Pagans
in the
Promised Land

Decoding the Doctrine of Christian Discovery

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Foreword

The formative influence of Christian doctrines on U.S. law was once clear and unambiguous. Religious dogmas of fifteenth-century Vatican papal bulls were deployed as the foundation of property law, nationhood, and federal Indian law in the early nineteenth century. Court decisions bound U.S. law to the world of Christendom and Christian imperialism. This process was not hidden or mysterious, nor was it a conspiracy among judges and priests. It was long-range planning for the takeover of a continent and a hemisphere. It was the theory that guided colonial practices. It is the story of Pagans in the Promised Land.

Before we go further, let us distinguish some core terminology. There is a difference between Christ and Christianity: the former is a title given to Jesus of Nazareth by those who believe him to be the Messiah of the family of Abraham; the latter is the teachings these believers produced over many years in the institutional development of their church. Christianity, the belief system of the church, is different from Christendom, which is an amalgamation of churches and states. Christendom consists of alliances among secular princes and priestly authorities; it culminates in the doctrine of divine right of kings and popes.

When we make these important distinctions, we can begin to understand the possibility of differences between the teachings of Jesus and the political and legal doctrines of a church-state complex operating in his name. Jesus is not reported as having ever uttered any words about American Indians, but the official organizations of Christendom most certainly did utter words and enact laws and polices affecting Indians, from the time of first contact to the present. As Newcomb demonstrates, the doctrines of Christendom informed the thinking of jurists and other lawmakers who created property and federal Indian law.

To put it in a nutshell, Pagans in the Promised Land is not an attack on Jesus or Christianity. It is a careful and impassioned exploration of the ways that federal law relating to property, nationhood, and American Indians grew from Christendom. The basic story holds true if we reverse Newcomb’s formulation, that Christendom is an aspect of federal Indian law, and say that federal Indian law is an aspect of Christendom. To be specific, property and federal Indian law—the
body of rules created by the U.S. government to define the indigenous peoples of this continent, their land rights, and the land rights of the colonizers—a continental manifestation of the world-historical mission of Christendom to bring all Creation into its domain.

I emphasize these distinctions to help readers who are unfamiliar with the history of church and state to get past resistance to the charge that Christendom is linked to colonialism and oppression. Readers familiar with Vine Deloria Jr. and God Is Red will have an easier time with this material because they will already distinguish between religion and spirituality. The point here is for the reader who is sensitive to Christian teachings about Jesus to be open to learning about the problematic history of Christendom in relation to U.S. law.

One more distinction is necessary, to help us understand what Newcomb means when he writes that federal Indian law is the result of the “white man’s imagination.” This is a statement about skin color. It is a statement about demographics and the historical development of a conceptual framework. Indeed, the white man’s imagination has spread to the minds of many who are not white. The target of Newcomb’s critique is a metaphorical, rather than a literal, whiteness. It’s about a way of thinking, not about the color of the people who think that way.

We may ask about the apparent acquiescence of so many indigenous peoples to the “white man’s imagination”: Did not Indians sometimes willingly accept the rules of their “discoverers”? Is this evidence that there was no oppression? The best response is to look at the demographics of discovery. As Charles C. Mann documents in 1491: New Revelations of the Americas before Columbus, the colonial projects of “discovery” were not possible until indigenous peoples had been decimated by strange diseases, their social relations disrupted and destroyed by widespread death.

From the viewpoint of cognitive theory, which Newcomb utilizes throughout his analysis, we may use Steven L. Winter’s terminology to say that the “sedimented tacit knowledge” and “cognitive structures of social meaning” of these peoples were nearly rendered obsolete by the devastation. The invaders’ worldview filled the deep gaps that had opened in their cultures.

Newcomb’s use of cognitive theory stirs up the deepest parts of today’s conventional thinking about law, the sedimented tacit knowledge and cognitive structures of social meaning of twenty-first-century American life. These are the deep layers of consciousness that support our everyday understanding and involvement with legal institutions. Cognitive theory also suggests that people resist challenges to their worldview unless or until it is obviously not functional. The question is whether and to what extent federal Indian law is no longer functional. The fact that federal Indian law is widely, almost universally, acknowledged to be riddled with contradictions does not mean it is perceived as not functional. Many areas of law carry built-in contradictions, but these areas are accepted and maintained because they solve discrete disputes, even if they cannot be satisfactorily explained in theory.

Dysfunction in federal Indian law is evident from several perspectives. Indigenous peoples throughout the Americas are asserting self-government, directly challenging claims of state sovereignty. State and nonstate entities are responding, sometimes violently, with efforts to assimilate indigenous peoples into standard state structures. International organizations, notably the United Nations Permanent Forum on Indigenous Issues, are taking up these matters of self-government and forced assimilation, questioning existing doctrines and practices. Indigenous peoples’ issues are a major part of the global movement toward expanding human rights that is challenging conventional understandings of government.

Newcomb challenges us to accept the effort of rethinking federal Indian law, land rights, and Indian nationhood. If we are surprised or angered by what his research has found, we must work through these reactions to study the documents he presents. This is a book to study, not simply to read. It cracks the code that explains the seminal U.S. Supreme Court case Johnson v. McIntosh, in which “Indian occupancy” and “discoverer’s title” intersected. Newcomb’s analysis of this cornerstone of U.S. law raises the stakes of legal analysis far beyond antiquarian concern for old cases. His work of decoding is akin to Michel Foucault’s “archaeology” of knowledge: It is not the history of the past but the history of the present telling us where we are in the law of property and nationhood and how we got there.

The fact that U.S. law is a precedent-based system means that legal history is always a history of the present. Each contemporary case rests on interpretation of previous cases. Therefore, a problem identified in a precedent case sends shock waves through subsequent cases. Sometimes a precedent must be overturned to make way for deep change in law, as when the doctrine of “separate but equal” was overturned to make way for civil rights equality.
The religious doctrine in Johnson v. McIntosh is at the core of federal Indian law and of all property title derived from colonization and “discovery,” as the Supreme Court stated when it rendered the decision, saying that “the property of the great mass of the community originates in it.” Federal Indian law is the lynchpin of property law in the United States. In light of this precedent that has never been overturned, we can see that the United States is not yet in a postcolonial era. Pagans in the Promised Land shows us the conceptual threshold over which the law must step if we are to enter that era.

This is not the first book to criticize the concept of discovery, but it is notable for not whitewashing our language to make it politically correct. In the latter years of the twentieth century, efforts were made, particularly in educational curricula, to avoid the term discovery and replace it with contact or encounter. Especially around Columbus Day, it became popular to speak about the “encounter” of the “old” and “new” worlds as a way of trying to forget exactly how bloody this event was. But, as Michael Shapiro wrote, “Societies that...have thought of themselves as a fulfillment of a historical destiny...could not be open to encounters.”

The cognitive underpinnings of discovery and attendant laws cannot be eradicated simply by changing the words we use. As John Trudell said in response to the terminological shift from American Indian to Native American, “They changed the name and treat us the same.” Newcomb’s decoding of the doctrine of discovery is an unpacking, not a relabeling. To decode is to make explicit what was hidden. Decoding implies a new understanding, not just a new way of stating an old understanding.

When Newcomb examines the cognitive models implicated in the doctrine of Christian discovery, he brings to light theological and political ideas that have been buried in legal discourse and exposes them to contemporary understandings of law and human rights that do not allow for religious discrimination. A similar process happened when the U.S. constitutional formula that a black person is three-fifths of a citizen was exposed to twentieth-century ideas of human freedom and equality.

Scholars will someday exhume the doctrines of religious discrimination that inflame our early twenty-first-century world, in which competing theologies of domination over homelands and new lands fuel wars of conquest and attrition. The Judeo-Christian-Islamic family of Abraham, from which Christendom grew, carries forward internal feuds stretching across thousands of years.

Newcomb’s analysis of the chosen-people doctrine at the core of federal Indian law and property law adds a significant piece to the puzzle of why the Abraham family feud persists: it is because theology is inscribed in the cognitive structures of warring humans, informing their daily lives with visions of eternal truths. Because these structures are the hidden foundation of ordinary thinking, they are resistant to ordinary questions. When they are made visible by cognitive analysis, they can be questioned.

One might speculate that the rise of cognitive theory itself is a response to an increasingly desperate human need for reconsideration of accepted truths in light of our actual experiences of life. As the twenty-first century opens, we find ourselves embroiled in competing claims of unitary truth. Our tendency to continue to assert our own unitary truth collides with our experience of multiple realities. Cognitive theory helps us explore and understand the situation. If we are fortunate, the result will be a heightened awareness of the fact that beneath our separate and competing truths is the common humanity we all share.

Pagans in the Promised Land will especially appeal to readers who see legal cases as stories. This is a narrative approach to law that has gained adherents in and out of the academic world. Newcomb’s presentation informs us about the master narratives of federal Indian law. He analyzes these narratives from an indigenous perspective and, in the process, sheds light on the ordinary workings of all law: how legal concepts are generated from argument, persuasion, and experience, and how these concepts become socially “real” in our lives.

Newcomb teaches us that the foundation of property law and federal Indian law is not the Constitution, but the idealized cognitive model of the conqueror seizing a promised land for a chosen people. This cognitive model involves not simply a historical right of conquest in the past, but an ongoing, contemporary right to conquer in the present. Newcomb’s conclusion suggests that the U.S. government applies this same model not only to American Indian nations but also to nations around the world as it tries to assert global hegemony. All the more reason to untangle and decode this model.

Newcomb’s unveiling of the Conqueror and Chosen People—Promised Land models reveals the nakedness of the American empire at its inception and shows that the Bible story of the family of Abraham is, in its own terms, a colonizing adventure. This decoding of the
Preface

To decode the deeper inner workings of federal Indian law and policy, one is well advised to begin with the findings of cognitive science, or the study of the human mind. Thanks to the revolutionary findings of cognitive science and the groundbreaking work of Steven L. Winter, a new theoretical framework known as cognitive legal studies is now in its infancy. This book follows Winter’s lead by making a tentative effort to bring some of the tools and methods of cognitive theory to bear on federal Indian law and U.S. Indian policy. Having been deeply inspired by Winter’s *A Clearing in the Forest* and George Lakoff and Mark Johnson’s *Philosophy in the Flesh*, I stand convinced that cognitive theory provides us with a new way of explaining not only the operations of the human mind, but also how U.S. government officials have sometimes consciously, but more often quite unconsiously, used certain doctrines of Christendom against American Indians. The cornerstone of this use of the dominating mentality of Christendom against Indian nations and peoples in U.S. law is the 1823 Supreme Court ruling *Johnson & Graham’s Lessee v. McIntosh*, a decision written for a unanimous Court by Chief Justice John Marshall.

The background perspective of this book is the original free existence of American Indian peoples in this hemisphere, an existence spanning many thousands of years, an existence that is grounded in the linguistic, cognitive, cultural, moral, and spiritual traditions of our indigenous ancestors. The book’s main objective is to focus on and decode the hidden biblical, or, more specifically, Old Testament, background of the *Johnson* ruling. This work is an effort to make up for the way that most scholars have slided away from a discussion of the fact that Old Testament religious concepts form a significant part of the backdrop of federal Indian law and policy.

