot's discovery in the New World and of his symbolic act of possession. Marshall now decided that, far from delivering a plenary title, discovery conferred only a ***pre-emptive right to acquire title***, not title itself. This reversal of opinion is crucial, and it is too often overlooked. Marshall's reinterpretation of the role of discovery inevitably

entailed a change in his views of the rights conveyed by the colonial charters.

Marshall elaborately set the stage for his reinterpretation of the role of discovery in his judgment in ***Cherokee Nation v. State of Georgia*** in 1831, wherein he held that the Cherokee Nation was not a "foreign state" within the meaning of the United States Constitution; therefore, the Supreme Court did not have original jurisdiction to hear the Cherokees' complaints against Georgia. In the course of this judgment, he began to back off from the absolutist and non-negotiable consequences of discovery. Two crucial elements found in his opinion in ***Johnson v. M'Intosh***--the absolute power of the sovereign to extinguish the Indian right of occupancy, and the plenary rights of the sovereign that flow from discovery--were now absent. Marshall explained that:

> Though the Indians were acknowledged to have an unquestionable, and, heretofore unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government;.... They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.[19]

The plenary title, according to this new doctrine, did not take effect until "possession" was acquired--meaning juridical possession, which is obviously no longer simply symbolic possession. Juridical possession could be taken on a voluntary cession, of lands guaranteed by treaty at any rate, and not by forcible seizure from the Indians. Marshall's restatement of the

principle of discovery was then fully enunciated in his judgment in ***Worcester v. State of Georgia*** in 1832.

Here he completely recast his thought on the problem of discovery. Instead of emphasizing the bellicose attitude of savage, barbaric, and cruel Indians, a cardinal feature of his rationalization for the dispossession of the Indians in ***Johnson v. M'Intosh,***[20] he now stressed the fact that America, when it was discovered by Europeans, was already inhabited by a distinct aboriginal people divided into several independent nations, each with its own laws and institutions of government. Given these facts, by what principle of law could a discoverer make blanket grants of the lands that such people possessed?

Marshall immediately conceded that he had posed a legal and moral dilemma,[21] and he asked whether or not the captains of discovery,

> by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?[22]

Warming to his argument, he cited the dictum he had advanced in ***Johnson v. M'Intosh***: European sovereigns had been obliged to agree on a principle that respected the actual state of affairs. This principle was that priority of discovery gave title, a title

that could be consummated by taking possession. Marshall then proceeded to give a quite different meaning to "possession".

Priority of discovery, he now argued, conferred the sole right of acquiring the soil and making settlements on it.

> It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but it could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[23]

In short, discovery conferred only a "pre-emptive privilege in the particular place", one which remained dormant until asserted in the appropriate manner.[24]

Did the charters qualify as such an assertion? Clearly, they did not, Marshall concluded, because they had been issued "before possession was taken of any part of the country". Plainly, symbolic acts of possession no longer sufficed as juridical possession. He continued:

> They purport, generally, to convey the soil, from the Atlantic to the South Sea [the Pacific]. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They 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. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.[25]

From conveying the soil "in absolute property", justified because they were issued after the performance of a symbolic act of possession, these instruments now were held to grant only the exclusive right of acquiring title from the natives. In sum, "these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the Natives were concerned."[26]

In ***Johnson v. M'Intosh***, Marshall had justified the seizure of Indian lands on the grounds that the aboriginal people were savage and warlike.[27] This view was largely followed by Story in his ***Commentaries***, although he gives a more sophisticated statement of it, connecting European claims with his view that the Indians were disqualified from having any sort of legal rights antecedent to a European assertion of territorial sovereignty because the Indians were regarded as infidels and heathens, and only used their land like animals.[28] In the Cherokee cases, Marshall played down the role of the discoverer. He dropped the extinguishment of the Indians' right of occupancy by conquest in favour of treaties of cession whenever the Indians had been willing to sell their rights. He pointed to the political and legal institutions of the Indians to support this new changed position, one that he may have accepted because of the high regard and esteem in which the United States public held

the Cherokee Indians at that time, a view brought to the fore by the controversy regarding the policy of removing the Cherokees from their lands. Story, in his discussion of the Commerce Power under the U.S. Constitution in his ***Commentaries***, reversed himself in the same breezy style as Marshall had. In conceding various sovereign rights to the Indians, he adopted a position indistinguishable from that in which he concurred with Mr Justice Thompson in ***Cherokee Nation v. State of Georgia***.[29]

Marshall's and Story's amazing reversals of opinion on the nature and effect of discovery, and the palpably contradictory accounts that these jurists have handed down to posterity are interesting in their own right. The two main principles that these men discussed have been taken up by later scholars, and they mark the main cleavage between the alternative explanations. This difference will be seen in the three legal contributions discussed next.

M.F. Lindley

M.F. Lindley, an English barrister, reminded his readers that two quite separate points of view have to be considered in discussing how a valid legal title could be acquired to territory beyond the realm. In his monograph, ***The Acquisition and the Government of Backward Territory in International Law*** (1926), he distinguished between the acquisition of rights that were good against rival European sovereigns on the one hand, and the acquisition of rights that were good against the aboriginal inhabitants of the

territories in question on the other. In his emphasis on the rights of the Indians in the New World, and insisting that they had rights both of sovereignty and property, he concluded that these rights entailed important consequences for the mode and effectiveness of any purported principle of territorial acquisition, such as that of discovery.

In stressing the rights of the Indians, Lindley was also trying to bring about a major revision of 19th-century scholarship, much of which amounted to little more than a apologia for imperialism. Lindley has been highly praised by students who wish to uphold the rights of the native people and to debunk arrogant imperialist and colonialist assumptions. Lindley thus attacked Marshall and Story for not realizing that the English, in extending dominion into America, used two different sets of arguments to claim title, advancing one argument to oppose the claims of rival Europeans, the other to oppose the claims of the Indians. Lindley held that Story was wrongly critical of Blackstone's view that England had acquired the original 13 colonies by right of conquest.[30] However, as the title of his work suggests, Lindley also thought that the acquisition of title to territory should be understood within the framework of international law.

Against rival Europeans, Lindley thought that acquisition of a valid title was a two-step process: "discovery" and "occupation". Unlike the simple, crucial, and definitive role that Marshall had ascribed to discovery and to symbolic acts (as

seen in ***Johnson v. M'Intosh***, but revised in the Cherokee cases), Lindley believed that a discovery consisted of an original sighting, and nothing more. All that accrued from a discovery "was the right to ***acquire*** the lands discovered--what in later times might have been called `sphere of influence'--and the questions dealing with the ***mode*** of acquisition had no place in a statement of the grounds upon which one European Power based its claims against the others."[31] Full and plenary rights were acquired only by taking the second step, "occupation". For Lindley, this had to be "effective occupation" or possession; symbolic acts of possession were insufficient. Sufficient governmental control had to be established over the territory appropriated to secure life and property there. Discovery legitimated this second step.[32]

How could effective occupation be secured? Lindley's position may at first appear to be indistinguishable from the revised position of Marshall and Story, but there is, in fact, a significant difference. This difference is a direct consequence of the high status that Lindley gave to the antecedent rights of the Indians. Story, in his ***Commentaries***, had said that the Indians had no sovereign or property rights to speak of because they were disqualified by European powers. Although he did not actually put it this way, what Story meant was that, because the New World had not been subject to any sort of prior sovereignty, it was ***terra nullius***, and, being legally vacant, sovereignty over it could be acquired by ***occupatio***. But, Lindley argued, from the

time of Columbus onward, many European theological jurists and publicists had argued that the Indians had sovereign rights and property rights. The Roman law doctrine of ***occupatio*** was, therefore, inapplicable, at least as a means of acquiring territory that was inhabited. Because the opinions of publicists led to the conclusion that the Americas could not be regarded as being ***terra nullius***, Lindley concluded that the only way to acquire territory there--that is to take juridically effective possession--was through conquest or forcible seizure of the Indians' lands, or through treaties of cession. He pointed to John Cabot's commission from Henry VII, which foresaw that the lands to be discovered might have to be wrested from the Indians by force. Cabot's commission, he argued, presupposed that the Indians had antecedent legal rights. The justification for these seizures by Europeans, Lindley thought, was religion.[33] In sum, under a subheading that non-Christian lands were to be acquired by conquest or cession, he concluded:

> But although the European Powers assumed, as between themselves, that they could acquire any lands not in the possession of Christians, it does not follow, and was not the case, that those lands were considered to be vacant and open to acquisition by Occupation....
>
> Again, the rule that discovery gave rights to the discoverer's State in respect of the land discovered was adopted to regulate the competition between the European Powers themselves, and it had no bearing upon the relations between those Powers and the natives. What the discoverer's State gained was the right, as against other European Powers, to take the steps which were appropriate to the acquisition of the

> Territory in question. What those steps were would depend upon whether there was already a native population in possession of the territory; and if it became necessary for a State that had acquired rights by discovery to fight with the natives in order to turn those rights of acquisition into rights of possession, its new territory would be an acquisition by Conquest, none the less because no other European Power had the right to make the Conquest.[34]

One important implication of Lindley's reasoning is that, because there had been no actual subjugation of the native population by conquest or by territorial cession, their antecedent legal rights, whatever they were, must have priority over European claims until they are extinguished. However, Lindley does not make clear what status these aboriginal rights may have under the municipal law of the relevant European states.

Julius Goebel

In 1927, an American scholar, Julius Goebel, Jr., published ***The Struggle for the Falkland Islands***, in which he devoted a chapter to a discussion of the principles of territorial acquisition. He did not know of Lindley's efforts, and he argued for a quite different view of this question. Lindley had put great weight on--indeed, most of his analysis of pre-19th-century developments was based on--the opinions of publicists. He felt able to rely on this evidence because he saw little difference between the way that lawyers thought states should behave and the way in which they actually do behave. Goebel would have none of this:

he stressed that State practice is the better measure of what the law really is.

> What attitude the jurists may take does not concern us particularly, for the determination of rules of international law is usually made without reference to the creative imagination of the lawyers, except in so far as they may have a hand in dealing with the settlement of a particular problem where the rule is applied.

Later he said that writers such as Vitoria might claim that Spain was relying upon mere discovery for her title to the Indies, but "state acts...are better proof of the law than the celebrations of the jurists and the theologians, particularly when the law is in a formative state."[35] With these two quite different views of what may be regarded as relevant evidence, it is not surprising that we should find they lead to different conclusions.

Goebel's analysis is undoubtedly the most learned of the lawyers' contributions to this subject. Not only is the evidence for his argument different, so is his point of departure. Whereas Goebel also thought that the problem of territorial acquisition had to be located in the framework of international law, he considered the Age of Discovery to be a formative period during which the European sovereigns were struggling to break away from the claims of the Universal Church to hegemony and overlordship and as a time when there was an increasing secularization of the public law of Europe. There was no ready-made code to regulate international competition for territory in the New World, although one was soon to emerge. Modern principles of territorial sovereignty were "forged in the fires

of the economic and political struggles over colonial possessions and the control of the seas". And, accordingly, Goebel gives Spain first place among the contributors to the development of international law.[36] Goebel cannot, therefore, be said to have viewed this problem wholly in terms of international law, because at the time these claims were being advanced there was no such law.[37] He then makes two important points in his account of the development of this law.

First, according to classical medieval thought, the whole world was held in tenure, and all land was vested in someone, either a king or a mesne lord; dominion over the land could, therefore, be exercised only by this overlord, either mediately or immediately. As a corollary, there could be no such thing as an original acquisition of territory; title could be acquired only derivatively from someone else, either by enfeoffment, conquest, or cession.[38]

Second, with the disintegration of the Roman Empire, there was a general collapse of public law. The functions of public law and public jurisdiction fell into the hands of kings and princes who were, in turn, subject to the Church's claim to universal overlordship. The secular states were increasingly able to resist the pretensions of the papacy, and the clear distinctions in Roman law between ***imperium***, or the right to rule, and ***dominium***, or private property, became blurred; political jurisdiction (***imperium***) came to be associated with landed property--in a word, with lordship. Thus, at the time Europeans

became familiar with the New World, "in respect to the territory of the state, the mediaeval view which confounded dominion with *imperium* and treated sovereignty as a sort of property right was still prevalent."[39] The treatment of sovereignty as a private right helped pave the way for a resurrection of the old Roman doctrine of ***occupatio***. A rule of ancient private law was made to serve the contemporary function of public law.

