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Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States

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JOHNSON V. M'INTOSH REVISITED: THROUGH THE EYES OF *MITCHEL V. UNITED STATES*

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Introduction

In the first four decades of the nineteenth century, the United States Supreme Court handed down five seminal decisions written by Chief Justice John Marshall, forming the political-philosophical-legal basis of tribal-state-federal relations. It is unnecessary to elaborate on the principles derived from these decisions — *Fletcher v. Peck*,[1] *New Jersey v. Wilson*,[2] *Johnson v. M'Intosh*,[3] *Cherokee Nation v. Georgia*,[4] and *Worcester v. Georgia*[5] — because they have been analyzed or at least broached by virtually every scholar wading into the turbid discipline of federal Indian law.[6]

This article will focus on (1) the question of the legal status of Indian titles (aboriginal possessory rights) to land; and (2) what, if any, limitations are there on the rights of tribes to convey their title to whomever they wish. This set of questions requires us, first, to recapitulate the principles announced in the *M'Intosh* decision which forcefully addressed the issue of Indian land title and the apparently "diminished" right of tribes to transmit the same and second, to then move to examine in great detail the little-discussed 1835 Supreme Court decision, *Mitchel v. United States*.[7] This case fundamentally

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* Assistant Professor of Political Science and American Indian Studies, University of Arizona. Ph.D., 1990, University of North Carolina/Chapel Hill; M.A., 1982, University of Arizona; B.A., 1976, Pembroke State University. I want to thank Professor Vine Deloria, Jr., who originally brought *Mitchel* to my attention. In addition, he suggested the comparative approach this article employs. Furthermore, Dr. Deloria gave a thorough and critical analysis of an earlier draft of this article. Any mistakes, however, are shouldered by the author.

1. 10 U.S. (6 Cranch) 87 (1810).
2. 11 U.S. (7 Cranch) 164 (1812).
3. 21 U.S. (8 Wheat.) 543 (1823).
4. 30 U.S. (5 Pet.) 1 (1831).
5. 31 U.S. (6 Pet.) 515 (1832).
6. *See, e.g.*, Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics & Morality*, 21 STAN. L. REV. 500 (1969); Jill C. Norgren & Petra T. Shattuck, *Limits of Legal Action: The Cherokee Cases*, 2 AM. INDIAN CULTURE & RES. J. 14 (1978); JOHN R. WUNDER, THE CHEROKEE CASES, IN HISTORIC UNITED STATES CASES, 1690-1990: AN ENCYCLOPEDIA 409-17 (John W. Johnson ed., 1992); 3-4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE: 1815-35, at 703-40 (Paul A. Freund & Stanley N. Katz eds., 1991). Although legal commentators obviously dominate the field of federal Indian law, historians, a few hardy political scientists, and a smattering of anthropologists have also braved analysis of these pivotal Supreme Court cases.
7. 34 U.S. (9 Pet.) 711 (1835). Despite *Mitchel's* importance, the decision has previously received only scant attention. *See* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28

contradicts the doctrines enunciated in *M'Intosh*. A critical review of *Mitchel* will reveal that (1) the doctrine of discovery elaborated by Marshall in *M'Intosh* and used to diminish tribal sovereignty is without credibility as a legal principle; (2) tribes are the possessors of a sacrosanct title that is "as sacred as the fee-simple";[8] (3) tribes may alienate their aboriginal territory to whomever they wish, and the question of whether the non-aboriginal purchaser has the authorization of a sovereign is a matter that cannot be used to reduce indigenous rights; (4) an argument based on alleged inferior tribal cultural status, regardless of its differences with Western culture, will not inhibit aboriginal sovereignty; and finally (5) tribes as collective entities and the individual members thereof are entitled to international protections of their recognized treaty rights which survived the federal government's assumption of jurisdiction upon Spanish cession of Florida.

We should open this article, however, with a pertinent question: why has *Mitchel* heretofore not received the scholastic, jurisprudential, or popular attention it clearly deserves? Is it because the decision was written by Justice Henry Baldwin (one of the least liked and most bizarre justices) and not the