This volume came about as a result of my first reading of the *Johnson* ruling in 1981. At the time, I was taking a federal Indian law class at the University of Oregon, and I was surprised at John Marshall’s dichotomy in the *Johnson* decision between “Christian people” and “natives, who were heathens.” For some reason, this brought to mind Vine Deloria Jr.’s book *God Is Red*, in which he explained how, in 1493, Pope Alexander VI declared that “barbarous nations” ought to be “overthrown [subjugated] and brought to the [Catholic] faith itself.” That same semester, I was taking another class, Education and
the Politics of Cultural Change, taught by Professor C. A. Bowers, in which I learned of the importance of metaphors and metaphorical frameworks in the social construction of reality. Bowers helped me understand that metaphors are carriers of and therefore connected to complex metaphorical systems. This insight helped tremendously when it came to reading and interpreting the Johnson ruling. This knowledge about metaphors helped me identify Marshall's argument—tucked away in his discussion of the royal colonial charters of England—that "Christian people" had "discovered" the lands of North America and that this event had given Christian Europeans "dominion" over the lands of "heathens." Professor Bowers's emphasis on the importance of metaphors as constitutive of reality eventually enabled me to realize that when Marshall made a distinction in the Johnson ruling between the religious categories Christian people and heathens, he was unconsciously using the religious metaphors of Christianity to reason about the nature of American Indian existence and Indian land rights.

After gaining this insight, I spent the next decade doing additional research and trying to engage federal Indian law experts in a meaningful discussion about the religious dimension of the Johnson ruling. To my disappointment, I found that most federal Indian law scholars and practitioners were completely unwilling to focus attention on the religious dimension of the Johnson ruling. Through the years, I have found that even those legal experts who are themselves Indian prefer to avoid any open public discussion of the implications found in the explicit mention of "Christian people" in the Johnson ruling. Invariably, those who are strongly committed to the well-entrenched, orthodox view of federal Indian law prefer to think, write, and speak about this area of law in nonreligious and nonbiblical terms. Thus it is customary among such writers and commentators to frame all discussions of the Johnson ruling in terms of a distinction between the secular categories "Indians" and "Europeans."

Chapter 1 gives introductory information about cognitive theory in order to provide the reader with tools and methods needed to follow the arguments throughout the rest of the book. A central focus is the extent that all law, including federal Indian law, is composed of human thoughts and ideas. Given Winter's observation that all human thought is "irreducibly imaginative," it necessarily follows that federal Indian law is also a product of the non-Indian (the white man's) imagination. Comprehending that the ideas of federal Indian law are the result of the non-Indian imagination enables us as Indian people to pose a fundamental question that challenges the United States' assertion of authority over Indian nations generally: "On what basis are originally free and independent Indian nations presumed to be subject to the thought processes, legal or otherwise, and behavioral patterns of non-Indians?"

Chapter 2 explains that much of what we take to be literally true is metaphorically true. Often, what we construe as being literal, such as trees having "roots" and "barks," is metaphorical, based on our imaginative interactions with our social and physical environment. Historically, Europeans who traveled to this hemisphere from Western Christendom, as Western Europe was previously known, mentally projected their own metaphorical concepts onto our indigenous ancestors. The Christian Europeans experienced their ancestors through the prism of their own conceptual systems and categories. Unfortunately, they understood their ancestors to be literally heathens, pagans, infidels, uncivilized, barbarians, subhuman, and so forth. In time, such categories became integral to U.S. Indian law and policy.

Chapter 3 provides a comprehensive explanation of the Conqueror cognitive model, which, it turns out, is a critically important feature of the Johnson ruling. Chapter 4 surveys the Chosen People—Promised Land cognitive model found in the Old Testament. It provides an indigenous account of the Old Testament as a colonial adventure story. Chapter 5 documents the extent to which the Chosen People—Promised Land model has become an integral part of the cognitive system and cultural fabric of the United States.

Chapter 6 unpacks the dominating or imperial mentality of Christendom that Cristóbal Colón (Christopher Columbus) and other conquerors carried with them to this hemisphere. Chapters 7 and 8 use the information gained from the previous chapters to guide the reader through a comprehensive analysis of the Johnson v. McIntosh decision. Chapter 9 illustrates how categories of "negation" have been used to create the appearance that Indian nations are no longer rightfully free. Chapter 10 explains how the religious-legal doctrine of Christian discovery has managed to stay hidden for nearly two hundred years.

The book concludes by suggesting that the doctrines of Christian discovery and dominion ought to be overturned. However, I also make the further point that the findings put forth in this work have global implications. The current foreign policy of the United States,
as the American empire, is predicated on the same Conqueror and Chosen People—Promised Land cognitive models that are found in federal Indian law and policy. I suggest that indigenous knowledge and wisdom holds out the possibility of an alternative path to a more sane future.

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Through my employment as indigenous law research coordinator at the Sycuan Education Department, the Sycuan band of the Kumeyaay nation generously provided me with the livelihood and the stability that enabled me to finally complete what I had begun to call “my never-ending book project.” In particular, I want to express my tremendous gratitude to Hank and Shirley Murphy.

The weekly newspaper *Indian Country Today*—under the inspiring intellectual leadership of Tim Johnson and José Barreiro (both of whom are now at the National Museum of the American Indian)—gave me a regular column that I’ve continued writing since 2001. They thereby gave me a forum that enabled me to refine and distribute many of the ideas that I had gathered and formulated over many years. All that writing honed my skills and helped me finish the book.

I also want to express my deepest appreciation to my Oglala Lakota friend and mentor Birgil Kills Straight. Birgil took me under his wing, so to speak, when we founded the Indigenous Law Institute in 1992 and began traveling internationally on a global campaign to call upon Pope John Paul II and the Vatican to formally revoke the *Inter Caetera* papal bull of 1493. He too believed in my ideas and encouraged me along the way.

Peter d’Errico, professor emeritus at the University of Massachusetts–Amherst, was the first legal scholar to favorably respond to my ideas about the *Johnson v. McIntosh* ruling, when we met over the telephone some seventeen years ago. Since that initial conversation, he has become a friend, a writing mentor, and an intellectual “running partner.” Our innumerable and invaluable conversations, and his editorial eagle eye, have enabled me to refine many of the ideas presented here. It thus made perfect sense to ask him to write...
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Introduction

It is a central contention of this book that the American Indian nations located within the geopolitical boundaries of the United States have always been rightfully entitled to retain a free and independent existence. The U.S. government, however, has denied Indian nations a free existence and expropriated the vast majority of Indian lands by means of a dominating conceptual system that operates in part on the basis of what cognitive theorists call "idealized cognitive models." These mental frameworks and other cognitive operations provide both the means and the background context for understanding such concepts as right of discovery and ultimate dominion in the 1823 Supreme Court ruling Johnson & Graham's Lessee v. McIntosh, a case that is strangely linked to fifteenth-century Vatican papal documents of subjugation, a case that continues today as the cornerstone of federal Indian law.

If succeed in the chapters that follow, the central premise of U.S. Indian law and policy—that the United States has plenary (virtually absolute) authority over Indian nations on the basis of a discovery of the North American continent by Christian people—will be revealed as truly bizarre. That premise, I contend, is fully in violation of the presumed separation of church and state in the United States, and in violation of the presumption that Christianity is not to be preferred in U.S. law over other religions. Given, for example, that it has been held unconstitutional to display a Ten Commandments monument in the rotunda of the Alabama Supreme Court building,2 on what basis is it constitutionally permissible and morally acceptable for the U.S. Supreme Court to categorize American Indians as "heathens" in U.S. law—in contrast with the category Christian people—and then, by means of the cultural and cognitive backdrop of these religious categories—to deny American Indian nations the right to retain their original free existence and their own territorial integrity?

Once we have made explicit the biblical basis of the claimed right of Christian discovery and dominion in the Johnson decision, it then becomes possible to call this oppressive religious aspect of federal Indian law into question, directly challenge it, and eventually overturn it. However, so long as the Old Testament background of the Johnson ruling (and of federal Indian law generally) continues to remain hidden from view, it will continue to be taken for granted and
successfully used as a covert weapon against indigenous nations and peoples. This book will reveal that whether it be the United States’ illegal occupation of the Black Hills of the Great Sioux nation and its allied nations, in violation of the 1851 and 1868 Fort Laramie treaties, or the refusal of the U.S. government to recognize, honor, and respect the boundaries of the Western Shoshone nation as delineated in the 1863 Treaty of Ruby Valley, or countless other such examples, the doctrine of Christian discovery and dominion as expressed in the Johnson ruling is always implicated.

Evidence of this connection with regard to the Western Shoshone nation arose at a United Nations conference in Geneva in August 2001. Members of the UN Committee on the Elimination of Racial Discrimination (CERD) asked U.S. representatives how the U.S. government interprets its 1863 Treaty of Ruby Valley with the Western Shoshone. The official U.S. response was that the U.S. government interprets the Ruby Valley treaty within the context of the Johnson v. M’Intosh decision. This book will demonstrate why it is that by citing the Johnson ruling, U.S. representatives were unconscious applying the right of Christian discovery and other idealized cognitive models (ICMs) to the Western Shoshone treaty. This discussion will show why this is true even though the U.S. representatives to the CERD never explicitly acknowledged the religious distinction between “Christian people” and “heathens” in the Johnson ruling.

In the chapters to follow, it will become clear that cognitive theory provides the kind of insight necessary to realize that when dominating forms of reasoning (categorization) found in the Old Testament narrative are unconsciously used to reason about American Indians, Indian lands metaphorically become—from the viewpoint of the United States—the promised land of the chosen people of the United States. Cognitive theory teaches us that a conceptual metaphor is formed when a target domain is conceptualized in terms of a source domain, such as when love or life is conceptualized in terms of a journey, thus creating the conceptual metaphor LOVE IS A JOURNEY and LIFE IS A JOURNEY. Hence, when the Indian lands of North America (target domain) are understood in terms of the promised land in the Old Testament narrative (source domain), the result is two conceptual metaphors: (1) INDIAN LANDS ARE THE PROMISED LAND (lands that “God” promised to the United States), and (2) THE AMERICAN PEOPLE ARE A CHOSEN PEOPLE (chosen by God to take over the Indian lands of North America). The Canaanites (pagans or heathens) in the Old Testament narrative are a source domain concept carried over to the target domain concept of American Indians, thus resulting in the conceptual metaphor AMERICAN INDIANS ARE THE CANAANITES OF PAGANS IN THE PROMISED LAND.

This book is the result of more than two decades of puzzling over and attempting to make sense of the ideas and arguments that U.S. government officials have applied to American Indian nations, generally known as federal Indian law and policy. When I began this investigation in earnest, in my early twenties, I believed that studying the history of the ideas found in federal Indian law and policy would enable me to understand the nature of the relationship between the United States and American Indians. Ultimately, I realized that the ideas and arguments constituting federal Indian law and policy were devised by U.S. government officials in order to successfully take the vast majority of indigenous lands and to control and govern the lives and remaining lands of American Indian nations.

I have come to realize that federal Indian law is a conceptual system premised on the assumptions viewpoint that American Indian nations and their lands are legitimately subject to the official ideas and judgments—called laws and policies—formulated by U.S. government officials. In other words, within the context of federal Indian law and policy, it has been and continues to be considered perfectly acceptable for the U.S. government to control and govern the lives of American Indians through its various offices and the decisions and actions of its officials. A prime example of the destructive history of this presumption is the 1830 Indian Removal Act, which resulted in the genocidal uprooting of the vast majority of Indians in the East to lands west of the Mississippi River. This policy is most commonly associated with the Cherokee, Choctaw, Chickasaw, Creek, and Seminole nations that were forcibly moved west to the Indian Territory. As a direct result of this policy, for instance, one estimate he Cherokee removal along the Trail of Tears during the wintertime of 1838 resulted in an overall population decline of some ten thousand Cherokees.