Occupatio is a method whereby one may acquire title to property that has no owner--***res nullius***. Title is acquired by taking possession. Goebel explained the mental and physical elements of ***occupatio*** thus:

> The means by which occupation was effected was by the taking possession of the ***res nullius***. Possession, in turn, meant not alone the material apprehension of the thing, but the accompanying intention, to hold it ***pro suo*** or for another. If this intention existed, it was necessary that it should contemplate an exclusive control for an indefinite period.
>
> Of equal importance in the process was the act--the taking possession--and this must be some physical act, for no mere declaration was sufficient; and this act in relation to unoccupied land had to be one of economic significance. The mere casual presence upon the land was not sufficient; it was necessary to take possession, entering upon the land, and such entry was regarded, because of the notion of physical control which it conveyed, to be sufficient to affect land in the immediate vicinity.[40]

Goebel argued that, although the Spanish and Portuguese had an interest in upholding the legal efficacy of the various papal bulls that had invested them with various rights (of either ***imperium*** or ***dominium***, or both), there was mounting resistance to

papal authority. Conflicts between Spain and Portugal, which they were reluctant to submit to papal jurisdiction, led them to secularize their political relationships. From the time of Bartolus (1313-1357), who advanced the view that not all corporate bodies acknowledged a superior lord as a matter of law, the future legal independence of states, the basis of modern international society, was assured,[41] and "the whole question of acquisition of new lands was removed from the limbo of semi-ecclesiastical politics onto a firm juristic basis."[42] This had been achieved by the mid-16th century. And that juristic basis was ***occupatio***.

Lindley had deduced from the fact that, since the native inhabitants of the New World were capable of having both ***dominium*** and ***imperium***, and therefore their lands were not ***nullia***, it followed that as against the Indians the only way to acquire a valid title was through conquest or cession. Goebel, on the other hand, completely ignored the writings of publicists on this central issue, although he must have thought that, at least before the mid-16th century, conquest played some part, as an inescapable consequence of the contemporary assumption that the whole world was vested in an overlord and that title could only be acquired derivatively. For Goebel, this assumption was sufficient to explain away conquest, and so he did not have to postulate that the Indians had any sort of antecedent rights that prevented their territories from being ***nullia***. He shrank from embracing this kind of logic; indeed, he denied that the legal

status of rights of the natives was in any way relevant. The reason for the insignificance of the natives of the New World among Europeans was that, because the heathen were the common enemy of all Christian kings, "a conquest of territory from them would not necessarily be a good title in international law."[43] In other words, conquest and cessions from the natives, as such, proved nothing. Goebel did admit, however, that conquest played a role in the minds of English common lawyers, but he put this down to their insularity and their failure to keep up with the times.[44]

Goebel, therefore, like Lindley, thought that the acquisition of valid legal title to territory was a two-step process: "discovery" and "possession", but he held that they were indissolubly linked as part of one process. His broad definition of "discovery" included the taking of possession, but he also defined "possession" to include more than symbolic acts of possession. For him:

> ... occupation in private law is the acquisition in fact, and not the mere casual exercise of power over a thing, for the latter is no more than a precedent step to the completed act, and is consequently without enduring legal significance.[45]

A mere sighting was, therefore, juridically useless; it did not deliver even a pre-emptive right to acquire title.

> Both the acquisition of territory by occupation and its conquest required continuous and uncontested possession. It followed, therefore, that as a matter of law, no right to the newly found lands could be maintained in the absence of the necessary

> physical acts, which the law would regard as sufficient.[46]

For this reason, Columbus, to protect the rights of his sovereigns, left a number of his followers on the island of Hispaniola, thereby establishing, as well as circumstances permitted, Spain's sovereignty.[47]

Symbolic acts of possession, according to Goebel, therefore had no international legal significance, and they could in no way be regarded as constituting juridical possession. Instead, he regarded them as merely wrong-headed attempts to apply feudal custom to effect a result that would be internationally recognized, or as archaic survivals. They were simply a formal entry at common law, "the seisin without which a title was invalid in feudal law". In the end, however, they were irrelevant, because seisin was significant as an act only when a title was being acquired derivatively. Title in the New World could be acquired originally, because the natives had no rights. Symbolic possession had no importance in the original acquisition of ***terra nullius***.[48] Symbolic acts, he observed, were never accepted as being important, "because the rules that creep into international law must bear an obvious relationship to fact, the law being intolerant of theories that have no relation to realities."[49]

In sum, according to Goebel, all European powers agreed that a valid legal title in the New World could be acquired only by "(discovery and) occupation". In relation to English claims, he pointed to evidence, from the time of Henry VII onward, to argue

that, in English common law, emphasis on possession indicated that these sovereigns would be disposed to regard as resting on a firm legal basis only those claims supported by *de facto* possession. Indeed, the common law discreted no rules that could support acquisition by discovery, and, although the English Crown put forward discovery from time to time (as in the struggle for the Falkland Islands), "it neither has nor deserves support in the English law, and it was never anything more than a fugitive political argument advanced by a chancellery that was unable to find adequate support in accepted international custom."[50]

So much for the views of John Marshall and Joseph Story.

Keller, Lissitzyn, and Mann

Goebel may as well not have published his analysis for all the good it did. In 1938, three other Americans published the results of their researches, and their conclusions are diametrically opposed to his. Although they knew of Goebel's obscure contribution, they made no effort in their text or in their footnotes to come to grips with his argument. Whereas Goebel thought that symbolic acts of possession were irrelevant in the international context, Arthur S. Keller, Oliver J. Lissitzyn, and Frederick J. Mann in their work, ***Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800***, regarded them as fundamental, delivering, in fact, all that was necessary. Yet, like Goebel, they thought that what governments and their discovering agents actually did to acquire title to ***terra nullius***

better indicated the "actual state of the law" during the period under study than did the statements of publicists.[51]

To these scholars, "discovery" meant more than a mere sighting of or accidental encounter with a previously unknown land. Instead, a discovery was "a purposeful act of exploration or navigation accompanied by a visual apprehension, a landing, and some other act marking or recording such visit, but not acts expressive of possession." To them, ***terra nullius*** was "land not under any sovereignty". For these scholars, so far as European powers were concerned, the "presence of a savage population, or aborigines, or nomadic tribes engaged in hunting and fishing, was generally disregarded"--a significant departure from Lindley's position. With the exception of places like India, parts of Arabia, and the Far East, most of the non-European world was regarded as ***terra nullius***, over which a European power could assert "sovereignty" or "a right of sovereignty".[52]

After a detailed analysis of Spanish, Portuguese, French, English, Dutch, and Russian practices, they concluded that no state regarded mere discovery, in the sense of a physical discovery or visual apprehension, as being sufficient ***per se*** to establish a right of sovereignty over, or a valid title to, ***terra nullius***. Nor did mere disembarkation or extended penetration into the hinterland deliver sovereignty or title. On the basis of the facts, they asserted,

> the formal ceremony of taking possession, the symbolic act, was generally regarded as being wholly sufficient ***per se*** to establish immediately a right of sovereignty over, or a

> valid title to, areas so claimed and did not require to be supplemented by the performance of other acts such as, for example, "effective occupation." A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state.[53]

Certainly, the details and content of the symbolic acts of possession that the various powers performed differed, but "what may be termed the ultimate legal effect thereof was the same."[54] Symbolic acts of possession delivered rights of sovereignty (in the post-Bodin sense of the term), although, at the time these acts had been performed, it was perhaps more accurate to describe the legal rights thus acquired as those of "dominion" or "lordship".[55]

* * * * *

The overwhelming impression given by the lawyers is that there was a single and universally agreed-to code of law that governed the acquisition of a valid legal title during the Age of Discovery. Admittedly, there was disagreement as to what exactly was involved in the acquisition of title, but they hold there was an unmistakable consensus. Much of this disagreement turns on the different kinds of evidence the lawyers cite in support of their respective cases: some point to the opinions of publicists, others to State practice, or to legal instruments issued by European sovereigns.

Possibly, lawyers have been and are, by their professional training, predisposed to seek unanimity and agreement in discussions of relevant and applicable principles. And certainly a coherent doctrine is preferable in every way to the shambles of disagreement. Historians may also be committed to particular principles in their explanations, but they must nevertheless present the facts, no matter how damaging the facts may be to any preconception.

The Historians' Contributions

William Christie MacLeod

The historian William Christie MacLeod was one of the first to criticize seriously the Marshall-Story explanation. In ***The American Indian Frontier*** (1928), MacLeod suggested that the problem of territorial acquisition could not appropriately be cast in terms of international law because not all European powers based their territorial claims on discovery. England had done so, he agreed, but he believed that the papal bulls promulgated in favour of the Spanish and Portuguese sovereigns were the main bases of their claims, and the Dutch and the Swedes for their part, because they could not point to any discovery that could oust the English occupation of the field, were driven to establish a third position. These late comers to the field, such as the Swedes and the Dutch, had to argue that the Indians were the true owners of the soil, and that the only means of acquiring a valid legal title to territory was by conquest or purchase from the natives. Consequently, they began by purchasing as much land as possible. They regarded such land as being the rightful property of the colonists, and they made no claims to sovereignty over the Indians.

When it came to explaining why the English purchased land from the Indians, MacLeod was very critical of the Marshall-Story explanation. The main reason for this was his reading of their interpretation to mean that the English had believed that the

Indians had some sort of legal right to their territories. Whereas there might be common sense in this reasoning, he seemed to say,[56] it was fallacious because it overlooked the logic and legal fictions of which the English were very fond, and on which the English in fact based their claims. MacLeod described the hard-headed legalism of the English in this way:

> But the English, with whom the Dutch were constantly at odds in later days over rights to settle, refused to concede Dutch claims. They argued to the effect that the English had pre-empted North America; that the lands of North America were considered by them as Crown lands to be disposed of only as the Crown saw fit. Title to lands in the Americas could only be derived through grant of the Crown. ***Even the Indians could obtain title only by grants from the British sovereign. The Indian "title", such as it might be, had no legal standing in English law, and the Indians therefore could not give any title to anyone which would be recognized by the Crown or its agents.***[57]

This, MacLeod argued, really only amounted to a statement that North America was a "sphere of influence" or a "protectorate" of the English Crown, from which all other foreigners must keep out. Yet, for all their legal wordiness, all the disputants recognized that it was only so much legalistic and diplomatic niceties, which "could be settled only by the arbitrament of comparative shows of force or by actual war".[58] Thus, the Dutch drove out the Swedes in 1654, and 10 years later the English drove out the Dutch.

If MacLeod is right to imply that Marshall and Story invented the Indians' right of occupancy as some sort of substantive right, whey then did the English purchase land from

the Indians if the English regarded such transactions as legally meaningless? MacLeod argued that they began to purchase land from the Indians not because the Indians had any legal title but because of pressure from the Dutch and the Swedes, but especially from the Dutch in the Connecticut River Valley during the 1630s. Roger Williams gave impetus to this practice. Almost alone among the English promoters of colonies, he insisted that the Crown had no right to grant land in North America, because the Indians were its true owners. In time, this conviction spread throughout New England, but there was one essential difference from the Dutch view: the English purchased land only *after* a Crown grant had been issued, whereas the Dutch purchased it before. The purchase of land, however, proceeded from the bottom up, and during this period of rivalry among small-scale colonial settlements, the colonists themselves, independently of the Crown, formulated policy. Nevertheless, Indian transfers of land to the English colonists were not deemed to be valid unless the Crown also granted them the same land, thereby giving a settler complete title to it. Indian deeds to land, as such, were worthless in law. All rights were held to flow from the Crown.[59]

Wilcomb E. Washburn

Wilcomb E. Washburn, an anthropologist and historian, published "The Moral and Legal Justifications for Dispossessing the Indians" in 1959. Washburn made two major points. He warned that we should not assume, simply because the King claimed to be

able to grant Indian territories under the colonial charters, that this royal claim was able to be justified by contemporary legal theory. In fact, Washburn pointed out that, because the colonizers were successful in asserting paper rights against the Indians and against rival Europeans, "a literature to justify and explain the Kingly attitude arose"--*ex post facto*.

