The increasing interest in problems of wildlife conservation has produced a considerable literature. Bibliographies may be found in Coggins & Smith, *The Emerging Law of Wildlife*: *A Narrative Bibliography*, 6 Environmental L. 583 (1975) and in M. BEAN, *supra*, p. S**Error! Bookmark not defined.**, at 470–78. More recent still are [U.S.] COUNCIL ON ENVIRONMENTAL QUALITY, WILDLIFE AND AMERICA (H. Brokaw ed. 1978) (an excellent collection of essays) and T. LUND, *supra*.

## C. CLASSICAL THEORIES OF PROPERTY

### 1.The "Occupation Theory" of Property.

We have already seen one statement of the "occupation theory" of property in the extracts from Pufendorf and a criticism of it by Barbeyrac who relied on the "labor theory" of John Locke, *supra*, p. S18. The following is perhaps the most famous statement of the occupation theory by an English writer, though it shows some influence from the labor theory. It is followed by an equally famous criticism of it by Sir Henry Maine, one of the first "social scientists" who applied himself to law.

**2 W. BLACKSTONE, COMMENTARIES**
*2–5, *14–15 (W. Lewis ed. 1898)[1]

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been stated by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required. . . .

. . . Not that this communion of goods seems ever to have been applicable, even in the earliest stages, to aught but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he quitted the use or occupation of it, another might seize it, without injustice. . . .

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominions; and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the

[1] First edition 1765–1769.

instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garments, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall: which seem to have been originally mere temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt, but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and ameliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein. . . .

But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *feræ naturæ*, or of a wild and untamable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again: there are other things in which a permanent property may subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state: or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to every thing capable of ownership a legal and determinate owner.

## H. MAINE, ANCIENT LAW

237–39, 242–54, 275–79, 280–83 (5th ed. 1888)[1]

The Roman Institutional Treatises, after giving their definition of the various forms and modifications of ownership, proceed to discuss the Natural Modes of Acquiring Property. Those

[1] First edition 1861.

who are unfamiliar with the history of jurisprudence are not likely to look upon these "natural modes" of acquisition as possessing, at first sight, either much speculative or much practical interest. The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us naturally. . . .

It will be necessary for us to attend to one only among these "natural modes of acquisition," Occupatio or Occupancy. Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called *res nullius*—things which have not or have never had an owner—can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and land newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own—an intention which, in certain cases, had to be manifested by specific acts. . . . The Roman principle of Occupancy, and the rules into which the jurisconsults expanded it, are the source of all modern International Law on the Subject of Capture in War and of the acquisition of sovereign rights in newly discovered countries. They have also supplied a theory of the Origin of Property, which is at once the popular theory, and the theory which, in one form or another, is acquiesced in by the great majority of speculative jurists. . . .

To all who pursue the inquiries which are the subject of this volume, Occupancy is preeminently interesting on the score of the service it has been made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once *res nullius*, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of *res nullius* long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the "no man's goods" of the primitive world became the private property of individuals in the world of history. It would be wearisome to enumerate the jurists who have subscribed to this theory in one shape or another, and it is the less necessary to attempt it because Blackstone, who is always a faithful index of the average opinions of his day, has summed them up in his 2d book and 1st chapter.

[Maine then quotes extensively from the Blackstone excerpt reproduced *supra*, p. S36.] . . .

Some ambiguities of expression in this passage lead to the suspicion that Blackstone did not quite understand the meaning of the proposition which he found in his authorities, that property in the earth's surface was first acquired, under the law of Nature, by the Occupant; but the limitation

which designedly or through misapprehension he has imposed on the theory brings it into a form which it has not infrequently assumed. Many writers more famous than Blackstone for precision of language have laid down that, in the beginning of things, Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual. Their object in so stating their theory was to reconcile the doctrine that in the state of Nature *res nullius* became property through Occupancy, with the inference which they drew from the Scriptural history that the Patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds.

The only criticism which could be directly applied to the theory of Blackstone would consist in inquiring whether the circumstances which make up his picture of a primitive society are more or less probable than other incidents which could be imagined with equal readiness. Pursuing this method of examination, we might fairly ask whether the man who had occupied (Blackstone evidently uses this word with its ordinary English meaning) a particular spot of ground for rest or shade would be permitted to retain it without disturbance. The chances surely are that his right to possession would be exactly coextensive with his power to keep it, and that he would be constantly liable to disturbance by the first comer who coveted the spot and thought himself strong enough to drive away the possessor. But the truth is that all such cavil at these positions is perfectly idle from the very baselessness of the positions themselves. What mankind did in the primitive state may not be a hopeless subject of inquiry, but of their motives for doing it it is impossible to know anything. These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped. . . .

Even were there no other objection to the descriptions of mankind in their natural state which we have been discussing, there is one particular in which they are fatally at variance with the authentic evidence possessed by us. It will be observed, that the acts and motives which these theories suppose are the acts and motives of Individuals. It is each Individual who for himself subscribes the Social Compact. It is some shifting sandbank in which the grains are Individual men, that according to the theory of Hobbes is hardened into the social rock by the wholesome discipline of force. It is an Individual who, in the picture drawn by Blackstone, "is in the occupation of a determined spot of ground for rest, for shade, or the like." The vice is one which necessarily afflicts all the theories descended from the Natural Law of the Romans, which differed principally from their Civil Law in the account which it took of Individuals, and which has rendered precisely its greatest service to civilisation in enfranchising the individual from the authority of archaic society. But Ancient Law, it must again be repeated, knows next to nothing of Individuals. It is concerned not with Individuals, but with Families, not with single human beings, but groups. Even when the law of the State has succeeded in permeating the small circles of kindred into which it had originally no means of penetrating, the view it takes of Individuals is curiously different from that taken by jurisprudence in its maturest stage. The life of each citizen is not regarded as limited by birth and death; it is but a continuation of the existence of his forefathers, and it will be prolonged in the existence of his descendants.