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(1947) [hereinafter Cohen, *Original Indian Title*] (arguing that *Mitchel* involved a situation where the Indian sale to whites had been made with the consent of the sovereign, in contrast to *Johnson v. M'Intosh* which, in Cohen's opinion, involved an illegal land transfer). For a parenthetical reference to *Mitchel*, see the oft-cited classic FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (Univ. of N.M. Press photo. reprint 1971) (1942). In a section focusing on aboriginal title, Cohen extracted a quote from Holden v. Joy, 84 U.S. (17 Wall.) 211, 244 (1872), wherein Justice Nathan Clifford remarked that the Cherokees held a title to their lands which "was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain . . . ." COHEN, *supra*, at 293. For a more current reference relating to Cohen, see FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds., 1982), which also briefly mentions *Mitchel*, *id.* at 442, 472, 485, 491, 508, 510, 512, 605, but only insofar as the decision discussed actual tribal "use and occupancy over an extended period of time." *Id.* at 442. Indian interests in real property were discussed as being "as sacred as the fee-simple title of the whites." *Id.* at 472. In a telling passage, the 1982 revisers vaguely note in describing *Mitchel* that the case "involved some difficult questions of Spanish law." *Id.* at 485.

For a hint at the importance of *Mitchel*, see Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (1987). "*Mitchel* . . . concerned title to land in Florida. Grants had been made by Indians under the authority of Spain, before cession . . . Spain had allocated to Indians a property right, and the United States was bound by the right under treaty . . . ." *Id.* at 33 n.152.

Finally, for a different view of the opinion, see Petra T. Shattuck & Jill Norgren, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM (1991). Their commendable work devotes but a single paragraph to the decision. While noting that *Mitchel* "held general faith with *Worcester*," they also assert that it was "an early example of the use of [*M'Intosh*] as authority." *Id.* at 51. And while correctly acknowledging that *Mitchel* established the principle that "Indian title included the power to transfer as well as to occupy," they incorrectly interpret the ruling by concluding that the Supreme Court "maintained its commitment to discovery theory and the dual, or split, nature of Indian land title." *Id.*

8. *Mitchel*, 34 U.S. (9 Pet.) at 746.

vaunted Chief Justice John Marshall? Or, from a contemporary standpoint, is it because *Mitchel*, by articulating a much more historically and legally accurate portrayal of indigenous land tenure, challenges and actually disputes both conservative and liberal views of tribal-Western political relations? Conservatives may discount or ignore the decision because it affirms the sanctity of Indian or aboriginal title even though this title is *not* based on Lockean views of private property. Liberals may not have given the decision much attention because it turns the "doctrine of discovery" (read: the European discoverer secures *absolute* title to Indian lands, subject only to the Indians' right of occupancy, which can be appropriated at any time by purchase or conquest) on its head. This doctrine, when defined in such a brazen fashion, is the core principle which fuels a liberal-radical view of tribal-Western relations which invariably depict tribes as the helpless victims of a European or European-derived colonial juggernaut intent on destroying all vestiges of indigenous rights.

However, a careful analysis of *Mitchel*, when linked to Marshall's *Worcester* decision, shows that the key concepts of "discovery" and "conquest" were actually terms designed more to limit competition between European nations; they were not, strictly speaking, created to diminish indigenous rights. Of course, it is possible that *Mitchel* has been ignored or overlooked for the simple reason that academics and jurists have simply been too preoccupied with Marshall's "major" Indian law decisions (especially *M'Intosh*, *Cherokee Nation*, and *Worcester*), or that since Felix Cohen said very little about the case in his treatise on federal Indian law, the bible of most Indian law experts, it was not deemed important enough to warrant serious scrutiny. It will be shown, however, that the *Mitchel* case should indeed be merged with the first-tier Indian law cases. In fact, a convincing argument can and will be made that this ruling should be placed among those considered the most important cases in federal Indian law.

Johnson v. M'Intosh: A Recapitulation

According to most commentators, *M'Intosh* is the foundational case which first addressed aboriginal possessory rights. The principal question to be resolved by the Court was whether the Indian title which had been ceded by the Illinois and Piankeshaw tribes to the plaintiffs (Johnson, et al.,) under two separate land transactions in 1773 and 1775 could be "recognized in the courts of the United States"[9] or whether the defendant's (M'Intosh's) title which had been purchased from the United States in 1818 — land that was part of Johnson's original purchase from the Indians — was valid. As stated more specifically by Chief Justice Marshall, "The inquiry, therefore, is, in a great

9. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country."[10]

The Illinois and Piankeshaw tribes had sold the same land to both the plaintiff and the defendant, although Johnson's deeds predated M'Intosh's by over forty-five years. The plaintiffs, however, because of the eruption of the American Revolution, had never been able to take possession of the land, although they began petitioning Congress as early as 1781 for relief.[11] Yet there was no question that the Illinois and Piankeshaw tribes held original possession of the land. There was, in addition, no doubt that the tribes' sale of the land to a group of land speculators preceded Virginia and United States efforts to convey the same land to McIntosh. It is true that Johnson and Graham were indeed private individuals "without any public authority or previous license from the Government,"[12] although these land transactions had taken place at British military posts in full view of military and civil officers, and the completed deeds were then attested to by these same officers.[13] Furthermore, the Indian chiefs who ceded the land to the plaintiffs' predecessors were, in fact, the duly authorized leaders of their nations. Nevertheless, Marshall and his brethren arrived at the startling conclusion that Indian tribes did not have and therefore could not convey their allegedly "incomplete" title to whomever they wished.