> Had the charters not proved to be effectual, there is little doubt that we would now have a literature, as we do in the case of the papal grants, showing that the English sovereigns were not really granting away other people's lands, but only giving privileges of government conditional upon the conversion of the Indians.[60]

The absurdity of claiming title by discovery was recognized by all, and so some writers facetiously suggested that Europe would have to be conceded to any Indian prince who happened to send a ship to "discover" it. So, whatever rights were supposed to accrue from papal donations or by discovery, Washburn found it only natural that European sovereigns desired "to reinforce citations of early discoveries with accounts of actual occupation of the lands."

> The monarchs were most liberal. Since it cost them nothing to give all, they gave all, with grants usually extending to the South Sea. But with several kings making grants in North America, international conflicts were inevitable. Final settlements depended on the course of events and the power of the claimants.[61]

This brought Washburn to his second point. "International law", if such a creature could be said to exist at that time, was unable to resolve such conflicts, primarily because there was no

central authority to make and to enforce decisions. One of the conventions that found acceptance during this period was agreement that acts of violence committed beyond the line of demarcation, drawn by the Pope in the Atlantic Ocean in 1494 under the Treaty of Tordesillas, would not be considered a ***casus belli*** in Europe. This agreement showed how tenuous was the confidence that the European powers placed in the strength of their respective claims to the New World.[62]

Above all, however, the justification for claiming title to land in the New World--papal grant, discovery, and possession--demonstrates that "the principal ethicolegal concern of the period was about the claims of rival European powers, not about the rights of the American Indians." The only principle upon which Europeans were in almost unanimous agreement was that the right of the native inhabitants of the New World could be disregarded.[63]

With respect to justifying the seizure of Indian lands, Washburn noted the growth of myths describing the polity of the natives, their character and habits, and their systems of land use and occupancy. Most of the early European accounts of Indians stressed the hospitable reception, succour, and aid they gave to the new settlers. Some colonists dismissed this welcome as an Indian trick intended to lull them into a false sense of security. On the other hand, some interpreted their welcome as evidence of divine intervention; God had "caused" the Indians to help the settlers--it was not Indian hospitality at all. The

colonists feared the Indians as heathens and infidels, and their favourable impressions of the Indians changed when the natives realized that the colonists were not tourists, but had come to stay. When, in 1622, the Indians rose in rebellion and massacred the Virginian settlement, the English donned the "bloody shirt", and they neither gave nor expected any quarter from the Indians. Thus the barbarism and cruelty of the Indians was emphasized, to be replaced, later on, by the view (based on Lockeian principles of how property could be acquired) that these barbarians had no property rights anyhow because they were wandering hunters, with not settled habitation. They roamed the land like animals.[64] "Again, was not the European creating the myth he wished to use? Were the Indians in fact nomadic hunters?"[65]

Max Savelle

Max Savelle, an historian, devoted two chapters of his international history of Anglo-America (1967) to the development of the international law related to territorial acquisition. His argument included little original research, but it is useful. Savelle clearly saw that the Iberian powers were in one camp because of their community of interest, and their rivals in northern Europe were in another, and he thereby invalidated the Marshall-Story explanation. He regarded the Age of Discovery as a formative period during which there was little agreement by the European powers on how an empire might be acquired.

Savelle's analysis of events is at times contradictory, but his main points are clear enough. He considered that Europeans generally acknowledged that title by discovery was inchoate or incomplete. The Iberian sovereigns had, therefore, turned to the Pope to secure supernational agreements that perfected their titles based on discovery alone.[66] At first, Savelle argued, there was general acceptance of the principle that national titles of ownership should be based on discovery, papal grants, or international treaty (although not by treaty with the natives).[67] This principle was, in fact, generally accepted and respected by other nations by the end of the 15th and the beginning of the 16th centuries. By the end of the 16th century, however, there was a consensus among the non-Iberian powers that a title based on papal grant, symbolic possession, or simple discovery would be respected only if the region were actually occupied and administered by the power that claimed it.

Savelle also held that the opinions of publicists (such as Vitoria and Suarez), relative to Spain's title to the Indies, were only theories; in practice, their theories were almost completely ignored in the Spanish government's colonial policy, and they had little or no effect on international practice. These jurists and their followers rationalized a set of principles to explain national titles to foreign territories and relations between the various colonizing states. The importance of their theories in the efforts made during the 20th century to decolonize these territories and to accept former colonies into

the family of nations is great. For the opponents of Spain and Portugal, including England, effective occupation and possession was the rule; the English conquest of the Dutch in New Netherland was, therefore, a "flagrant violation" of that principle and insupportable.[68]

When, during the early 17th century, the English, French, and Dutch established colonies in North America, the colonizers paid lip-service to the idea that the Indian nations had the rights of sovereign states. But in practice, Savelle argued, the colonizers more often ignored than respected the Indians' antecedent rights. In fact, the colonists very often had not even heard of these Spanish theorists' ideas.

Through the 17th and into the 18th centuries, probably because of Roger Williams's influence, the notion grew that the Indians were sovereign and owners of their lands. English policy on this question was sometimes equivocal, at least until the Treaty of Utrecht in 1713. (Savelle implied that the equivocation of the English arose from their fear of the French.) At any rate, the custom of making formal treaties with the Indians, with implicit recognition of the Indians' rights of ownership and sovereignty, became common. Both Europeans and Indians agreed, in general, that the aboriginal inhabitants had certain rights that the Europeans were bound to respect. This consensus, however, did little more than implement a sort of "customary law" or theory in the area of "quasi-international

relations".[69] The treaties were not true international agreements.

Marshall Harris and Francis Jennings

Two other American scholars again point to different considerations. Harris offered one of the most fully developed explanations of the problems created by the English purchase of land from the Indians in his ***Origin of the Land Tenure System in the United States*** (1953). Jennings's book, ***The Invasion of America*** (1975), is also of great interest in this connection. Both scholars described in detail how the English authorities and colonists grappled with the fact that the lands they claimed were used and occupied by Indians.

Jennings was less concerned with the elucidation of the legal principles involved in the acquisition of a valid title than with an exploration of the origins and bases of the various ideological imperatives that were at work during the 17th century, whereby the invasion of Indian territory was justified. He did not, however, commit himself to a position with respect to the legality of the English presence in North America, leaving his reader with the impression that it is ridiculous to claim that the Indians were "conquered" in a fictitious or a legal sense, or that English claims to jurisdiction over the Indians were, in fact, unilaterally based.

Harris pointed out that, whereas European claims to title were based on discovery and settlement (with the Spanish and the

Portuguese in a special category because of their papal bulls), in the last analysis, no matter what doctrinal positions the competing powers adopted, territory in the New World was, in fact, held by the sword.[70] Claims to Indian territory might be justified by an appeal to religious precepts and imperatives as well as to more secular arguments, such as those developed by Sir Thomas More in his political romance, ***Utopia*** (1516). Whatever may be said of the doctrine of discovery, the European settlers were confronted with the practical problem of dealing with the Indians themselves. Very early, they began to purchase land, a practice that Harris, in contrast to MacLeod, considered a clear demonstration of the English settlers' belief that the land belonged to its original inhabitants.

> Both the theory regarding right of discovery and the plans for missionary activities were of little consequence in actual practice. The great disregard of the civilizing and christianizing mission of the English is a clue to their basic position. Apparently they never meant to carry out a religious and educational program among the Indians. Even if one could concede some sincerity of purpose, it appears that their pronouncements did not carry conviction. The doctrine of right of discovery also was disregarded by the English as soon as convenience showed an advantage. The doctrine was at fault in theory and a farce in practice.[71]

But the English never officially admitted that the Indians had rights in their land and that the settlers had to purchase them. In practice, the colonists dealt with the Indians as if they did have to secure rights, especially in parts of New England that

were settled without any official authority or sanction from the Crown under a charter. Indian deeds would have to do so.[72]

Originally, the English authorities permitted private purchases from the Indians, but this practice soon got out of hand. Statutes restraining these transactions were enacted; settlers had to obtain a licence to purchase from the authorities, and the purchase had to be subsequently confirmed. Other procedures were also sometimes used to obtain Indian lands: gifts from the natives, treaties of cession to colonial authorities, occupation of lands that had been abandoned, forcible seizures after a military conquest, and, occasionally, long-term leases.[73] Harris's analysis of the colonial charters and of the principles on which they were officially based (as contrasted with the colonies' unauthorized but realistic and practical policies) is very close to MacLeod's analysis.

Jennings tried to give a detailed answer to Washburn's question: Were the Indians, in fact, nomadic hunters and savage barbarians? The tendentious myth that they were nothing more was built up to justify European seizures of their lands. Jennings showed that, far from being a "virgin land", waiting to be appropriated by English colonists, North America--and New England, in particular--may be better described as a "widowed land". New England had formerly been teeming with Indians, many of whom practised sophisticated forms of agriculture; epidemic diseases had drastically reduced the aboriginal population of the region, but it was still settled by Indians living by various

agricultural means.[74] Loose talk of a "conquest" has obscured the fact that the Indians relinquished to English jurisdiction a great deal of territory by negotiated voluntary cessions that took the form of property sales.[75]

Despite the appearance of legality, an appearance sustained by the self-justifying myths and ideologies that Washburn had noted, the settlers carried on wars with the Indians that more than matched the savagery of the Indians.[76] In the end, whether the Indian lost his land through fair or fraudulent purchases, the cession of his land to the settlers was quite traumatic for himself and his society. Whether negotiated by diplomatic treaty or commercial contract, the effect of systematic dispossession cannot be overestimated.[77] Here was another chapter in an old story: the European settler seizes the native's means of production, denies him any meaningful economic alternative, and then denounces him for being unable to accommodate himself to the new order.

John Marshall may have believed that the Europeans were not wrong to invade and dispossess the Indians because they were, by definition, savages and outside the sanctions of both law and morality.[78] In practice, the realization of this view was brutal, and its effects were devastating.

> Peaceful purchase of Indians territory was more drastic in its consequences than many armed conquests of one European power by another. It was a ***double*** conquest in which Indians lost not only sovereignty but also commons and severalty, and it established the harshest possible terms for the Indians who might hope to assimilate into "civilization."

> Property and liberty were synonyms in the seventeenth and eighteenth centuries. When the Indian was dispossessed of his land, he lost all hope of finding any niche in the society called civilized, except that of servant or slave.[79]

What the colonists regarded as simple settlement, the Indians saw as invasion. The colonists anticipated Indian resistance and armed themselves to overcome it. They also produced volumes of propaganda to overcome the conscientious scruples of their countrymen back home. The legal assumptions and legal papers of the English made no sense to the Indians, who did not understand the relationship of lord and vassal or of patron and client.[80] They bought land from the Indians, but every such transaction was effectively a dispossession.

The Juricek Analysis

Where the lawyers see uniformity in and consensus over principles, most historians see only chaos and confusion. John T. Juricek, an historian, adopted a middle course. He argued that although there was no universal consensus, neither was there complete confusion. To be sure, the rival European powers devised their own self-serving arguments for the acquisition of title in new territories but they can be divided into two camps. If the members of each camp had implacable foes, they also had dependable allies.

Juricek's analysis of English claims is of particular importance for the argument from aboriginal rights in Canada and Australia. The other European powers were, in general, consistent (within limits) in the principles they adopted, but the English sovereigns were inconsistent in the principles they used. From the beginning, the English, with the French, Dutch, and Swedes, opposed the legal arguments of the monarchs of Spain and Portugal. But James I, when he saw his way to winning an empire in the New World for himself, abandoned his own and his predecessors' arguments and embraced the position of their Iberian rivals. Juricek's insight into this problem is of value in interpreting the Marshall-Story explanation and the role of the colonial charters, and in understanding the legal significance of the treaties of purchase made with the Indians.

Juricek identified not one, but two, nascent codes of territorial acquisition. In both, two elements were necessary for the lawful appropriation of new territory: "discovery" and "possession". Put this simply, this would seem to mean that these two codes collapse into the single corpus of international law that the lawyers, from different points of view, have described. This seeming agreement dissolves on analysis, because the key concepts in the debate between the competing sovereigns--"discovery" and "possession"--were defined quite differently. The first code to be developed he dubbed the "preemptive" (or "permissive"), and the code that was developed to counter it he called the "dominative" (or "demanding").[81]

Juricek's main interest lay in understanding the original constitutional status of the American colonies and the connection between this problem and the constitutional ambitions of James I both at home and abroad. To understand the legal logic and the historical precedents for James's plans, Juricek perceived that the crucial question is who or what was the beneficiary of the various claims that the English advanced in the New World. Was it the King in his capacity as the personal lord of these new dominions? Or was it the King as the holder of some "crown"? Or was the beneficiary the nation-state? To answer this question properly, Juricek had first to clear away much misunderstanding about the legal nature and justifications for European claims in the New World. He therefore discussed in some detail the two preliminary questions that are of direct interest to us here.