Another example of Indian nations being considered subject to the authority of the United States is found in the 1887 General Allotment Act. This Act stipulated that the president of the United States was authorized to allot “160 acres to each family head, eighty acres to each single person over eighteen years and each orphan under eighteen, and forty acres to each other single person under eighteen.” The remaining lands were called “surplus” lands and were opened to white
homesteaders. In 1887 an estimated 140 million acres of land was still in Indian ownership. By means of this policy, over the course of the next forty-five years, the United States expropriated some 90 million acres of Indian lands. In 1890 alone, the U.S. government managed to obtain from the Indians some 17.4 million acres, roughly one-seventh of all Indian lands at that time. That same year, Indian Commissioner Thomas J. Morgan explained the rationale behind the policy of allotment by saying that "the settled policy of the government [is] to break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life, and deal with them not as nations or tribes of bands, but as individual citizens." Nearly forty years earlier, Indian Commissioner George W. Manypenny had commented on the desire of the Indians to retain reservations "on their present tracts of land." The Indians, he said, "are opposed to selling any part of their lands, as announced in their replies to speeches of the commissioners." Manypenny said that the "idea of retaining reservations, which seemed to be generally entertained, is not deemed to be consistent with their true interests, and every good influence ought to be exercised to enlighten them on the subject. If they dispose of their lands, no reservation should, if it can be avoided, be granted or allowed." The key point here is that U.S. government officials such as Indian Commissioner Manypenny considered Indian people to be ultimately subject to non-Indian ideas and used their ideas, and the actions that followed from them, as a means of tearing our respective Indian nations away from our extremely valuable lands in an effort to destroy our traditional indigenous cultures and economies, and thus benefit the United States.

Still other examples of the presumption that Indian nations are legitimately subject to the authority of the United States can be found in the arguments expressed in scores of decisions issued by the U.S. Supreme Court, starting with the Marshall Trilogy, three cases dating back to the 1820s and 30s. Thus from an indigenous perspective, a couple of poignant questions arise: Given that our respective American Indian nations were originally free and independent of the European mind and mental processes for thousands of years in this hemisphere, now known as the Americas, how did it come to be considered virtually "self-evident" that our very existence as American Indians is legitimately controlled by the ideas developed by representatives of the United States? Suppose that we as American Indians were to make a concerted effort to challenge the United States' assertion of authority over our respective Indian nations? What would such an effort look like? This book is an attempt to develop such a challenge, from an indigenous perspective.

The effort to arrive at a better understanding of federal Indian law has necessarily been made by a number of scholars in an effort to come to terms with the fact that the relationship between the United States and Indian nations is almost impossible to define. The difficulty with this way of framing the matter, however, is that it relies on a rationalist model of the human mind. This model of the mind sees reason as operating in a "linear, hierarchical, propositional, and definitional" manner. This view of reason leads to the presumption that if we could only come up with some apt definition of federal Indian law, we would then reach a clearer understanding of this field of law. Reference to the near impossibility of defining the relationship between the United States and Indian nations suggests that if we simply keep working at it, the rationalist perspective will one day deliver us the clarity we are looking for. However, developing a precise definition of federal Indian law is hardly the point when what is needed is a deeper understanding of how the complex mechanisms of the mind (including the imagination and reason) operate in the real lives of human beings.

This cognitive look at federal Indian law begins with the observation that Indian people were not the ones who mentally developed the ideas that constitute and structure federal Indian law. Indeed, federal Indian law should not be called Indian law, because it was not devised by Indian people. Federal Indian law is non-Indian law. Although it's true that over the past thirty years more and more Native men and women have become attorneys and thereby entered into and participated in the field and practice of federal Indian law, that doesn't change the fact that the major ideas that constitute federal Indian law are almost entirely a product of European and Euro-American mental processes. Fortunately, the findings of cognitive science and cognitive theory enable us to better comprehend how U.S. government officials have used their mental processes to reason about American Indians and American Indian existence in relation to the United States, and how these mental processes have become institutionalized as a conventional part of legal thinking and practice, even by Indian lawyers.

One of the most significant findings of research in cognitive science brilliantly highlighted by Steven L. Winter is that legal thinking is a product of the human imagination. Given its origin in the non-Indian mind, federal Indian law entails the imaginative use of metaphors,
cognitive models, and other mental operations to think through and arrive at answers to particular legal problems, questions, or issues regarding American Indians in relation to the United States. As we shall see in the coming chapters, a number of the findings of cognitive theory are able to provide us with some powerful insights into the composition and structure of the ideas called federal Indian law.

A key problem in the study of federal Indian law has been the general inability of scholars to dive below the surface of the concepts, categories, doctrines, and linguistic expressions in the field. Most federal Indian law scholars have tended to explain the general contours of the field in terms of its major legal doctrines: the doctrine of discovery; doctrine of plenary power; the political question doctrine; the reserved rights doctrine; the guardian-ward relationship, or the trust doctrine; the Winters' water doctrine; and so on. The tools of cognitive theory enable us to plunge below the surface of such doctrinal formulations and plumb the depths of what Lakoff and Johnson have termed the "cognitive unconscious," where largely unexamined cognitive infrastructures lie. It is at this level that we will be better able to understand federal Indian law and the basis of the covert religious argument that Indian nations are legitimately subject to the ideas and judgments of the United States.

If this work is open to any particular criticism, the first would be the fact that it does not provide a sufficient human-interest angle by presenting specific stories about the many ways that Indian nations and peoples have suffered at the hands of the Europeans and Euro-Americans. One such story would tell how the Freemason organization known as the Society of the Cincinnati, under the leadership of George Washington, conspired to take millions of acres of land in the Ohio Valley from the Indian nations for the "future dignity of the American Empire."

An Indian confederacy of many nations, under the leadership of the Miami Chief Little Turtle, defeated two armies, under the leadership of General Josiah Harmar and General Arthur St. Clair, respectively. The Indians, in a concerted effort to protect their lands and way of life, inflicted many hundreds of casualties on the U.S. forces. In 1794, General "Mad Anthony" Wayne drove a well-conditioned and well-trained army across the Ohio River and then northwest through the Indian country, burning every village and cornfield in sight. Wayne is said to have later bragged of having burned fifty miles of Indian cornfields, which, of course, decimated the Indian food supply and tore the corn-based economy out from under the Indian nations. As a result, facing the dire prospect of their people starving, most of the Indian leadership signed the 1795 Treaty of Greenville, thereby relinquishing some two-thirds of what is now part of Ohio.

Other stories might tell of the genocidal massacres by United States soldiers and white militias of Indians—women, children, and men—across the continent. Rather than attempt to recount these kinds of stories in specific detail, however, this book is an attempt to use the tools and methods of cognitive theory to explore the pathology of the dominating mentality that has led to such atrocities against Indian people, across such a vast geographical area, through many generations.

A second possible criticism of this book would be that it does not specifically deal with the "trust relationship" said to exist between the United States and Indian nations, or "tribes." According to this relationship, the United States is characterized as the "guardian" of the Indians, who are said to be the "wards" of the federal government. It is on the basis of this "trust relationship" that the United States is said to "hold" all Indian reservation lands "in trust" for more than 360 Indian "tribal entities" that are formally recognized by the federal government. For this reason, most Indian people quite understandably feel extremely protective of this relationship.

Why Indian nations, as truly sovereign nations, are not able to hold their own lands in trust for themselves, without the involvement of the U.S. government, continues to be something of a mystery. It would be considered ludicrous, for example, to suggest that the United States has to have its lands held in trust by some other government or that the lands of the Vatican have to be held in trust by the government of Italy, within the boundaries of which the lands of the Vatican City state lie. Yet when it comes to Indian nations, this same ludicrous idea is suddenly considered to make perfect sense.

Despite centuries of genocide and oppression, indigenous nations and peoples live on. And we as indigenous people continue to persevere, now armed with the colonizers' own language and conceptual system, which, by means of cognitive theory, are able to provide us with a deeper insight than ever before into the mentality of the colonizers' society. Using the tools and methods of cognitive theory, combined with an indigenous perspective, it is now possible for us to peer into the inner workings of the dominant society's collective mind and to understand more specifically the conceptions that U.S.
government officials used against our ancestors in the past, such as Christian discovery and dominion, conceptions that U.S. and state government officials continue to use against us in the present.

We are, in other words, becoming wise to the ways and extent to which U.S. government officials have used the power of the human mind as a weapon against our respective nations and peoples. This book is an effort to develop an indigenous critique of the mentality that maintains U.S. dominance of American Indian nations. It is the result of an abiding belief that indigenous peoples are moving on a path toward liberation and healing on the basis of our own respective languages, cultures, and spiritual traditions and on the basis of our sacred birthright as the original free and independent nations of this hemisphere. It is my sincere hope that the ideas put forth in this book will help to further energize this spiritual trajectory, for the benefit of indigenous peoples, Mother Earth, and all living things.

Finally, I want to point out that, although they are not referred to specifically, this book is also intended to apply to the situation faced by our indigenous brothers and sisters in Alaska and Hawai‘i, who have also been terribly abused by the laws and policies of the United States. One can only hope that this book will benefit indigenous nations and peoples in all other parts of the world as well. After thirty years of work by indigenous representatives and human rights experts, the United Nations General Assembly, on September 13, 2007, adopted the UN Declaration on the Rights of Indigenous Peoples (143 countries voted yes, but the United States, Canada, Australia, and New Zealand voted no). The adoption of the declaration signals the formal recognition that indigenous nations do have an inherent and fundamental right of self-determination. It announced the dawn of a new era for indigenous human rights. The no votes and the eleven abstentions by other countries remind us that there is still a tremendous amount of work to do and many reforms that still need to take place on the ground. It is my humble wish that this book will, in some small way, assist with that work and help facilitate those much-needed reforms to rid the planet of the dominating mentality of Christendom, oppression, and exploitation.

Chapter 1

A Primer on Cognitive Theory

This book is a tentative effort to apply what has been termed "cognitive legal studies" to federal Indian law. This chapter introduces the reader to a number of important conceptual tools that will be utilized throughout the rest of the chapters. The information presented in this chapter can be quite challenging because it involves an entirely new way of thinking about thinking. However, the insight to be gained from this information is critically important for those who seek to better understand how human beings reason, and for those who are serious about decolonization. Because cognitive science and cognitive theory involve a great deal of complexity and subtlety, this effort to apply some of the tools and methods of cognitive theory to federal Indian law should be understood as merely suggestive and tentative rather than definitive. A key point is that federal Indian law can be studied as an ongoing process of mental or conceptual activity and socialized human behavior. In part, it can therefore be analyzed and studied in terms of conceptual metaphors, image-schemas, and other cognitive operations, such as radical categories and idealized cognitive models (ICMs).

Cognitive science studies the mind by investigating conceptual systems, or systems of thought. This is accomplished in part through empirical research in such areas as psychology, linguistics, cultural anthropology, philosophy, and neuroscience. Some cognitive scientists study what is known as the "cognitive unconscious," where they say, most of our mental activity takes place. Two prominent thinkers in the area of cognitive theory, George Lakoff and Mark Johnson, use the term cognitive to refer to "any mental operations and structures that are involved in language, meaning, perception, conceptual systems, and reasoning." Based on some thirty years of work, their findings show that "our conceptual systems and our reason arise from our bodies." Cognitive scientists study the way that people think and speak by also investigating the role that our physical bodies play in cognition, including the complex neural activities of our brains.

