2003


Gordon S. Barker

College of William & Mary - Arts & Sciences

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https://dx.doi.org/doi:10.21220/s2-ghr7-n653

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JOHN MARSHALL AND NATIVE RIGHTS:
The Law of Nations and Scottish Enlightenment Influence

A Thesis
Presented to
The Faculty of the Department of History
The College of William and Mary in Virginia

In Partial Fulfillment
Of the Requirements for the Degree of

Master of Arts

by
Gordon S. Barker
2003
APPROVAL SHEET

This thesis is submitted in partial fulfillment of
The requirements for the degree of

Master of Arts

(Dale E. Hoak)

(Approved, 2003)

(Robert A. Gross)

(Charles F. Hobson)
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ACKNOWLEDGEMENTS

Professor Robert A. Gross provided me with guidance over a two-year period during which this thesis took shape. With patience, he reviewed several drafts of work-in-progress and gave me the benefit of his valuable insights. I am indebted to him not only for his advice but also for his encouragement. Professor Dale E. Hoak and Charles F. Hobson, Editor of The Papers of John Marshall, also read initial versions with considerable patience and provided me with sound advice that significantly improved the final product.
ABSTRACT

This thesis revisits Chief Justice John Marshall’s Native American rights cases—
*Fletcher v. Peck, Johnson v. McIntosh, Cherokee Nation v. Georgia*, and *Worcester v. Georgia*. In underscoring the need for a reconsideration of Marshall’s rulings, it juxtaposes scholarly critiques of his opinions against his sympathy for the plight of America’s original people. His decisions are examined in the context of the emerging law of nations and the Scottish Enlightenment. The positivist influences of Hugo Grotius, Samuel Pufendorf, Cornelius Van Bynkershoek, and Emmerich de Vattel are addressed. The impact of leading figures of the Scottish Enlightenment, particularly David Hume, Adam Smith, and Thomas Reid, are also dealt with.

Rather than an individual intent on furthering a political agenda or fostering commercial and special interests, including his own, Marshall emerges as a chief justice who believed that the law of nations represented an integral part of the new nation’s jurisprudence and framed his opinions in accordance with contemporary philosophies of justice. His broad interpretations—and sometimes rejections—of principles advanced by recognized jurists and scholars suggest that Marshall did not seek to stifle the initiative of Native Americans or wrest their lands from them, but he sought to give them wide rein to develop their communities through their own institutions.

The essay also documents international jurisprudence provided by a nineteenth-century case that obliged justices of the Canadian Supreme Court to re-examine many of the issues Marshall confronted and consider the basis of his decisions. The opinions of
the Canadians provide an independent test of his rulings. Similar to Marshall, they
grounded their opinions in positive law. Their interpretation of proclamations and
treaties concurred with those of Marshall and their methodological approach was similar
and at times identical. If Marshall’s decisions on Native American land rights
represented a watershed, it was one that marked a transition to positive law, not the
intentional marginalization of America’s original inhabitants by an ‘interested’ chief
justice.
JOHN MARSHALL AND NATIVE RIGHTS:
The Law of Nations and Scottish Enlightenment Influence
CHAPTER I  
INTRODUCTION

In the autumn of 1828, the fate of Native Americans preoccupied at least two members of the United States Supreme Court. In September, Associate Justice Joseph Story traveled to Salem, Massachusetts, to deliver the official address at the town’s bicentennial. As he reviewed two centuries of progress since the arrival of the Puritan settlers on the shores of Massachusetts Bay in 1628, Story addressed the sad fate of the region’s original inhabitants. His tone was reflective, even sorrowful:

There is, indeed, in the fate of these unfortunate beings [Native Americans], much to awaken our sympathy, and much to disturb the sobriety of our judgment; much, which may be urged to excuse their own atrocities; much in their characters, which betrays us into involuntary admiration. What can be more melancholy than their history? By a law of their nature, they seem destined to a slow, but sure extinction. Everywhere, at the approach of the white man, they fade away. We hear the rustling of their footsteps, like that of the withered autumn leaves, and they are gone forever. They pass mournfully by us, and they return no more. Two centuries ago, the smoke of their wigwams and the fires of their councils rose in every valley, from Hudson’s Bay to the farthest Florida, from the ocean to the Mississippi and the lakes... But where are they? Where are the villages, and warriors, and youth; the sachems and the tribes; the hunters and their families? They have perished... The winds of the Atlantic fan not a single region, which they may now call their own. Already the last feeble remnants of the race are preparing for their journey beyond the Mississippi. I see them leave their miserable homes, the aged, the helpless, the women and the warriors, “few and faint, yet fearless still.” The ashes are cold on their native hearths. The smoke no longer curls round their lowly cabins. They move on with a slow, unsteady step. The white man is upon their heels, for terror or despatch; but they heed him not. They turn to take a last look of their deserted villages. They cast a last glance upon the graves of their fathers...They know and feel, that there is for them still one remove farther, not distant nor unseen. It is to the general burial ground of their race.1

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1 William W. Story, ed., The Miscellaneous Writings of Joseph Story (New York, 1972), 462-3; Marshall’s appreciation of Story is evident in a letter he wrote to him on December 25, 1832. Thanking Story for an acknowledgement, he said “Truly sensible as I am that the commendation bestowed on the Chief Justice, both in the dedication and preface, greatly transcends his merit...I am yet deeply penetrated by the evidence it affords of the continuance of that partial esteem and friendship which I have cherished for so
Although Story’s remarks reflected the discourse of vanishing Indians that developed after the Battle of Fallen Timbers in 1794 ended two centuries of bloody warfare with native peoples, his message had special meaning for his brethren on the Supreme Court, particularly John Marshall.

By the late 1820s, the aging chief justice had wrestled with legal issues involving white-Indian relations for almost three decades. As he witnessed mounting pressures to remove once great tribes westward across the Mississippi, Marshall recognized the pressing need to resolve the status of America’s original inhabitants—especially their rights to their ancestral lands and political sovereignty. In the South, the burgeoning white backcountry population increasingly coveted Indian lands to expand King Cotton, making a final clash imminent. Marshall realized that this resolution also would require the Supreme Court to pronounce on the division of powers between the federal and state governments, thus defining the new Republic as either a powerful new nation or a mere compact between states. In the fall of 1828, the Georgia legislature, frustrated by the federal government’s failure to extinguish the Cherokees’ claims in accordance with the 1802 agreement by which the state of Georgia ceded western lands to the Union, was poised to enact legislation to annex Cherokee lands and promote white settlement.

Always conscious of political and social tensions, Marshall must have read Story’s remarks with the intellectual vigor that permitted him “to grasp a subject in its entirety…to analyze its constituent parts and understand their relation to the whole.”

Marshall did more than that. Replying to Story, he revealed emotion and a heightened many years, and still cherish as one of the choicest treasures of my life. John Marshall Papers, Swem Special Collections, College of William and Mary.

sensitivity to the plight of the very people who had terrorized the backcountry of his native Virginia, aligned with the British during the Revolution, and threatened the new Republic that he had sought to secure throughout his public life. “But I have been still more touched with your notice of the red man than of the white,” confessed Marshall. “It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of justice which ought always to govern our conduct towards the aborigines...That time however is unquestionably arrived; and every oppression now exercised on a helpless people depending on our magnanimity and justice for their preservation of their existence, impresses a deep stain on the American character.”

Marshall’s sentiments on the eve of his two final decisions on Native American land rights, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, are evidence of his concern for justice and humanity as well as the astuteness with which he observed social and political developments. They are a tribute to his enduring statesmanship in an era in which the forces of self-interest and individualism replaced republican virtue as the defining feature of the new order. Marshall’s sentiments indicate that his vision transcended special interests. They also cast doubt on scholarly critiques that portray him as the legal mastermind of the final dispossession of Native American lands.

Late twentieth-century legal and social historians who advanced such critiques stressed the role of land dispossession in shaping the tragic fate of Native Americans. Invariably, they presented America’s original inhabitants as victims in a world.

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dominated by Europeans and governed by laws designed to promote the white man’s interests. They portrayed the law as a powerful instrument brandished against helpless and sometimes unsuspecting tribes. They assailed Marshall’s opinions, arguing that they reflected racism, political expediency, sensitivity to public opinion, and acquiescence to expanding commercial and financial interests, including his own.

These critiques are flawed, however, in terms of their historical representation of white-Indian relations and Marshall’s jurisprudence. They inadequately describe the complex process of land dispossession. Supporters of the ‘victimization’ approach usually fail to recognize Indian agency and portray Europeans and Native Americans as monolithic groups, neglecting the diversity of interests within each community. These scholars tend to ignore factions, which characterized most Indian and European communities throughout the seventeenth, eighteenth and early nineteenth centuries and often reached across the cultural divide. Furthermore, they seldom acknowledge that ‘the law’ was in a state of flux during this period. Reflecting unprecedented social, economic, political, and intellectual developments, the law changed constantly. Rather than a known quantity, it was ill defined, even elusive, for all parties. Discoveries of unknown continents and peoples accentuated uncertainty and precipitated new concerns about the rights of discovered peoples and discovering nations.

In light of these concerns, this essay challenges interpretations of Marshall, which embrace ‘Indian victimization’ and argue that special interests—political, commercial or personal—shaped Marshall’s opinions. It also suggests that Marshall’s rulings must be
considered within the context of his efforts to distinguish law from politics and to establish the authority of the judiciary with a view to rendering it less vulnerable to intrusions from the legislative and executive branches. Marshall grounded his opinions on Native American land rights on legal premises that were accepted by the leading scholars and jurists of his day. His rulings were shaped by his adherence to positive law and well-established principles of common law, a reflection of his legal education and his experience in the superior courts in Virginia. Marshall’s positivist approach was evident in his marked reliance on the Constitution, statutes, treaties, and the writings of international legal scholars when his opinions touched on the law of nations. Marshall recognized the law of nations as an integral part of the new nation’s developing jurisprudence. “When the United States ceased to be part of the British Empire, and assumed the character of an independent nation,” Marshall declared, “[it] became subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe.” For Marshall, “the faithful observance” of the law of nations was “essential to national character, and to the happiness of mankind.” At times, Marshall also emphasized principles of natural justice that were embodied in the texts of leading international theorists.