The Legal Nature of English Claims: Dominium

Goebel was one of the first to realize that, during the Age of Discovery, European claims were somehow essentially connected with claims to property right and titles at the time when ***imperium*** and ***dominium*** were commonly confused. Keller, Lissitzyn, and Mann also understood the relevance of the concept of lordship, but they jeopardized their argument by asserting that the concept of "sovereignty (or the right to acquire it)" would serve their purpose and that their readers would understand their meaning.[82] As a result, their analysis is seriously misleading: the use of the word "sovereignty" predetermines the answer to any question of who may be the beneficiary of such claims.

Students before Juricek had perceived that European claims to territory in the New World were in the nature of claims to ***dominium***, or private property, but Juricek was the first to nail down this view of European claims with a document that summarizes a debate sometime before 1609 in the council of the Virginia Company. The council was debating whether or not to publish an explanation and justification of their objectives in attempting to colonize Virginia, to increase the confidence of possible investors in this enterprise. In the event, the arguments against such a publication won: it was agreed that such an explanation would probably raise more questions than it answered; it would provoke comment on the morality and legality of English entry into Indian lands; and it would play into the hands of the pro-Spanish faction at Court. Look, a member of the council

argued, at the trouble the Spanish sovereigns had brought on their own heads by encouraging public discussion. Controversy over the legality of Spanish titles to the Indies had only injured the Spanish king's claims. He had been forced to re-interpret the papal donations and to concede that they conveyed only a right of magistracy over the Indians, not property rights to their land. But, this anonymous official of the Virginia Company explained, the English were claiming much more than mere jurisdiction in Virginia: "Wee seeke Dominion", he said. dominion that was to be "absolutely good agaynst ye Naturall people."[83] In sum, English claims in North America were essentially claims to rights of private property, together with attendant jurisdictional rights usually associated with lordship. The legal nature of English claims in North America changed little throughout the entire Tudor and most of the Stuart period, from 1497 to 1660.[84]

Juricek's generalization must, however, be qualified. Very often, he argued, English claims were not as far-reaching as they appeared at first sight. Occasionally, when English claims to title were resisted by rivals, they were scaled down a notch; claims that the English already had title were often reduced to claims that they had a right to acquire title.[85] Retreat of this nature cannot be taken to imply that the presence of Indians somehow posed an impediment to English claims that had to be accommodated before a plenary title to territory could be obtained.

Although the English (and the French) were, in general, reluctant to talk about the rights of the Indians, they held that the aboriginal people were disqualified from having any sort of civil title to their lands that a European power must respect. The Indians were held to have "natural" rights, rights accorded by the law of nature, not by the law of civilized states. The principal justification for this view oscillated between regarding the Indians as disabled on religious grounds (see, for example, Coke's dictum on infidels in ***Calvin's Case*** [1608][86]) and regarding them as disabled by more secular justifications. The weight of evidence suggests that, on the whole, the secular arguments found a wider acceptance among the European rivals. The Indians were, therefore, disqualified from having legal rights because they were barbarous and uncivilized, and not because they did not profess the True Faith.[87] Despite the foregoing, it would be wrong to say that the Indians were completely irrelevant from a legal point of view, and I shall discuss why they were not presently.

Juricek, following earlier scholars, showed that Marshall and Story (and those who have followed them) were being quite unhistorical when they thought that European sovereigns during the Age of Discovery were asserting rights in the nature of territorial sovereignty in the New World. It was inevitable that Marshall and Story should regard the problem in this way, because their argument began with the concepts of international law. The trouble with an explanatory framework based on international law,

as Goebel saw, is that there was no such entity as the nation-state during the Age of Discovery. Nor could there be one until the 16th century, when Jean Bodin (1530-1596) separated the concept of the medieval universal state from its theocratic assumptions.[88] Marshall and Story thus attempted to force English claims into a framework that did not exist when those claims were being advanced. There were, of course, vague references in some of these claims to the law of nature and to ***jus gentium***, but these laws were supposed to regulate the relations of individuals, not of nation-states. Because there was no nation-state, there could be no claims to territorial sovereignty.

This logic also makes clear that it was not the nation-state of England that acquired title; it was the sovereigns of England, and they acquired their rights in one or the other of two possible capacities. An English monarch could have acquired title either in his personal capacity as the lord of a new territory or in his capacity as the holder of a "crown", either national or imperial. Or the monarch may have acquired title as an individual, but, perhaps as a patriotic gesture, he may have annexed his new acquisition to the Crown so that it became dependent upon, but not part of, his realm. Such new territories could be converted from "dominions of the king" into "dominions of the crown".[89] Only legal persons can acquire property. The state, as such, holds territory only through its subjects. They, in turn, might, according to municipal law, be able to acquire

title only from the Crown, but the Crown is not the nation-state.[90]

Juricek showed that the early Stuart monarchs claimed that their possessions in North America were dominions of the king, but were not annexed to the Crown. James I of England had his own imperial constitutional vision of a "Great Britain" in which the role of Parliament was to be subservient to his own sovereignty, which was derived from divine sources. James I organized his constitutional claims to the colonial plantations to advance his own constitutional schemes at home.[91]

Fascinating though Juricek's evidence and argument are on the problem of the constitutional status of the plantations, his more important contribution to the problems examined in this paper is his development of a terminology with which the various claims to the defences of title in the New World can be measured, judged, and understood.

Goebel had seen that the Age of Discovery was an essential preliminary to the development of an international code for the acquisition of territory, and that the arguments for it were developed in response to practical necessities. Juricek made much the same point, but he went beyond this and said that what Goebel, and with him, Marshall and Story, had overlooked was the practical impossibility for European sovereigns to come to any formal agreement, unless it was couched in vague and general terms, because such an agreement would have cut late comers from the enormous wealth of the New World that everyone believed was

there for the taking. Self-interest demanded that each rival sovereign should formulate his own argument for empire, to maximize his claims and to prove that rival claims were unfounded in law. The major points of international disagreement revolved around the meanings of the words "discovery", and "occupation" and "possession". It was all very well to talk in general terms about how a valid legal title could be acquired, but when it came down to specifics there was a world of difference among the respective arguments advanced by those European powers that were struggling for an empire in the newly found lands.

Juricek began with the Iberian monarchies of Spain and Portugal, because they were the first to perceive the possibilities of empire and to enter the business of acquiring new territory. They were also the first to realize that exploitation of the newly discovered lands would take many years, possibly generations. They were, therefore, obliged to articulate a position that would enable them to pre-empt all possible rival claims and that would establish legal arguments that shut out and make illegal any and all competition. They had to establish a monopoly, and their arguments for the acquisition of a valid legal title to new territory were formulated to serve this end.

The Iberians' monopolistic and universalist claims were, from the beginning, therefore, basically defensive. However they justified their claims, they had "one common and enduring characteristic: the legal argument supporting them was designed

to deliver a quick and final title (or a right to acquire it) to the new territories in question."[92] The arguments used by their northern competitors, including (for a long time) England, were formulated to show that the Spanish and Portuguese claims to title in the New World were somehow legally defective and that they could not deliver all the rights claimed by them. The late comers had to clear the way to win something for themselves. The French, English, Dutch, and Swedes were driven to adopt aggressive arguments devised to make acquisition of title a drawn-out and time-consuming process. Only by that means could they supply a legal foundation for empire building on their own account.

The Pre-emptive Code of Territorial Acquisition

As the first line of justification, the Spanish and Portuguese claimed that the Pope had given them monopolistic rights to their discoveries in the New World and that they had the exclusive right to exploit their new discoveries. The donations in 1493 by Pope Alexander VI to the sovereigns of Castile and Aragon, who had united their two kingdoms to become Spain, were originally interpreted as being full and final grants of territory in the New World. Furthermore, these papal bulls were originally understood to mean that the rights of the aboriginal inhabitants were of absolutely no account; the Spanish could seize their property at will. The bulls promulgated in favour of the two monarchs of Spain purported to be full and final enfeoffments of

territory and to convey both ***imperium*** and ***dominium***; the rights conveyed to the Portuguese were usually only rights to ***imperium***, together with the right to acquire title, but not title itself. (The Portuguese were for much of the period operating under a proclaimed crusade.) For Juricek, these bulls illustrate better than anything else the Iberians' desire to obtain a quick and final legal title.[93]

In time, the value of these bulls depreciated, first because later popes refused to stand behind them, and later because other powers, even other Catholic powers, heaped abuse and scorn on them. François I, King of France, observed, "The sun shines for me as for others; I should like to see the clause in Adam's will that excludes me from a share in the world."[94] Queen Elizabeth I of England protested that:

> Moreover, she understood not why her or any other Princes Subjects should be debarred from the Indies, which she could not perswade herself of the Spaniard had any just title to by the Bishop of Rome's Donation, (in whom she acknowledged no Prerogative, much less Authority, in such cases, so as to lay any Tie upon Princes which owed him no Obediance or Observance, or as it were to infeoffe the Spaniard in that new World, and invest him with the possession thereof,)...[95]

The Spanish monarchs had to deal with domestic opposition to their activities in the Indies, an opposition generated by news that filtered home of atrocities committed against the Indians, and with foreign opposition to their claims to jurisdiction based on the papal donations. They began, by the 1540s, to shift the

bases of their arguments for the defence of their titles to discovery and possession.[96]

By this time, the bulls had served their tactical function: the Spanish sovereigns had been able to sidetrack much domestic opposition because they could point to the bulls as justification for their claims. Juricek argued that, without them, the Dominicans would have flayed alive the Spanish king's conscience, but they could not so easily do so when he justified his actions in the Indies by the authority of a papal grant. Even Las Casas (all too often hailed as the apostle of aboriginal rights) was forced to admit that the Alexandrine donations were the only possible basis of Spanish title to the Indies. "With that conceded", Juricek remarked, "all the furious debating over Spanish rights in the Indies could not and did not amount to much."[97]

The Spanish sovereigns accepted the reinterpretation of the jurisdictional authority behind the papal grants, but they denied the validity of the reinterpretation of the kind of rights that had been conveyed. They abandoned their claims to ***dominium***, but they elevated them to claims to ***imperium*** and expanded them into claims to "sovereignty". The papacy, thereafter, was recognized to have authority to intervene in secular affairs only in cases of deep religious emergency. The discovery that the heathen existed in the New World was held to be such an emergency, and the Alexandrine bulls were reinterpreted to have been extraordinary temporal expedients necessary to cope with it.[98]

The Iberian powers were able to maintain their universalist and monopolistic claims to the New World well into the 16th century because the other European sovereigns simply did not grasp how vast and magnificent the Spanish and Portuguese discoveries were. When it was generally realized that Columbus had discovered, not just a few islands, but two whole continents, the doctrine behind these claims to monopoly was regarded as ridiculous, and it had to go.[99] When the extent of the New World began to dawn on the consciousness of northern Europeans, many of them began to insist that a valid legal title could only be acquired there by "actual", "real", or "effective" occupation or possession, a time-consuming process that was obviously beyond the ability of the Spanish and Portuguese, both in terms of manpower and treasure. The maintenance of this contrary position was, of course, essentially aggressive, and it was designed to open opportunities for other powers.

The rights conveyed to the Portuguese under the papal donations were less extensive than those conveyed to the Spanish sovereigns, but they had a common interest in upholding the validity of their grants, and they doggedly persisted in it into the 18th century. Both claimed to have monopolistic privileges; all else was of peripheral concern.[100] As the bulls came increasingly under attack, the Iberians were driven to a fall-back defence of their titles, and strove to take possession of as much territory as possible. The logic of this defensive step is

important, and Juricek has helped our understanding of this problem by emphasizing it.

Because the Iberian powers' northern rivals ridiculed the papal grants, they hoped that their opponents would at least respect claims to title based on possession. The way they did this was to perform numerous symbolic acts of possession, which, they claimed, delivered juridical possession (exactly as Keller, Lissitzyn, and Mann had argued was the case for everyone). But Juricek shows, contrary to the views of Goebel and of Keller and his colleagues, that the acquisition of rights and these symbolic acts of possession were not connected with the private-law doctrine of ***occupatio***, but rested instead on the rule in Roman public law of ***occupatio bellica***, or the seizure of enemy territory in war--in other words, by conquest. There are two limbs to Juricek's argument on this subject.