Steven Winter describes mind as "an embodied process formed in interaction with the physical and social world." One of the most
surprising claims made on the basis of cognitive theory is that "all thought is irreducibly imaginative," "Meaning," says Winter, "arises in the imaginative interactions of the human organism with its world, and these embodied experiences provide both the grounding and the structure for human thought and rationality." Thus the human imagination is said to be the central means by which we interact with and adapt to the social and physical world. Furthermore, our dynamic imagination, says Winter, operates in a "regular, orderly and systematic fashion."

However, as Lakoff and Johnson have pointed out, "Our conceptual system is not something we are normally aware of. In most of the little things we do every day, we simply think and act more or less automatically along certain lines. Just what these lines are is by no means obvious." Cognitive science and cognitive theory are efforts to empirically examine human phenomena, such as language, in order to better understand the inner workings and structure of human conceptual systems.

Based on the above, because the conceptual system of federal Indian law is a product of the human imagination, it is also irreducibly imaginative. Because the ideas that constitute federal Indian law are the result of imaginative processes, those ideas operate systematically in a regular, dynamic, and highly adaptive manner. Furthermore, the deep cognitive structure of the conceptual system of federal Indian law is not immediately evident, even to those who regularly study and practice this area of law. Cognitive science and cognitive theory provide a number of valuable tools for gaining much-needed insight into federal Indian law; one of these tools is conceptual metaphor.

**Conceptual Metaphors**
Metaphor is a matter of thought, not just language. Metaphorical thinking involves imaginatively thinking of and experiencing one thing in terms of another. Since we as humans automatically and reflexively think and reason (imaginatively conceptualize) about all kinds of things in terms of the functions, structures, and activities of our physical bodies, it necessarily follows that human conceptual systems are largely metaphorical in nature. Because federal Indian law is a conceptual system composed of countless abstract ideas, it too is largely metaphorical in nature. Thus a study of the role that conceptual metaphors and other cognitive operations have played and continue to play in federal Indian law may provide us with a much deeper understanding of this extremely difficult and problematic field of law than has been previously possible.

The term metaphor is derived from the Greek *metapherein* and means "to carry over," thereby "suggesting that the meanings and ideas associated with one thing are carried over to another." A more technical way of describing metaphor is to say that it involves complex neural brain functions that facilitate thinking of or understanding one conceptual domain in terms of ideas and inferences drawn from another conceptual domain. Two common examples of conceptual metaphor include understanding and experiencing the domain of argument in terms of the domain of war (argument is war) or thinking of and experiencing the domain of love in terms of the domain of a journey (love is a journey). In the first example, some entailments of war are mapped onto our understanding of argument. In the second example, the entailments of a journey are mapped onto our understanding of love. This gives rise to such expressions as "Our relationship isn't going anywhere" and "We're driving in the fast lane on the freeway of love."

An understanding of the indigenous peoples of the Americas in terms of the location of the Indies, as Europeans referred to Eastern Asia during the so-called Age of Discovery, eventually resulted in the Europeans mentally projecting the concepts *indians, Indians,* or *American Indians* onto the indigenous peoples of this hemisphere. Thus the misnomer *indians* can be thought of as the primary metaphor in federal Indian law. The tools of cognitive theory provide us with an effective means of examining the way that federal lawmakers, judges, and policy makers have unconsciously and imaginatively applied certain categories, concepts, metaphors, and other thought processes to American Indian peoples, some of which, through time, have come to be objectified and reified as "the law."

**Image-Schemata**
In addition to identifying conceptual metaphors and the central role they play in human thought, scholars of cognitive science have also identified a mental phenomenon called image-schemata, which are part of the structure and operation of the human imagination. Image-schemata play a highly significant role in the conceptual system of federal Indian law. Such schemata are mentally modeled after the structure, functions, activities, and spatial orientation of the human body and its interactions with the social and physical world.23
Image-schemas are grounded in the bodily experiences of our everyday actions. For example, when we get up in the morning, we walk upright. We typically walk forward, not backward, and we continue moving forward throughout our day. This continual forward motion is part of the experience of being human and the reason why, for example, humans tend to metaphorically think of, experience, and reason about the conceptual domain of life in terms of the conceptual domain of a journey. The typical forward movement of humans results in the metaphors life is a purposeful journey and purposes are destinations, both of which are structured in terms of what is called the source-path-goal image-schema. On the basis of this image-schema, and in keeping with such metaphors, it is typical to conceptualize our lives, and all kinds of daily activities, in terms of traveling from some source or starting point along some path or route toward and to a goal or destination. Another example of this thought process is the tendency for people raised in American society to typically think of progress as a forward movement toward some idealized image or model of society in the future. The classic image of this is exemplified in the painting American Progress, or Manifest Destiny by John Gast, which depicts the movement of the United States westward in the manner of a manifest destiny. An angelic white woman floats through the air in a westward direction, carrying what appears to be a Bible under her right arm while unfurling a telegraph line behind her.

Based on the source-path-goal image-schema and the life is a purposeful (westward) journey conceptualization, there is a long history of the American people thinking of the indigenous peoples of North America as a “barrier” or “obstacle” to American “progress.” This is partly the result of American society’s sense of a forward-moving manifest destiny being traditionally and unconsciously measured in terms of success at colonization and the resulting accumulation of Indian land. Because the Indians, as the original possessors of the land, stood fast in resistance to their ancestral homelands being overrun and taken over by the invading Europeans, American society viewed them as impediments standing in the way of America’s purpose and, therefore, as obstacles to America’s “civilized, forward, westward momentum.” Thus, according to the standard viewpoint of the United States, the American Indians, because of their efforts to hold on to their lands, were typically thought of as “backward” peoples. In other words, the Indians were not considered to be attempting to stand still. They were thought of as not having “advanced,” or as holding back, the “forward” movement of “progress.”

There is another aspect of the human experience that has gone into the development of federal Indian law and policy; it is the fact previously mentioned that we walk upright. We do so by maintaining our balance (though we seldom spend much time consciously thinking about this, unless we are about to or do lose our balance). As Winter has stated, “The discovery that human rationality is embodied means that basic body states like balance, and other image-schemas, provide the primary structure of human reason.” We habitually think and speak in terms of the concept of balance, either how to achieve it or to maintain it. It is our bodily experience of balance that leads, for example, to the common metaphorical expression about some important issue “hanging in the balance.” In other words, our everyday human experience of balance results in the balance image-schema, and this schema yields metaphors and linguistic expressions having to do with balance. For example, the balance image-schema is the basis for the iconic image of the scales of justice held by the statue of the female figure known as Justitia. Judgments are unconsciously thought of as being made by “weighing” alternative courses of action.

Other Important Image-Schemas
The human experience of individuating objects and the experience of grasping objects and holding onto them result in object image-schemas. For example, conceptualizing ideas as if they were individual physical objects leads to the metaphor ideas are objects. Additionally, the experience of using our hands to physically grasp objects is used as the basis for the metaphorical concept of mentally “grasping” ideas, which leads to the metaphor understanding is grasping. This example leads to the observation that metaphorical thinking is expansive; we are able to imaginatively conceive of mental activity as grasping without losing the meaning of grasping in a physical sense. The idiomatic expression “hold that thought” is an example of the use of a conceptual metaphor that follows from a thought being conceived of as if it were a physical object that one can grab hold of. The question “Could you please repeat that, it went right over my head?” is a metaphorical expression that imaginatively conceptualizes an idea as if it were a physical object that moves
how Christian Europeans unconsciously used the power of their thoughts and ideas, their concepts and categories, to metaphorically relegate the category Indian to a permanent downward position of inferiority in the "New World" they were constructing.

Once the United States came into existence, U.S. officials made it a cardinal rule to always conceptualize the United States as existing on a higher level or plane than indigenous nations. Conversely, U.S. government officials used the power of the human mind to automatically and unreflectively assign Indian nations to a permanent position of subordination in relation to the United States, thus leading to the following statement in the U.S. State Department document mentioned earlier: "Conquest renders the tribes subject to the legislative power of the United States, and in substance, terminates [brings an end to] the external powers of sovereignty of the tribe." Imaginatively conceptualizing Indians as existing in a permanent position of subordination in relation to the United States corresponds precisely with the deep structure of the Old Testament, the Conqueror model, and the dominating mentality of Christendom, out of which emerged the Johnson v. McIntosh ruling and the aggregate of ideas known as federal Indian law and policy.

Chapter 7

Johnson v. McIntosh

Johnson & Graham's Lessee v. McIntosh did not directly involve American Indians at all. The case involved a "dispute" between non-Indians. The two sides claimed to have rival claims to the same area of land in the state of Illinois. The initial events that led to the dispute began just prior to the Revolutionary War, when two land companies—the Illinois Land Company and the Wabash Land Company—purchased huge areas of land from the Indians. The first land purchase took place in 1773, when the Illinois Land Company purchased lands from the Illinois Indians (otherwise known as the Wabash). The second purchase took place in 1775, when the Wabash Land Company bought lands from the Pikeashaw Indians (otherwise known as the Kickashas). Some four decades later, in 1818, the U.S. government sold 31,560 acres of land to William McIntosh in what had by that time become the state of Illinois. The lands that McIntosh had purchased and occupied were said to be "contained within the lines of the 1775 land purchase from the Pikeashaws." The issue for the courts to resolve was who had superior title to the land. Was it the land companies (which merged after the original purchases) or William McIntosh, who had purchased his lands from the United States?

The case implied a number of other interesting tangential questions: What is title? What sort of title did Indians have to their lands originally? When British subjects, either as private individuals or as a private company, purchased lands from an Indian nation, what type of land title did the British subjects receive? Did non-Indian land speculators who purchased lands from the Indians before the United States came into existence receive a title that was valid so far as the courts of the United States were concerned? On the other hand, what type of title did the United States receive from the Indians when the federal government purchased lands from them by treaty? And when it came down to a legal contest between former British subjects (or their heirs) who had purchased lands directly from the Indians before the United States was formed and someone who later purchased some of the very same lands from the United States, which of the two, in the opinion of the U.S. Supreme Court, held the superior title?

Recent scholarship reveals that the "dispute" between the two
parties in the Johnson case was collusive and manufactured. For example, law professor Eric A. Kades has claimed that there could have been no actual conflict in the Johnson case because the two land parcels in question “were not within 50 miles of each other.” According to Lindsay G. Robertson, William McIntosh “was financially ambitious, and this certainly played a role in his decision to collude with the Illinois and Wabash Companies.” Like the earlier case Fletcher v. Peck (1810), involving the massive Yazoo land fraud in Georgia, Johnson v. McIntosh was the result of the two sides committing a fraud upon the Court. Robertson has documented that the Illinois and Wabash land companies and William McIntosh had reached an agreement to pretend that there was a point of controversy between them. They did this in order to get the land companies’ title claims before the Supreme Court as a last-ditch effort to secure recognition that they had valid title to the lands they had purchased from the Indians. The most telling evidence of the fraud is the fact that the attorneys for the land companies (Robert Goodloe Harper and the famous Daniel Webster) hired the two attorneys who would represent McIntosh (William Henry Winder of Baltimore and Henry Maynard: Murray of Annapolis) and be “opposing” counsel. The defense attorneys, says Robertson, “would argue against Harper and Webster ‘for effect,’ and they would do so in the employ of the Illinois and Wabash Land Companies” that were suing their client.