The Roman distinction between the Law of Persons and the Law of Things, which though extremely convenient is entirely artificial, has evidently done much to divert inquiry on the subject before us from the true direction. The lessons learned in discussing the Jus Personarum have been forgotten where the Jus Rerum is reached, and Property, Contract, and Delict, have been considered as if no hints concerning their original nature were to be gained from the facts ascertained respecting the original condition of Persons. The futility of this method would be manifest if a system of pure archaic law could be brought before us, and if the experiment could

be tried of applying to it the Roman classifications. It would soon be seen that the separation of the Law of Persons from that of Things has no meaning in the infancy of law, that the rules belonging to the two departments are inextricably mingled together, and that the distinctions of the later jurists are appropriate only to the later jurisprudence. From what has been said in the earlier portions of this treatise, it will be gathered that there is a strong a priori improbability of our obtaining any clue to the early history of property, if we confine our notice to the proprietary rights of individuals. It is more than likely that joint-ownership, and not separate ownership, is the really archaic institution, and that the forms of property which will afford us instruction will be those which are associated with the rights of families and of groups of kindred. . . .

The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitus detineri* ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common. The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organized society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal government, for police, for the administration of justice, and for the apportionment of taxes and public duties. . . .

### *Note and Questions*

Try to get some feel for the nature of Blackstone's argument. To what extent is it simply a descriptive statement of what happened at some remote time? To what extent is it a "justification" of private property? How does Blackstone move from the descriptive part of his theory to the normative, from the "is" to the "ought"?

Today, few would defend the occupation theory, at least in the form in which we find it in Blackstone. For one thing it turns out that as a matter both of history and of anthropology Maine's views on the origin of property are probably a lot closer to the truth than Blackstone's. *See*, *e.g*, M. GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE 75–169 (1965). Secondly, in complex societies like our own few resources are acquired merely by finding or seizing. Thus, however true the theory may be as an historical matter, it can hardly account for much today. Thirdly, the occupation theory cannot begin to explain the complex of powers of transfer which have grown up around property. *See* M. COHEN, LAW AND THE SOCIAL ORDER 49–51 (1933).

Nonetheless it would be mistaken to suppose that the occupation theory is totally without use. It forms a part of the moral basis for the law's willingness to protect possession, and around it swirl some of the considerable moral dilemmas which pervade the field of international law, as we will see when we examine *Johnson v. M'Intosh* and *United States v. Percheman*, *infra*, at S44.

Consider this contemporary exposition of the occupation theory:

> Possession as the basis of property ownership . . . seems to amount to something like yelling loudly enough to all who may be interested. The first to say, "This is mine," in a way

> that the public understands, gets the prize, and the law will help him keep it against someone else who says, "No, it is mine." But if the original communicator dallies too long and allows the public to believe the interloper [—adverse possession—], he will find that the interloper has stepped into his shoes and become the owner. . . .
>
> Why, then, is it so important that property owners make and keep their communications clear? Economists have an answer: clear titles facilitate trade and minimize resource-wasting conflict. If I am careless about who comes on to a corner of my property, I invite others to make mistakes and waste their improvements to what I have allowed them to think is theirs.

Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985).

The entire article is well worth reading. The opinions of both majority and dissent in *Pierson v. Post*, *supra*, p. S5, figure prominently in it. Professor Rose suggests that what may have divided the court in *Pierson* is the question of relevant audience—with the "dissenting judge [thinking] fox hunters were the only relevant audience for a claim to the fox." *Id.* at 82.

When possession or occupancy is viewed as communication there are not only issues of audience, but timing, clashing cultures, and more:

> It is not always easy to establish a symbolic structure in which the text of first possession can be "published" at such a time as to be useful to anyone. Once again, *Pierson v. Post* illustrates the problem that occurs when a clear sign (killing the fox) comes only relatively late in the game, after the relevant parties may have already expended overlapping efforts and embroiled themselves in a dispute. . . . [Dealing with] the whaling industry in the nineteenth century . . . courts expended a considerable amount of mental energy in finding signs of "possession" that were comprehensible to whalers from their own customs and that at the same time came early enough in the chase to allow the parties to avoid wasted efforts and the ensuing mutual recriminations.

*Id*. at 83.

### 2. The "Labo(u)r Theory" of Property

The justification of property that follows the occupation theory both historically and logically is the theory that everyone is entitled to the full product of his labor. The principal exponent of this theory (though not the first, see D. MERINO, NATURAL JUSTICE AND PRIVATE PROPERTY 27–31 (1922)) was John Locke. The excerpt below from Locke's *Second Treatise of Government* explains the theory well and demonstrates its basis in natural law.

**J. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT**
Book II, 25, 27–28, 30–41, 45–51 (G. Routledge 2d ed. 1887)[1]

I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners. . . .

27. Though the earth and all inferior creatures be common to all men, yet every man has a "property" in his own "person." This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this "labour" being the unquestionable property of

[1] First edition 1690. For a good modern edition of the second treatise, see THE SECOND TREATISE OF GOVERNMENT (J. Gough ed. 1966).

the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.

28. He that is nourished by the acorns he picked up under an oak, or the apples he gathered from the trees in the wood, has certainly appropriated them to himself. Nobody can deny but the nourishment is his. I ask, then, when did they begin to be his? when he digested? or when he ate? or when he boiled? or when he brought them home? or when he picked them up? And it is plain, if the first gathering made them not his, nothing else could. That labour put a distinction between them and common. That added something to them more than Nature, the common mother of all, had done, and so they became his private right. And will any one say he had no right to those acorns or apples he thus appropriated because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? If such a consent as that was necessary, man had starved, notwithstanding the plenty God had given him. We see in commons, which remain so by compact, that it is the taking any part of what is common, and removing it out of the state Nature leaves it in, which begins the property, without which the common is of no use. And the taking of this or that part does not depend on the express consent of all the commoners. Thus, the grass my horse has bit, the turfs my servant has cut, and the ore I have digged in any place, where I have a right to them in common with others, become my property without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them. . . .

30. Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labour upon it, though, before, it was the common right of every one. . . . And even amongst us, the hare that any one is hunting is thought his who pursues her during the chase. For being a beast that is still looked upon as common, and no man's private possession, whoever has employed so much labour about any of that kind as to find and pursue her has thereby removed her from the state of Nature wherein she was common, and hath begun a property.

31. It will, perhaps, be objected to this, that if gathering the acorns or other fruits of the earth, &c., makes a right to them, then any one may engross as much as he will. To which I answer, Not so. The same law of Nature that does by this means give us property, does also bound that property too. "God has given us all things richly" (1 Tim. vi. 12). Is the voice of reason confirmed by inspiration? But how far has He given it us "to enjoy?" As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in. Whatever is beyond this is more than his share, and belongs to others. Nothing was made by God for man to spoil or destroy. And thus considering the plenty of natural provisions there was a long time in the world, and the few spenders, and to how small a part of that provision the industry of one man could extend itself and engross it to the prejudice of others, especially keeping within the bounds set by reason of what might serve for his use, there could be then little room for quarrels or contentions about property so established.

32. But the chief matter of property being now not the fruits of the earth and the beasts that subsist on it, but the earth itself, as that which takes in and carries with it all the rest; I think it is plain that property in that too is acquired as the former. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, enclose it from the common. . . .

33. Nor was this appropriation of any parcel of land, by improving it, any prejudice to any other man, since there was still enough and as good left, and more than the yet unprovided could use. So that, in effect, there was never the less left for others because of his enclosure for himself. . . .

45. Thus labour, in the beginning, gave a right of property, wherever any one was pleased to

employ it, upon what was common, which remained a long while, the far greater part, and is yet more than mankind makes use of. Men at first, for the most part, contented themselves with what unassisted Nature offered to their necessities; and though afterwards, in some parts of the world, where the increase of people and stock, with the use of money, had made land scarce, and so of some value, the several communities settled the bounds of their distinct territories, and, by laws, within themselves, regulated the properties of the private men of their society, and so, by compact and agreement, settled the property which labour and industry began. . . .

46. The greatest part of things really useful to the life of man, and such as the necessity of subsisting made the first commoners of the world look after—as it doth the Americans now—are generally things of short duration, such as—if they are not consumed by use—will decay and perish of themselves. Gold, silver, and diamonds are things that fancy or agreement hath put the value on, more than real use and the necessary support of life. Now of those good things which Nature hath provided in common, every one hath a right (as hath been said) to as much as he could use, and had a property in all he could effect with his labour; all that his industry could extend to, to alter from the state Nature had put it in, was his. He that gathered a hundred bushels of acorns or apples had thereby a property in them; they were his goods as soon as gathered. He was only to look that he used them before they spoiled, else he took more than his share, and robbed others. And, indeed, it was a foolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to anybody else, so that it perished not uselessly in his possession, these he also made use of. And if he also bartered away plums that would have rotted in a week, for nuts that would last good for his eating a whole year, he did no injury; he wasted not the common stock; destroyed no part of the portion of goods that belonged to others, so long as nothing perished uselessly in his hands. Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the right of others; he might heap up as much of these durable things as he pleased; the exceeding of the bounds of his just property not lying in the largeness of his possession, but the perishing of anything uselessly in it.

47. And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life.

48. And as different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them. . . .

50. But since gold and silver, being little useful to the life of man, in proportion to food, raiment, and carriage, has its value only from the consent of men—whereof labour yet makes in great part the measure—it is plain that the consent of men have agreed to a disproportionate and unequal possession of the earth—I mean out of the bounds of society and compact; for in governments the laws regulate it; they having, by consent, found out and agreed in a way how a man may, rightfully and without injury, possess more than he himself can make use of by receiving gold and silver, which may continue long in a man's possession without decaying for the overplus, and agreeing those metals should have a value.

### *Note*

In the seventeenth century a period of struggle between a conception of society based on the naturalness of absolute monarchy and the nascent idea of a capitalistic society marked by individual rights, Locke's theory supported the middle class revolutionaries in their quest for private property as a source of production and power. It became the classical liberal theory of property. It is not surprising that the theory found great support among the rugged individualists of frontier America.

But the labor theory was not always a support for "popular" thought. It is not difficult to see how the theory could be used to justify a capitalistic system in which the majority of the people did not have access to property. The bourgeois who have the capital to develop and work property are owners, and the poor are only wage laborers and servants of the owners. Furthermore, the theory could be used to support an argument that the owner has no other obligations than to work his property and, therefore, no social obligations can be imposed by the government. *See* C. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 214–15 (1962). As you might imagine, this idea created many problems for American reformers in the early twentieth century. *See*, *e.g.*, Hamilton, *Property—According to Locke*, 41 YALE L.J. 864 (1932); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

Today, many would quarrel with Locke's theory. First, it is at least arguable that Locke himself would not apply the theory in a modern industrial society, because he was arguing in terms of man in a state of nature, the savage individualist, rather than the wage laborer. *But see* C. MACPHERSON, *supra*, for the proposition that Locke was indeed speaking of the wage laborer. Second, to the extent that Locke's theory depends on the broader notion of social compact, it presupposes a unity of self-interest among individual workers in society (so that a stable sovereign body may be established) and a self-perception of equality among all those in society (so that each accepts his societal obligations). Only if these conditions are met can the labor theory promise a stable well-governed society. Many would argue that these conditions are not met today. *See* C. MACPHERSON, *supra*, at 271–77. Furthermore, no one today can claim full responsibility for the production of economic goods. What part of the good, then, is to be labeled as the property of any one individual? Likewise, no one can claim that his property, his estate and fortune, have been attained solely through his own labor. Society has aided every individual in his labor, and society, so the argument runs, may properly demand certain tributes from the individual. *See* M. COHEN, THE LAW AND SOCIAL ORDER 51 (1933).