In examining Marshall’s rulings on Native American land rights, the degree to which the Scottish Enlightenment influenced him is remarkable but perhaps not surprising. Scotsmen Archibald Campbell and James Thomson, who played important roles in Marshall’s education, were immersed in Scottish Enlightenment thinking. They were schooled at the University of Glasgow during Thomas Reid’s tenure in moral

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philosophy. The contention here is not that Marshall necessarily read specific works of the Scottish thinkers but that he was familiar with them and their ideas particularly David Hume on morality and justice, Adam Smith on the ‘four stages of civilization’ as well as property and contract law, and Thomas Reid on Common Sense Philosophy. Marshall’s interest in the “political essays of the day” and the books he held in his library reinforce this view. He owned Samuel Smith Stanhope’s Lectures, Corrected and Improved, on Moral Philosophy in which the President of the College of New Jersey expounded the ideas of the Scottish philosophers. Another of his holdings was the North American Review, which made numerous references to the Scots during the 1815-35 period. Similar to the Founding, the ‘hidden hand’ of the Scottish Enlightenment left its mark on the judicial branch during its formative years.
CHAPTER II
MARSHALL’S FRAMEWORK FOR INDIAN LAW: FOUR CASES

_Fletcher v. Peck_ (1810), also known as the Yazoo case, has been described as “a squabble between thieves.” It grew out of the infamous Yazoo land sales following the passage of Georgia state legislation in 1795 authorizing the sale of some thirty-five million acres of western lands at a price of about two cents an acre. Charges of corruption followed as most members of the legislature held shares in the four companies that acquired immense tracts of land, which included most of present-day Alabama and Mississippi. In 1796, a newly elected legislature repealed the legislation and passed a rescinding act that declared the earlier legislation—and subsequent sales made under it—null and void.

The Yazoo scandal attracted widespread attention partly as a result of the fact that a large number of purchasers, organized as the New England Mississippi Land Company, were from the Northeast. Denying any knowledge of corruption and claiming ignorance of the state’s intentions to revoke the initial legislation, John Peck emerged as the defendant in litigation that had the trappings of an arranged case between friendly parties whose primary aim was to validate the Yazoo land titles. The plaintiff, Robert Fletcher of New Hampshire, had purchased fifteen thousand acres from Peck in May 1803. His complaint appeared to be something of a ruse; if his claim failed, then he possessed sound title to the land and could pursue his speculative activities. Peck’s

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profits on the sale would also be secured. Fletcher initiated proceedings in the United States Circuit Court in Boston in June 1803, claiming that Peck’s title, originating under the 1795 act, was not valid. After a judgment in favor of Peck in 1807, the case advanced to the Supreme Court in 1809 on a writ of error. Although the Court initially reversed the Circuit Court’s decision and entertained “doubts” about the “authenticity of the case,” in 1810 the justices acknowledged the dispute as “real” and ruled on Fletcher’s complaints.9

Fletcher v. Peck was one of Marshall’s two landmark opinions during his first decade on the Court. The other, Marbury v. Madison (1803), was the only time that he ruled an act of Congress unconstitutional.10 Although Marshall began by regarding Fletcher v. Peck as a dispute involving the deprivation of vested property rights by the legislature, his application of the contract clause made the case the first of his several rulings on contract law that included Dartmouth College v. Woodward (1819), Sturges v. Crowninshield (1819), and Ogden v. Saunders (1827). The Yazoo opinion was the first time that the Marshall Court declared state legislation repugnant to the Constitution. It established the contract clause as a “principal weapon” in the restriction of state legislatures and a means by which Marshall transformed politically explosive public policy issues into questions of law, permitting their resolution through reference to common law principles and a growing body of written statutes.11 It also re-affirmed Marshall’s desire to separate law and politics, which he had set forth earlier in Marbury v. Madison when he stated that “the province of the court, is solely, to decide on the

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11 Hobson, 83-85.
rights of individuals, not to enquire how the executive, or executive officers, perform
duties in which they have discretion. Questions, in their nature political, or which are,
by the constitution and laws, submitted to the executive, can never be made in this
court."12

In *Fletcher v. Peck*, Marshall laid the foundations for Indian law through the
invention of Indian title. Also known as aboriginal title, this legal concept
acknowledged Native American tribes’ right to occupy a certain territory by virtue of
their original inhabitancy of the land. This title recognized a right of usage. It was
distinguished from the European notions of *fee simple title*, which gave absolute
ownership to the holder, or *fee tail*, which also provided full ownership but restricted
title by feudal custom to descendants of the original holder or his heirs. Marshall did not
consider Indian title as inconsistent with fee simple ownership on the part of the state.
He reasoned that the state of Georgia “was legally seized in fee of the soil” subject only
to the “extinguishment” of Indian title. Absolute ownership rested with the state; the
Indians benefited from a right to occupy the land.13

Several late twentieth-century scholars, including Howard Berman, criticized
Marshall’s opinion in *Fletcher v. Peck*. Berman paid special attention to Justice
Johnson’s dissent from Marshall’s majority opinion. Johnson suggested that there was
an inconsistency in the majority’s recognition of coincident claims on land arising from
Indian title and fee simple title. Johnson reasoned that ownership was either absolute or
it was not. Berman argued that Marshall, “always sensitive to the political currents,"

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ignored the claims of Native Americans as original possessors of the soil and viewed the issue "as a conflict between the United States and Georgia over jurisdiction of the lands." Berman saw the invention of Indian title as a first step in Marshall's development of a hierarchical framework of land rights in which those of Native Americans would be subordinate.\textsuperscript{14} Robert Williams seconded this view. He described Marshall's ruling in \textit{Fletcher v. Peck} as "the legal interment of the doctrine that American Indians possessed natural rights to the land they had occupied since time immemorial." Williams also challenged Marshall's description of lands occupied by the Indians as "vacant lands within the United States."\textsuperscript{15}

More recent work has cast new aspersions on the \textit{Fletcher v. Peck} ruling. In his well-researched biography, R. Kent Newmyer viewed the case of \textit{Huidekoper's Lessee v. Douglass}, which saw small landholders in Pennsylvania clash with large speculative interests such as the Holland Land Company that included Robert Morris as a major stockholder, as a predecessor to \textit{Fletcher v. Peck}. He suggested that in \textit{Huidekoper's Lessee} it was "difficult to separate Marshall's aggressive opinion for the speculators from the fact that he was a speculator." Newmyer went on to say "this is not to mention the even more direct connection between the Morris and Marshall families." In addressing \textit{Fletcher v. Peck}, Newmyer noted "as in \textit{Huidekoper's Lessee}, the Yazoo case pitted large land speculators against the state legislature, so that the issues involved were again ones in which Marshall was personally interested, and ones in which personal


\textsuperscript{15} Robert A. Williams, \textit{The American Indian in Western Legal Thought: The Discourses of Conquest}, (New York, 1990), 308-317.
interest may have intruded into his opinions.”

Johnson v. McIntosh (1823) came at a time when the Supreme Court’s predominance in the affairs of the new nation and Marshall’s influence over the associate justices reached unprecedented levels. During this period, the Court rendered opinions in McCulloch v. Maryland (1819), Dartmouth College v. Woodward (1819), and Gibbons v. Ogden (1824). Other significant cases included The Antelope (1825), Green v. Biddle (1821, 1823), and Cohens v. Virginia (1821).

Johnson v. McIntosh has been regarded as the Supreme Court’s “first major statement on Native American land ownership” and a critical denial of “unqualified sovereignty” to Native Americans. Some scholars have argued that the Court’s ruling substantiated Alexis de Tocqueville’s nineteenth-century observation on Indians in America that “it would be impossible to destroy men with more respect for the law.” Berman was especially critical of Marshall’s images of conquest and savagery. He

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16 Newmyer, 221-23. G. Edward White also has provided new insights on Marshall, his legal reasoning, and specific rulings, but he did not refute interest-based criticisms of the chief justice. Although White called for a reassessment of Marshall, he placed much emphasis on Marshall’s intervention in the case of Martin v. Hunter’s Lessee, the Fairfax appeal in which by modern standards Marshall might have been considered to have had a conflict of interest. Despite White’s conclusion “that the legal principles judges extracted and applied in constitutional cases were simply the extensions of judicial self-interest,” his analysis raised questions about Marshall’s code of judicial behavior. G. Edward White, “Reassessing John Marshall,” William and Mary Quarterly, 3rd Series, 58 (2001), 680-84.

17 In McCulloch v. Maryland, the Court confirmed Congressional power to establish the Second Bank of the United States, prohibited state legislatures from the taxation of citizens other than its own constituents, and introduced the doctrine of implied powers and national supremacy. In Dartmouth College v. Woodward, Marshall ruled that the College’s charter was a contract and thus subject to the contract clause of the Constitution. Gibbons v. Ogden, the steamboat case, established Congress’s plenary power to regulate inter-state commerce. The Antelope case resulted from an appeal asserting the United States’ claim to Africans aboard the privateer ship, the Antelope, which entered Savannah. In this case, Marshall drew extensively on tenets of international law. Green v. Biddle, which built on the contract clause ruling in Fletcher v. Peck, involved land claim disputes in Kentucky. The Court confirmed guarantees to holders that were made prior to Kentucky becoming a state. In Cohens v. Virginia the Supreme Court’s appellate jurisdiction was confirmed, irrespective of the Eleventh Amendment.

18 Newmyer, 442; Wilcombe Washburn, Red Man’s Land/White Man’s Law (New York, 1971), 66.

19 Robert Clinton et al, American Indian Law (Charlottesville, 1973), 8; Alexis de Tocqueville, Democracy in America (New York, 2000), 410.
attacked the chief justice’s discussion of conquest as “a language of juridical discourse that would potentially rationalize the process of manifest destiny and provide the conceptual space for the forced extinguishment of Indian lands.” Robert Williams’ attack was even more biting—particularly with regards to Marshall’s elaboration of the Doctrine of Discovery. Williams claimed “Marshall and the other justices were well aware of the historical paternity of this bastardized principle sired by Europe’s Law of Nations and legitimated by the United States Supreme Court.... [Their] acceptance of the Doctrine of Discovery into the United States law preserved the legacy of one thousand years of European racism and colonialism directed against non-Western peoples.” Like Berman, Williams insisted that the *Johnson v. McIntosh* ruling created a hierarchical structure in United States law whereby ‘normatively divergent peoples’ could be deprived of rights accorded to persons who adhered to the values and customs of European civilization.\(^{20}\)

Jill Norgren and Eric Kades also advanced virulent attacks on the *Johnson v. McIntosh* ruling. Norgren suggested that Marshall’s construction of Indian title was politically motivated. She noted that “tension was high in Washington over a joint French and Spanish expedition into South America and the expansionist activities of the Russians in the Northwest.” She argued that “while President Adams was mulling over his foreign policy options, Chief Justice Marshall might have launched the myth of conquest as an additional statement of American independence and hegemony.”\(^{21}\)

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\(^{20}\) Robert A. Williams, 308-317; Berman, 655.