Instead of addressing the single question raised by the facts: whether private individuals could purchase Indian land, or whether only the national government had that authority, Marshall raised and then answered an entirely different and far more profound question, especially since Indian tribes were not parties in the suit: Do tribes have a title that can be conveyed to whomever they choose? By asking this self-generated question and in answering it negatively, Marshall, in the process of this unanimous opinion, both created and recreated a set of legal rationalizations to justify the reduction of Indian rights without allowing any room for the Indian voice.

This is evidently his purpose in the second paragraph of his opinion where he states:

> As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted, to depend entirely on the law of the nation in which they lie; it will be

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10. *Id.*

11. *See* Memorial No. 177 to the House of Representatives, 11th Cong., 3d Sess., Concerning the Illinois and Wabash Land Companies (Dec. 21, 1810), *in* 2 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, at 108, 108 (Walter Lowrie & Walter S. Franklin eds., Gales & Seaton 1834) [hereinafter AMERICAN STATE PAPERS].

12. *Id.*, *in* AMERICAN STATE PAPERS, *supra* note 11, at 112.

13. *Id.*

> necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice . . . which are admitted to regulate, in a great degree, the rights of civilized nations . . . but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.[14]

Here Marshall was asserting that if the rule of law or "abstract justice"[15] was in conflict with the national government's right to generate rules favorable to its own needs then it was the court's duty to adapt principles or amend existing principles which will sanction those new standards. In other words, the rule of law, which should have led to a decision in favor of the plaintiffs because of their preexisting property rights, was circumvented in this case and the politically expedient compromise agreed to by the founders of the American Republic which "provided for the cession of frontier claims by the 'landed' states to a federal sovereign claiming exclusive rights to extinguish Indian occupancy claims by purchase or conquest . . . settled the legal status and rights of the American Indian in United States law."[16] The bulk of Marshall's opinion, as most observers note, was spent articulating or rearticulating the "doctrine of discovery."[17] This doctrine has been vilified by a number of writers,[18] though a small minority of scholars have argued that "Marshall's version of the doctrine of discovery has small consequence for the tribes."[19] Notwithstanding the minority views' substantial arguments, the reality for tribes over the years has been that the major principles emanating from *M'Intosh* — the discovery doctrine, the inferior status of Indian property rights, the notion of

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14. *M'Intosh*, 21 U.S. (8 Wheat.) at 572.

15. *Id.*

16. ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 231 (1990).

17. VINE DELORIA & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 4 (1983) (contending that Marshall's characterization of the "doctrine of discovery" was really a corrupted version of the discovery principle first discussed by Francisco de Vitoria in 1532).

18. *See, e.g., id.*; WILLIAMS, *supra* note 16; FRANKE WILMER, THE INDIGENOUS VOICE IN WORLD POLITICS 1 (1993).

19. Ball, *supra* note 7, at 25. "[T]he Indian property interest is described as a 'title of occupancy.' It is recognized and protected. And it can be conveyed to non-Indians." *Id.* Ball continues:

> It has all the indicia of fee simple except this: unless a non-Indian purchaser is licensed by the discovering sovereign or that sovereign's successor, the non-Indian purchaser takes only the Indian's interest. That is, the unlicensed purchaser takes everything except what Marshall describes variously as "absolute title," "absolute ultimate title," or "complete ultimate title." "Absolute title" is an abstract tautology. . . . The plaintiffs' [Johnson, et al.] claim to the land was defeated principally because the Indians themselves had extinguished plaintiffs' interest.