## D. OCCUPANCY AND SOVEREIGNTY

### JOHNSON v. M'INTOSH

Supreme Court of the United States
21 U.S. (8 Wheat.) 543 (1823)

ERROR to the District Court of Illinois. This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts: . . .

[The statement of the case outlines the boundaries in the royal charter establishing the Virginia Company in 1609, which included the land north of the Ohio River forming today the southern parts of Illinois and Indiana. In 1773 the plaintiffs' predecessors in title purchased a huge tract of land in southern Illinois from the Illinois Indians for the then-enormous sum of $24,000; in 1775 another group of plaintiffs' predecessors in title purchased a similarly large tract of land in southern Indiana from the Piankeshaw Indians for $31,000. Both deeds granted the land to the plaintiffs' predecessors in title "or to George the Third, then King of Great Britain and Ireland, his heirs and successors, for the use . . . of the grantees . . . by whichever of those tenures they might most legally hold." After the Revolution, Virginia ceded its claim to lands beyond the Appalachians to the United States, and in 1818 the United States conveyed by patent title to William M'Intosh to the 11,560 acres specifically at issue in this case. Neither the plaintiffs nor any of their predecessors in title ever obtained possession of the land,] but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles

which preceded it, from obtaining such possession. . . . [S]ince the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781, till the year 1816, petitioned the Congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

The cause was argued by Mr. *Harper* and Mr. [*Daniel*] *Webster* for the plaintiffs, and by Mr. *Winder* and Mr. *Murray* for the defendants. . . .

On the part of the plaintiffs, it was contended, 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem, therefore, to be unnecessary, and merely speculative, to discuss the question respecting the sort of title or ownership, which may be thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstances, that the members of the society held in common, did not affect the strength of their title by occupancy.[1] In the memorial, or manifesto, of the British government, in 1755, a *right of soil* in the Indians is admitted. It is also admitted in the treaties of Utrecht and Aix la Chapelle. The same opinion has been expressed by this Court,[2] and by the Supreme Court of New-York.[3] In short, all, or nearly all, the land in the United States, is holden under purchases from the Indian nations; and the only question in this case must be, whether it be competent to *individuals* to make such purchases, or whether that be the exclusive prerogative of government.

[The plaintiffs went on to argue that the proclamation of 1763 (*infra*, at S50) could not bind the Indians because they were not British subjects, nor could it bind the grantees because legislation by proclamation was not valid within Virginia once it had its own legislature.

[The defendants argued, among other things: "By the law of nature, they [the Indians] had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them", citing Grotius, Barbeyrac, Blackstone, Pufendorf and Locke.]

MARSHALL, C.J. The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognised in the Courts of the United States?

The facts, as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession[4] of the land they sold. The inquiry, therefore, is in a great measure, confined to the power of Indians to give and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must

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[1] *Grotius*, *de J.B. ac P.* 1.2.c.2.s.4.1.2.c.24.s.9. *Puffen*. 1.4.C.5.s.1.3.

[2] Fletcher v. Peck, *6 Cranch's Rep.* 646.

[3] Jackson v. Wood, *7 Johns.Rep.* 296.

[4] [Nota bene. Ed.]

be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

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

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles. . . .

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. . . . So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. . . .

. . . Thus [sic] asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognised. [The opinion then reviews the various royal charters to the English colonists.] . . .

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. . . .

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters. Some of them purport to convey the soil alone; and in those cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Further proofs of the extent to which this principle has been recognised, will be found in the history of the wars, negotiations, and treaties, which the different nations, claiming territory in America, have carried on, and held with each other. . . .

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American States rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these States. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it. . . .

The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America.

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

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. . . . All our institutions recognise the absolute title of the crown subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers. . . .

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken

possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice. . . .

. . . The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our Courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a Court to say, that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title.[5] These nations had been at war with the United States, and had an

[5] [Marshall, C.J., is referring to various treaties negotiated with the Piankeshaws in the early 1800's. *E.g.*, Treaty of June 7, 1803, 7 Stat. 74; Treaty of Aug. 7, 1803, 7 Stat. 77; Treaty of Aug. 27, 1804, 7 Stat. 83; see generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 51–53 (1942, repr. [1971]). There does not seem to have been a similar treaty with the Illinois Indians, whom the standard accounts say were in deep decline and moving across the Mississippi at the time the conveyance was made. *See* Raymond E.

unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and, we think, with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest," and strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands. . . .

It is supposed to be a principle of universal law, that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connexion with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law. . . .

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our Courts. . . . It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. . . .

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the Court is decidedly of opinion, that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

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Hauser, *The Illinois Indian Tribe: From Autonomy and Self-Sufficiency to Dependency and Depopulation*, 69 J. ILL. STATE HIST. SOC'Y 127–38 (1976). Ed.]

***Note***

Chief Justice Marshall's view on Indian titles changed over time, though perhaps there are some hints of his later views in *Johnson v. M'Intosh*.[1] In Worcester v. Georgia, 31 U.S. (6. Pet.) 515, 542–46 (1832), he tells the story this way:

> [542] America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their 543 own laws. It is difficult to

[1] I am grateful to Jed Shugerman for pointing this out to me. CD.

comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the preexisting rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, 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?

But power, war, conquest, give rights, which, after possession, are conceded by the world, and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole, and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was

> "that discovery gave title to the government by whose subjects or by whose authority it was made against all other European 544 governments, which title might be consummated by possession."

8 Wheat. [21 U. S.] 573.

This principle, acknowledged by all Europeans because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of 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 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.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political, but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the King granted charters to companies of his subjects who associated for the purpose of carrying the views of

the Crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil from the Atlantic to the South Sea. 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 545 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.