\(^{21}\) Norgren, 87-105.
Kades referred to Marshall’s opinion as “obtuse and cryptic.” He argued that Marshall intentionally declined to base his ruling on relevant colonial statutes and appealed to customs in order to confirm European and American traditions of prohibiting the private purchase of Indian land. He concluded that Marshall sought to create a monopsonistic framework, whereby the federal government would be positioned as the only purchaser of Indian land in order to ensure expropriation of Native American lands at minimal cost.

Similar to *Fletcher v. Peck*, neither party in *Johnson v. McIntosh* was Native American. The disputants were white Americans representing competing claims to an extensive tract of about fifty million acres lying between the Illinois and Wabash rivers in the Old Northwest. Johnson’s claim originated from conveyances by the Kaskaskia, Peoria, and Cahokia tribes in 1773 and the Piankashaws in 1775 to the predecessors of the United Illinois and Wabash Land Company. McIntosh claimed title as a result of a federal government grant in 1818. This case also appeared to be arranged as both parties were involved in speculative activities and “seemed determined to obtain a legal ruling whether or not the facts showed that the litigants had conflicting land claims.”

Proceedings were initiated in the United States’ District Court of Illinois, which decided in favor of McIntosh. The case was brought to the Supreme Court in 1821 on a writ of error and heard in February 1823.

The significance of *Johnson v. McIntosh* resulted from Marshall’s determination

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22 A monopsony is the opposite of a monopoly; it exists when there is one buyer and many sellers and thus yields lower transaction prices favoring the buyer.
24 Kades, 100; In his analysis Kades contends “that the parties either feigned the case or that the defendant and the courts declined to take even the simplest steps to verify the existence of a true controversy.”
that Indian title was impaired. He ruled that the United States as successor to Great Britain had acquired title to the lands occupied by the colonies under the European Doctrine of Discovery, which he regarded as an accepted principle of the law of nations. Consequently, only the United States had the right to “extinguish” Indian title and convey absolute rights to the soil to individuals. Although he argued that the United States benefited from an exclusive right to alienate Native American land, Marshall emphasized that the discovery principle did not justify denial of Indian rights of occupancy; it “conveyed nothing more than a right to acquire the Indian title of occupancy.” In other words, the Doctrine of Discovery established the way European nations allocated the right “to extinguish Indian title” among themselves.\(^{25}\)

Marshall’s opening remarks in *Johnson v. McIntosh* stressed that his ruling was grounded in positive law, not natural law. “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 be, admitted, to depend entirely on the law of the nation in which they lie,” Marshall declared it was necessary to consider “not only 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 great

\(^{25}\) See *Papers of John Marshall*, 9:281-4. It is interesting to note that Marshall adhered to an interpretation similar to that put forward by his cousin and arch ‘political’ foe, Thomas Jefferson who wrote two decades earlier “A society taking possession of a vacant country, and declaring they mean to occupy it, does therefore appropriate to themselves, as *prime occupants*, what was before common. A practice introduced since the discovery of America authorises them to go farther, and to fix limits which they assume to themselves; and it seems for the common good to admit this right to a moderate and reasonable extent. If the country, instead of being altogether vacant, is thinly occupied by another nation, the right of the natives forms an exception to that of the newcomers; that is to say, these will only have a right against all other nations...the exclusive privilege of acquiring the native right by purchase or other just means. This is called the right of pre-emption; and is become the principle of the law of nations, fundamentally with respect to America.” See Julian Boyd et al., *Papers of Thomas Jefferson*, 16: 407.
degree, the rights of civilized nations... but those principles also which our government has adopted in the particular case, and given us as the rule for our decision.”

Marshall placed his reasoning on the Doctrine of Discovery and Indian title within a framework of socially constructed justice. “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear,” Marshall remarked, “if the principle has been asserted in the first instance, and afterward 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 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.” Marshall acknowledged that this approach was “opposed to natural right, and to the usages of civilized nations,” but he suggested that “if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by the courts of justice.” In Johnson v. McIntosh, Marshall struggled with the tensions between natural law theory and increasingly accepted notions of socially constructed justice that shifted the focus from abstract principles to positive law set out in written documents, including treaties, statutes, and proclamations.

Cherokee Nation v. Georgia (1831) resulted from tensions unleashed by the Articles of Agreement and Cession, also known as the ‘Compact of 1802,’ by which

Georgia ceded the western lands claimed pursuant to the Treaty of Paris in 1783 to the federal government in exchange for the United States agreeing to obtain the extinguishment of Cherokee and Creek land rights. Buoyant cotton markets, an expanding white settler population, and the Louisiana Purchase boosted demands for federal action and the removal of Native Americans. To the dismay of Georgia's white settlers, sporadic federal attempts toward removal achieved limited success. Moreover, by the early 1820s, the Cherokees showed increasing scepticism about removing westward and began to favor a policy of coexistence. They adopted 'civilizing' measures, intermarried with whites, introduced republican self-government, and engaged in large-scale agriculture and other commercial activities.

In the late 1820s, continuing delays in the federal fulfilment of the compact accentuated the antagonism of the growing white settler constituency toward Native Americans. Members of the state legislature wanted to implement a land lottery system and gold was discovered on Cherokee land. In 1828, the legislature introduced legislation annexing Cherokee lands, opening settlement under a land lottery scheme, denying the Cherokees their legal jurisdiction over their territory, and excluding them from access to state courts.28

With little hope of redress from Congress or the executive branch, which were firmly in the hands of President Andrew Jackson, the Cherokees retained attorneys William Wirt and John Sergeant to file an injunction against Georgia in the Supreme Court in early 1831. Framing their action as an original jurisdiction case under Article

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28 For background on Cherokee Nation v. Georgia see Clinton et al, 11-15; Norgren 41-63 and 87-112.
III of the Constitution, which authorized the Supreme Court to rule on controversies “between a State, or the citizens thereof, and foreign States, citizens or subjects,” the Cherokees transformed their demands into a veritable test of their sovereignty. Wirt and Sergeant argued that the Georgia state laws contravened treaties between the United States and the Cherokees, which they also presented as evidence of the Cherokees’ status as a foreign nation. They claimed that the Georgia laws violated the supremacy clause of the Constitution prohibiting state legislation repugnant to federal statutes or treaties.

_Cherokee Nation v. Georgia_ was also remarkable because of Marshall’s “extraordinary departure from his policy of preserving unity on the Court.” He encouraged Justice Thompson’s dissenting opinion, which suggested that the Cherokees were a foreign nation and the Georgia laws violated federal statutes and treaties. Marshall also backed the court reporter’s plan to publish the entire case, including the attorneys’ arguments, the dissenting opinion, and materials supporting the tribe’s claims.29

These initiatives indicated Marshall’s sympathy for the Cherokees’ plight and perhaps his ‘Madisonian’ recognition of the risks that powerful factions in state legislatures posed to the republican order and rights of minorities.30 In presenting the Court’s opinion, he noted that the Cherokees were “praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which...go directly to annihilate the Cherokee as a political society, and to seize for the use of the state of Georgia, the lands of the nation which have been assured to them by the United States, in

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29 Hobson, 174.
30 Ibid, see especially 208-12.
solemn treaties repeatedly made and still in force.”

His reference was to the Treaty of Hopewell (1785) and the Treaty of Holston (1791). The former established peace with the Cherokees. It placed them under the exclusive protection of the United States and affixed the boundaries of their lands. Under the Holston agreement, which was amended in 1794, “the United States solemnly guarantee[d] to the Cherokee nation all their lands not hereby ceded.”

Marshall’s sensitivity to the Cherokees was especially apparent when he stated “if courts were permitted to indulge their sympathies, a case better calculated to excite them [could] scarcely be imagined.” Echoing Story’s reflections, he added that “a people, once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands, by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. *To preserve this remnant, the present application is made.*”

Despite his sympathy, in delivering the majority opinion, Marshall based his legal reasoning strictly on positive law. His comments on differences between European and Native American cultures were designed to explain his understanding of the Founders’ intentions in their framing of the commerce clause and their perceptions of Native Americans. “When forming this article [the commerce clause],” declared Marshall, “the convention considered them entirely distinct.”

31 *Reports of the Supreme Court of the United States*, 30:10.
33 *Supreme Court Reports*, 30:10-11 (italics added).
Marshall's determination that the Cherokees were a "domestic dependent nation," not a foreign state, precluded the Supreme Court from hearing their action as an original jurisdiction case. He indicated that the Cherokees were in "a state of pupilage;" their relationship with the United States "resemble[d] that of a ward to his guardian." Marshall considered that the commerce clause empowered Congress to develop government policy dealing with Native Americans, which some scholars have regarded as having confirmed their subordinate status in a hierarchical legal structure thus ensuring that they, as neither citizens nor aliens, at best had a very tenuous hold on their lands.35

Considered Marshall's "ordeal by fire," *Worcester v. Georgia* (1832) reaffirmed the aging chief justice's commitment to the Court as a legal rather than a political institution. His emphasis on the Proclamation of 1763, the Constitution, treaties, and the writings of pre-eminent theorists on the law of nations indicated his adherence to positive law. As "one of Marshall's longest and most thoroughly researched opinions," *Worcester v. Georgia* came shortly after his wife's death and is evidence that "he was still in full command of his faculties." Marshall's opinion was consistent with reasoning and principles established in earlier cases, particularly *Johnson v. McIntosh* and *Cherokee Nation v. Georgia*. Newmyer, for example, has argued that Marshall's notion of domestic dependent nations linked the three cases by combining an impaired land title with recognition of the Cherokees' political distinctiveness—albeit within a context of

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35 *Supreme Court Reports*, 30:16-18. John Wunder, "Retained by the People": a History of American Indians and the Bill of Rights (New York, 1994); Wunder provides a history of these arguments.
diminished sovereignty over commercial and diplomatic relations.\textsuperscript{36}

The nullification crisis, Georgia’s execution of the Cherokee Chief Corn Tassels despite Marshall’s approval of a writ of error to hear an appeal of his conviction for murder, and mounting pressures for Indian removal heightened political tensions. In this regard, \textit{Worcester v. Georgia} perhaps rivaled only \textit{Marbury v. Madison} or the trial of Aaron Burr.\textsuperscript{37} Although Marshall’s legal positivism helped to shield the Court from criticism, delays in the enforcement of the ruling led to Samuel Worcester’s remaining in custody under Georgia state law for several months.