Id.; *see also* Cohen, *Original Indian Title*, *supra* note 7, at 47 (stating that "the dismissal of the plaintiffs' complaint in this case was not based upon any defect in the Indians' title, but solely upon the invalidity of the Indian deed through which the white plaintiffs claimed title"); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1222 (1980).

conquest, the alleged inferior cultural standing of tribes, the impaired ability of tribes to sell their incomplete title, and the diminished political status of tribes — have had lasting implications for political and legal relations among tribes, states, and the federal government.[20]

Marshall's retrospective vision of "discovery" — the definitive principle in the case — created a "landlord-tenant relationship between the federal government and the Indian tribes. The federal government, as the ultimate landlord, not only possessed the power to terminate the 'tenancy' of its occupants but also could materially affect the lives of Indians through its control and regulation of land use."[21] Several quotations from the opinion vividly evidence this unilateral transmutation of Indian property and political rights, based solely on self-generated notions by the Supreme Court.

On the "Discovery" principle, Marshall stated:

> 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. . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements . . . to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
>
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. . . .
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> . . . .
>
> 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. . . .
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> . . . .
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> 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 discoverer to appropriate the

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20. Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 643 (1978). *See generally* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS (1994); FRANKE WILMER, THE INDIGENOUS VOICE IN WORLD POLITICS (1993); JAMES E. FALKOWSKI, INDIAN LAW/RACE LAW: A FIVE-HUNDRED YEAR HISTORY (1992); PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM (1991).

21. DELORIA & LYTLE, *supra* note 17, at 26-27.

> lands occupied by the Indians. Have the American states rejected or adopted this principle?
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> . . . .
>
> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.
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> . . . .
>
> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[22]

Regarding the tribes' impaired rights to both soil and sovereignty, Marshall stated:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.
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> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.
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> . . . .
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> . . . The existence of this power [to grant lands] must negative the existence of any right which may conflict with, and control it.

22. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-73, 579, 584, 587, 591 (1823).

> 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 recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.
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> . . . .
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> . . . So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural rights, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.
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> . . . .
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> It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.[23]

The thrust of the Court's message in *M'Intosh* was that indigenous peoples did not have the natural right exercised by "civilized" nations to sell their property to whomever they wished. But why? Marshall had acknowledged that they possessed certain rights and a form of title that could be disposed of under certain situations. To legitimate the denial of full tribal territorial sovereignty and complete political sovereignty, Marshall pulled together a conflicting and confusing potpourri of arguments. First, he couched his argument against recognition of full tribal property rights on the basis of their allegedly inferior, non-Christian cultural status, though he tried to downplay this cultural ethnocentrism by saying that "we will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[24] This statement was more than offset, however, by several other passages where the Chief Justice referred to tribes as "fierce savages, whose occupation was war,"[25] as "warlike tribes";[26] or as people

23. *Id.* at 574, 588, 591-92, 603.
24. *Id.* at 588.
25. *Id.* at 590.

"whose subsistence was drawn chiefly from the forest."[27] According to Marshall, "To leave them in possession of their country, was to leave the country a wilderness."[28]

Second, Marshall made several equivocal statements about the concept of "conquest" and how that affected the relationship between tribes and European or Anglo-American nations. After a long discussion about the limitations placed upon conquered peoples, Marshall rechanneled and redirected his thoughts and stated that the "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people [tribes] under such circumstances."[29] The result was that the Court created a "new and different rule, better adapted to the actual state of things."[30] That rule, as noted earlier, was Marshall's deployment of the doctrine of discovery and the doctrine of conquest, no matter how "extravagant" and pretentious it was, to legitimize the United States power over tribes.[31]

Finally, Marshall argued that Johnson and Graham as successors to the original purchasers of Indian title in the two pre-revolutionary land transactions, had in buying land "within their territory, incorporate[d] [them]selv[es] with them, so far as respects the property purchased;" and therefore "holds their title under their [tribal] protection, and [is] subject to their laws."[32] The United States, by contrast, in concluding post-revolutionary treaties with the tribes for the same territory, had secured recognizable title to the lands in dispute in part because "[t]hese [tribes] had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption that they considered it as of no validity."[33] In short, the Chief Justice was saying that the plaintiffs' claims were defeated because the tribes themselves had extinguished their interest by selling the land again, this time to the United States.