The power of making war is conferred by these charters on the colonies, but defensive war alone seems to have been contemplated. … [546]

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defence, not for conquest.

The charters contain passages showing one of their objects to be the civilization of the Indians, and their conversion to Christianity -- objects to be accomplished by conciliatory conduct and good example, not by extermination.

The actual state of things and the practice of European nations on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them which gave importance and security to the neighbouring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments by asserting claims to their lands or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of 547 words, nor supposing it to be material whether they were called the subjects or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country. and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The King purchased their when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs or interfered with their self-government so far as respected themselves only.

### *Note on Indian Titles*

By and large the Court has followed *Johnson v. M'Intosh*. (Some would argue that it has extended it far beyond its original bounds.) Tee-Hit-Ton Indians v. United States, 348 U.S. 272

(1955), is typical. The case involved a claim by Alaska Indians for compensation under the fifth amendment on the ground that the Government had sold timber on land "belonging" to the tribe from before the time the white settlers came. In denying the claim, the Court had this to say about Indian titles:

> . . . *Indian Title*.—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.
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> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587. . . .
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> In *Beecher v. Wetherby*, 95 U.S. 517, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin. In a controversy over timber, this Court held the Wisconsin title good.
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> "The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P. 525.
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> In 1941 a unanimous Court wrote, concerning Indian title, the following:
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> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347.
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> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.
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> (b) There is one opinion in a case decided by this Court that contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States. *United States v. Tillamooks*, 329 U.S. 40.

> Recovery was allowed under a jurisdictional Act of 1935, 49 Stat. 801, that permitted payments to a few specific Indian tribes for "legal and equitable claims arising under or growing out of the original Indian title" to land, because of some unratified treaties negotiated with them and other tribes. The other tribes had already been compensated. Five years later this Court unanimously held that none of the former opinions in Vol. 329 of the United States Reports expressed the view that recovery was grounded on a taking under the Fifth Amendment. *United States v. Tillamooks*, 341 U.S. 48. Interest, payable on recovery for a taking under the Fifth Amendment, was denied.
>
> 348 U.S. at 279–82.

The Court acknowledged that if the Government had "recognized" the title of the Tee-Hit-Tons, compensation would be owing, but no such recognition was found. The Court also carefully distinguished the situation posed by the case from those involving legislation in implementation "of the policy of the Congress, continued throughout our history to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians." *Id*. at 273–74. Finally, the Court refused to deal with the argument that the Tee-Hit-Tons' stage of civilization and relations with the original Russian settlers demanded a different treatment for them than that accorded the Indians of the lower forty-eight states, on the ground that the special circumstances alleged had not been proved in the Court of Claims.

Congress' reaction to the problem of Indian titles has been extremely varied. There is quite a bit of legislation granting "payments from the public purse to needy descendants of exploited Indians." Further, Congress has also had to legislate concerning the method of holding land still under Indian control. This legislation has reflected pressures on the Congress to permit exploitation of Indian land for its natural resources, a desire to reflect tribal forms of ownership in the statutes, and a desire to protect Indians against exploitation. The resultant pattern of legislation is, not surprisingly, complex and not very consistent. For a good summary, see R. POWELL, REAL PROPERTY § 67 (M. Wolf ed. 2012).

The notion that the Indians have some sort of legal claim to their land (as opposed to a claim simply on the Congress' conscience) is not entirely dead. For a good review of both the prior and subsequent history of the *Tee-Hit-Ton* case and a suggestion that it was wrongly decided, see Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980). Partly as a result of the questions raised concerning title to land on the oil-rich northern slope of Alaska, legislation was proposed in the 92nd Congress to compensate the Alaska natives for their land out of the proceeds from the sale of the oil leases. The hearings on this legislation contain the following memorandum produced by counsel for the natives entitled: "Alaska Native Claims Settlement—Gratuity or Payment of a Legal Obligation?":

> A recurrent question in discussions of the Alaska Native Claims Settlement, bill is whether compensation should be measured by generosity or legal obligation—in short, do we owe the Natives anything, or is this bill a sort of welfare-with-dignity dole?
>
> The answer, equally short, is that the Natives have a valid claim, and an enormously valuable claim. They are not asking for a dole. The principles involved are clear and long-established. It may help to set them out briefly.
>
> (1) *Congress has the power to extinguish Native title on whatever terms it wishes*.—When the United States collides with aboriginal Natives, the clash is really one of sovereign people. If our government takes their land by superior force, the seizure presents political, not justiciable issues.
>
> (2) *In exercising its power*, *the consistent policy of Congress has been to pay fair value when Native land is taken*.—While Congress could in theory ignore Native rights and allow

non-Natives to run roughshod over Native lands, that has never been its policy. To the contrary, the law of the United States since the time of Northwest Territory Ordinance has been that the land and property of the Indians "shall never be taken from them without their consent" and that "their property, rights, and liberty, . . . never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress. . . . " 1 Stat. 50, 52.

Under this settled policy, Native title represents a valuable "right of occupancy which the sovereign . . . protects against third parties," *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Chief Justice Marshall stated in *Johnson v. M'Intosh*, 8 Wheat. (21 U.S.) 543, 574 (1823) that the original inhabitants are "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it." In short, until Congress has acted to extinguish Native title, anyone who takes their lands acquires only the bare legal title, subject to the Natives' claims, and may be forced to account to Native claimants—as the Santa Fe Railroad learned to its sorrow. *See United States v. Santa Fe Pacific R. R.*, 314 U.S. 339 (1941).

"The policy of Congress . . . to extinguish Indian title through negotiation rather than by force," *Tee-Hit-Ton Indians*, 348 U.S. at 273, has sometimes been honored in the breach. But Congress has recognized injustice where it has occurred, returning to the problem with later jurisdictional acts that allowed Natives to sue for the fair value of their lands—most notably, by the Indians Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. § 70 *et seq*.