\textit{Worcester v. Georgia} arose from the prosecution of Worcester, Elizur Butler and a handful of other whites who resided illegally in the Cherokee Nation according to state legislation that required non-natives to be licensed by the Governor and swear an oath of loyalty to the state of Georgia. In contrast to others arrested, Worcester and Butler, missionaries committed to the Cherokee cause and friends of Elias Boudinot who edited the \textit{Cherokee Phoenix}, refused to accept a pardon in exchange for swearing an oath of loyalty. Sentenced to four years in prison, they were incarcerated and put to hard labor. After an unsuccessful appeal in state courts, Worcester and Butler, supported by Chief John Ross and other leading Cherokees intent on defending their

\footnote{\textsuperscript{36} Newmyer, 447-451; Some scholars, including Norgren, have failed to identify the consistency between Marshall’s rulings in the Cherokee cases and argued that his reasoning in \textit{Worcester v. Georgia} significantly departed from that in \textit{Cherokee Nation v. Georgia} and \textit{Johnson v. McIntosh}. What they have overlooked is that ‘conquest’ is not a ‘necessary condition’ in Marshall’s construction of the notion of domestic dependent nations. A domestic dependent nation presumably could result from negotiations. See footnote 41.}

\footnote{\textsuperscript{37} Reflecting perhaps the spirit of the times in Jacksonian America as well as the Chief Justice’s diminishing ability to achieve consensus among his colleagues and render unanimous opinions, only Justices Duvall, Story, and Thompson supported Marshall’s ruling in \textit{Worcester v. Georgia}. Baldwin, a Jackson supporter, refused to condemn Georgia state legislation as a violation of federal statutes and authority; McClean’s ‘dissent’ concurred with the decision but raised a caveat by suggesting “If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them.”}
lands and sovereignty, appealed their conviction with the legal team of Wirt and Sergeant.\textsuperscript{38} Citing \textit{Cohens v. Virginia} as a precedent, they argued that the Georgia laws encroached on federal authority and were repugnant to the Constitution. They sought to establish Cherokee rights by forcing a ruling on federal and state powers that required the incidental clarification of the Cherokees’ sovereignty. The case provided Marshall with wide scope for the judicial review of constitutional powers and an opportunity to build on his earlier decisions on Native American rights. In introducing the case, he asserted:

This cause, in every point of view in which it can be placed, is of the deepest interest. The defendant is a state, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States. The plaintiff is a citizen of Vermont, condemned to hard labor for four years in the penitentiary of Georgia; under colour of an act which he alleges to be repugnant to the Constitution, laws, and treaties of the United States. The legislative power of a state, the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.\textsuperscript{39}

As a result of this broad construction, Marshall ensured that he addressed the division of powers and questions of political and social order, including his Madisonian concerns regarding the tendency of legislatures to overstep their jurisdictions. He also ensured that “the Cherokees would get a full hearing of their case.” Most likely, this was an indication of his belief that the time had arrived “to give

\textsuperscript{38} For the state appeal they acquired the services of Elisha Chester, who also assisted in the appeal to the Supreme Court. Without the knowledge of the Cherokees, he began working with the Jackson forces who sought to remove the Cherokees across the Mississippi. Paradoxically, Worcester later supported removal on the basis that it was the only chance for the Cherokees survival. This caused much disappointment on the part of Ross and other Cherokees as well as Butler who remained steadfast in support of Cherokee rights. See Norgren, 112-33.

\textsuperscript{39} \textit{Supreme Court Reports}, 31:535.
full indulgence to those principles of humanity and justice which ought always govern our conduct towards the aborigines."40

In rendering his opinion, Marshall began by tracing the history of encounters between Europeans and Native Americans in an effort to uncover "the actual state of things." He explored the evolution of positive law relating to European discovery and settlement in America in order to determine whether the process had "annulled the pre-existing rights of its ancient possessors." Marshall reiterated his understanding of the Doctrine of Discovery, which conferred a right "to acquire rights to the soil" on European nations only against other European nations; it did not extinguish the rights of Native Americans that existed from "time immemorial."

Marshall emphasized the development of a body of positive law—the Proclamation of 1763 and subsequent treaties between Native Americans and Great Britain or the United States as successor to Great Britain. In reviewing the Treaty of Hopewell and the Treaty of Holston, Marshall established the contractual intentions of the United States and the Cherokee Nation, which he demonstrated did not include the divestment of the Cherokees' rights to their ancestral lands or to self-government as a distinct political community. In fact, Marshall remarked that these agreements "explicitly [recognized] the national character of the Cherokees, and their right to self-government; thus guarantying their lands." The United States assumed "the duty of protection" of the Cherokees and "pledged" to provide it. He reasoned that the relationship between the United States and the Cherokee Nation was consistent with

40 Papers of John Marshall, 11:178-9; Hobson, 177.
Emmerich de Vattel’s view of protectorate self-government in which the protected community retained jurisdiction over internal affairs while the protector assumed jurisdiction over diplomacy, defense, and—in the case of the United States and the Cherokees—the regulation of commerce.41

Marshall suggested that the Cherokees’ divestment of their rights to regulate commerce and the United States’ acceptance of this responsibility implied that the Cherokees were a distinct political community able to divest themselves of specific rights.42 He stated that the Federal Intercourse Act, enacted under the authority of Article III of the Constitution, confirmed this interpretation. Congress assumed responsibility for the regulation of trade “with the Indian tribes” and the latter submitted to this authority but retained sovereignty over their internal affairs. Similar to treaties, the Intercourse Act “manifestly consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.”43

Consistent with this reasoning, Marshall ruled that the Georgia legislation was “repugnant to the Constitution, laws and treaties of the United States.” The Georgia laws “interfere[d] forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our

41 Supreme Court Reports, 31:545,556, and 559.
42 This is an important point, which is frequently overlooked and has led some scholars to allege inconsistencies between Worcester v. Georgia and Marshall’s earlier Native American rights cases. In treaties, the Cherokee Nation consented to a diminished status under the protection of United States (and within the boundaries of the United States) and therefore in Cherokee Nation v. Georgia Marshall considered them to be a domestic dependent nation, not a foreign nation. In both cases, he drew on similar evidence, treaties, but in Cherokee Nation v. Georgia he could not consider the Cherokees’ complaint because of the Constitution and their protectorate status—to which they themselves had consented.
43 Ibid, 556.
Constitution, [was] committed exclusively to the government of the Union.” He concluded by returning to the fate of Worcester, reaffirming the positivist foundations of his ruling. “The judgement of the superior court for the county of Gwinnet, in the state of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the state of Georgia, for four years, was pronounced by that court under a law which is void, as being repugnant to the Constitution, treaties and laws of the United States and ought, therefore, to be reversed and annulled.”⁴⁴

⁴⁴ Ibid.
CHAPTER III

“OLD HUGO GROTIUS” TO VATTEL

Marshall’s rulings in these Native American rights cases reveal his emphasis on positive law and socially constructed justice, themes advanced by Renaissance Humanists and Scottish Enlightenment thinkers. In contrast to natural law, positive law was inseparable from history, the evolution—as Marshall put it—of the “actual state of things.” For him, positive law took precedence over “principles of abstract justice.” Justice was socially constructed; it was a social or artificial virtue linked to a specific context.\(^4\)\(^5\)

The influence of Renaissance Humanism and the Scottish Enlightenment on the chief justice is understandable. Marshall was schooled in Virginia where the chef-d’œuvres of Hugo Grotius, Samuel Puffendorf, and the leading thinkers of the Scottish Enlightenment were incorporated in the legal curriculum. These works also were held in Virginian libraries. Undoubtedly, Marshall’s affinity for positivist doctrines was reinforced by his duties as Minister to France, his experience as Secretary of State, and his interest in contemporary events—the “political essays of the day.”\(^4\)\(^6\) His decisions on Native Americans are a unique lens through which to examine the influence of

\(^{45}\) Supreme Court Reports, 31:545; Papers of John Marshall, 9:284.
\(^{46}\) William Hamilton Bryson, Census of Law Books in Colonial Virginia (Charlottesville, 1978) and Legal Education in Virginia (Charlottesville, 1982). Bryson showed that Pufendorf’s work ranked as one of the most commonly-held legal books in libraries at this time. Bryson also noted the reliance of George Wythe on Blackstone’s Commentaries, undoubtedly the first text legal text with which Marshall was familiar as his father procured him a copy when he was seventeen years old. See Newmyer, 77. In “The Events of My Life” Marshall suggested that in his eighteenth year he devoted more time “to the political essays of the day”—indeed more than to “the classics or to Blackstone.” John Marshall, “The Events of my Life”: an Autobiographical Sketch (Ann Arbor, 2001), 15.
Renaissance Humanism and the Scottish Enlightenment on his legal reasoning and exercise of judicial discretion.

i) The Moral Scientists

Hugo Grotius, the founder of a new ‘science of morality’ based on “man’s impelling desire for society” and the “Dictates of a right and sound Judgment,” was highly regarded by Marshall.47 When Henry Wheaton published *A Digest of the Decisions of the Supreme Court of the United States* in 1821, Marshall commended him on his treatment of Grotius. “Old Hugo Grotius is indebted to you for your defence of him & his quotations,” wrote Marshall. “You have raised him in my estimation to the rank he deserves.”48 Although copies of *The Rights of War and Peace* were circulating in Virginia, Marshall’s familiarity with Grotius likely stemmed from Thomas Rutherford’s summary of his work, which Marshall often cited. Rutherford’s volume was one of the key law books in Marshall’s library.49

The influence of Grotius may explain Marshall’s references to clashes between reason and passion as well as the consistency of a number of his major opinions with basic Grotian principles. Marshall’s dissent in *Ogden v. Saunders* (1827), which addressed the constitutionality of a New York bankruptcy law and was his only dissent in a constitutional case, advanced Grotius’s premise that obligations did not originate in civil law but that the right to the fulfilment of contracts—the right to receive what was due—was “brought by individuals with them into society.” Marshall argued that obligations resulting from man’s “social faculty” and his capacity for reason and

49 Rudko, 25-26;
judgment existed in a state of nature.\textsuperscript{50} Irrespective of man's level of civilization, he had obligations and rights.