In conclusion, Marshall had cleverly reached a political/legal compromise that avoided two contrasting visions of Indian title: (1) that the doctrine of discovery completely vanquished Indian title in toto, or (2) that tribes held a title equal to the fee-simple title that was wholly unaffected by the claims of the European and U.S. "discoverers."[34] The former would have left the tribes

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26. *Id.* at 586.
27. *Id.* at 590.
28. *Id.*
29. *Id.* at 591.
30. *Id.*
31. Berman, *supra* note 20, at 655. *But see* Ball, *supra* note 7, at 28 n.132 (providing a splendid analysis of Marshall's equivocation on the doctrine of conquest).
32. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 593 (1823).
33. *Id.* at 594.
34. Cohen, *Original Indian Title*, *supra* note 7, at 48.

with no enforceable interests whatsoever; the later would have nullified state and federal grants derived from Indians. The end result, of course, was the enshrinement and institutionalization of a theory of tribal "subservience to the federal government."[35] Put more pithily, *M'Intosh's* "acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. White society's exercise of power over Indian tribes received the sanction of the Rule of Law in *Johnson v. M'Intosh.*"[36]

The Cherokee Cases: The Bridge to Mitchel

The Marshall court had dispatched Johnson and Graham's appeal for an ejectment of M'Intosh without any "intrinsic difficulty."[37] *Cherokee Nation v. Georgia*[38] and *Worcester v. Georgia*,[39] however, would not be so easily resolved. As noted above, these cases have been analyzed many times and need not be elaborated here. It is generally accepted that the Cherokee cases, along with *M'Intosh*, constructed the basic underpinnings of tribal property rights, as well as tribal status in relation to the states and the federal government. As Deloria and Lytle point out:

> The *Cherokee Nation Cases* should be considered as one fundamental statement having two basic thrusts on the status of Indian tribes. In the first case [*Cherokee Nation*] Marshall defined the relationship of Indian tribes to the federal government and in the second case [*Worcester*] he described the relationship of the tribes to the several states.[40]

Mitchel v. United States: The Prelude

In the most detailed examination[41] of *Mitchel* to date, Cohen asserted that

> [w]hereas [*Johnson v. M'Intosh*] had held that an unauthorized Indian sale could not give a title superior to that later obtained by treaty, the case of *Mitchel v. United States* dealt with the obverse situation where the Indian sale relied upon had been made with the consent of the sovereign. In such case, the Court held, the

35. DELORIA & LYTLE, *supra* note 17, at 26.
36. WILLIAMS, *supra* note 16, at 317.
37. *M'Intosh*, 21 U.S. (8 Wheat.) at 604.
38. 30 U.S. (5 Pet.) 1 (1831).
39. 31 U.S. (6 Pet.) 515 (1832).
40. DELORIA & LYTLE, *supra* note 17, at 33.
41. Cohen, *Original Indian Title*, *supra* note 7, at 50-51. Cohen's article devotes about one page to *Mitchel*.

> purchases from the Indians secured a title superior to any title which the United States could assert.[42]

Cohen noted the Court had observed that the United States could not secure from the Spanish King property that did not belong to the monarch, and that Indian property or grantees of that property could not become vested to the royal family or the federal government without formal judicial action.[43]

Cohen concluded his brief analysis of the case by stating that

> what had been conceded, by way of dictum, in [*Johnson v. M'Intosh*], namely that Indian title included power to transfer as well as to occupy, is the core of the decision in the *Mitchel* case. Finally, *Mitchel* clarifies the scope of the rule of respect for Indian possessions by expressly rejecting the view that such possession extended only to improved lands.[44]

While Cohen is rightly considered the founding father of federal Indian law, and while his research and analysis are excellent, it does not necessarily follow that his interpretation of case law is infallible. An analysis of *Mitchel* will show, conversely, that *M'Intosh* and *Mitchel* actually have much more in common than is generally understood and that the fact situations have a certain similarity, notwithstanding Cohen's perspective of what the Court held. In fact, Cohen's statement that *M'Intosh* was based on an unauthorized Indian sale — because the land in question was purchased by "a private individual claiming title to land by reason of a private purchase from an Indian tribe *not* consented to by the sovereign"[45] — is only partially correct. This will be discussed further *infra*. And if this important historical fact is not as Cohen presented it, then heightened scrutiny must be applied to Cohen's interpretation of the *Mitchel* case.

Before proceeding to our examination of *Mitchel*, however, it is pertinent to point out three interesting items. First, John Marshall, who had authored all of the previous Indian law cases, for some reason chose to not write this decision, although he did author the brief opening section in which the Court denied the motion of the U.S. attorney for a postponement of the Court's verdict. Marshall retired from the bench in July 1835, the same term in which *Mitchel* was decided.

Second, *Mitchel* was a unanimous ruling that postdates *M'Intosh* by over a decade, possibly indicating firm ideological consensus on the merits of the case. Third, and of most importance, Justice Henry Baldwin was the author of the opinion. Baldwin, it must be recalled, provided a separate opinion in

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42. *Id.* at 50.
43. *Id.*
44. *Id.*
45. Cohen, *Original Indian Title*, *supra* note 7, at 47.

the *Cherokee Nation* case in which he agreed with the majority to dismiss the Cherokee Nation's case "but not for the reasons assigned."[46] Baldwin, in fact, did not believe that the Cherokee Nation, or by extension any other tribe, was a sovereign independent nation entitled to sue in the federal courts. Baldwin's views expressed in *Cherokee Nation* on tribal sovereignty, Indian treaties, and the tribal-federal and state-tribal relationship warrant some discussion.