Thus, as a matter of pure sovereign power the Alaska Natives are at the mercy of Congress. But this does not mean their claims have no "legal" basis. Beyond the question of sheer power, "legality" is also a function of fundamental fairness, adherence to settled policy, and satisfaction of reasonable expectations created by past policy.

By these standards, the Alaska Natives have a legal claim. They are entitled to the same treatment other Native groups have received. Congress has the power, of course, to reverse the long-standing policy and leave these Natives literally standing out in the cold. But this would not be a denial of "generosity." It would be a denial of equal treatment, and would ignore the elemental considerations of justice upon which the present policy rests.

(3) *The legal obligation of Congress is to compensate the Natives for the fair value of their lands at the time of taking*.—If the Alaska Natives are entitled to the same treatment other Natives have received, they are similarly entitled to the same measure of compensation. The standard applied in judicially-supervised settlements has always been that Natives shall receive the fair market value—at the time of taking—of the lands they have historically used and occupied. *E.g.*, *Crow Tribe of Indians v. United States*, 284 F.2d 361 (Ct.Cl.1960). This value includes all rights to the land, surface and subsurface, not merely the value of the lands to the Natives for historic purposes. *E.g.*, *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Otoe and Missouria Tribe of Indians v. United States*, 131 F.Supp. 265 (Ct.Cl.1955).

(4) *The time of taking for most Natives lands in Alaska is now*.—Native title may be extinguished in many ways—"by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *Santa Fe Pacific R. R.*, 314 U.S. at 347. But some clear demonstration of a Congressionally-sanctioned extinguishment is necessary.

In Alaska, a small share of the state has been taken from the Natives by adverse dominion. But there has been no overall legal extinguishment of title. The [1867] treaty of cession from Russia, later legislation, and most importantly the Statehood Act have all left the question of Native claims for later resolution. . . .

. . . When the Statehood Act was passed in 1958, the State in Section 4 explicitly disclaimed "all right and title . . . to any lands or other property (including fishing rights); the

> right of title to which may be held by any Indians, Eskimos, or Aleuts. . . .” (72 Stat. 339, as amended, *see* 73 Stat. 171.)
>
> The State was granted the right in Section 6 to select more than one hundred million acres of land, but only land that was “vacant, unappropriated, and unreserved.” The Court of Appeals for the Ninth Circuit has refused to hold that Native-occupied lands is eligible for selection under this standard. *Alaska v. Hickel*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).
>
> In short, for the vast bulk of Alaska, Native title has not been extinguished, and, where it exists, stands in the way of grants to the State or other third parties. The necessity for a settlement of Native land claims to permit development of Alaska and the fact that for valuation purposes Native title will be extinguished by this bill are two sides of the same coin.

*Hearings on H.R. 3100*, *H.R. 7039*, *and H.R. 7432 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 92nd Cong., 1st Sess., ser. 92–10, at 206–08 (1971).

Congress responded in 1971 by passing the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1624 (1976 & Supps. II 1978 & IV 1980). The Act extinguished all aboriginal title to land in Alaska, but compensated the natives both in money (more than $950 million was paid) and by allowing them to select more than 38 million acres of what was previously aboriginal land for which the government issued patents to special native corporations. JAMES D. LINXWILER, THE ALASKA CLAIMS SETTTLEMENT ACT AT 35: DELIVERY ON THE PROMISE (53rd Annual Rocky Mountain Mineral Law Institute, Paper 12, 2007).

Recent years have also seen some spectacular litigation by Eastern Indians claiming that they lost their lands by actions in violation of the Nonintercourse Act of 1790, 25 U.S.C. § 177 (1976), which invalidates conveyances of Indian land not made pursuant to a federal treaty. By and large the courts have been quite receptive to these claims. *See*, *e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (holding the federal courts have jurisdiction of such claims and remanding for trial). The courts have also been receptive to the Indians’ claims that the federal government, as trustee, has an obligation to represent them in such proceedings. *See*, *e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). Since an enormous amount of land is involved in these cases, the states and the current landowners have proposed to Congress that it abrogate these claims without compensating the Indians. That the trust responsibility of Congress to the Indians would make such an action subject to judicial review, if not for violation of the fifth amendment at least for violation of some broader standard of fairness, is suggested in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).

The Court, then, seemed to pull back. In Blatchford v. Native Village of Noatak and Circle Village, 501 U. 775 (1991), it ruled that the Eleventh Amendment bars suits in federal court brought by tribes against states for damages. The same case also, however, held that the United States could bring cliams on behalf of a tribe in federal court with the tribes intervening as interested parties. *Id.*, at 783. The Court has also held that the Eleventh Amendment bars sutis to quiet title to property held by the state. Idaho v. Coeur d’Elene Tribe, 521 U.S. 261, 281–82 (1997). Finally, it has ruled that Congress does not possess the power under the Indian Commerce Clause to abrogate state sovereign immunity by statutes authorizing suits against the United States. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996). The current state of play in these suits is well described in J. SINGER, INTRODUCTION TO PROPERTY §15.6.2 (2d ed. 2005).

## UNITED STATES v. PERCHEMAN

Supreme Court of the United States
32 U.S. (7 Pet.) 51 (1833)

MARSHALL, C. J. This is an appeal from a decree pronounced by the judge of the superior court for the district of East Florida, confirming the title of the appellee to two thousand acres of land lying in that territory, which he claimed by virtue of a grant from the Spanish governor made in December 1815. . . .