In the first place, although the Iberians claimed title to the New World, they did not necessarily claim that they also had possession. In Roman law there is a sharp distinction between ownership (title) and possession: ownership is normally acquired before possession is taken. Under ***occupatio***, however, ownership and possession are acquired simultaneously.

According to Juricek, the difficulty with Goebel's view that the principle of ***occupatio*** was decisive is that the territory in the New World must be presupposed to be ***terra nullius***. But a host of publicists from Vitoria and Las Casas onwards (as Lindley recited) have contradicted that assumption. Consequently,

Juricek held that Goebel badly misunderstood the importance of symbolic acts of possession; much more than simple *occupatio* was involved.

Goebel thought that a symbolic act of possession was of no international legal significance. It was, for the Iberian powers, merely a precedent step to the completed act of occupation, not occupation itself. Juricek disagreed; he showed that the Iberian powers thought that symbolic acts were sufficient to consummate their title, and he demonstrates that the acts of possession performed in the Indies were analogous to those performed in Castile and, even earlier, to those performed in the Roman empire.

These acts of possession, which were connected with the transfer of landed property or with the appropriation of abandoned or ownerless property, consisted of a ritual pantomime or a public ceremony on the land conducted before numerous witnesses and at least one magistrate or notary. The new owner walked around the perimeter of the land to be possessed, digging up clods of earth, tearing twigs off trees, drinking water from a spring, and so forth. All of these acts (which were similar to the English turf-and-twig ceremony) were designed to show that the new owner was asserting and exercising absolute control. If a witness challenged this ritual claim, the proceedings were halted and the question of title was litigated. Juricek pointed out that in the New World there was additional symbolism in the use of religious and regal paraphernalia, such as the erection of

a cross and running up of a royal or national standard. These additions he associates with the Crusades and with the *Reconquista* of Spain. There were no religious or regal paraphernalia in the Castilian or Roman precedents, so Juricek interpreted them as meaning that when a cross was erected and a royal standard unfurled, the action suggested that the new lands were being added in some way to the King's dominions and to Christendom.[101]

Juricek found five essential elements in a symbolic act of possession:

(1) It was always in public, performed in the presence and hearing of persons likely to be affected by it (for example, the Indians who inhabited the place).

(2) A cross, often emblazoned with the appropriate royal or national insignia, was usually erected. If the insignia was not affixed to the cross, it usually appeared in some other form, such as the unfurling of the royal or national banner, such as the Castilian cross of St James.

(3) Usually a more permanent marker of possession was planted by the leader of the expedition.

(4) As agent of the sovereign, the leader acted in pantomime the taking of possession, commonly with his sword drawn.

(5) The leader drew up or caused to be drawn up an official record of the proceedings: Spanish records of such acts usually contained a statement that no one present contested the act; French records usually asserted that everyone present joined in affirming the act.[102]

What did these interesting ceremonies mean?

By the mid-16th century, Juricek maintained, all of the powers whose legal traditions were based in Roman law (including the papacy) recognized that the American Indians were rational beings with "natural rights", including the right to own

property. (It is difficult to demonstrate that this statement is true of the French: they were secretive and diffident in speaking of the rights of Indians.) At any rate, the Spanish certainly did not regard the Indies as ***terra nullius***.

If the Spanish claimed title to the Indies on the strength of the papal donations, why did they perform enough symbolic acts of possession? Juricek pointed out that Castilian law was basically Roman law, in which the ***right*** of ownership and the ***fact*** of possession were absolutely distinct, and were acquired separately. Roman law provided different procedures and remedies for these two phenomena. Whereas Spanish monarchs claimed to have title to the Indies under the papal grants, they did not claim to possess them. They did not, however, take long to perform enough symbolic acts of possession to support their claims. When England and France began to question the validity of the papal donations, neither they nor any other European power denied that "possession" conferred some sort of legal rights.[103]

Juricek concluded that the only way to accommodate all of the evidence was to reject the common view that European claims to the New World were based on ***occupatio***; rather, the governing principle of acquisition should be considered as ***occupatio bellica***. There are two main distinctions between these two modes of acquisition: under ***occupatio*** the property is supposed to be ***res nullius***, and the appropriated property accrues to the actual occupier. Under ***occupatio bellica***, the individual soldier did not win the property for his own benefit; it accrued to the

(Roman) state and became public property. During the Age of Discovery, this principle was varied, because sovereigns did not then derive their power from their peoples but from other sources. New territory, therefore, accrued to some king or crown.

> The essence of the symbolic act of possession appears to be found in the challenge that it contains. A Christian prince seizes a piece of territory and dares all the world, Christian and infidel, to deny him. This challenge is implicit in the raising of crosses and banners, the pantomime of possession, and especially the planting of possession markers. Such markers stand as semi-permanent challenges, whose obvious if unwritten meaning is: "No trespassing".[104]

Symbolic acts of possession were, therefore, acts of conquest.

In the second place, Juricek cited a second source of evidence to support his view that the principle relied on was *occupatio bellica*. If Goebel belittled the evidence of publicists, Juricek regarded it as revealing and relevant. He referred to a passage in Vitoria's writings:

> Not much, however, need to be said about this third title of ours [right of discovery], because, as proved above, the barbarians were true owners, both from the public and the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant....And so, as the object in question was not without an owner, it does not fall under the title which we are discussing.

Instead, Vitoria looked elsewhere for the lawful basis of title to the Indies: "the seizure and occupation of those lands of the barbarians whom we style Indians can best, it seems, be defended under the law of war."[105]

Juricek held that there was a fictitious conquest of the Indians under these symbolic acts of possession. He thereby implicitly rejected Goebel's reasoning and moved closer to Lindley's. Conquest presupposes a derivative form of acquisition. Thus, when we accept these ritual challenges for what they were, "we must reject the common view that the Latin powers regarded the presence of the Indians in the American lands they claimed as legally irrelevant."[106] The Spanish and Portuguese usually performed their symbolic acts with Indians as witnesses; the French acts always had Indian witnesses, who shared in proclaiming the act.

> The Indian's role as witness is crucial. As La Salle ended his oration in his 1682 act, he announced "I hereby take to witness those who hear me." La Salle's meaning was clear to all Europeans: the crowd of Indians present had borne witness against themselves. This was all Latin Europeans needed. This was why Columbus was so elated that "no opposition was offered to me." This was why the Portuguese possession of Guinea was unimpeachable. As Barros said, "Nobody defended it."
>
> When Indians declined to challenge a European act of possession, in European eyes they had either denied or surrendered their own right. The former, which apparently would momentarily make the land in question ***res nullius*** is a possibility. The latter, however, seems the better interpretation. For one thing, the reputation of these enterprises as conquests points in this direction. Furthermore, the ritual challenge always seems to come towards the ***end*** of the ceremony, when possession has apparently already been taken. Finally, a formal act of submission to the appropriate European king apparently always followed or was included in an act of possession. The question of whether Indians were supposed to deny or surrender

> their rights was of no practical importance to contemporaries. Either way the result was the same, and this interesting theoretical problem will probably never be fully resolved.[107]

If the Indians did not understand this hocus-pocus, it did not matter. If they resisted, the Europeans resorted to trickery. If this deception was discovered by rivals, the claim was bound to be discredited, but that was all part of the game.

Symbolic acts of possession were, therefore, a vital matter to European contemporaries of Columbus. They were a formal legal assertion of rightful possession of a territory and, more than that, an intention to defend it by all available means, including force of arms. For the French and Portuguese, symbolic acts of possession dated the origin of their claims to dominion over territories. This was why the French based their claims to Canada on Cartier's voyages of 1534 to 1536. He had created New France by formally taking possession of the shores of the St Lawrence River, whereas Verrazzano, 10 years earlier, had failed to perform an act of possession during his voyage of exploration.

The Spanish case was somewhat different. After 1493, they relied on the papal grants of Alexander VI to support their claims to ownership of the Americas. Nevertheless, despite this high-handed and arrogant policy, they performed symbolic acts of possession in every new area they explored. Because these acts concerned a territory that the King of Castile already claimed to own, they cannot, strictly speaking, be regarded as acts of conquest (except in the vague pre-Grotian sense of that term).

The point remained: "Possession of territory inhabited by Indians could not fail to subject these aborigines to a higher authority."[108]

Later in the 16th century, other European powers entered the field. Envious rivals subjected the bulls and symbolic acts of possession to increasing pressure and attack, for they insisted that a valid legal title could be acquired only through effective occupation and possession. They denied that symbolic acts of possession qualified as juridical possession. Under this pressure, the Iberians asserted that discovery conferred title or that discovery conferred at least a preferential or pre-emptive right to acquire title. The Spanish and Portuguese knew that, whatever else might be said, the achievements of Columbus and Da Gama could not be denied, nor, indeed, could they be duplicated. Juricek regarded this tactical manoeuvre as brilliant, for it shifted attention away from the confused and confusing question of title to the question of who had the best right to acquire title.

The Iberians, by reducing emphasis on the papal grants and their symbolic acts of possession, and by basing their claims on discovery, implicitly conceded that they could not make out a convincing defence of their claims to title. "It was a significant retreat for both the Spanish and Portuguese." Juricek continued:

> The Iberian monarchies, like all of their northern rivals, never contended that visual discovery conferred anything more than a preferential right to acquire territorial

> dominion... The indisputable achievements of Columbus and Da Gama as "discoverers" were far more difficult to denigrate than papal bulls or claims of possession in areas lacking a European population.[109]

For the proponents of the pre-emptive code, juridical discovery did not mean the accidental finding of new land. Rather, such discovery meant the recognition of the existence of something new, ***provided*** that this recognition resulted from deliberate search. "Effective" possession or other time-consuming activities could not affect the validity of an act of discovery. Juricek concluded:

> As a result, the juridical discovery embraced by the Iberian powers met their acid test for all legal defences. It provided valuable (though not plenary) legal rights quickly and indefeasibly, for it appeared that no rival could hope to duplicate the feats which supposedly gave rise to these rights. The fact that Columbus had not recognized what he had found was successfully concealed.[110]

Juricek demonstrated three distinct phases in the development of the pre-emptive code of territorial acquisition, and that there are subtleties to this problem that previous scholars have not noticed. The Spanish and Portuguese had tried to assert and maintain fantastic and monopolistic claims to the New World to make illegal all European competition there. Their first line of defence had been the papal bulls. Marshall and Story had barely mentioned these important instruments, which they interpreted as merely confirming Iberian rights acquired by discovery.

For Spain, the bulls meant that in 1493 Alexander VI had invested full and final title to the New World in the Spanish sovereigns. For the Portuguese, however, the bulls had given them an exclusive right to acquire territory in the New World, not title itself. Domestic opposition, especially in Spain, forced a reinterpretation both of what rights were conveyed under these instruments and of the jurisdictional authority on which they were based. Spanish monarchs denied that all that had been conveyed was a pre-emptive right to acquire territory; they maintained this position into the 18th century. They did accept a new interpretation of the jurisdictional basis of the bulls by conceding that Pope Alexander VI had a right to intervene in secular affairs only to advance religion or cope with a temporal emergency. The necessity of bringing the infidels and heathens in the New World to the True Faith was, they held, just such an emergency. When rival European monarchs argued that title could be acquired only through effective occupation and possession, the Iberians argued that symbolic acts of possession represented juridical possession and that colonization was not necessary. This argument did not convince their more demanding opponents, so the Iberians were driven to base their claims on discovery, which they defined as establishing the existence of new territory as a result of a deliberate search. Such a discovery, if it did not deliver a plenary title to new land, certainly gave prior right to obtain it.

The Dominative Code of Territorial Acquisition

The envious rivals of Spain and Portugal did not docilely accept the Iberians' monopolistic pretensions. The dominative code of territorial acquisition put forward by these rivals was essentially aggressive; it was intended to undermine existing claims rather than to defend present or future claims to empire. The French, Dutch, English, and Swedes insisted that a valid legal title to land in the New World could be acquired only through "real", "actual", or "effective" occupation or possession. Whatever else these formulas were meant to convey, one point was absolutely clear: effective occupation and possession of inhabited lands could be acquired only by "conquest" of the aboriginal inhabitants. For an uninhabited area, occupation and possession meant its colonization.