Baldwin asserted that the federal government, in enacting the Northwest Ordinance in 1787,[47] paid "no regard to Indian jurisdiction, sovereignty, or their political rights, except providing for their protection . . . ."[48] In his narrow analysis of Indian treaties, the associate justice said the treaties were

> not negotiated between ministers on both sides representing their nations; the stipulations are wholly inconsistent with sovereignty; the Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting-grounds; [and] give to Congress the exclusive right of regulating their trade and managing all their affairs as they may think proper.[49]

In sum, "[m]ere phraseology cannot make Indians nations, or Indian tribes foreign states."[50]

In voicing his undivided support of Georgia sovereignty over Cherokee territory, Baldwin categorically asserted that "Indian sovereignty cannot be roused from its long slumber, and awakened to action by our fiat."[51] Finally, while acknowledging that Indians had rights of occupancy to their lands which were "as sacred as the fee simple," still Baldwin quoted liberally from *M'Intosh* and said these were "only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the government."[52]

Baldwin's tenure on the Court, from 1830 until his death in 1844, was considered particularly "distracting."[53] He was considered "conceited, willful, and wrongheaded."[54] Fellow Justice Joseph Story in 1833 bluntly stated that Baldwin's

> opinions . . . are so utterly wrong in principle and authority, that I am sure he cannot be sane. And indeed, the only charitable

46. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 31 (1831).
47. Act of Aug. 7, 1789, ch. 8, 1 St. 50.
48. *Cherokee Nation*, 30 U.S. (5 Pet.) at 35.
49. *Id.* at 38.
50. *Id.* at 44.
51. *Id.* at 47.
52. *Id.* at 48.
53. WHITE, *supra* note 6, at 298.
54. *Id.* (quoting Letter from Justice Joseph Story to Justice Joseph Hopkinson (May 9, 1833)).

> view which I can take of any of his conduct is that he is partially deranged at all times. His distaste for the Supreme Court and especially for [Chief Justice Marshall] is so familiarly known to us that it excites no surprise.[55]

Baldwin, in fact, missed the entire 1833 term "because of mental illness."[56]

Notwithstanding his mental disorder, an evaluation of the *Mitchel* ruling will show that it is one of the most lucid, historically accurate, and highly principled decisions ever handed down by the Supreme Court; particularly insofar as it contains one of the most articulate and straightforward accounts of the interplay of European nations in their affairs with tribes and how the law of nations were clearly relevant to the protection and enhancement of undiminished aboriginal sovereign rights. Moreover, this decision, when read in conjunction with *Worcester*, goes far towards undermining, although not explicitly disavowing, the disastrous doctrines unleashed in *M'Intosh*.

A short historical summary of indigenous-Spanish-U.S. relations is necessary to provide the necessary historical backdrop before discussing *Mitchel*.

Indigenous, Spanish, Anglo-American Affairs[57]

After the French and Indian War was concluded by the Treaty of Paris in 1763, Spain, which had sent explorers to circumnavigate and invade Florida as early as 1513, ceded East and West Florida to Great Britain. However, after the American Revolution, the embryonic American Republic was in a desperate struggle to gain control over much of the territory it had fought to secure from the tribes, Great Britain, and Spain. Spain had also fought the fledgling American colonies in the war against Great Britain. And in the succeeding peace negotiations Spain had regained dominion, from a European perspective, of Florida and the Gulf Coast region east of New Orleans; in addition, the nation remained the preeminent European power in the Southwest region of the North American continent.

The Jay Treaty of 1794 between the United States and Great Britain, in which the British agreed to evacuate its military posts in the West, was a prelude to the Pinckney Treaty that was worked out the following year between Spain and the federal government. The Spanish, fearing British attack and concerned over their inability to organize wide-scale Indian resistance against the Americans, had decided that a diplomatic settlement might prevent a total collapse of their ever-weakening colonial position in North America. In the Pinckney Treaty, Spain granted the United States free

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55. *Id.*

56. *Id.* at 299.

57. 1 JOHN A. GARRATY, THE AMERICAN NATION: A HISTORY OF THE UNITED STATES (1st ed. 1966). This section draws from Garraty's work.

navigation of the Mississippi River and accepted the American version of the disputed Florida boundary.