Marshall's discussion of Native American civilization also reflected Grotian thought. In addressing the origins of property, Grotius described "the original inhabitants of America" as people in a state of civilization without property. "Dominion or Desmesne" did not exist; man benefited only from a "Universal right" to what was required for subsistence. "Men but persisted in their primitive simplicity, or lived together in perfect Charity," wrote Grotius. "Some People in America...by the extraordinary Simplicity of their Manners, without the least Inconvenience [have] observed the same Method of Living for many Ages."\textsuperscript{51} According to Grotius, if property did not exist in this early stage of civilization, rights to property according to European definitions did not exist. Rights were merely to occupancy or usage, "to enjoy in common" what was necessary for survival. This right was not necessarily inconsistent with absolute European property rights being vested in the state, a position that Marshall adopted in \textit{Fletcher v. Peck} and \textit{Johnson v. McIntosh}.

Grotius argued that the allocation of property not claimed on the "original division" out of a state of nature —and America fell within this category—required the exercise of "a double right of possession, the one Universal, and the other Particular; the former...done by the whole People...for a Public Advantage; the latter by private and particular Persons...a Tenure rather assigned to them, than taken and held by them by their own Will or Choice." This reasoning provided the foundation for the European

\textsuperscript{50} Hobson notes that although Marshall did not specifically refer to Grotius in this opinion, he undoubtedly had him in mind.
\textsuperscript{51} Grotius, 26.
Doctrine of Discovery, which was central to Marshall’s rulings. According to Grotius’ *Universal* title, the state became the first possessor and benefited from absolute title. Only when absolute title had been transferred by the state to individuals could they transfer it to other parties. Indians had not benefited from such a transfer. Although they could transfer the title that they had to other individuals—as Marshall indicated in *Johnson v. McIntosh*—it would be a title constructed according to their institutions and “Manners.” It would not be the absolute title that resided in the state. “The title of the crown,” reasoned Marshall, “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 purchase it, still, he could acquire only that title.”

Samuel Pufendorf built on Grotius’s science of morality. Through his impact on the Scottish Enlightenment, in part as a result of Gershom Carmichael’s annotated edition of *De officio* that served as a text in moral philosophy at the University of Glasgow and was read by Hume and Smith, Pufendorf’s contemporary influence was expanded. As one of the twelve most popular law books in Revolutionary Virginia, Pufendorf’s *Law of Nature and Nations* had a significant influence on the “state’s leading sons,” including Marshall.

Pufendorf argued that morality was basically a human creation assisted in part by man’s deductions from nature. He suggested that a fundamental law of nature was that man should live sociably. Man’s desire to escape the misery of a state of nature led him to initiate a progressive process of enculturation; through the development of kinship and

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53 Seidler, 16.
social relationships, he advanced from a pre-cultural state to a pre-civil state. Pufendorf believed that by securing additional benefits of sociability through exchange and rules that sanctioned bonds between humans and protected their property, man could advance to a civil state.

Pufendorf’s vision of civilizing progress placed morality and law on center stage and put a new emphasis on obligation and duty. “To do things enjoined by Law is a Matter of Duty,” concluded Pufendorf. “Obligation” became “a moral operative Quality, by which a Man [was] bound to perform.”55 He stressed that laws and customs recognized in civil states contributed to improvement in the human condition. “Men’s standards of living [could be] significantly furthered by states,” wrote Pufendorf, because “citizens [could] securely devote themselves to their work without hindrance and be more assured about reaping the fruits of their industry.”56 As man progressed through various levels of civilizing progress, the nature of his duties and obligations reflected more varied and complex interactions.57

As civil states proliferated, customs and rules—the law of nations—were required to govern relations between them. Pufendorf recognized the importance of boundaries and the principle of usucapion in defining rights, including property rights derived from occupancy.58 He noted that “whoever has continued the possession of a

56 Seidler, 117.
58 Usucapio was a term from Roman law for the mode of acquiring property by possession in good faith over a certain period of time. Arthur English, A Dictionary of Words and Phrases Used in Ancient and Modern Law (Littleton, Col., 1987); Pufendorf defined Usucapio and Prescriptio in the following passage: “It belongs to our present Design to enquire likewise concerning that Method of Acquisition, by which he who hath gotten Possession of what was really another’s, by just Title and with honest Intentions, and hath also held it for a considerable time without being disturbed or opposed, obtains the full Property of the thing thus possessed, so as to extinguish all the Rights and legal Claim of the former Owner. This the Roman Law terms Usucapio, because the Thing is, as it were, taken and acquired by long Use or Possession. The Word Prescriptio in the Sense of the same Law imports strictly, that Plea, Demur, or
thing...has something ‘added’ to him which he has thus far lacked. And he to whom the ‘law’ has added something can be said to have acquired it.” Pufendorf recognized the principle of usucapion as essential to orderly relations between civil states. It served “to prevent states from being disturbed by uncertain and unsettled dominion” and to grant to “possessors over a long period, who deserve great favour, an ultimate security in their holding.” Pufendorf also sought to define possession through effective land use. He reasoned that “we are said to have occupied a thing only when we actually take possession of it...[I]t is the customary thing that occupancy of...land [be effected] by the feet, along with the intention of cultivating it and of establishing boundaries either exact or with some latitude.59

Marshall’s familiarity with Pufendorf was evident from the references to him in several major cases including the post-Revolutionary War British debt case of Ware v. Hylton, the only case that Marshall argued before the Supreme Court.60 In his rulings on Native American rights, Marshall reasoned on principles advanced by the seventeenth-century scholar. In Fletcher v. Peck, Marshall’s classification of “a grant as a contract,” was consistent with Pufendorf’s interpretation of obligation and “faith between parties.”61 Marshall’s elaboration of Indian title conformed to Pufendorf’s restatement of Grotius’s Doctrine of Discovery, which established the state as the absolute possessor of lands and gave it the exclusive right to extinguish native title. In discussing discovery and settlement—what he referred to as “Occupancy in general”—Pufendorf noted “we are farther to observe, that it confers on the Community, as such, a Dominion over all

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59 Ibid
61 Hobson, 86; Pufendorf, 266-7.
things contained within the Tract which they possess.” Pufendorf affirmed that absolute title resided in the *discovering* state and addressed the New World saying “the same Rule may, in our Judgment, be extended to such desolate Islands as lie in any Sea.”

In *Worcester v. Georgia*, Marshall concurred with Pufendorf on prescription and usucapion. The chief justice declared that Native Americans were possessors of the soil from “time immemorial” and had “an unquestionable, and heretofore, unquestioned, right to the lands they occupy until that right shall be extinguished.” Echoing Pufendorf, Marshall asserted that “it is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over inhabitants of the other, or over lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.” Marshall questioned whether “adventurers, by sailing along the coast and occasionally landing on it, acquire[d] 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.” He asked whether “nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers.” By pursuing this line of inquiry and noting that Native Americans had not consented to the extinguishment of their internal sovereignty or land rights, Marshall emphasized the issues upon which Pufendorf had focused, boundaries and usage.

Addressing the Treaty of Hopewell, Marshall declared:

> Is it reasonable to suppose, that the Indians, who could not write, and most

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62 Pufendorf, 387.
63 *Supreme Court Reports*, 31:556.
64 Pufendorf, 439.
probably could not read, who certainly were not critical judges of our language, should distinguish the word “allotted” from the words “marked out.” The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject... So with respect to “hunting grounds.” Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

This broad interpretation of Pufendorf’s principle of usage undermines criticisms that Marshall applied judicial discretion in favor of non-Native American interests.

Marshall recognized the Cherokees’ claim to their lands by usage, which he defined in terms of Native American rather than European practices. A narrow interpretation of Pufendorf’s usage principle would have vested Native Americans with rights only for their actual usage, which at the time of discovery was confined to hunting. Marshall’s broad interpretation in *Worcester v. Georgia* took into account that activities might change over time. In recognizing the Cherokees’ rights, Marshall stated that “it could not be a matter of concern [to the United States], whether their [the Cherokees’] whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.”

Cornelius van Bynkershoek, recognized as a great “positivist” among the continental jurists, forged a critical link between Pufendorf and Emmerich de Vattel. Stressing treaties, proclamations of sovereign authorities, and tacit agreements between nations, Bynkershoek focused on customary usage, which he called the “mistress of the

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65 *Supreme Court Reports*, 31:550-60.
law of nations." Through emphasis on consent between civil states, he took notions of duty and obligation, previously applied to individuals, and extended them to nations. Some eighteenth and nineteenth century observers such as James Wilson understood the law of nations simply as the law of nature applied to civil states. Nations had the right, indeed duty, of self-preservation. They also were obliged to respect agreements among themselves in order to sustain a community of nations just as individuals were obligated to abide by rules of sociability.

Marshall referred to Bynkershoek in several major opinions. In Schooner Exchange v. McFadon and Greetham (1812), a “very delicate case” in which American citizens claimed ownership of a schooner refitted as a warship by the French when it entered the port of Baltimore, Marshall called Bynkershoek a “a jurist of great reputation.” In the Neireide (1815), another case involving international law in which a Spanish national contested the seizure of his goods during the War of 1812, Marshall drew at length on Bynkershoek’s interpretations of the law of nations and

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67 Cornelius van Bynkershoek, Quaestionum Juris Publici Libri Duo (New York, 1930) translated by Tenney Frank, xlii.

68 James Wilson, The Works of James Wilson, ed. Robert Green McCloskey, 1:148-55. For Wilson, a difference between a nation’s exercise of the right of self-preservation under the law of nature and that of an individual was that the nation required the consent of the people in whom sovereign authority ultimately resided. “By the voluntary act of the individuals forming the nation, the nation was called into existence: they who bind, can also untie: by the voluntary act therefore, of the individuals forming the nation, the nation may be reduced to its original nothing.”

69 Papers of John Marshall, 7:313.
stated “the Court is bound by the law of nations, which is part of the law of the land.”

In Brown v. United States (1814), Marshall referred to Bynkershoek in establishing rights of creditors and debtors.

Marshall’s decisions on Native American rights emphasized three principles endorsed by Bynkershoek—the right of nations to their self-preservation, the primacy of proclamations, treaties, and agreements in international law, and the importance of consent. In Worcester v. Georgia, Marshall affirmed that “the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people...are all involved in the subject now to be considered.” He confirmed the legitimacy of treaties, which “explicitly” recognized the “national character of the Cherokees, and their right of self-government.”