After repudiating the papal donations, the monarchs of northern Europe became interested in winning empires for themselves. What "real", "actual", or "effective" occupation means can best be defined negatively. Applied to a vast territory, these adjectives are "so amorphous as to be meaningless unless some standards of possession are agreed upon." The question of what precisely a nation must do to take real, actual, or effective possession of new territory was seldom faced and never answered during the long period that European nations contested for empire in the New World. Juricek summarized the position:

> We can only be sure of the negative meaning of such statements: for these late-comers,

> symbolic or declaratory possession was not sufficient to establish legal possession or ownership. If anything more substantial were required for possession, occupation necessarily became a time-consuming process. That was the vital point: unless a long and painful process were necessary to acquire legal title to a new territory, it would be difficult to dispute the early and extravagant claims of the Spanish and Portuguese.[111]

The necessity of taking time to establish occupation also influenced the adherents to the dominative view of discovery. Opponents of the Spanish and Portuguese insisted that the visual and mental elements involved in juridical discovery made up only part of the story. For them, juridical discovery involved more than finding new land after a deliberate search for it. It was not simply the factual question of discovery: the discoverer had to possess the new land as well. One element is common to both the pre-emptive and dominative views: accidental discovery did not count. Even this broad area of agreement did not resolve some questions. In the dominative view of discovery, the visual and mental elements of discovery need not have been pre-meditated. Since simple priority counted for little, unless the discovery was quickly followed by legitimate possession, later explorers could begin the process of discovery anew. In sum, the dominative code held that "discovery" and "possession" were inseparably linked in the one process of acquiring title to new territory.[112]

England Switches Sides

The most fascinating and, for Canadian students, the most important part of Juricek's study lies in his argument that the English reversed their position on how a valid legal title could be acquired to territory beyond the realm. Under Henry VII and Elizabeth I, English efforts to extend their empire were all based on the dominative code, whereby title could be acquired only by conquest and possession. However, by 1610 James I was on the brink of gaining an empire for himself in the New World. He could not then possibly claim that he was in real, effective, or actual occupation or possession of North America between Florida and Canada. After 1620, when he was making claims to empire that rivalled in extravagance the claims of the Spanish and Portuguese, he quietly abandoned his support of the dominative code and adopted as justification the arguments of the pre-emptive code.

Before the accession of King James I in 1603, the most the English claimed on the strength of Cabot's discoveries in 1497 was a pre-emptive right to acquire title, but not title itself. For a long time, Sir Humphrey Gilbert and Sir Walter Raleigh, not Cabot, had been regarded as the heroes of English imperialism. Cabot had discovered new land, but at most he had performed only symbolic acts of possession (and the Elizabethans did not certainly know that he had done even that). He had not followed up his discovery with possession that was real, actual, or effective.

As a result of the massive effort to colonize Virginia that the English made during the first decade of the 17th century, James realized that his new empire would need to be defended. Unable to justify his claims according to the criteria of the dominative code, he abandoned it and embraced the pre-emptive code of his former rivals. He played down Gilbert's and Raleigh's early efforts to colonize Virginia and Newfoundland in the 1580s, and he now presented Cabot as the founder of English rights in North America. At about this time, there was a shift in the diplomatic alliances in Europe; for the next 150 years, France was England's greatest rival in the struggle for empire. France, according to Juricek, throughout this period, consistently cleaved to the dominative code, for France had her own interests to serve.[113]

Whereas Washburn queried the view that the colonial charters reflected a coherent doctrine, and it is to his credit that he saw a problem here, Juricek gave a detailed explanation of these important instruments. In doing so, he has provided some insights that, in my opinion, go to the very heart of the argument from aboriginal rights.

There can be no doubt that the Theory of Tenures provides a fundamental theoretical objection to the proposition that the Australian Aborigines and the Canadian Inuit and Indians have legal rights in those territories and to those resources that they can claim according to their own *lex loci* and that the Crown must respect. (A different view of this doctrine is taken in the

United States; there, the rule that antecedent rights be recognized by the sovereign before they are enforceable rests on quite different theoretical assumptions.) The Theory of Tenures, if binding, is also binding on the Crown.[114] If the aboriginal inhabitants must be able to point to a documentary source for their title, so too must the Crown. Where, therefore, is the Crown's documentary (or statutory) title to North America or to any particular territory in question? Juricek was not directly concerned with this vital theoretical problem, but he has provided the rudiments of an answer.

None of the several instruments issued by English monarchs before 1609 related to territorial acquisition in the New World claimed to convey territory; they were merely licences to acquire territory. This fact is consistent with (and, indeed, is convincing evidence of) dominative premises, because no territory in the New World had yet been acquired that could be granted. In 1609, however, James I issued a second charter to colonize Virginia. Juricek sees this charter as a tentative and covert announcement by this devious king that he is about to change his position on territorial acquisition. At first sight, this charter seems to convey a massive chunk of territory to the Virginia Company, but when the grant is carefully perused, it is less audacious. Instead of granting this territory in "absolute property" from sea to sea, all that passed was territory that James "maie or can graunte". As Juricek explained:

> This charter not only purports to convey a seemingly huge territory within certain bounds to the Virginia Company of London, it indicates that not all of the territory within the prescribed boundaries is actually supposed to be conveyed, at least [not] immediately. After delineating the external bounds of this grant, James provided that it is subject to the "reservations, limitations and declarations hereafter expressed." The essential reservation is as follows: only that territory was granted "which we by oure lettres patent maie or can graunte." This proviso, with slight variation, appears in all of the other extant colonial grants which James issued prior to 1620.[115]

Juricek argued that, with this vast grant, James wanted to go on record with a pre-emptive claim to this territory before another European sovereign beat him to it, and Juricek saw James's may-and-can-grant proviso essentially as an escape clause. So long as James adhered to the dominative view of the acquisition of legal title to new land, he could not claim to have title to the areas that he pretended to convey. "Measured by Elizabethan standards, vague as they were", Juricek wrote, "the American territory which James `might' and `could' grant to his subjects was surely only a tiny fraction of the enormous tract of land delineated in these charters."[116] He therefore interpreted the English land grants between 1609 and 1615 as characteristic of a period of confusion and transition, because Elizabethan dominative views on possession were a stumbling-block to James's expansionist plans. James was, however, unwilling to repudiate them outright for two reasons.

First of all, until the English colonies were securely established and had survived their first dangers, James would

have been unwise to abandon his opposition to the Spanish claims to title that were based on Columbus's discoveries and on symbolic acts of possession. Second, there was the problem of domestic opposition. These grants made between 1609 and 1615

> ... thus contrived to accommodate contrary commitments. The vast bounds of the territories described therein allowed the King to indicate the vast extent of his imperial ambitions, while the escape clause guarded against explicit repudiation of his professed views on lawful possession. Without doubt these charters purported to claim and convey extensive territories but the escape clause made it equally certain that none of these territories could be exactly located on any map. In this way James could encourage his subjects to exert themselves in behalf of a glorious vision of empire without abandoning the still useful critique of Spanish pretensions and without presenting much of a target to potential critics. He had it both ways.[117]

In sum, James was preparing his ground to change to the pre-emptive code to which the Spanish and Portuguese adhered.

In Juricek's view, James finally embraced the pre-emptive code in 1620, when he issued the great New England charter and omitted the escape clause. This grant conveyed *all* of North America between 40° and 48° N latitude, excepting only the territory actually possessed by any Christian prince on the day the grant was issued. This charter, breath-taking in its scope, marked James's final adoption of the pre-emptive code. No longer was it necessary, with regard to rival European powers, for the English to be in actual possession, of the land claimed. Symbolic possession was now juridical possession, and, because discovery was no longer linked with effective possession, Cabot's

discoveries were no longer flawed by the fact that he may have performed only symbolic acts of possession. From this time onward, Cabot's pre-eminent role in the acquisition of territory in North America was assured. Juricek wrote:

> It is clear, then, that in the space of a dozen years the English government had completely reversed itself on the law of territorial appropriation. Two nascent codes of "international law" on this general question were in conflict during our period [to 1660]. On the one hand, there was the "permissive" [pre-emptive] law pioneered by the Iberian powers, a law focussed on the two central issues of discovery and possession. On the other hand was the "demanding" [dominative] law originally championed by all rival powers. English officials before 1609 and after 1620 would have agreed that only "discovery and possession" could convey title to new territories, but this agreement was superficial. Despite this appearance of continuity, James' official policy at the end of his reign was diametrically opposite to that he had followed at the beginning. On the two legal issues on which the various imperial powers wrangled over--the nature of juridical discovery and the nature of territorial possession--James had switched sides.[118]

According to Juricek, the post-1620 English charters were full and final grants of the territories named therein. With the omission of the escape clause, there is no longer any implied or explicit admission that the granting king might not have title to all of the territories conveyed. Marshall's position, as he explained it in ***Johnson v. M'Intosh***, is a better statement of the law than is his position in the Cherokee cases.

Juricek's evidence and reasoning on the charters are also of great importance in understanding how the Crown may be said to

have complied with the Theory of Tenures. If the Crown is obliged to point to a documentary (or statutory) source of title in its own hands, Juricek has shown that the colonial charters served this important function. According to contemporary theory, a king could write out his own title deeds to new territories. The charters themselves were equal to the task of seizing territory into the hands of the king, and, consequently, they became the documentary root of his title.[119] These charters also played an important role in the diplomatic offensive that the English mounted against their rivals. The fact that the king had issued paper titles to a particular territory was proof in itself that the king was in possession of them. Juricek included this kind of logic in his catalogue of matters that he considered amounted to "declaratory possession". Thus, the styles and titles that various sovereigns adopted were, in effect, assertions that legal rights existed, and, by these assertions, they became legal rights.[120]

King James's shift from the dominative to the pre-emptive code has an obvious bearing on interpreting the legal significance and meaning of the fact that the English purchased land from the Indians. So long as the grants conferred only a right to acquire territory--and that was the case for every Henrician and Elizabethan instrument--one may logically view purchases from the aboriginal inhabitants as attempts to acquire a basic proprietary title, not just some residual right of occupancy that is all the Indians had left after *dominium* had

supposedly been acquired. To make out this view in any convincing way requires a demonstration that, during the 16th century, Englishmen did in fact think that the Indians had substantive rights in their territories; there is much evidence to support this view. The may-and-can-grant escape clause in the Jacobean charters issued between 1609 and 1615 may also possibly be interpreted in this way. However, Juricek considered that the better view is against this inference. The escape clause was probably only an expedient to meet the attack of critics who might protest that the King was granting away land from under the Indians' feet. It is not evidence of a genuine solicitude for the Indians' antecedent rights.[121] With the apparent[122] disappearance of the escape clause in the post-1620 charters, there is no implied admission that the king might not be in juridical possession of the whole of the territory he intended to convey. And we find, especially in the 1620s, that purchase of land from Indians was discouraged because purchases might be interpreted to mean that, despite English claims to a plenary title, the Indians none the less had substantive rights--rights that might be sold to a rival power. When, in the 1630s, English claims came under increasing pressure from the Dutch and the French, there was a revival in the belief of the efficacy of purchasing land from Indians and of receiving their submissions, surrenders, etc. But the law had not changed, only the practice.[123]

What, then, was the legal nature of the Indians' rights?

Here Juricek made another important contribution. He is the first scholar to identify the evidentiary importance of letters patent issued by James I to Robert Harcourt in 1613 granting territory in Guiana. The patent began by reciting an earlier grant to Harcourt that authorized him to make new discoveries and to search out new trade; James traced Harcourt's activities in Guiana, then continued to explain his reasons for making the present territorial concession.

> ... we therefore finding upon deliberate consideration of the premises that we are tied and bound by our duty to Almighty God and our Regall Office to procure and endeavour the in Largement of the territories of the Christian Church in all partes of the world, and well knowing that the said countreys lyinge Waste and being savage so that by the law of nature and nations we may of our Regall authority possess ourselves and make grants thereof without doing wrong to any other prince of state considering it is not actually possessed by any Christian prince do think it a Christian and honourable acts of ours not only to work and procure the benefit and good of many of our subjects but principally to advance the knowledge of our omnipotent God and the propagation of the Christian faith therefore... we do give and grant... [and so forth][124]

Juricek concluded that James had at last explained himself. "`Countreys lyinge Waste and being savage'... may be seized and granted at will, and Guiana was one of those countries. The Indians' lack of civility put them beyond the pale of civil law."[125]

Contrary to many, Juricek believed that the essential justification for disqualifying the Indians from having legal

rights in their lands was secular, not religious, although, when James I changed the symbolism associated with symbolic acts of possession in his name, religious elements became more important, perhaps implicating James in the revival of a crusading ideology or, perhaps, because of Coke's dictum on infidels in ***Calvin's Case***.[126] It was not so much the infidelity of the aboriginal inhabitants, James claimed, as it was their supposed heathenism, barbarism, and savagery that disqualified them. The Harcourt patent is the most direct and most official evidence to support this view.