Justice for European Nations, Injustice for Indian Nations

At the outset of the decision that Chief Justice Marshall wrote for a unanimous Court, he said that every society has the right “to prescribe those rules by which property may be acquired and preserved” and this right cannot be called into question.” The Court made its decision in the case on the assumption that the United States as a society has an unquestionable right to lay down rules of its own making regarding the purchasing and holding of property. The court’s reasoning in the case was also premised on the view that “title to lands ... must be admitted to depend entirely on the law of the nation in which they lie.” The proposition reflects the container image-schema and the metaphor a nation is a container, which follows from the boundaries of a nation being thought of as a container or bounded region. On the basis of this metaphor, a nation and its territorial boundaries are conceived of as a type of box. The boundaries of the imaginary box are understood as corresponding to the territorial boundaries of the nation. Thus because the lands at issue in the Johnson case were considered to be located in (within or inside) the geographical boundaries of the United States, Marshall posited that the Court, on behalf of the U.S. government, had an unquestionable right to decide a case regarding a title dispute involving some portion of those lands.

Next, Marshall turned to the concept of justice. That a case involving the “rights of civilized nations” would be decided on “principles of abstract justice” was a given. (Marshall did not specify what he meant by the term justice, but we will assume for the moment that at a minimum he intended to evoke a general sense of “fairness.”) Marshall, however, further announced that the Court had reached a decision in Johnson on the basis of “those principles also which our own government has adopted in the particular case and given us as the rule for our decision.” In other words, when it had been necessary for the Court to reason about the rights of “civilized” European nations, it did so based on a concept of justice. Conversely, however, this implies an admission: when the Court was reasoning about the rights of Indian nations, nations that the Court considered to be uncivilized, it did so based on a conceptual framework of injustice. Marshall’s language poses a unique conceptual problem: What do we call a concept that excludes justice? What do we name that which is not justice?

In short, Marshall admitted that the Court had reached a decision in Johnson on the basis of injustice, or unjust concepts, so far as the rights of the Indians were concerned. In the opinion of the Court, it was the United States’ prerogative to deal with the Johnson case in this manner, and the Court would not question the U.S. government’s right to do so. Below, it will become clear that what Marshall meant when he referred to principles “other than those of abstract justice” was “discovery” or “Christian discovery.”

The injustice that the Court applied to Indian nations had to do with the way that the Court categorized nations: “civilized nations” and “uncivilized nations.” At the beginning of the ruling, Marshall said that “civilized nations” (by which he meant European nations) possessed “perfect independence.” Based on a classical view of categories, the category civilized nations is characterized by the shared property of its members. Those nations that share the same properties deemed civilized are considered to be in the category, and those that do not share those properties are not members of the category. According to this conception, the Court viewed European nations as
being both nations and civilized. By virtue of being presumed to possess these two properties, the European nations were deemed by the Court to possess "perfect independence" and "perfect sovereignty." Indian nations, on the other hand, were deemed by the Court to not be civilized. Since only Christian European "civilized nations" were deemed to possess "perfect independence," this meant that Indian nations considered to be uncivilized were also considered to possess an imperfect independence, or to not be independent. As we shall see, the Supreme Court decided in the Johnson ruling that the independence of Indian nations had been "diminished" by Christian European "discovery."

The Age of Discovery in the Johnson Ruling

Marshall opened the main body of the Johnson ruling with the following discussion of discovery:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them [the Indians] as a people over whom the superior genius of Europe might claim an ascendency.13

The above passage takes the concept of discovery as self-evident. It is partly structured by a SOURCE-PATH-GOAL image-schema that is associated with the metaphors LIFE IS A PURPOSEFUL JOURNEY AND PURPOSES ARE DESTINATIONS. Behind the above passage from the Johnson ruling is the background image of "great nations of Europe" having started out from Western Europe (Source) and journeyed by ship across the Atlantic Ocean (Path) until they ultimately arrived to this hemisphere. Marshall referred to this arrival event as "the discovery of this immense continent" (Goal). In the excerpt, Marshall points out that at the time the nations of Europe located ("discovered") the North American continent, they desired ("were eager") to take over and possess ("appropriate") as much of the land as possible.

Marshall further said that the vast size of the continent led the seafaring monarchs to believe that there was more than enough land to divide among themselves. By so doing, we might say that they would thereby satisfy their appetite for colonization.14 Furthermore, although Marshall used the terms character and religion without further elaboration, this certainly suggests that the European monarchs interpreted the Indians as having an "uncivilized" lifestyle, "savage" behavioral traits or character, and "heathen" religion. This was their means of justifying (what Marshall called an "apology") for claiming a position of "ascendancy" over the Indians. Marshall's concept of ascendancy, which is a synonym for dominion, also refers to a higher position. It is structured by an UP-DOWN image-schema based on body orientation of being most in control of one's body when standing upright. In keeping with our earlier discussion of the dominating mentality of Christendom, the concept of ascendancy correlates with the conceptual metaphors POWER IS UP, CONTROL IS UP, AND HIGH STATUS IS UP, which associates status with power, and power is conceived of as up.15 Because to ascend is "to move upward" or "to come to occupy a throne," the passage can be interpreted to mean that the seafaring nations of Europe had claimed to exist on a higher (UP) plane or level than the Indians, who were considered to exist on a lower (DOWN) plane or level than the Europeans. The nations of Europe had justified their claim of dominion ("higher power") over the continent on the basis of the Indians' character and religion ("heathen"). Considering that during the Age of Discovery, Western Europe was still known as Western Christendom (where Christianity prevails or has successfully subdued heathenism), Marshall's statement that the Europeans claimed an ascendancy over the continent on the basis of religion can only be interpreted as referring to Christianity, and to the fact that the indigenous peoples were not Christians. In 1826, in the case of Johnson v. McIntosh, the Supreme Court of Tennessee provided a similar explanation:

To have a correct view of the rules adopted and applied to Indian affairs when grants were issued by the kings of England for lands in North America, we must look to the prevailing opinions in those days in matters of religion. The spiritual fathers of Christendom dictated the creed of the people, and assumed enormous powers upon that passage of scripture which is found in Matthew, ch. 16, verse 18. As the successor of St. Peter, his grant of infidel countries were considered binding in heaven, and of course upon the consciences of Christians. The unquestionable tenets which they all held are those laid down by Lord Coke in Calvin's (sic)
case, that all infidels are in law perpetual enemies; for between them, as with the devils whose subjects they be, and the christian, there is perpetual hostility. The old law of nations, too, had not then been superseded by the modern, so far as regarded their conduct toward infidel countries. It had been practiced upon by all the nations of antiquity; the Babylonians, Persians, Greeks and Romans, and by the Israelites under the guidance of Moses and Joshua. According to what it permitted, they exterminated the inhabitants of the countries they invaded, driving them from their habitations, or killing or enslaving them, as best suited their present circumstances. With these religious opinions and this law of nations for their government, the Spaniards came to the frontiers of Mexico with a grant in their hands given by the supreme disposer of earthly possessions [the pope], by which the whole continent of America was made subject to their dominion. They called upon the [indigenous] nations to renounce their errors and the religion of their ancestors, and to embrace the only true faith, or to yield up themselves and their country to the government of the newcomers. Under this law of nations, they sent for slaves to Africa, and consigned the captives and their descendants to perpetual bondage. Under thses auspices, was European dominion over the soil and over the bodies of men interwoven into the codes of American jurisprudence. It was deemed a title of the highest authenticity throughout the whole christian world.18

Despite the presence of millions of indigenous peoples already living in this hemisphere, we are told that the monarchies of Western Christendom assumed that they had the right to rule the lands of the continent from "on high" (a metaphorically projected position of "ascendancy"). Marshall said that the Europeans had used the Indians’ “character” (“savage”) and “religion” (“pagan” or “heathen”) to justify their claims of ascendancy (dominion) over the continent. But he also referred to Europe having a “superior genius.” This is a claim that the Europeans were higher (in) intelligence than the Indians, and also suggests that the Europeans, by virtue of a “superior” intelligence, possessed a higher position of power in relation to the lands of the continent and in relation to the indigenous peoples living there.

Marshall next claimed that the monarchs of Europe had convinced themselves that they were justified in assuming “ultimate domination” over newly “discovered” lands of the continent because the Indians would be adequately compensated with European civilization and Christianity.19 As Marshall put it, the Indians would be given civilization and Christianity “in exchange for unlimited independence.”20

The chief justice’s use of the concept exchange employs an ICM of trade or commercial transaction. A trade or commercial transaction is a “two-way activity,” or the exchange of one thing in return for another. The participants are both givers and receivers. On the basis of this model, we could characterize Marshall as depicting civilization and Christianity as being the items given to (“bestowed upon”) the Indians “in exchange” for an “unlimited independence” that the European monarchs received from the Indians.

Marshall’s mention of such an exchange is somewhat puzzling. After all, he characterized the European monarchs as both bestowing and receiving, but he never explicitly said that the Indians “gave” the monarchs “unlimited independence.” The only clue provided is Marshall’s implication that the monarchs intended to give European civilization and Christianity to the Indians as a way of “compensating” them. Compensation is made for something lost, an injury received, or for some damage done. There is a party responsible for the loss, injury, or damage, and this responsible party compensates the victim. Thus a possible way of interpreting Marshall’s puzzling language is that the Indians were the injured party who deserved to be compensated because the monarchs had granted or given themselves “unlimited independence” on the continent. This would injure, impair, or diminish the Indians by not allowing them to retain their own independence. The Indians, in other words, deserved to be compensated for the loss of their independence and free way of life. Yet Marshall’s explanation is also deeply ironic, for it suggests that the Indians would be compensated for the supposed loss of their independence with the two things most responsible for that loss: European civilization and Christianity. This implies that once the process of “exchange” had been completed, the Indians would no longer have their independence, but they would have been adequately compensated by receiving European “civilization,” Christianity, and an imposed system of law.

However, there is another possible way of interpreting Marshall’s comment about compensation: as soon as the monarchs of Christendom arrived on this continent, they, or their duly authorized
representatives, immediately asserted their dominion (ascendancy and independence) over the land. It was therefore inevitable and only a matter of time before the Indians would lose their own independence. According to this interpretation, the Indians would eventually be compensated for the future loss of their independence. The Indians would receive their compensation at such time as they had been converted to Christianity and made to live under a civilized system of Christian European dominion. Since the monarch’s assertion of independence and dominion was accompanied by an intention to extend European civilization and Christianity onto the continent and to eventually bestow these two “gifts” on the Indians, once this intention was carried out in the physical realm, the Indians would be “compensated” for the loss of their independence. The Indians would then be left with only an “imperfect independence.” According to this theory, the mere intention of the European monarch to eventually “benefit” the Indians at some time in the future, even while injuring them by depriving them of their own free and independent way of life, provided the Christian European monarchs with an “apology” (formal justification) for their own perspective and subjugating actions. After all, the monarchs of Christendom and their colonial subjects could always claim that they only had the Indians’ “best interests” in mind.

Marshall did not indicate that the Indians had ever willingly agreed to “exchange” their own independence for European civilization and Christianity.11 Therefore, one possible way of interpreting Marshall’s concept of an exchange is to view the Christian European monarchs as having conceptually (imaginarily) given themselves independence on the continent while vowing and planning to physically do away with the Indians’ own independence. Marshall evidently considered it to be irrelevant that the Indians were not participants in this “exchange.” Despite the Indians’ desire to retain their lands and traditional way of life, Marshall’s phrasing implies that the Christian European monarchs had conceptually “exchanged” European civilization and Christianity for the Indians’ independence. It was then necessary for the royal subjects of the monarchs to engage in the hard mental and physical work needed to make European independence and Indian subjugation a physical, social, and cultural reality.