In Johnson v. McIntosh, Marshall recognized the Doctrine of Discovery as a tacit agreement or customary practice between the civilized states of Europe, which also served as evidence of their consent. Customary usage implied consent. “Discovery gave title...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.”

The pre-eminence that Marshall accorded proclamations, treaties, and agreements, especially apparent in his last two cases on Native American rights, reflected his commitment to positive law. In Cherokee Nation v. Georgia, Marshall partially based his ruling rejecting the status of the Cherokees as a foreign nation on

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70 Papers of John Marshall, 8:5,76; Benjamin Munn Ziegler, The International Law of John Marshall (Chapel Hill, 1939), 12; Ziegler pointed out that in fact Marshall’s “adjudications on international law were three times more numerous than those involving questions of constitutional law...between 1801 and the time of Marshall’s death in 1835, there were 1215 cases decided. Of these there were 62 involving constitutional questions, and 195 involving questions of international law or in some way affecting international relations.

71 Supreme Court Reports, 31:556.
treaties to which the tribe had given its consent. In *Worcester v. Georgia*, Marshall invoked the Proclamation of 1763, the Treaty of Hopewell, and the Treaty of Holston—agreements to which Great Britain and the United States as its successor had assented—as the basis for his opinion on the Cherokees' rights to their land and to self-government. Marshall made it clear that in his view the Constitution confirmed the status of treaties. In *Worcester v. Georgia*, he asserted “the Constitution, by declaring the treaties already made, as well as those to be made, to be the law of the land, has adopted and sanctioned the previous treaties with the Indian nations.”

ii) *The Scots*

In dealing with Native American land claims and human rights cases such as *The Antelope*, Marshall wrestled with issues that preoccupied the leading thinkers of the Scottish Enlightenment. Similar to the ‘moral scientists,’ these philosophers sought to reconcile rights based on natural law theory with positive laws reflecting the “moral life and moral institutions of humanity in social and historical terms.” They developed notions of subjective or adventitious rights and moral agency, which they believed shaped the evolution of man's sociability. The Scots, especially Hume and Smith, viewed history as “essential to moral theory, because moral consciousness, moral judgement, and moral institutions were formed by the accommodations reached at a given stage of society and in a given type of government.”

For Hume, morality reflected man’s existence in society and the values prevailing at a specific moment. Justice was a social virtue and depended on public utility or

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73 *Supreme Court Reports*, 31:559.
"sympathy" with the advantage or general interest of society. He suggested that there was no "natural" connection between the general interest and respect for the rules of justice; they became connected only through "artificial convention," the adoption of a "social value system." Justice did not originate in a state of nature except in that it reflected man's natural sociability. Social institutions, including property and contracts, were "no more than practices" introduced in accordance with "the particular state and condition" in which men found themselves. Hume recognized, however, that justice was essential to the preservation of society itself. He stressed that "human nature cannot, by any means, subsist without the association of individuals; and that association never could have place were no regard paid to the laws of equity and justice. Disorder, confusion, the war of all against all are the necessary consequences of such a licentious conduct." 75

Hume's influence may have helped to distance the chief justice's opinions from natural rights theory. In Johnson v. McIntosh, Marshall stated "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 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 simply those principles of abstract justice...but those principles also which our own government has adopted in the particular case, and given us the rule for our decision." Marshall's confirmation of the European Doctrine of Discovery also was consistent with Hume's contextual approach. "If the principle has

been asserted in the first instance, and afterward sustained; if a country has been acquired under it; if the property of the great mass of the community originates in it,” wrote Marshall, “it becomes the law of the land, and cannot be questioned.” This theme was evident again in his opinion on America’s claim of absolute title to Native American lands. “The British government, which was then our government, and whose rights have passed to the United States” noted Marshall, “asserted a title to all the lands occupied by the Indians... 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.” Marshall reasoned that the title had been socially constructed at a certain moment; social conduct had been fashioned accordingly; land titles could not be questioned, nor the rules undone.

Marshall’s Native American rights opinions were also fashioned in accordance with Hume’s definition of property. Hume argued that property was “anything which it is lawful for [a man], and for him alone, to use.” He indicated that property could be distinguished by reference “to statutes, customs, precedents, analogies, and a hundred other circumstances—some of which are constant and inflexible, some variable and arbitrary.” Marshall adopted this approach, grounding his opinions in positive law—the Constitution, treaties, proclamations, precedents, and customs including practices legitimated by the emerging law of nations.

It is also difficult to divorce Marshall’s jurisprudence from the doctrines of Adam Smith. Smith reinforced the idea of justice as a social virtue through his development of

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76 Papers of John Marshall, 9:279-301.
77 Hume, 28.
the "impartial spectator." Justice was dependent on "the very existence of community" and the impartial spectator extended sympathy in accordance with a given social context. Smith emphasized the historical development of adventitious rights and advanced a view of ‘four stages of civilization,’ which influenced late eighteenth century and early nineteenth century thought.78

According to Smith, although rights were key to man’s living socially, they were not "pre-social moral equipment" that existed in a state of nature. They reflected the state of society, which depended on the evolution of civilization or moral progress. Smith was careful to distinguish between natural and adventitious rights. The former related to private law and concerned the individual’s personal integrity and reputation; the latter emerged with the advancement of civilization and pertained to property, family, and public or municipal law. Smith believed that adventitious rights had a history and could “only be explained in their historical context.”79

Smith’s sympathy mechanism—the impartial spectator—determined how justice was established, how things were perceived or looked upon. Smith stressed that the nature and complexity of law changed according to man’s civilizing progress such that the history of the law was embedded in “the present state of the law.” In elaborating the four stages of civilization—"the age of hunters, the age of shepherds, the age of agriculture, and the age of commerce”—Smith argued that the concept of property was

78 Samuel Stanhope Smith, 59; In his work that Marshall owned, he addressed Adam Smith’s concept of the impartial spectator and the Scottish Enlightenment concern with moral sentiments. He stated “…the perceptions of the moral sense, and the sanctions of its conscience, which is only the moral sense speaking with authority, have an ulterior view to a law, and to a Supreme Judge, to which each man, in his calm and reflecting moments, feels himself amenable…These sentiments are essentially connected with the perceptions of duty and obligation, which peculiarly belong to the moral sense.

inherently related to the "essential activities" of society. In the ages of hunters and shepherds, property was confined to a person's immediate possessions such as clothing and tools for hunting or herding. With the development of agriculture, the notion of property was extended to land, "the greatest extension it has undergone." According to Smith, property rights defined in terms of European agricultural and commercial development did not yet exist in Native American hunter societies. Rights that existed were those of occupancy, usage for the predominant activities of hunting and fishing.

Marshall's discourse on savagery and his comments on differences between European and Native American civilizations suggest that he shared Smith's views on civilizing progress. Marshall, however, did not limit Native American rights to their "essential activities" or, as seen in discussing Pufendorf, their actual usage. Indeed, in Johnson v. McIntosh—almost a decade before Worcester v. Georgia—Marshall was careful not to restrict Native Americans' 'internal' political sovereignty, particularly with regard to their ability to develop their own laws and institutions, including property. In an often overlooked passage, he stated:

Admitting to their [Native Americans'] 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 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 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 [their decision].

In sharp contrast to criticisms of him, Marshall recognized Native American internal

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80 Smith, Lectures on Jurisprudence, LJ(A) i, 53; Haakonsen, Science, 162.
81 Papers of John Marshall, 9 281-4.
political sovereignty. Far from seeking to stifle Native American initiative or wrest their lands, Marshall gave America’s original inhabitants wide rein to develop their communities through their own laws and institutions.\footnote{Marshall’s view of Native Americans and their property rights was much more favorable than that advanced by William Robertson whose *History of America*, adopted a Smithian approach to civilizing progress but showed little appreciation of Native American culture or political order. Robertson stated “In every inquiry concerning the operations of men when united together in society, the first object of attention should be their mode of subsistence. Accordingly as that varies, their laws and policy must be different. The institutions suited to the ideas and exigences of tribes, which subsist chiefly by fishing or hunting, and which have as yet acquired but an imperfect conception of any species of property, will be much more simple than those which must take place when the earth is cultivated with regular industry, and a right of property, not only in its productions, but in the soil itself, is completely ascertained...While the idea of property is unknown, or incompletely conceived...while the spontaneous productions of the earth, as well as the fruits of industry, are considered as belonging to the public stock...where the right of separate and exclusive possession is not introduced, the great object of law and jurisdiction [property itself] does not exist.” William Robertson, *The Work of William Robertson*, Volume 5, *History of America*, (Edinburgh, 1851) 309, 324.} The constraints that he specifically imposed on them related to the United States’ right to extinguish Indian title and the Cherokees’ protectorate status with regard to diplomatic and commercial relations.\footnote{Protectorate status, a term used by Vattel, is discussed below.}

Similar to other late eighteenth and early nineteenth-century Americans, Marshall was influenced by the Scottish Common Sense philosophy championed by Thomas Reid, Dugald Stewart, and their followers.\footnote{James Wilson, in particular, has been considered instrumental in disseminating this philosophy. Educators, including Samuel Stanhope Smith, who occupied influential academic positions in the new nation’s colleges also played important roles. With respect to Marshall, scholars have seen links through Archibald Campbell and James Thomson. James Wilson, *The Works of James Wilson*; Newmyer, 7.} Their empiricist approach incorporated notions of agency and duty within a framework of socially constructed justice. The “end of law” was the protection of citizens in “all that they may lawfully do, or possess, or demand.” Although the general right to property was a natural right, individuals “acquire[d] the right to a specific piece of property.” Man was obliged to respect rights of others; individual claims were not to conflict with the common good but contribute to it. This approach “heavily circumscribed” rights to property and underpinned Reid’s proposition
that "we may occupy only such parts of nature as are necessary for the satisfaction of the needs and wants of ourselves and those dependent upon us, and we may do so provided that we do not injure others in their similar rights."85 Reid’s application of the principles of obligation and duty were especially important. Morally, he saw no difference between "a stated contractual obligation" and one that was "tacitly implied." A contract—written or tacitly implied—created an "office," which carried obligations.