The Indians were not completely disqualified from having any rights at all. Instead, they had a "natural title", one that was accorded by the law of nature but not one that was cognizable (legally speaking) by the laws of civilized states. Deeds of purchase from the Indians, therefore, might usefully be waved in the face of European rivals when it suited the English, and, of course, such deeds were enforceable against the Indians. But their actual legal importance, so long as English sovereigns adhered to the pre-emptive code, was minimal.[127]

Concluding Remarks

Proponents of the argument for title based on aboriginal rights must admit that there are several hard facts that lean heavily against it, if they do not totally destroy it. How can these facts be explained away? It may be admitted, for example, that during the 17th century the Indians were considered to be too uncivilized to have legal rights that had to be abrogated before their territories could be legally conveyed to a grantee. But does it necessarily follow that the doctrine of precedent and ***stare decisis*** means that this historical legacy--this general presumption against the Indians' having legally enforceable rights--burdens the present situation? Does the argument from aboriginal territorial rights really boil down only to an argument of policy? Do the arrogant and ethnocentric assumptions that James I and his contemporaries held about the nature of aboriginal land use and occupancy have any place in a modern court of law? Or can the American colonial precedents be admitted and distinguished on sound theoretical principles to show that whatever may have happened in Guiana or Virginia is interesting and revealing, but ultimately irrelevant to the land rights of, for example, the Australian Aborigines, the Indians of British Columbia, and the Inuit in northern Canada and Labrador because the Crown acquired title to their territories by peaceful settlement, not by conquest? In any case, how did English assumptions on the acquisition of title to territory beyond the realm evolve during the 18th century? How did Englishmen later

view the legal status of the antecedent rights of the North American Indians?

In this paper, I have drawn attention to the fact that there is much disagreement among lawyers and historians over how European powers thought a legal title to territories beyond the realm could be validly acquired. In concluding this essay, I wish to emphasize that there is much work yet to be done on the influence of the Indians and the colonists on the constitutional consequences of European, and especially English, claims in the New World. This fundamental problem can, perhaps, be understood best by returning to the beginning with some final remarks on the Marshall-Story explanation.

Both Marshall and Story denied that conquest was in any way relevant to the acquisition of title in North America, and so in no sense could the original 13 colonies be said to come within the status of having been acquired by conquest. Instead, "discovery" was the mode of acquisition and the determinant of constitutional status. Consequently, the colonists had all the rights and privileges of Englishmen, and were not subject to an arbitrary and despotic prerogative legislative power in the hands of the Crown as conqueror. But the Indians were exempt from this privileged position, and this was justified on the basis that they were savage and cruel, with an insatiable taste for war. Therefore, a discovering sovereign, while not a conqueror, none the less had all the powers of a conqueror and could make blanket grants of land from under the feet of the Indians. This power of

extinguishing the Indian "right of occupancy" was absolute, and, therefore, the courts could not supervise its exercise. Extinguishment, therefore, raises only a political, and not a justiciable, question.

But more than this, as a result of Marshall and Story having linked the justification for conceding this power to a discovering sovereign by reference to the savagery, primitivism, and barbarism of the Indians, there has become established in American law, as an irrebuttable rule of law, the principle that Indians do not in fact have, and in law cannot be said to have, any sort of system of land use and occupancy which can be said, on the evidence, to be of a class presumed to have survived the acquisition of ***dominium***, ***imperium***, or the assertion of a territorial sovereignty by a discovering sovereign. In American law, hunters and gatherers are irrevocably presumed not to have a ***lex loci*** worthy of the name because there is no way in which they can question the exercise of the Crown's prerogative power of extinguishment.[128]

It is easy to see where the explanation that English rights are based on discovery may lead. To combat the view, held by English common lawyers such as Blackstone, that the Crown had acquired the American plantations by conquest, it becomes necessary to deny the necessity for conquest, however defined. Before the end of the 17th century, any non-inherited acquisition was deemed to have been acquired by conquest in a loose and fictitious sense: the word was more precisely defined after

Grotius. The only way to deny that conquest was at all relevant to the argument was to deny the legal necessity for it. In turn, the only way to demonstrate that conquest was not necessary is to show that the territory in question was not subject to an anterior sovereignty that had to be displaced by compact or force before plenary rights could be acquired. According to Marshall and Story's explanation, North America was ***terra nullius***: the land lay open to appropriation by a civilized European power that could acquire plenary rights by asserting a territorial sovereignty based on discovery and symbolic acts of possession. As against the aboriginal inhabitants, the discoverer had an unfettered prerogative power to extinguish the aboriginal inhabitants' antecedent rights just as if he were a conqueror.

If, for example, New South Wales, British Columbia, or parts of northern Canada were acquired by discovery or peaceful settlement, as Marshall and Story claimed the original 13 colonies had been, then Marshall's judgment in ***Johnson v. M'Intosh*** is directly relevant and of the highest persuasive authority. Applying this authority to the particular facts--that the Crown has an unlimited power to abrogate these antecedent rights of the aboriginal inhabitants--it follows that there can be no doctrine of communal native title, as the plaintiffs claimed in the ***Gove Land Rights Case*** in Australia in 1971, or of legal rights, as claimed in ***Calder's Case*** in 1973.

Now it seems to me incredible that members of the Supreme Court of Canada can subscribe to the view that the aboriginal

territorial rights of the Indians in British Columbia could be extinguished by conquest--that the Crown could commit Acts of State and of conquest against its own subjects, as if they were enemy aliens. Yet this contradiction is at the heart of Marshall's and Story's explanation: conquest was irrelevant in North America--but the Indians could be conquered.

This contradiction is particularly troublesome because there is clear authority from the Privy Council to show that the question of the existence of rights under an antecedent aboriginal *lex loci* is quite distinct from the problem of whether or not the Crown is bound to respect those rights. The latter question turns on the constitutional status of the territory: here, the main distinctions are between conquest (or cession) and peaceful settlement. And, of course, the prerogative legislative power of the Crown and the legal status of the aboriginal occupiers of an acquired territory are quite different. Marshall and Story would have us believe that they are the same. They try to persuade us that, throughout the struggle for empire in the New World, discovery was the rule that covered all contingencies, in particular the acquisition of a plenary title. Such a title flowed from the accrual of an unlimited prerogative power to grant away lands that were still in the possession of the Indians. Hence the results of ***Milirrpum*** and ***Calder***.

To use the fact of the supposed primitivism and barbarism of the Indians (if, indeed, it is a fact) to justify the existence of a limitless prerogative power in the hands of a discovering

sovereign not only does violence to the relevant and applicable legal principles, it also amounts to a rewriting of the original constitutional status of the plantations in North America. This kind of ethnocentrism has found little favour in the English courts, and, indeed, it has practically been discredited.[129] Much of the damage caused by Marshall and Story's historical revisionism to a presentation on first principles of the argument from aboriginal rights can be mitigated, by considering whether or not the aboriginal plaintiffs or defendants have a *lex loci* of a class that can be presumed to have survived the assertion of a series of rights and claims over a particular territory. This question is one of fact, and it can be decided in light of the available evidence according to the principles enunciated in such cases as ***Nireaha Tamaki v. Baker,***[130] ***Re Southern Rhodesia,***[131] and ***Amodu Tijani v. Secretary, Southern Nigeria.***[132] Whether these rights, once proved to exist, are enforceable against the sovereign, is a question of law, and that will depend on the constitutional status of the territory in question.[133]

Driven to uphold the rights and privileges of the colonists as beneficiaries of English common law, Marshall and Story were driven to assert that conquest and its consequences were irrelevant to North America. By that assertion, they sacrificed the rights of the aborigines in Australia and of the Indians in British Columbia. Had Blackstone's opinion of the constitutional status of the American plantations survived in the historiography of English claims, the plaintiffs in ***Milirrpum*** and ***Calder*** might

have finessed the tendentious and present-minded reasoning that underpins the Marshall-Story explanation.

The international aspect of territorial acquisition during the Age of Discovery was a much more subtle and complicated process than Marshall and Story's now traditional explanation suggests. Their explanation is inherently contradictory on a number of issues, and it is historically inaccurate in several respects: the courts should look at it again with a critical eye. Alternative views may be taken of the validity of the received view of the relationship between the rights claimed and acquired by the Crown and the antecedent rights of the aboriginal inhabitants of North America.

If the courts do decide to follow the Marshall-Story explanation in Canada or in Australia and New Zealand, then they must do so only after having been made conscious of the fact that the explanation is seriously misleading in a number of respects, if not dead wrong. There is now a weighty body of scholarly criticism of that explanation, and in this paper I have tried to make that criticism more widely known.

Notes

1. [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

2. Charles Howard McIlwain, ***The American Revolution: A Constitutional Interpretation*** (New York: Macmillan, 1923); Robert Livingston Schuyler, ***Parliament and the British Empire: Some Constitutional Controversies Concerning Imperial Legislative Jurisdiction*** (New York: Columbia University Press, 1929).

3. ***Milirrpum v. Nabalco Pty. Ltd. and Commonwealth of Australia*** (1971) 17 F.L.R. 141; ***Wi Parata v. The Bishop of Wellington*** (1877) 3 N.Z. Jur. (N.S.) 72; ***Calder v. Attorney General of British Columbia*** (1969) 8 D.L.R. (3d) 59; 13 D.L.R. (3d) 48; [1973] S.C.R. 313, 34 D.L.R. (3d) 145.

4. See Joseph Burke "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 ***Stanford L.R.***, pp. 500-31.

5. 10 U.S. (6 Cranch) 87 at 121.

6. 21 U.S. (8 Wheaton) 543 at 573.

7. ***Ibid.***, at 576.

8. John Marshall, ***The Life of George Washington*** ..., 5 vols (London: Printed for Richard Phillips, 1804-1807), I, ch. 1, espec. pp. 7-8. This chapter was later published in Marshall's ***History of the Colonies***.... (Philadelphia: Abraham Small, 1824), pp. 13-25, espec. p. 14. See also 21 U.S. (8 Wheaton) 543 at 574-5.

9. 21 U.S. (8 Wheaton) 543 at 577.

10. For example, Neil H. Mickenberg, "Aboriginal Rights in Canada and the United States" (1971), 9 ***Osgoode Hall L.J.***, pp. 119-154; Peter A. Cumming and Neil H. Mickenberg (eds), ***Native Rights in Canada***, 2nd. ed. (Toronto: Indian-Eskimo Association of Canada and General Publishing Co. Ltd., 1972); Slattery, "Lands Rights of Indigenous Canadian Peoples ...", ***passim***.

11. This was clearly recognized by Sir James Stephen; see Stephen to Smith, 28 July 1839, C.O. 209-4, extracted in my essay "Primitivism versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land", in Carol Brice-Bennett (ed.), ***Our Footprints are Everywhere: Inuit Land Use and Occupancy in Labrador*** (Ottawa: Labrador Inuit Association, 1977), pp. 351-374, at p. 360; and by the United States Supreme Court in ***Tee Hit-Ton Indians v. United States***, 348 U.S. 272 (1954). The classic authority on

licences is ***Thomas v. Sorrell*** (1673) Vaughan 330 at 315, 124 E.R. 1098.

12. 21 U.S. (8 Wheaton) 543 at 592; ***accord, Fletcher v. Peck,*** 10 U.S. (6 Cranch) 87 at 142-3. For the implications of this view, see my argument in "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument" (D. Jur. dissertation, Osgoode Hall-York University, 1981), pp.233-243. I have summarized this work in ***Inuit Territorial Rights in the Canadian Northwest Territories: A Survey of the Legal Problems*** (Ottawa: Tungavik Federation of Nunavut, 1984).

13. 21 U.S. (8 Wheaton) 543 at 587-8, 598, 590.

14. Sir William Blackstone, ***Commentaries on the Laws of England,*** 4 vols (Oxford: Clarendon Press, 1765-9), I, pp. 104-5.