The Chosen People—Promised Land Model and the Johnson Ruling

In Johnson v. McIntosh, Chief Justice Marshall pointed out that “all the nations of Europe” were attempting to acquire newly discovered lands during the Age of Discovery and thus “were all in pursuit of nearly the same object.”12 The historical, cultural, and religious backdrop for this statement is found in our previous discussion of how the nations of Christendom had conceptually taken the Old Testament narrative of the chosen people and the promised land out of the context of the Middle East and extended it globally. To do so, they ventured forth on crusading ocean voyages while envisioning themselves as a new chosen people who, on the basis of such biblical passages as Genesis 1:28 and Psalms 2:8, were determined to subdue the earth and extend dominion over all living things. This sense of a crusading religious mission to Christianize and dominate the entire world was a major impetus for the Age of Discovery, which Marshall was explaining on the Court’s behalf.

As “the nations of Europe” were all vying for lands in the same hemisphere, Marshall said, to “avoid conflicting settlements, and consequent war with each other,” they had established among themselves “a principle, which all should acknowledge as the law by which the right of [land] acquisition ... should be regulated.”13 The emphasis on “a principle” and “law” in the previous sentence refers us back to the point Marshall had made at the beginning of the Johnson ruling when he said that the United States, within its own claimed limits, had an unquestionable right to adopt any principle of its own choosing as a rule of property law. The principle that Marshall said was acknowledged by the United States as “the law” used to regulate the claimed right of European land acquisition on the continent was that “discovery gave title to the government, by whose subjects, or by whose authority, it [the discovery] was made, against all other European governments.”14

Marshall’s use of such phrasing as nations of Europe and European governments could easily lead the reader to conclude that the principle of discovery identified by Marshall was secular and nonreligious. Fortunately, however, Associate Justice Joseph Story, who was on the Supreme Court at the time of the Johnson ruling, provided further insight into the religious nature and historical background of Marshall’s concept of “discovery.” Story was one of John Marshall’s most intimate friends. Because of Story’s deep and abiding decades-long friendship with Chief Justice Marshall, it stands to reason that Story, perhaps more than anyone else we know of, would have a deep understanding of the conceptual basis of Marshall’s use of “discovery” in the Johnson ruling. Story’s explanation below—first published
just one decade after the Johnson ruling was handed down—initially uses the secular linguistic expression “European nations” to discuss the discovery principle, but then immediately shifts to an explanation of “discovery” in terms of the pope and in terms of the religious categorization of American Indians as “heathens.” Anyone who cares to take Story’s account below and read it alongside the Johnson ruling will notice that this passage is Story’s paraphrase of Marshall’s language in Johnson:

The European nations found little difficulty in reconciling themselves to the adoption of any principle, which gave ample scope to their ambition, and employed little reasoning to support it. They were content to take counsel of their interests, their prejudices, and their passions, and felt no necessity of vindicating their conduct before cabinets, which were already eager to recognize its justice and its policy. The Indians were a savage race, sunk in the depths of ignorance and heathenism. If they might not be extirpated for their want of religion and just morals, they might be reclaimed from their errors. They were bound to yield to the superior genius of Europe, and in exchanging their wild and debasing habits for civilization and Christianity they were deemed to gain more than an equivalent for every sacrifice and suffering. The Papal authority, too, was brought in aid of these great designs; and for the purpose of overthrowing heathenism, and propagating the Catholic religion. Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince. 20

Story says that the nations of Europe adopted a principle that would give “ample scope to their ambition” and that they used “little reasoning” to support it. His explanation frames the European nations as having relied on their “interests, prejudices, and passions” and as having thought of the Indians as “a savage race, sunk in the depths of ignorance and heathenism.” The phrase sunk in the depths employs an up-down image-schema to metaphorically portray the Indians as existing at an extremely low level in relation to Christian Europeans. “Sunk in the depths” invokes such conceptual metaphors as bad is down, low status is down, and lack of power is down. Furthermore, Story’s deployment of the metaphor heathen, a concept of Christian origin, obviously and immediately places Story’s account into the context of the Bible. His use of the terms ignorance and superstition to ascribe a low degree of intelligence to the Indians in contrast to “the superior genius of Europe,” a phrase lifted directly from the Johnson ruling and Marshall’s own phrase “superior genius of Europe.” Then, using the exact same cognitive model of commercial transaction or trade that Marshall employed in the Johnson ruling, Story referred to the claim that the Indians would “gain more than an equivalent for every sacrifice and suffering” when “their wild and debasing habits” were replaced with “civilization and Christianity.”

As Story continued, he described “Papal authority” and “a [papal] Bull issued in 1493” as the context for the concept of discovery he was about to explain. By that Vatican document, said Story, the pope granted “to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.” What was the motive for this grant? According to Story, one reason the pope made his grant was “for the purpose of overthrowing heathenism, and propagating the Catholic religion.” Thus the history that Justice Story used in order to contextualize the concept of discovery in the Johnson ruling had to do with four papal bulls issued by Pope Alexander VI in 1493 after the pope received word from King Ferdinand and Queen Isabella that Cristóbal Colón had successfully located land by sailing west across the Atlantic Ocean. In the Inter Caetera papal bull of May 4, 1493, Pope Alexander declared it to be his desire that “barbarous nations” be overthrown or subjugated and brought to the Catholic faith and Christian religion “for the honor of God himself and for the spread of the Christian Empire.” By the Inter Caetera papal bull the pope declares that

by the authority of Almighty God conferred upon us in blessed Peter and of the viceroyship of Jesus Christ, which we hold on earth, do ... grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, towns, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainland and found and to be found, discovered and to be discovered towards the west and south. ... With this proviso however that none of the islands

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or mainlands, found and to be found, discovered and to be discovered, ... be in the actual possession of any Christian king or prince up to the birthday of our Lord Jesus Christ just past from which the present year one thousand four hundred ninety-three [1493] begins. And we make, appoint, and depose you and your said heirs and successors [to be] lords of them [the located or "discovered" lands] with full and free power, authority and jurisdiction of every kind; with this proviso however, that by this our gift, grant and assignment no right acquired by any Christian prince, who may be in the actual possession of said islands and mainlands prior to the said birthday of our Lord Jesus Christ, is hereby to be understood to be withdrawn or taken away.

As mentioned elsewhere in previous chapters, in the fifteenth century the Holy See of the Vatican had granted Portugal the right to take over and subjugate non-Christian lands along the western coast of Africa and elsewhere. The papal bull Dum Diversas, for example, issued by Pope Nicholas V to King Alfonso V of Portugal, authorized the Portuguese king and his nephew Prince Henry the Navigator the right to "invade, capture, vanquish, and subdue all Saracens, pagans, and other enemies of Christ, to put them into perpetual slavery, and to take away all their possessions and property." Pope Alexander's language in the Inter Caetera papal bull reflects his desire on behalf of the Holy See of the Vatican to make certain that Portugal was protected in its right to retain any non-Christian lands that the Vatican had previously granted to Portugal, while at the same time ensuring that King Ferdinand and Queen Isabella would be given wide latitude to begin colonizing distant non-Christian lands.

The point here is that Justice Story identified a Vatican papal bull issued in 1493 as the origin of the principle of discovery that his friend and mentor John Marshall incorporated into the Johnson ruling. The Vatican promulgated that principle for the religious purpose of overthrowing ("subjugating") heathenism and propagating the Catholic religion. Below I have used italics to show how Story next used—verbatim, and without attribution—the same wording that John Marshall used in the Johnson ruling to express the principle of discovery, which Story said originated in the pope's bull of 1493:

Alexander the Sixth, by a Bull issued in 1493, granted to the crown of Castile the whole of the immense territory then discovered, or to be discovered, between the poles, so far as it was not then possessed by any Christian prince.

The principle, then, that discovery gave title to the government, by whose subjects or by whose authority it was made, against all other European governments, being once established by the pope's grant, it followed almost as a matter of course, that every government within the limits of its discoveries excluded all other persons from any right to acquire the soil by any grant whatsoever from the natives. No nation would suffer either its own subjects or those of any other nation to set up or vindicate any such title. It was 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.

Notice how Story posits that following a "discovery" of lands not "in the actual possession of any Christian prince" the European government responsible for that "discovery" had the "right to acquire the soil ... from the natives" and the right "to perfect its own dominion over the soil." This presumes that the Christian prince already had dominion on the continent even before the soil had been acquired from "the natives." Story's mention of a "Christian prince's" right to "perfect its dominion" correlates exactly with Marshall's observation at the beginning of the Johnson ruling that, as a matter of "abstract justice," the Court would regard "civilized nations" as possessing "perfect independence." A Christian prince, by virtue of "Christian discovery," supposedly had "his own dominion over the soil" that he was free to "perfect."

Christian Discovery in the Johnson Ruling

It was when Chief Justice Marshall examined the royal charters of England in the Johnson ruling that he explicitly revealed the Christian religious premise of the concept of discovery that he had mentioned toward the beginning of the decision. "No one of the powers of Europe," wrote Marshall, "gave its full assent to this principle [of discovery] more unequivocally than England." He continued by referring to the specific religious terminology that he considered illustrative of "this principle" of discovery; he even placing italics on the words Christian people to explicitly emphasize this point:

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The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title. 30

Above, Marshall focused specific attention on King Henry VII’s commission that authorized John Cabot and his sons to “take possession” of lands unknown to Christians. As Marshall continued, he again emphasized the presumption found in the English charters that “Christian people” had the right to take possession of “discovered” countries, provided those countries were inhabited by “heathens” or non-Christian people. Thus:

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle [of discovery] which has been mentioned. The right of discovery given by this commission, is confined to countries “then unknown to Christian people,” and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.

The same principle [of discovery] continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen, and barbarous lands, as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms. 31

Marshall’s repetition of the phrases Christian people and Christian prince or people and the distinction he made between the two categories Christian people and natives, who were heathens enables us to grasp the religious basis and context of his concept of discovery. This is also why it is accurate to refer to the main conception that runs through the Johnson ruling as Christian discovery rather than simply discovery or European discovery. That Marshall also associated this principle of Christian discovery with Christian European claims of dominion is illustrated by his emphasis on the fact that the king of England granted John Cabot and other English explorers the “right to take possession” of heathen and barbarous lands. Marshall’s phrase right to take possession is simply another linguistic expression of the phrase right of possession, which Thomas Hobbes said “is called Dominion.” Therefore, Marshall’s statement that the English had asserted a “right to take possession” was another way of stating, on the Supreme Court’s behalf, that Christian people had asserted dominion over whatever non-Christian lands they located on the North American continent.
Chapter 8

Converting Christian Discovery into Heathen Conquest

In the *Johnson* ruling, Chief Justice Marshall said that the “different nations of Europe” had not “entirely” disregarded the rights of the Native nations, because the nations of Europe had “respected the natives as occupants.” The word *entirely* suggests, of course, that the European nations had *mostly* disregarded the rights of the Indians, just not *entirely* so. As we shall see, in the Court’s view Indian rights were to be disregarded to the extent necessary to ensure that the Indian nations were incapable of contradicting the United States’ claim to an “ultimate dominion” over and an “absolute title” to the lands of the continent.

Because Marshall answered the central issue before the Court in the *Johnson* ruling by deciding that Indians only had a “title of occupancy,” this has led most scholars to conclude that Marshall’s Indian title of occupancy is the main significance of the *Johnson* ruling. But interpreting the concept of an Indian title of occupancy within the context of the royal charters of England, as Marshall did, reveals that the more important significance of the *Johnson* ruling is Marshall’s mention of “ultimate dominion.” The chief justice said that those royal charters illustrated how “Christian people” had asserted, on the basis of “discovery,” “a right to take possession” of the indigenous lands of the continent, “notwithstanding the occupancy of the natives, who were heathens.” In other words, Marshall saw the royal charters as evidence that the Christian European monarchs who sent colonizers to this continent were in possession of a governmental authority (“dominion”) to grant or convey the lands of “heathens.” Based on their assertion of “ultimate dominion,” the Christian monarchs could begin granting the land and colonizing the continent without first receiving permission from the indigenous nations and peoples who were already living on and in possession of the land. As Marshall put the matter, the “different nations of Europe claimed and exercised as a consequence of this assertion of ultimate dominion, a power to grant the soil, while yet in possession of the natives.” Marshall said that such charter-grants of the soil had “been understood by all [Christian Europeans], to convey a title to the [Christian European] grantees,
subject only to the Indian right of occupancy."