The Spanish role in Florida grew even more precarious after the War of 1812. The United States military seized the rest of West Florida in 1813 and Anglo frontiersmen eyed East Florida covetously. Moreover, Creek and Seminole warriors often raided American territory and would then slip back into Florida for refuge. In addition, escaping African slaves would often flee into Florida seeking sanctuary.

In 1818 President James Monroe ordered General Andrew Jackson to quell the Seminole raids of American settlements.[58] Jackson marched into Florida and captured two Spanish forts. In the process he captured and hanged two British subjects who he alleged had been inciting the Seminoles against the United States.[59] Although Jackson later withdrew from Florida, it was evident that the Spanish presence in that territory would not last.

Hence, in 1819 the so-called Adams-Onis "Transcontinental Treaty" was signed between Spain and the United States. By this treaty Spain ceded not only its tenuous jurisdiction over Florida but, more importantly, the United States forced the Spanish monarch to relinquish "a boundary to the Louisiana Territory that followed the Sabine, Red, and Arkansas rivers to the Continental Divide and the 42nd parallel to the Pacific, thus abandoning Spain's claim to a huge area beyond the Rockies that had no connection at all with the Louisiana Purchase."[60] We now turn to the facts of the *Mitchel* case.

Mitchel: The Facts

Panton, Leslie, & Co., an English mercantile house, had established itself in St. Augustine, East Florida, sometime prior to Spain's reassertion of territorial jurisdiction vis-à-vis Great Britain in 1783. The house had "extensive connections and great credit in England, and its operations were very great."[61] When Spain secured jurisdiction of Florida by virtue of the 1783 Treaty, the Spanish monarch by royal edict authorized the mercantile house by license to "carry on and continue their commercial operations in those provinces and Louisiana."[62] The house, although operating in a satisfactory manner according to Spanish commercial law, nevertheless sustained a number of material losses (estimated at over $60,000) at the hands of Seminole raiding parties, led by Bowles, in 1792 and 1800.

The company's representatives immediately began petitioning the Spanish crown seeking compensation for those losses. Panton, Leslie, & Co. pressed the "great importance and services of the house as a political instrument of the

58. *Id.* at 205.
59. *Id.*
60. *Id.* at 206.
61. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 726 (1835).
62. *Id.*

government; that they had a right to indemnity from the king; that the situation of the house was such, that they must sink under their losses if it was not afforded; and that it must be sustained and preserved as indispensable to retain any control over the Indians, and secure the possession of the provinces entrusted to their care."[63]

The company's protestations soon paid off. First, the Spanish Governor of Louisiana issued a grant of "twenty leagues square of royal lands west of the Mississippi, or a loan of four hundred thousand dollars without security."[64] Second, the company received permission from the Louisiana governor to purchase from the Seminoles, who had agreed to provide compensation in the form of lands, enough territory to satisfy Panton, Leslie & Co.'s claims.[65] In a series of negotiations with the Seminoles over the next seven years, the mercantile house in four separate purchases secured the Indian title to over 1,250,000 acres of tribal land. As Baldwin noted, insofar as

> the merits of the case depend on the genuineness of the deeds and documents, the facts of the grants and confirmations by the Indians and governor, the marking the lines and possession of the land, the good faith of the whole transaction, the absence of fraud, the authority of the Indian chiefs, as representatives of their respective tribes, we entirely concur with the court below.[66]

Colin Mitchel and others, plaintiffs in the case, by various deeds from the Seminoles, the Creek Confederacy, and Panton, Leslie, & Company, John Forbes & Company, and John Forbes, had purchased all the land in controversy. The United States, on the other hand, claimed the land by virtue of the 1819 treaty of cession by Spain in which the federal government acquired the Floridas for five million dollars "paid in extinguishment of certain claims of the citizens of the United States on the government of Spain."[67] The U.S. did, however, acknowledge the "equity" of Mitchel et al.[68]

Mitchel: The Question and Legal Route of the Case

The question, as stated by Baldwin, was "whether at the time the cession by the treaty took effect in favour of the United States, there was a right of property in Colin Mitchel to the lands included in his grants, or whether they had been previously granted by the lawful authorities of the king."[69] Mitchel

63. *Id.*
64. *Id.* at 727.
65. *Id.*
66. *Id.* at 730-31.
67. *Id.* at 725.
68. *Id.* at 737.
69. *Id.* at 738.