15. Joseph Story, ***Commentaries on the Constitution of the United States....,*** 3 vols (Boston: Hilliard, Grey & Co., 1833) I, p. 135.

16. ***Loc. cit.***

17. ***Ibid.,*** p. 136.

18. ***Loc. cit.***

19. 30 U.S. (5 Peters) 1 at 17.

20. 21 U.S. (8 Wheaton) 543 at 589-91.

21. 31 U.S. (6 Peters) 515 at 542-3.

22. ***Ibid.,*** at 543.

23. ***Ibid.,*** at 544.

24. ***Loc. cit.***

25. ***Ibid.,*** at 544-5.

26. ***Ibid.,*** at 546.

27. 21 U.S. (8 Wheaton) 543 at 587-590.

28. Story, ***Commentaries,*** I, pp. 135, 136-7.

29. ***Ibid.,*** II, pp. 359-543; 30 U.S. (5 Peters) 1 at 52-80.

30. M.F. Lindley, ***The Acquisition and Government of Backward Territory in International Law. Being a Treatise on the Law***

and Practice Relating to Colonial Expansion (London: Longmans, Green and Co. Ltd., 1926), pp. 28-9.

31. *Ibid.*, p. 29; Lindley relied on *Worcester v. Georgia* in support of this view.
32. *Ibid.*, ch. 19.
33. *Ibid.*, and espec. pp. 24-5, 29.
34. *Ibid.*, pp. 26-7.
35. Julius Goebel, Jr., *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (Newhaven: Yale University Press, 1927), pp. 87-8, 99; see also p. xi.
36. *Ibid.*, p. xi and ch. 2 generally.
37. *Ibid.*, p. 64.
38. *Ibid.*, p. 64.
39. *Ibid.*, p. 65.
40. *Ibid.*, p. 72.
41. *Ibid.*, pp. 64-5.
42. *Ibid.*, p. 99.
43. *Ibid.*, p. 105.
44. *Ibid.*, pp. 99-107.
45. *Ibid.*, p. 73.
46. *Ibid.*, pp. 89-90.
47. *Ibid.*, p. 90.
48. *Ibid.*, pp. 92, 94.
49. *Ibid.*, p. 95.
50. *Ibid.*, pp. 87.
51. Arthur S. Keller, Oliver J. Lissitzyn and Frederick J. Mann, *Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800* (New York: Columbia University Press, 1938), p. 3.
52. *Ibid.*, p. 4, and ch. 2 "The Usage of European Governments with respect to Native Governments".

53. *Ibid.*, pp. 148-9.

54. *Ibid.*, pp. 149.

55. *Ibid.*, p. 4.

56. William Christie MacLeod, ***The American Indian Frontier*** (New York: Knopf, 1928), p. 207.

57. *Ibid.*, p. 196.

58. ***Loc. cit.***

59. *Ibid.*, pp. 196-208.

60. Wilcomb E. Washburn, "The Moral and Legal Justifications for Dispossessing the Indians", in James Morton Smith (ed.), ***Seventeenth Century America: Essays in Colonial History*** (Chapel Hill: University of North Carolina Press, for the Institute of Early American History and Culture, 1959), pp. 15-32, p. 16.

61. *Ibid.*, p. 18.

62. *Ibid.*, p. 19.

63. *Ibid.*, p. 15, and 15n.

64. *Ibid.*, pp. 19-23.

65. *Ibid.*, p. 23.

66. Max Savelle, ***The Origins of American Diplomacy: The International History of Angloamerica, 1492-1763*** (New York: Macmillan, 1967), ch. 2; pp. 194-198.

67. *Ibid.*, p. 205.

68. *Ibid.*, p. 199-205.

69. *Ibid.*, pp. 202-5.

70. Marshall Harris, ***Origin of the Land Tenure System in the United States*** (Ames: Iowa State College Press, 1953), ch. 4, and pp. 155-7.

71. *Ibid.*, p. 69.

72. *Ibid.*, ch. 11, espec. pp. 158-9.

73. *Ibid.*, ch. 11, ***passim***.

74. Francis Jennings, ***The Invasion of America: Indians, Colonialism, and the Cant of Conquest*** (Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture, 1975), chs. 2-5.

75. ***Ibid.***, pp. 128-9.

76. ***Ibid.***, ch. 9.
77. ***Ibid.***, ch. 7.

78. ***Ibid.***, pp. 60, 72.

79. ***Ibid.***, p. 145.

80. ***Ibid.***, chs, 7, 8 and 15. See also the interesting discussion in an appendix, "The Formation Period of a Large Society: A Comparative Approach", pp. 327-335.

81. John T. Juricek, Jr., "English Claims in North America to 1660: A Study in Legal and Constitutional History" (Ph. D. dissertation, University of Chicago, 1970). Several of these chapters are summarized in "English Territorial Claims in North America under Elizabeth and the Early Stuarts", ***Terrae Incognitae***, VII (1976), pp. 7-22. In this article, Juricek announced a new terminology for the "permissive" and "demanding" codes described in his doctoral dissertation: he changed them to "preemptive" and "dominative". In the discussion that follows, I have used his preferred terminology even when referring to the earlier work.

82. Goebel, ***op. cit.***, pp. 64-65; Keller, ***op. cit.***, p. 4.

83. Susan Myra Kingsbury (ed.), ***The Records of the Virginia Company of London***, 4 vols (Washington, D.C.: Library of Congress, 1906-1935), vol. III, p. 3; Juricek, "English claims... to 1660", pp. 464-466.

84. Juricek, "English Claims... to 1660", p. 39.

85. ***Ibid.***, ch. 8; p. 747.

86. 7 Co. Rep. 1a at 17a; 77 E.R. 377.

87. Juricek, "English Claims... to 1660", chs. 7 and 8.

88. See Charles Howard McIlwain, ***The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages*** (London: Macmillan, 1932), pp. 286, 388, 390-91; J.W. Allen, ***A History of Political Thought in the Sixteenth Century*** (London: Methuen, University Paperbacks, 1960), ch. 8; F.W. Maitland, ***The Constitutional History of England*** (Cambridge: University Press, 1908; reprinted by the same publisher in

paperback, 1968), pp. 101-3, 254-5, 297-301, 482; Keller, *op. cit.*, p. 4; Juricek "English claims... to 1660", pp. 743-4.

89. Juricek, "English Claims... to 1660", Part II.

90. Goebel, *op. cit.*, pp. 66-9.

91. Juricek, "English Claims... to 1660", ch. 9.

92. *Ibid.*, p. 749; Part I, "Legal Doctrines Used to Justify Iberian Overseas Claims, and the Rise of Counter Doctrines."

93. Juricek, "English Territorial Claims", p. 9; "English Claims... to 1660", Part I.

94. Quoted in Savelle, *op. cit.*, p. 19.

95. William Camden, ***The History of the Most Renowned and Victorious Princess Elizabeth, Late Queen of England...***, 4th ed. (London, 1688), p. 255.

96. Juricek, "English Claims... to 1660", Part I.

97. *Ibid.*, p. 108.

98. *Ibid.*, pp. 95-108; 749-750.

99. *Ibid.*, pp. 89-90.

100. *Ibid.*, pp. 70 ff., 751.

101. *Ibid.*, p. 118.

102. *Ibid.*, pp. 127-8.

103. *Ibid.*, pp. 129-130.

104. *Ibid.*, p. 137.

105. James Brown Scott, ***The Spanish Origins of International Law: Francisco de Vitoria and his Law of Nations***, Publications of the Carnegie Endowment for International Peace (Oxford: Clarendon Press, 1934), p. xxv; and Ernest Nys (ed.), ***De Indis et Ivre Belli Relectiones, being parts of Relectiones Theologicae XII by Franciscus de Vitoria***, The Classics of International Law, James Brown Scott, gen. ed. (Washington, D.C.: Carnegie Institution of Washington, 1917), p. 165; Juricek, "English Claims... to 1660", pp. 130-4.

106. Juricek, "English Claims... to 1660", p. 141.

107. ***Ibid.***, pp. 141-2.

108. ***Ibid.***, pp. 145-6.

109. ***Ibid.***, pp. 753-4.

110. ***Ibid.***, p. 754.

111. ***Ibid.***, pp. 755-6.

112. ***Ibid.***, ch. 3; p. 756.

113. ***Ibid.***, Part III, p. 769. Although Juricek treated the French claims only in general terms to counterbalance his analysis of English claims, his main contentions have been independently confirmed by Brian Slattery in "French Claims in North America, 1500-59", ***Canadian Historical Review,*** LIX (1978), pp. 139-69. This important article also contains some descriptions of the French attitude to the rights of the Indians; its theoretical and analytical perspectives provide points of comparison with those of Henri Brun in "Les droits des Indiens sur le territoires du Quebec" (1969), 10 ***Cahiers de droit,*** pp. 415-460. It is clear, however, that the French could put up a good case of their own based on pre-emptive premises, and the struggle between the English and the French for control of Hudson Bay provides a splendid illustration of the clash between the pre-emptive and dominative codes. I have explored some implications of the reasoning on which the English case was based in "Aboriginal Land Rights: The Significance of Inuit Place-Naming", ***Etudes Inuit/Studies***, III (1979), pp. 53-75.

114. The argument supporting this assertion is developed in Lester, "Territorial Rights of the Inuit of the Canadian Northwest Territories", ch. 7, and pp. 1004-1067.

115. Juricek, "English Claims... to 1660", pp. 477-8.

116. ***Ibid.***, p. 478.

117. ***Ibid.***, pp. 479-80.

118. ***Ibid.***, pp. 507.

119. ***Ibid.***, pp. 528-35.

120. ***Ibid.***, pp. 99-100, 534, 753.

121. ***Ibid.***, pp. 565-77.

122. I have argued that the difference between the pre-1620 and post-1620 charters is not as great as Juricek believes,

although his main point would appear to remain unshaken until about the 1660s (beyond his period of study); see Lester, "Territorial Rights of the Inuit of the Canadian Northwest Territories", Excursus B, espec. pp. 408-17.

123. Juricek, "English Claims... 10 1660", pp. 565-77.

124. Letters patent granted to Robert Harcourt, 28 August 1613, Patent Rolls, C. 66/1986, P.R.O.; Juricek, "English Claims... to 1660", p. 556.

125. Juricek, "English Claims... to 1660", p. 557.

126. ***Ibid.***, pp. 535-44, 561-2; 7 Co. Rep. 18, 77 E.R. 377.

127. Juricek, "English Claims... to 1660", pp. 569-77.

128. Lester, "Primitivism versus Civilization", pp. 361-362; "Territorial Rights of the Inuit of the Canadian Northwest Territories", ch. 6 and Excursus A.

129. See ***Oyekan and Ors. v. Adele***(1957) 2 All E.R. 785 (P.C.). Even Judson J. in ***Calder's Case*** was willing to look sympathetically at the evidentiary basis of the plaintiffs' system of land use and occupancy; and Hall J. actually denounced Marshall for the ethnocentric bias that permeated his reasoning in ***Johnson v. M'Intosh***. Before condemning Marshall as racist or a child of his times, it should be realized that the cases he and Story had to decide were overladen with contemporary political, social, and constitutional issues. In the light of these pressures, many students do not see these judgments as racist and ethnocentric; they see an admirable strain of liberal humanism in Marshall's attempt--ultimately futile--to protect the Indians in their rights. See, for example, Burke, "The Cherokee Cases" for the political and other factors involved; and Robert Kenneth Faulkner, ***The Jurisprudence of John Marshall*** (Princeton, N.J.: Princeton University Press, 1968), pp. 52-9 for an assessment of Marshall's response. There can be no doubt that Marshall was present-minded in the Cherokee cases, and this fact goes a long way toward explaining the inconsistencies and contradictions in basic principles of law. In terms of law and legal history, however, the damage had been done.

130. [1901] A.C. 561 (P.C.).

131. [1919] A.C. 211 (P.C.).

132. [1921] 2 A.C. 399 (P.C.).

133. There is a hint of a new trend toward revisionism in

Australia: ***Coe v. Commonwealth of Australia***; 24 A.L.R. 118 (H.C.A.), at 136, per Murphy J. I have attacked this attempt in "Aboriginal Land Rights: Conquest or Peaceful Settlement?", ***Australian Law News***, vol. 20 (no. 5) (1985), pp. 14-16.