One way of interpreting the Johnson ruling is that after a land grant had been made by a Christian European monarch, on the basis of a presumption of ultimate Christian dominion and an imperial right of occupancy, the Native peoples would then be conceptualized, from a Christian viewpoint, as still being in possession of but only "temporarily occupying" lands that the Christian "discoverers" now purported to own. As clearly documented in chapter 4-particularly Henry Sumner Maine’s point about the Indians being "compared almost universally to the Canaanites of the Old Testament"—the cognitive background of Marshall’s account in Johnson is the Chosen People—Promised Land cognitive model: the Christian monarch or nation purported to own the "discovered" land by virtue of a mandate by "God," given to them as "chosen people," to locate, possess, and occupy "promised" heathen lands. According to this mental model, God is considered to have promised the land to the Christian Europeans, and it is therefore only a matter of time before the indigenous people would be uprooted and driven out. Joseph Story conveyed this sense of a temporary Indian occupancy when he referred to the Indians having possession of the land for their "temporary" and "fugitive" purposes. The term fugitive is based on the conceptualization Indians are Criminals and frames the Indians as attempting to flee or attempting to escape "justice" at the hands of Christian Europeans, and as being under the dominion of the Christian civilization of the new "chosen people."

Other Conceptions in the Johnson Ruling

According to Marshall, the first Christian nation ("Christian people") to "discover" lands inhabited by "heathens" had the right, based on well-accepted custom, to exclude all other Christian nations from the discovered region. This right to exclude any other Christian Europeans, said Marshall, meant that the discovering Christian people had the sole right of "acquiring the soil from the natives, and establishing settlements upon it." No other nation could rightfully interfere with the discovering nation’s right to acquire the land from the indigenous peoples, either by purchase or by conquest. All the nations of Christendom honored this right of exclusivity that conceded to the discoverers of a given region the exclusive right to acquire the land from the Indians living there. As Marshall put it, "Those relations which were to exist between the discoverer and the natives were to be regulated by themselves." No other Christian European power could come between the first discoverer and the native inhabitants.

In the opinion of the Court, said Marshall, the exclusive right of the first "discovering" power to colonize and possess the "discovered" lands had a negative or damaging effect on the rights of the Native peoples. The rights of the indigenous peoples were not entirely disregarded, but were "to a considerable extent impaired." One of the most significant ways in which the Indians’ rights were impaired, said the chief justice, was that their "rights to complete sovereignty, as independent nations, were necessarily diminished by the original fundamental principle, that discovery gave exclusive title to those who made it [the discovery]." Because to diminish is to make less or cause to appear less," Marshall’s conceptualization of a diminishment of Indian sovereignty and independence is predicated on the unconscious mental image of Indian rights as having originally been of one size or extent prior to Christian Europeans arriving to this hemisphere and then subsequently becoming "reduced" in size or extent because of the event of Europeans physically arriving to and "discovering" the Americas. What we must now account for is an explanation as to why or how the Christian European "discovery" of "the Americas" supposedly caused a lessening, or "diminishment," of Indian sovereignty and independence. Given the extent to which the domination of American Indian existence by the United States has hinged on this conception of a diminishment of complete Indian sovereignty and independence, the following point is central to the overall argument of this book.

Discovery: A "Mask" for the Mental Power of Conceptualization

In keeping with the source-path-goal image-schema, the concept of discovery as found in the Johnson ruling contains two main aspects. First, discovery conveys of Christian Europeans as human agents who left one location (Western Europe or Christendom) and physically traveled by ship on a metaphorical path across the Atlantic Ocean to another location or place—specifically, the lands now known as North America, or the Western Hemisphere. The second aspect of the concept of discovery is the fact that when the Christian Europeans arrived at the second location, they saw the land with their eyes and thereby became conscious of and understood the existence of that location. Thus discovery, as used in this context, is related to the metaphors knowing is seeing and understanding
IS GRABBING. In other words, when the Christian European travelers visually saw the lands where they arrived, they immediately understood that those lands existed. Thus to claim that discovery gave the Europeans an “ultimate title” to the lands of the continent is to claim that the Europeans ended up with a title to the lands of this continent by physically traveling to and seeing the land, by physically interacting with the land, and by becoming mentally cognizant of the land’s existence.

Chief Justice Marshall phrased this claim as follows: “Discovery gave title, to the government, by whose subjects, or by whose authority it [the discovery] was made.” We may assume that by the term title Marshall meant ‘a legal right to take possession of property.’ Yet his sentence does not indicate what it was about the Europeans having traveled to and having become conscious of the continent’s existence that could have caused Indian rights to complete sovereignty and independence to have been “diminished” or lessened, or could have caused the Europeans to end up with any kind of “ultimate title” or “right to possess” the continent. The analysis of concepts of causation in cognitive theory provides us with some tools for sorting through this dilemma.

The observation that the Europeans moved across the ocean from one location to another location entails a LOCATION-EVENT-STRUCTURE metaphor, which combines a STATES ARE LOCATIONS metaphor with the image of a state as a “bound region of space.” One reason, or basis, for claiming that the Europeans had “ultimate title” to the continent would be the bare fact that the European physically traveled from the location of Europe across the Atlantic Ocean, which resulted in the event of the Europeans arriving at a place they did not previously know to exist, a place now commonly known as the Western Hemisphere. Thus the underlying and highly implausible claim suggested by the Court is that the mere invasive physical arrival of Europeans to the continent is what “gave” them “ultimate title” to the lands of the continent. Yet given the long-standing physical presence of millions of indigenous peoples on the continent at the time the Europeans arrived, there is no readily apparent and sensible reason as to why or how the mere physical arrival of Europeans on the continent could trump the possession of the American Indians so as to give the Europeans an ultimate title to the indigenous lands of the continent.

The claim that the Europeans obtained title to the lands of the continent by becoming conscious of the continent’s existence employs an OBJECT-EVENT-STRUCTURE metaphor: in this instance, the idea of title is metaphorically conceived of as an object, and the event of the Europeans becoming conscious of the continent’s existence is being characterized as what supposedly “gave” this title (object) to the Europeans. But an additional step is needed to explain how the Europeans’ becoming conscious of the continent’s existence could have resulted in them obtaining title to the continent despite the continent being already in the possession of the indigenous nations and peoples.

By traveling to and becoming conscious of the continent’s existence and by physically interacting with its environs, the Christian Europeans were simultaneously able to begin exercising their physical and social behavior and their imaginative mental processes (thoughts and ideas) in relation to the continent’s existence. Thus behind Marshall’s explanation is the view that the main way the Europeans began exercising their cognitive powers in relation to the continent was by imaginatively conceptualizing themselves as having “dominion over” and “title to” the lands of the continent. How can we account for Marshall’s claim that the Europeans’ discovery of the continent gave them dominion over and title to the lands of the continent? The answer lies in understanding that Marshall was thinking and writing metaphorically.

Cognitive theory enables us to recognize an underlying claim buried in the Johnson ruling: the Europeans mentally gave themselves dominion over and title to the continent by imaginatively conceptualizing themselves as having dominion over and title to the lands of the continent. The concept discovery tacitly refers to the ability of the Europeans to imagine the possibility of a particular “reality” and then to act with intensive and sustained human energy on that imagined possibility until the envisioned reality becomes “manifested” or “constructed.” Similarly, Marshall’s claim that discovery had “diminished” Indian “rights to complete sovereignty as independent nations” was the result of John Marshall, on behalf of the Supreme Court, metaphorically conceptualizing Indian rights to complete sovereignty as independent nations as having been diminished by the event of discovery. Having understood this, it is then possible to realize that behind the mask of discovery is nothing other than the imaginative and largely metaphorical Christian European mental power of conceptualization, which supposedly diminished Indian rights to complete sovereignty as independent nations. From a liberating indigenous perspective, however, this is nothing but a delusion.
The Personification of Discovery in the Johnson Ruling

A key point expressed in the Johnson ruling is that the U.S. government formally adopted the argument that "Christian people" had "discovered" this "heathen" continent and that the "civilized inhabitants" of the United States therefore collectively "hold this country" on the basis of a "right of discovery." Marshall said that it is on the basis of this right of discovery that all the states of the United States now "hold and assert in themselves, the title by which" this country "was acquired." When Marshall wrote the phrase discovery gave title, he was using a metaphorical expression known as personification. In cognitive theory, personification "allows us to comprehend a wide variety of experiences with nonhuman entities in terms of human motivations, characteristics, and activities." By saying that discovery gave an exclusive right, Marshall was imaginatively conceptualizing discovery as if it were able to engage in the human activity of giving Europeans an exclusive right to extinguish the Indian title to the lands of the Americas. Of course, we know this is impossible. Not being human and not having a bodily existence, "discovery" was not able to "give" anything to anyone.

Marshall's use of the concept discovery is further problematic because the Christian Europeans did not discover this hemisphere in the sense of locating a place that was unknown, initially, they merely happened upon lands that were already inhabited by, and extremely well known to, millions of indigenous people living here. Thus it is entirely inaccurate to say that the Christian Europeans had "discovered unknown lands," except from an entirely Eurocentric perspective that completely disregards the indigenous peoples' own mentality and awareness of their own homelands. It is much more precise to say that the Christian Europeans invasively arrived in this hemisphere. What is generally referred to as the doctrine of discovery might be more accurately called the doctrine of Christian European arrival, or, better still, the doctrine of Christian European invasion.

Elsewhere in the Johnson ruling, Marshall referred to the "power now possessed by the government of the United States to grant lands," still inhabited by and in the possession of the Indians. He said this power to grant Indian-held lands had previously existed in Great Britain when the original thirteen states were still British colonies. Marshall also said that the charters of England were examples of this assertion of Christian European dominion: "Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees." Marshall further said that as a result of the United States' own assertion of "dominion" on the continent, the government of the United States possessed the power to grant lands to non-Indians, lands to which the Indian title or "right of occupancy" had never been extinguished: "It has never been doubted that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty [1783 Treaty of Paris ending the Revolutionary War], subject only to the Indian right of occupancy." The power to grant lands in the possession of Indians, said the chief justice, had been previously exercised by European nations "over territory in possession of the Indians. ... Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the [Christian] discoverer to appropriate the lands occupied by the Indians."

Did the United States Adopt the Doctrine of Discovery?

"Have the American States rejected or adopted this principle [of discovery]?", asked Marshall. In answering this question, the chief justice suggested that by the 1783 Treaty of Paris, Great Britain had transferred its assertion of ultimate dominion to the United States and that when this transfer of dominion took place, the United States began to employ the same argument of Christian discovery to assert its own claim of dominion over Indian lands in North America. It was on the basis of this claim of "dominion," or "right to take possession," said Marshall, that the United States subsequently claimed to have the power and the right to grant away lands that were still inhabited by and in the rightful possession of the Indians.