The attorney of the United States for the district, in his answer to this petition, states, that on the 28th of November 1823 the petitioner sold and conveyed his right in and to the said tract of land to Francis P. Sanchez, as will appear by the deed of conveyance to which he refers; that the claim was presented by the said Francis P. Sanchez to the register and receiver, while acting as a board of commissioners to ascertain claims and titles to land in East Florida, and was finally acted upon and rejected by them, as appears by a copy of their report thereon. As the tract claimed by the petitioner contains less than three thousand five hundred acres of land, and had been rejected by the register and receiver acting as a board of commissioners, the attorney contended that the court had no jurisdiction of the case. . . .

The general jurisdiction of the courts not extending to suits against the United States, the power of the superior court for the district of East Florida to act upon the claim of the petitioner Percheman, in the form in which it was presented, must be specially conferred by statute. It is conferred, if at all, by the act of the 26th of May 1830, entitled "an act to provide for the final settlement of land claims in Florida." The fourth section of that act enacts "that all the remaining claims which have been presented according to law, *and not finally acted upon*, shall be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, as are prescribed by the act of congress approved the 23d of May 1828, entitled "an act supplementary," &c.

The claim of the petitioner, it is admitted, "had been presented according to law;" but the attorney for the United States contended, that "it had been finally acted upon." The jurisdiction of the court depends on the correctness of the allegation. In support of it, the attorney for the United States produced an extract from the books of the register and receiver acting as commissioners to ascertain claims and titles to land in East Florida, from which it appears that this claim was presented by Francis P. Sanchez, assignee of the petitioner, on which the following entry was made. "In the memorial of the claimant to this board, he speaks of a survey made by authority in 1819. If this had been produced, it would have furnished some support for the certificate of Aguilar. As it is, we reject the claim."

Is this rejection a final action on the claim, in the sense in which those words are used in the act of the 26th of May 1830?

In pursuing this inquiry, in endeavouring to ascertain the intention of congress, it may not be improper to review the acts which have passed on the subject, in connexion with the actual situation of the persons to whom those acts relate.

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February 1819.

The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of

right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. "The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article."

This special enumeration could not have been made, had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words "which are not private property," had private property been included in the cession of the territory.

This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words. "All the grants of land made before the 24th of January 1818 by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."

This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. . . .

. . . Although the words "shall be ratified and confirmed," are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they "shall be ratified and confirmed" by force of the instrument itself. When we observe that in the counterpart [in Spanish] of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable. . . .

This understanding of the article, must enter into our construction of the acts of congress on the subject.

The United States had acquired a territory containing near thirty million of acres, of which about three millions had probably been granted to individuals. The demands of the treasury, and the settlement of the territory, required that the vacant lands should be brought into the market; for which purpose the operations of the land office were to be extended into Florida. The

necessity of distinguishing the vacant from the appropriated lands was obvious; and this could be effected only by adopting means to search out and ascertain preexisting titles. This seems to have been the object of the first legislation of congress.

On the 8th of May 1822, an act was passed, "for ascertaining claims and titles to land within the territory of Florida."

The first section directs the appointment of commissioners *for the purpose of ascertaining* the claims and titles to lands within the territory of Florida, as acquired by the treaty of the 22d of February 1819.

It would seem from the title of the act, and from this declaratory section, that the object for which these commissioners were appointed, was the ascertainment of these claims and titles. That they constituted a board of inquiry, not a court exercising judicial power and deciding finally on titles. By the act "for the establishment of a territorial government in Florida," previously passed at the same session, superior courts had been established in East and West Florida, whose jurisdiction extended to the trial of civil causes between individuals. These commissioners seem to have been appointed for the special purpose of procuring promptly for congress that information which was required for the immediate operations of the land office. In pursuance of this idea, the second section directs that all the proceedings of the commissioners, the claims admitted, with those rejected, and the reason of their admission and rejection, be recorded in a well bound book, and forwarded to the secretary of the treasury to be submitted to congress. To this desire for immediate information we must ascribe the short duration of the board. Their session for East Florida was to terminate on the last of June in the succeeding year; but any claims not filed previous to the 31st of May in that year to be void, and of none effect.

These provisions show the solicitude of congress to obtain, with the utmost celerity, the information which ought to be preliminary to the sale of the public lands. The provision, that claims not filed with the commissioners previous to the 30th of June 1823 should be void, can mean only that they should be held so by the commissioners, and not allowed by them. Their power should not extend to claims filed afterwards. It is impossible to suppose that congress intended to forfeit real titles not exhibited to their commissioners within so short a period.

The principal object of this act is further illustrated by the sixth section, which directed the appointment of a surveyor who should survey the country; taking care to have surveyed and marked, and laid down upon a general plan to be kept in his office, the metes and bounds of the claims admitted.

The fourth section might seem in its language to invest the commissioners with judicial powers, and to enable them to decide as a court in the first instance, for or against the title in cases brought before them; and to make such decision final if approved by congress. It directs that the "said commissioners shall proceed to examine and determine on the validity of said patents," &c. If, however, the preceding part of the section to which this clause refers be considered, we shall find in it almost conclusive reason for the opinion that the examination and determination they were to make, had relation to the purpose of the act, to the purpose of quieting speedily those whose titles were free from objection, and procuring that information which was necessary for the safe operation of the land office; not for the ultimate decision, which, if adverse, should bind the proprietor. The part of the section describing the claims into the validity of which the commissioners were to examine, and on which they were to determine, enacts, that every person, &c. claiming title to lands under any patent, &c. "which were valid under the Spanish government, or by the law of nations, and which are not rejected by the treaty ceding the territory of East and West Florida to the United States, shall file, &c."

Is it possible that congress could design to submit the validity of titles, which were "valid under the Spanish government, or by the law of nations," to the determination of these commissioners?

It was necessary to ascertain these claims, and to ascertain their location, not to decide finally upon them. The powers to be exercised by the commissioners under these words, ought therefore to be limited to the object and purpose of the act.

The fifth section, in its terms, enables them only to examine into and confirm the claims before them. They were authorized to confirm those claims only which did not exceed one thousand acres.