In his discussion of moral agency, Reid emphasized the ability to judge reasonably and morally what was willed. He viewed "proper instruction and practice" as essential for the development of the moral faculty. Children or persons with mental defects, temporary or permanent, were typical of people who might fall into a category of deficient agency—individuals who could be regarded as incompetent to judge what they willed.86

In Worcester v. Georgia, Marshall’s recognition of the Cherokee as a "people distinct from others," a "nation" that had not surrendered the right of self-government, was consistent with Reid’s principle that obligations resulting from an implied contract were equivalent to those of a written contract. Marshall reasoned that a contractual relationship existed between the Cherokees and the United States and deemed it essential that the intentions of the contracting parties be considered. Marshall cited the Constitution as evidence of an implied relationship between nations. "The Constitution, by declaring treaties already made, to be the supreme law of the land," wrote Marshall, "has adopted and sanctioned the previous treaties with Indian nations, and consequently

85 Thomas Reid, An Inquiry into the Human Mind, ed. Timothy Duggan, (Chicago, 1970), 238-9,247; Haakonsen, Natural Law, 205-6. These views underpinned colonists' arguments that Native American land ownership should be limited to a quantity of land required for subsistence. Extensive hunting grounds infringed on the colonists' rights. Such arguments were adopted by the Connecticut authorities in the lengthy case of The Mohegan Indians v. Connecticut (1704-1772).
admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth.’’

The notion of pupilage or wardship that Marshall elaborated in *Cherokee Nation v. Georgia*, however, was inconsistent with Reid’s definition of deficient agency. Marshall regarded Native Americans as having the capacity to reason and judge their interests. He stressed that Native American rights to their lands could not be extinguished except by their “voluntary cession” to the government, a clear indication that he recognized their decision-making capacity. In *Worcester v. Georgia*, Marshall noted that Native Americans were “capable of making treaties” and exercising their the right to self-government. These remarks contradict late twentieth-century criticisms of Marshall, which linked his notion of pupilage to Francisco Vitoria. Although Marshall’s view of history embodied different stages of civilization, in contrast to Vitoria he never questioned the capacity of Native Americans to reason. The state of

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87 *Supreme Court Reports*, 31, 559-60.
88 *Supreme Court Reports*, 30:17; 31:559.
89 Robert Clinton, Nell Jessup, and Monroe Price advanced the idea that Marshall “imparted” Vitoria’s views into American law. They quoted Vitoria: “Although the aborigines in question are...not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. I say there would be some force in this contention; for if they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay, our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit better or little better than such so far as self-government is concerned, or even wild beasts, for their food is not more pleasant and hardly better than that of wild beasts. Therefore their governance should be entrusted to people of intelligence. See Robert Clinton et al, *American Indian Law* (Charlottesville, 1973),15-16.
pupilage he had in mind is better understood with reference to the doctrines of Vattel and the developing law of nations.

iii) Vattel

Peter and Nicholas Onuf have remarked that among works on international law, Vattel’s *Law of Nations* was “unrivaled” in terms of its “influence on the American founders.” Marshall proved to be no different from them. Early in his career, he referred to Vattel in the British debt case, *Ware v. Hylton*. As Minister to France, he cited the *Law of Nations* in a memorial to Talleyrand. When Marshall was Secretary of State, Vattel’s treatise was the “authoritative text” for the Department of State.  

In view of the many cases on international law that came before the Supreme Court and the fact that Marshall’s tenure as chief justice coincided with the “second stage in the evolution of the modern law of nations” in which Vattel was the most influential figure, the continental jurist was a logical authority for Marshall. He used Vattel as a reference on the rules of diplomatic immunity in *Schooner Exchange v. McFadon and Greetham* when he exempted the ‘American’ vessel that had been refitted as a French warship from domestic law. In dissenting from the majority in *The Venus*, Marshall quoted Vattel on the rights of “perpetual inhabitants” and citizens residing in foreign countries in times of peace. In his “Friend of the Constitution” essays following *McCulloch v. Maryland*, Marshall demonstrated his mastery of Vattel by assailing Hampden’s interpretation of his writings. Marshall, having reflected on Vattel’s

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doctrines and their applicability to the United States, turned the authority of the continental jurist against his adversary.

Vattel provided at least two supporting arguments for Marshall’s rulings on occupancy title. The first was contained in his discussion of “inhabitants,” which Marshall cited at length in *The Venus*. Vattel argued that a distinct class of individuals, which he referred to as inhabitants, could be justified in a civilized state. Indeed, he suggested that there might be a class of individuals who could be regarded as “perpetual inhabitants,” persons permitted to reside in perpetuity within a civilized state but denied full citizenship. Vattel considered that such individuals might be granted only the benefits that law or custom accorded them. They represented “a kind of inferior order…united to the society without participating in all its advantages.” According to Vattel, the sovereign authority had discretion concerning the rights that might be bestowed on these inhabitants. If custom dictated their exclusion from full rights to property, the state could enact laws to this effect.

The second argument resulted from Vattel’s elaboration of the Doctrine of Discovery, which he applied differentially to *vacant* and *non-vacant* lands. In the case of the former, Vattel noted that “a nation [that] finds a country uninhabited, and without an owner, may lawfully take possession of it; and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation.” Probably with the Americas in mind, Vattel added “if at the same time two or more nations discover and take possession of an island or other desert land without an owner, they ought to agree
among themselves, and make an equitable partition; but, if they cannot agree, each will
have right of empire and the domain in the parts in which they first settled.” Vattel’s
vision was clearly Eurocentric and designed to promote a law of nations that reflected
the European balance of power, commercial interests, and ‘civilized’ values.

With regard to non-vacant lands, Vattel adopted the principle of effective land
use. Building on premises of usage established by Pufendorf, Vattel stipulated that the
law of nations did not “acknowledge the property and sovereignty of a nation” unless it
formed settlements or made “actual use” of discovered lands. Vattel focused on the case
of “the original inhabitants of America.” He remarked that Native Americans occupied
vast expanses of land at a time when the European population was growing rapidly and
required new land. Vattel asked whether “a nation may lawfully take possession of some
part of a vast country, in which there are none but erratic nations whose scanty
population is incapable of occupying the whole.” Displaying an Old World bias, Vattel
responded to his own query:

We have already observed in establishing the obligation to cultivate the earth,
that those nations [Native American tribes] cannot exclusively appropriate to
themselves more land than they have occasion for, or more than they are able to
settle and cultivate. Their unsettled habitation in those immense regions cannot
be accounted a true and legal possession; and the people of Europe, too closely
pent up at home, finding land of which the savages stood in no particular need,
and of which they made no actual and constant use, were lawfully entitled to take
possession of it and settle it with colonies. The earth…belongs to mankind in
general and was designed to furnish them with subsistence: if each nation had,
from the beginning appropriated to itself a vast country, that people might live by
hunting and fishing, and wild fruits, our globe would not be sufficient to maintain
a tenth part of its present inhabitants. We therefore do not deviate to confining
the Indians within narrower limits.91

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91 Vattel, 100
It is noteworthy—especially in light of the criticisms of him by Berman, Williams, Norgren, and others—that Marshall never embraced this Vattelian argument. Despite his reference to efficient land use in *Johnson v. McIntosh* when he mused “to leave them [Native Americans] in possession of their country was to leave the country in wilderness,” Marshall confirmed Native American land titles and stressed that they could not be extinguished without their consent. He did not concur with Vattel’s conclusion that “the savages of North America had no right to appropriate” vast expanses of land in the New World. To the contrary, in *Worcester v. Georgia*, Marshall adopted a broad interpretation of the usage criteria, noting “hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.”

Vattel, however, may have provided the foundations for Marshall’s notion of *pupilage*. In discussing the expansion of agriculture onto pastoral lands, Vattel recognized a responsibility on the part of advancing agriculturists to ensure the transition of pastoral peoples to a new way of life. Agriculturalists could “without injustice” expand into an area only if they taught the original inhabitants “the means of rendering” the land sufficient for their needs “by cultivation of the earth.” The advancing hosts had a responsibility for the civilizing progress of the original inhabitants, who effectively became wards until they had acquired the skills required to survive in a ‘higher’

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92 *Papers of John Marshall*, 7:229-41; *Supreme Court Reports*, 31:556.
Marshall's notion of pupilage embodied such responsibility. The relationship was one of protection—the ward by the guardian—and Marshall was careful to point out that "protection [did] not imply the destruction of the protected." He considered that the United States' role as protector of Native Americans, their lands, and their sovereignty was enshrined in treaties and the Constitution. In this regard, Marshall was at odds with many of his fellow Virginians, even moderate republicans whose views were represented by James Monroe. "The hunter state can exist only in the vast uncultivated desert," declared the fifth president. "It yields to the more dense and compact form of civilized population, and of right it ought to yield, for the earth was given to mankind to support the greatest number of which it is capable, and no tribe or people have the right to withhold from the wants of others more than is necessary for their own support and comfort." Criticisms voiced by Berman, Williams, Norgren, and others might have been more appropriate for Marshall's fellow Virginians than for him.

93 Ibid, 171.
94 Supreme Court Reports, 31:556.
95 James Monroe, The Writings of James Monroe, ed. Stanislaus Murray Hamilton, (New York, 1969), 40. Monroe's argument was similar to that of Thomas Reid. Monroe, like Marshall, studied under Archibald Campbell.
CHAPTER IV
MARSHALL, "THE OTHER," AND THE CANADIAN SUPREME COURT

Because of Marshall’s language of “savagery,” scholars such as Berman, Williams, and Norgren have regarded his opinions as having reinforced the image of Native Americans as “the other.” Some have viewed his decisions as a watershed. Prior to his rulings, Native Americans were an “other” but they occupied or at least shared center stage in the New World. Marshall’s decisions helped to deprive them of full participation and citizenship in the new Republic and thus charted a course that marginalized them. He brandished the white man’s law against them.

Although Marshall recognized Native Americans as “the other,” a distinct people, he acknowledged them as having rights accorded to any people exhibiting “social faculty” and reason. He interpreted their rights according to the legal thought of his day—and he did so broadly. Marshall’s elaboration of Indian title was consistent with the emerging law of nations. His rulings were rooted firmly in treaties, proclamations, and the Constitution. Marshall’s judgments were consistent with prevailing legal thought, including principles of consent, duty, obligation, and custom and usage. His view of pupilage reflected Vattel, not Vitoria.