Marshall further said that the power of the United States to grant lands based on discovery must foreclose or preclude "the existence of any right which may conflict with and control it." In other words, the United States would refuse to recognize the Indians as possessing "any right" that would "conflict with" or "control" the United States' power to grant or sell lands to those of its own choosing. Marshall explained the reasoning behind this position as follows:

"An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute
title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.²⁶

Marshall’s argument is predicated on a classic view of categories in which categories are defined or characterized based on the properties that the category members share in common. Category membership is evaluated based on a “necessary and sufficient criteria.”²⁵ All category members must share the same properties based on the criteria. This gives rise to the logic of what Winter refers to as “P and not-P: something either has the defining property necessary for category membership or it doesn’t.”²⁷ Something is either in or out of the category, depending on whether or not it shares the same properties as the other members of the category. This classical concept of categories conceptualizes categories as having rigid boundaries, like a box.²⁹

Furthermore, Marshall’s category of absolute title, which he attributed to the U.S. government, is a manifestation of a political ideology of absolutism. In political philosophy, absolutism is the political doctrine or practice of unlimited power and absolute sovereignty such as is considered to be vested in a monarch, dictator, theocrat, or oligarchy. Despotic and tyrannical, two synonyms for the word absolute, are identical to terms that define the concept dominion, which suggests ‘complete power or authority without external constraint,’ which is also the definition of sovereignty. ‘Perfect’ is another meaning of the term absolute, and this calls to mind Marshall’s mention of “perfect independence” discussed earlier.

Marshall’s category absolute title suggests the necessary and sufficient criteria that Marshall said the Indians were lacking in order for the type of “title” he ascribed to them to qualify for category membership. According to Marshall’s rationalist logic, the Indians’ title could only be a “perfect title” if it were a “complete title.” And since their title was, in his view, only a title of occupancy, it was, therefore, incomplete. Since the institutions of the United States recognized the British “crown” as having the absolute (complete) title, and since there can only be one absolute title to the same thing at the same time, Marshall concluded that the Indians’ title was less than absolute, and therefore less than complete. Since the Indian title was not, in the opinion of the Court, a title of dominion, it was “merely” a right of “occupancy” subject to the dominion of the first Christian European “discoverer” or subject to the “dominion” of the political and legal successor to that first discoverer, namely, the United States.

Rules of Conquest

After saying that the Court would not address the issue of “whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles to expel hunters from the territory they possess,”²⁸ Marshall entered into an extended discussion of principles of conquest. By doing this, the chief justice thereby implied (and many scholars have wrongly understood) that the Court was merely applying customary rules of conquest to the Indians:

Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the Mississippi, by the sword. The title to a vast portion of the lands we now hold, originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.²⁹

As Marshall continued, he acknowledged that the Johnson ruling viewed the Indians’ rights as having been “wrested from them.”³² To wrest is ‘to wrench or twist away from,’ a concept understood in terms of the bodily activity of the hand, and Marshall seemed to acknowledge that the net effect of the Johnson ruling would be to create the appearance that “discovery” had deprived the Indians of some of their most fundamental rights. Apparently believing he had to justify what the Court was doing, Marshall said that although “we do not mean to engage in the defense of those principles which Europeans have applied to the Indian title,” some “excuse, if not justification” for such principles might be found “in the character and habits of the Indians.”³³ Once again, on the basis of the Conqueror cognitive model, Marshall launched into a discussion of conquest and the role

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of the conqueror, thereby giving the mistaken impression that he was applying such rules of conquest to the Indians:

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

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power. 31

It would be quite natural for the reader to conclude that Marshall was simply putting forth rules of coquest that the United States had applied to the Indians and that those rules were the justification he had mentioned earlier. Nothing could be further from the truth. Using a wrongful and inaccurate characterization of the Indians as “fierce savages,” Marshall went on to explain why it was impossible to apply the above rules of conquest to the Indians:

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

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood, and exposing themselves and their families to the perpetual hazard of being massacred. 32

Marshall’s mention of “the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could be governed as a distinct society” is a reference to the very “principles” of “discovery” he had previously written about.

The chief justice went on to explain how frequent and “bloody wars, in which the whites were not always the aggressors, unavoidably ensued.” 33 As the white population advanced, he said, the population of the Indians receded. White encroachment caused the game, upon which the Indian economy depended, to move farther away from the white settlements. The Indians followed the game, said Marshall, and the “soil to which the [British] crown originally claimed title” was abandoned by its ancient inhabitants.” 34 It was “parceled out” according “to the will of the sovereign [Christian European] power, and taken possession of by persons who claimed [it] immediately from the crown, or mediatly, through its [the crown’s] grantees or deputies.” 35

Marshall’s Pretended Conquest

The following point is extremely important, and quite subtle, which means it can be easily missed: Marshall said that the Europeans of the past were faced with a clear choice. They either had to give up their pompous claims to the country or else enforce their claims “by the sword” and adopt principles that would be specifically adapted to “the nature” of the Indians. 36 We know, however, that Marshall’s explanation of the rules of conquest was not directed at the Indians. We know this because he went on to say that the ordinary “law” that “regulates ... the relations between the conqueror and the conquered” could not be applied to the Indians and that it was therefore “unavoidable” for the Europeans to “resort to some new and different rule, better adapted to the actual state of things.” 37 What was this new and different rule that was better adapted to the fact that the Indians “could not be governed as a distinct society” and were “impossible to mix” with?

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Marshall's contention that the Europeans of the past could not avoid developing some "new and different rule of conquest" better adapted to the Indians suggests that the Europeans had indeed developed such a rule at some time in the past. However, if this were true, then Marshall would have gone on to explain the rule that the Europeans had developed. That the Europeans had never developed a new rule of conquest is made evident by one simple fact: in mid-paragraph, Marshall suddenly stopped writing about Europeans in the past and referred instead to "every rule which can be suggested."

In short, it was Marshall himself who, on behalf of the Supreme Court, was using the Johnson ruling as an opportunity to suggest an entirely new and different rule of conquest that the United States would be able to use against the Indian nations. What was Marshall's new rule of conquest? Simply this:

A pretension is 'something alleged or believed on slight grounds: an unwarranted assumption', or 'the act of offering something false or feigned: presentation of what is deceptive or hypocritical: deception by showing what is unreal and concealing what is real: false show.' Thus one of the most essential points of the Johnson ruling is the Supreme Court's effort to pretend that originally free Indian nations had been conquered, based on the claim that they and their lands had been "discovered" by "Christian people." On the basis of this concept of pretended conquest, the Court would further pretend that Indian rights to complete sovereignty and independence had been "diminished." Marshall freely acknowledged that such a pretended conquest might appear "extravagant" and even stray beyond the bounds of reason. Yet he also said that it might be possible to justify this pretension of conquest on several grounds: first, if pretended conquest has been asserted and afterwards maintained; second, if the country has been acquired and held on the basis of pretended conquest; and third, if the property of the great mass of the community originates in pretended conquest. Then the pretension of conquest becomes the law of the land and may not be questioned.

An inference follows from Marshall's concept of pretended conquest: not only would the U.S. government pretend that the Indians are the "conquered" inhabitants of the continent, the United States would also pretend that the Indian nations do not possess a right of dominion over their own homelands, thus leading to the conclusion that the "absolute title" to the soil was in the possession of the first Christian claimants or the political and legal successors of the first Christian claimants. The resulting theory of heathen "occupancy" meant that the indigenous nations were viewed by the United States as possessing neither dominion nor absolute title to the lands of the continent and would therefore be regarded as incapable of transferring the absolute or ultimate title to others. On this basis, the Court ruled that the land companies' deeds were worthless, since the Indians had only a title of occupancy to sell and since private land purchases from the Indians were not considered valid. The Court considered the opposing deed to be valid, however, as against an Indian land grant, since it resulted from a grant by the United States, which supposedly held ultimate or absolute title by right of Christian discovery and dominion.

To express the matter in terms of cognitive theory—imposing the category title of occupancy on the Indians "may be opposed to natural right" and to the accepted practices of "civilized nations." But, according to Court, the United States may be justified in imposing such a mental category on the Indians if that category is "indispensable" to the system under which the United States "has been settled" (colonized). That category of title may perhaps be supported by reason, and certainly cannot be rejected by "courts of justice."

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Thus by our analysis of the Johnson ruling, we have documented that the concept of discovery as used in the Johnson ruling means discovery by Christian people of lands inhabited by “natives, who were heathens.” It follows that we may accurately characterize Chief Justice Marshall’s “new rule” as (1) a matter of pretending that a mere discovery by Christian people of lands inhabited by “heathens” was the same as the “conquest” of heathens, and (2) this pretended event of discovery resulted in the presumption that Christian Europeans automatically possessed ultimate dominion over the indigenous peoples and their lands.

This rule of pretended conquest is predicated on the cognitive power of assumption. After all, one meaning of the word assume is “to pretend”; another is “to appropriate or arrogate,” as in “to assume a right to oneself.” Thus the Johnson ruling clearly demonstrates the capacity of U.S. government officials such as John Marshall to imagine the United States as having “plenary power” over the Indian nations and to claim, on the basis of discovery, a right to appropriate the vast majority of the Indian lands and resources of the continent for the economic benefit of the United States. Hence the Johnson ruling assumes, on the basis of a rule of pretended conquest and a distinction between “Christian people” and “heathens,” that the United States has the right to colonize an entire continent. In the Supreme Court’s opinion, this “new rule” became the law of the land.

Marshall’s writing in the Johnson ruling is truly ingenious and, from an indigenous perspective, quite diabolical. He used the Christian religion and Christian nationalism, combined with the cognitive powers of imagination and assumption, to construct a subjugating reality for American Indians. More than 180 years after Marshall set feathered pen and ink to paper to write the Johnson ruling for a unanimous Supreme Court, this subjugating reality still serves as the cornerstone of federal Indian law and policy. Clearly, John Marshall’s doctrine of pretended Christian conquest and his doctrine of pretended absolute Christian title (U.S. title) are two truly brilliant and nefarious aspects of his judicial legacy.

The Mental Process of Negation

By categorizing indigenous peoples as heathens, Chief Justice Marshall was conceptualizing them in terms of what they were not. This is an example of assigning indigenous peoples to a category of negation based on the ICM of Christian, which, from a Christian perspective, unconsciously suggests everything that is positive, good, and fully human. Conversely, from the same perspective, the category heathen serves a tacit cognitive function of judgment based on negation: not Christian, not positive, not good, not fully human, not civilized. According to one scenario we will get to, heathen can also mean ‘to not exist,’ either partially or entirely.

As a category of negation, the term heathen accomplishes a number of useful conceptual tasks from a Christian European standpoint. The term negation derives from the Latin negare, ‘to say no, deny.’ Negation refers to ‘something without real existence, not real, a non-entity.’ To negate is ‘to deny the existence, truth, or fact of’ and ‘to refuse to admit’ something. Thus the category heathen enabled Chief Justice Marshall, on behalf of the U.S. Supreme Court, to negate (deny the existence, truth, or fact of) the original free and independent existence of American Indian nations and peoples on the basis of a claim that Christian Europeans had “discovered” the North American continent.

A mental process of negation can be used to conceptualize a diminishment or reduction in the size, amount, or extent of something. Thus Chief Justice Marshall was using a cognitive process of negation when he claimed that Indian “rights to complete sovereignty as independent nations” had been “diminished” by Christian European “discovery.” By pretending to “convert” the “discovery” of an inhabited “heathen” country into “conquest,” Marshall, on behalf of the Supreme Court, conceptually negated Indian “rights to complete sovereignty as independent nations.” On the basis of cognitive theory, we might say that it was by means of the imaginative processes (thought processes) of Marshall’s mind, based on his interpretation of history, that the original rights and existence of the Indians were imaginatively diminished and, to that extent, mentally negated.