From this review of the original act, it results, we think, that the object for which this board of commissioners was appointed, was to examine into and report to congress such claims as ought to be confirmed; and their refusal to report a claim for confirmation, whether expressed by the term "rejected," or in any other manner, is not to be considered as a final judicial decision on the claim, binding the title of the party; but as a rejection for the purposes of the act.

This idea is strongly supported by a consideration of the manner in which the commissioners proceeded, and by an examination of the proceedings themselves, as exhibited in the reports to congress.

The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties: but to have pursued their inquiries like a board of commissioners, making those preliminary inquiries which would enable the government to open its land office; whose inquiries would enable the government to ascertain the great bulk of titles which were to be confirmed, not to decide ultimately on the titles which those who had become American citizens legally possessed. . . .

On the 23d of May 1828 an act passed supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida.

This act continues the power of the register and receiver [who had replaced the commissioners in the intervening legislation] till the first Monday in the following December, when they are to make a final report; after which it shall not be lawful for any of the claimants to exhibit any further evidence in support of their claims.

The sixth section of this act transfers to the court all claims "which shall not be decided and finally settled under the foregoing provisions of this act, containing a greater quantity of land than the commissioners were authorized to decide, and above the amount confirmed by this act, and which have not been reported as antedated or forged," and declares that they "shall be received and adjudicated by the judge of the district court in which the land lies, upon the petition of the claimant, according to the forms," &c. "prescribed," &c. by act of congress approved May 26th, 1824, entitled "an act enabling the claimants to land within the limits of the state of Missouri and territory of Arkansas to institute proceedings," &c. A proviso excepts from the jurisdiction of the court any claim annulled by the treaty or decree of ratification by the king of Spain, or any claim not presented to the commissioners or register and receiver.

The thirteenth section enacts that the decrees which may be rendered by the district or supreme court "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." . . .

On the 26th of May 1830, congress passed "an act to provide for the final settlement of land claims in Florida." This act contains the action of congress on the report of the 14th of January 1830, which contains the rejection of the claim in question. The first section confirms all the claims and titles to land filed before the register and receiver of the land office under one league

square, which have been decided and recommended for confirmation. The second section confirms all the conflicting Spanish claims, recommended for confirmation as valid titles. . . .

The fourth enacts "that all remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions [as in the act of 1828]," &c.

It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress on the report containing this claim, is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed on those which were rejected. They were, of consequence, expressly submitted to the court.

The decision of the register and receiver could not be conclusive for another reason. Their power to decide did not extend to claims exceeding one thousand acres, unless the claimant was an actual settler; and it is not pretended that either the petitioner, or Francisco de Sanchez, his assignee, was a settler, as described in the third section of the act of 1824.

The rejection of this claim, then, by the register and receiver did not withdraw it from the jurisdiction of the court, nor constitute any bar to a judgment on the case according to its merits. . . .

The court does not enter into the inquiry, whether the title has been conveyed to Sanchez or remains in Percheman. That is a question in which the United States can feel no interest, and which is not to be decided in this cause. . . . [P]rivate adverse claim[s] . . . , under the law giving jurisdiction to the court, are not to be decided or investigated.

The decree is affirmed.

### *Notes and Questions*

1. How do you think Chief Justice Marshall would have responded to the following: "In *Johnson* you struck down the grant of a sovereign Indian tribe, in *Percheman* you sustained the grant of the sovereign king of Spain. The only difference I can see between these two cases is that the Indians were not members of your race."

2. The supremacy clause of the Constitution says: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land . . . ." U.S. CONST. art. VI, § 2. The fifth amendment to the U.S. Constitution says: "No person shall be . . . deprived of life, liberty, or property without due process of law." Neither provision is cited in *Percheman* nor is the occupation theory of property mentioned; yet all three lie behind the opinion. One might even argue that construction both of the treaty and of the statutes can only be understood in the light of these broader ideas. See if you can see where the Court's conclusion is not compelled by the language of the treaty or the statutes, and then how these broader ideas may have led it to the result it reached.

If you are inclined to think that the Court's conclusion necessarily follows from the words of the documents, look again at:

(1) The English and Spanish versions of the treaty. Do they say the same thing? The English version of the treaty, which the Court quotes, says that Spanish grants "shall be ratified and confirmed" (Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty (Adams-Onís Treaty), U.S.-Spain, art. 8, Feb. 22, 1819, 8 Stat. 252). The Spanish version of the treaty (which is quite a bit harder to find) says: "quedarán ratificadas y reconocidas" (quoted in Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 644 n. 200 (2008)).

(2) The jurisdictional provisions of the Act of 1830 with its cross-reference to the Act of 1828. Can you see an argument that the court had no jurisdiction under this Act even if the claim was not one "decided and finally settled under the foregoing provisions of this act"? (Note: the statutory confirmations were all for one square league or less, but one square league is a considerably larger amount than the 2000 acres which Percheman claimed.)

3. As one of the first U.S. Supreme Court decisions involving treaties *Percheman* has had a permanent effect on American jurisprudence. For example, the suggestion in the case that where there is ambiguity in the language of a treaty, the official version in another language may be cited to resolve the ambiguity, particularly when the provision was introduced by the party which used the other language, is well recognized. *Percheman* has recently become controversial as the U.S. Supreme Court has recently revived a doctrine that at least in some circumstances treaties are not "self-executing" but require further legislation in addition to the "advice and consent" that the Senate gives to them in order to become judicially enforceable. *See* Vázquez, *Treaties as Law of the Land*, *supra*, Note 2; Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-self-execution*, 123 HARV. L. REV. 32 (2009).

## Section 2. SOME LEGAL CONSEQUENCES OF THE LABEL "POSSESSION" (HEREIN OF *JUS TERTII*)

[Omitted in these Materials.]

## Section 3. ADVERSE POSSESSION

[Omitted in these Materials.]