What many scholars have failed to recognize is that Marshall’s discourse on savagery was incidental to his opinions. His language merely reflected historical perceptions of his time, which drew on the colonial experience and views of differences in customs and habits embodied in the contemporary understanding of civilizing
progress set out in the works of scholars such as Adam Smith and disseminated by writers like Samuel Stanhope Smith and William Robertson. Marshall, after all, was a product of the Virginian frontier, the Revolutionary War and the Scottish Enlightenment.96

More important, a review of nineteenth-century international jurisprudence supports this interpretation. A somewhat obscure dispute in Canada between a lumber company licensed by the Canadian government and the Province of Ontario involving a tract of land north of Lake Superior independently tested Marshall’s ruling. The dispute forced the justices of the Supreme Court of Canada to revisit the issues that Marshall confronted in his cases on Native American rights. The parallels with the challenges faced by Marshall were striking. The conflict arose two decades after Canadian Confederation. The issues involved private interests but raised concerns about Native American land rights and the division of powers between two levels of governments. In *St. Catharines Milling and Lumber Company v. The Queen* (1886), the Canadian jurists were compelled to consider the law of nations and render judgments based on treaties, proclamations, and consensual agreements between nations. They had to revisit Marshall’s sources and reasoning. On balance, their opinions agreed with those of Marshall. In addressing specific situations, notably treaty negotiations in the Detroit region, their analysis reinforced his conclusions.

In the first recorded *St. Catharines* opinion, Justice W. J. Ritchie was forthright, though cryptic, and echoed Marshall.97 “I think the crown owns the soil of all

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96 Newmyer stresses these points in his first chapter; see Newmyer, 1-68.
97 The Canadian justices filed separate opinions.
unpatented lands,” stated Ritchie, “the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title.” Ritchie addressed the issues from an international rather than a Canadian perspective. In fact, he quoted Marshall’s trusted associate, Joseph Story, on the crown’s exclusive right to alienate Indian land noting “it is to be deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure... The crown has the right to grant the soil while yet in possession of the Indians, subject, however, to their right of occupancy.”

Justice Strong delivered a lengthy opinion comprising some forty pages. He also took a North American perspective, which included a review of Marshall’s decisions. Similar to the American chief justice, Strong underscored the need to examine “the surrounding circumstances” and “history” in ruling on the Native American land claims. In reviewing events during the period when Sir William Johnson acted as Superintendent of Indian Affairs for the Imperial Government and the Proclamation of 1763 was announced, Strong followed an approach similar to that of Marshall. Stressing the proclamation and treaties signed with Native Americans, Strong concluded that the crown recognized a “usufructuary title in the Indians to all unsurrendered lands.” This title “sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making

98 Supreme Court Records (Canada), 13:599-600.
any valid alienation otherwise than to the crown itself.” The Crown had absolute and ultimate title. In supporting his ruling, Strong referred to Marshall’s reasoning in *Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia*. He declared that Indian title could only be “properly surrendered or extinguished” by formal treaty, which was an exclusive right of the Crown. In his summary, Strong referred specifically to the American context:

To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil.  

Strong also agreed with Marshall’s reasoning that the Indian title set out in the Proclamation of 1763 was not disturbed by either the Quebec Act of 1774 or American Independence. “The Supreme Court of the United States had to deal directly with this identical point of the binding effect as a legislative ordinance, of the proclamation of 1763, and with its operation at a date subsequent to the Act of 1774,” remarked Strong. In discussing the disputed land claims in *Johnson v. McIntosh*, he agreed with Marshall noting “the lands there in question were within the territory, which, by the Treaty of Versailles (1783) settling the boundaries between Canada and the United States, became part of the United States and was known as the Territory of Illinois, and these lands had been purchased from the Indians…in contravention of the terms of the

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99 *Supreme Court Reports* (Canada), 13:602-39.
Justice Gwynne provided another detailed opinion stressing the Proclamation of 1763, which he called an "Indian Bill of Rights." Like Marshall, he documented the series of treaties that had been signed with Native American tribes as evidence of Native American rights to the soil and the Crown's exclusive right to extinguish Indian title. He cited treaty negotiations that preceded American Independence, including General Thomas Gage's extinguishment of Indian title to lands along the Detroit River. Gwynne confirmed "the most explicit recognition by the crown of the Indian title for upwards of a century in the most solemn manner—by treaties entered into between the crown and the Indian nations in council assembled according to their national custom, and by deeds of cession to the crown and of purchase by the crown."\textsuperscript{101}

The opinions of these Canadian Supreme Court jurists and their consistency with Marshall's jurisprudence incorporated contemporary legal thought. If Marshall's decisions on Native American land rights represented a watershed, it was one that marked a transition to positive law, not the intentional marginalization of America's original inhabitants by an 'interested' chief justice.

\textsuperscript{100} Ibid.
\textsuperscript{101} Supreme Court Reports (Canada), 13: 650-75.
CHAPTER V
CONCLUSION

John Marshall left an “astounding” legacy in American constitutional law that still lingers over the United States Supreme Court in the twenty-first century. In recent decades, it has been tarnished by historians who have supported the view that Marshall, motivated in part by political, commercial, or personal interests contributed to Native Americans becoming “casualties” of conquest. The sentiments that he shared on the eve of his final Native American rights decisions with his trusted associate Joseph Story, however, undermine these scholarly criticisms of Marshall. In particular, they call into question critiques put forward by Jill Norgren alleging political motivations and by Eric Kades who emphasized commercial interests. They also clash with R. Kent Newmyer’s allusions to the influence of Marshall’s personal financial interests on his judicial opinions. A review of Marshall’s correspondence and Native American rights decisions does not suggest that the legendary chief justice sought to use the judicial branch during his tenure as a means to advance a political agenda or commercial interests at the expense of a people who he considered no longer threatened the expanding new nation. Marshall was acutely aware of the conditions of America’s original inhabitants as they struggled for subsistence and cultural survival; he demonstrated much sympathy for their plight. The historical evidence indicates that rather than an individual intent on fostering economic and commercial interests at all

costs, he believed strongly that committing a defenseless people to "the general burial ground of their race" would "impress a deep stain on the American character."\textsuperscript{103}

A re-examination of the foundations of Marshall's opinions on Native American rights also does not support the criticisms of Howard Berman or the harsher allegations of Robert Williams to the effect that he intentionally sought to develop a hierarchical framework of law in which America's original peoples would be established as a subordinate "other," neither citizens nor aliens. Viewing the law of nations as an integral part of the new Republic's jurisprudence, Marshall embraced a positivist approach grounded in the doctrines of renowned jurists and scholars including Hugo Grotius, Samuel Pufendorf, Cornelius van Bynkershoek, and Emmerich de Vattel. He also leaned toward philosophies of socially constructed justice advanced by leading thinkers of the Scottish Enlightenment including David Hume, Adam Smith, and Thomas Reid. These influences are not surprising given that Marshall was schooled in Virginia where the ideas of leading Enlightenment thinkers were incorporated in the legal curriculum and disseminated by educators. The works of the moral scientists were held widely in libraries of the Old Dominion. Marshall also had a penchant for the "political essays of the day," which frequently emphasized man's reason, innate sociability, contractual rights and obligations—notions that lay at the very core of prevailing philosophies of justice and contemporary treatises on international law. Marshall recognized these principles in rendering judgment on the rights of Native Americans.

\textsuperscript{103} Story, 463; Papers of John Marshall, 11:178-9.
Marshall’s positivist approach was apparent early in his tenure on the Court. In *Fletcher v. Peck*, he classified a grant as a contract in accordance with Pufendorf and established the contract clause as a means to restrict state legislatures from overstepping their jurisdictions. In this manner, he transformed politically explosive issues into legal questions that could be resolved through reference to a growing body of written laws.

In *Johnson v. McIntosh*, Marshall’s elaboration of Indian title incorporated distinctive, positivist leanings that built upon the Doctrine of Discovery as set forth by Grotius, Pufendorf, and Vattel. He ruled explicitly that the Doctrine of Discovery conferred on European nations only a right to acquire Indian title. Indian claims, existing from time immemorial, were not extinguished—nor could they be—without tribal consent.

Marshall’s *Cherokee Nation v. Georgia* and *Worcester v. Georgia* rulings took account of Pufendorf’s doctrines on prescription and boundaries as well as Bynkershoek’s views on consent, treaties and tacit agreements between civil states. In framing his opinions, Marshall adhered to principles of socially constructed justice consistent with Scottish Enlightenment thinking. In *Johnson v. McIntosh*, Marshall specifically distanced his opinion from natural rights theory and ruled on the basis of “those principles which our government has adopted.”\(^{104}\)

In light of allegations that Marshall’s decisions were motivated by political, commercial or special interests, his broad interpretation of Pufendorf’s principle of usage in *Worcester v. Georgia* and his rejection of Vattel’s argument that the effective use of non-vacant lands could serve as grounds to justify European land claims are

remarkable. Marshall’s interpretation of the language of the treaties of Holston and Hopewell, as well as his determination that the Constitution confirmed the validity of these agreements with the tribes in question, also indicated that rather than prejudicing rights of Native Americans Marshall sought to protect them against the advancing hosts in accordance with positive law. Far from seeking to stifle Native American initiative or wrest their lands, Marshall sought to give America’s original peoples wide rein to develop their communities through their own institutions. The state of ‘pupilage’ that Marshall envisioned in *Cherokee Nation v. Georgia* was not consistent with the wardship advanced by Francisco de Vitoria, which assumed ‘deficient agency’ on the part of America’s first people. Marshall acknowledged their ability to reason and he certainly recognized their treaty-making capabilities. His notion of pupilage is better understood in the context of Vattel’s writings on the responsibilities of agriculturists toward pastoral peoples when they occupied their lands. Marshall’s definition of domestic dependent nations was consistent with the continental jurist’s discussions of the obligations and rights of civil states entering into protectorate relationships.

Given the controversies occasioned by Marshall’s Native American rights decisions, the opinions of the justices of the Canadian Supreme Court in the nineteenth-century case of *St. Catharines Milling and Lumber v. The Queen* assume particular relevance. The Canadian justices were obliged to revisit many of the issues confronted by Marshall. Similar to the American chief justice, the Canadian justices grounded their opinions in positive law. They adopted an international perspective and their
interpretation of proclamations and treaties concurred with those of Marshall. Their methodological approach to the issues was similar if not identical.

In conclusion, historians might be well-advised to take notice of how one of the most astute observers of the day, Cherokee Chief John Ross, framed his arguments as his people were “threatened with removal or extinction.” “We claim it [justice]” asserted Ross, “by the strongest obligation which it imposes on them [the United States]—by treaties.”105 Marshall agreed—any other view would have been a denial of positive law. If Marshall’s decisions on Native American land rights represented a watershed, it was one that marked a transition to positive law, not the intentional marginalization of America’s original inhabitants by an interested chief justice.

105 Indian Affairs, 18th Congress, no. 208.
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VITA

Gordon S. Barker