had filed his petition in October 1828 in the superior court of middle Florida, using a congressional law enacted earlier that year which allowed for the settlement of private land claims in Florida. The superior court dismissed Mitchel's claim in November 1830. He immediately appealed to the U.S. Supreme Court, but the case was postponed at the behest of the federal government's attorneys "to enable the government . . . to procure papers from Madrid and from Havana, which were considered important and necessary in the cause."[70] Although these delays were bitterly contested by Mitchel's attorneys, the case was stalled until 1835 when Chief Justice Marshall refused to issue any more postponements noting that "[t]he Court . . . must see with its own eyes, and exercise its own judgement, guided by its own reason."[71]

Legal Arguments Raised by Mitchel's Attorneys

Mitchel's lawyers stressed the following major points. First, that the Indian sales and the confirmations of these deeds by the governor of Florida "vest[ed] in the grantees a full and complete title to the land in controversy."[72] Second, that Spain's King was legally bound to indemnify the mercantile company for the losses it had sustained as a result of Indian depredations. Third, that the land transactions had been formally assented to and ratified by all the appropriate Spanish officials, such action amounting to an "acquiescence on the part of the King of Spain and his legitimate authorities; which . . . vest[ed] a valid title in the grantees."[73] Finally, that Mitchel and the other grantees had legal possession of the disputed territory "since the date of the respective grants" which entailed title by prescription under Spanish law.[74]

Legal Arguments Relied on by the U.S. Attorneys

Attorney General Benjamin F. Butler, representing the federal government, admitted that the Forbes & Co. mercantile house had provided important services to Spain and was entitled to compensation for the losses it had sustained from Indian raids. However, he elaborately argued that notwithstanding this, the Supreme Court had to affirm the lower court's decision unless it could be proved that Mitchel et al. "had a legal right to the lands in question" either by grant or concession *before* the U.S. acquired it in 1818, or by "virtue of some other valid title."[75] This, they argued, was an impossibility.

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70. *Id.* at 717.
71. *Id.* at 723.
72. *Id.* at 718.
73. *Id.*
74. *Id.*
75. *Id.* at 719.

The major points utilized by the United States were (1) that the King of Spain was not, in "point of fact," liable to indemnify Forbes & Co. under "the law of nations . . . []or any existing treaty";[76] and (2) that the King had made no "substantive grant" of the land in question to the appellants but was based "on cessions made by Indian tribes, and on alleged ratifications and confirmations thereof, and acquiescence therein, by the Spanish authorities."[77] The Attorney General argued, according to *Mitchel*, that "[i]n this respect, the present case differs from all the cases hitherto submitted to this Court."[78]

Third, the U.S. argued that since the Indian tribes had no legal title to cede, then Panton, Leslie & Co. could have secured no valid or recognizable legal right to the land in question. Fourth, it was argued that under Spanish law, absolute title rested with Spain. "The Indians, by those laws, were regarded as having no title whatever," merely a right of occupancy to those tracts they "actually inhabited."[79] Finally, the U.S. argued, the Indian right of occupancy, "if any ever existed," had been extinguished by a 1765 treaty between Great Britain and the Indians, and by the Treaty of 1783 Spain succeeded to all the rights of soil and sovereignty previously possessed by Great Britain.[80] The Indian deeds had been invalidated by this series of events, according to the Attorney General.[81]

Mitchel: The Decision

Concisely stated, the Court held that since the Seminoles' sale of land to Mitchel et al. and their predecessors (Panton, Leslie & Co.) had been made with the consent of a European sovereign (Spain), the purchasers of the Indian land thereby gained a superior title to any which the United States could assert. Baldwin said that "this court is unanimously of opinion that the title of the petitioner[s] . . . is valid by all the rules prescribed by the acts of Congress . . . by the law of nations . . . [and by] the treaty between the United States and Spain . . . ."[82] This is a stunning ruling for several reasons and implicitly contradicts the very basis of the *M'Intosh* holding. First, and in direct contrast to Baldwin's anti-sovereignty views expressed in *Cherokee Nation* and in direct contrast to the *M'Intosh* ruling, the Supreme Court recognized not only the sovereignty of the Seminole Nation, but also explicitly acknowledged that the Indians had a title that was indeed transfer-

76. *Id.*
77. *Id.* at 720.
78. *Id.*
79. *Id.* at 720-21.
80. *Id.* at 720.
81. *Id.*
82. *Id.* at 761.

able. As Baldwin noted, "The Indian right to the lands as property was not merely of possession, that of alienation was concomitant . . . ."[83]

Additionally, Baldwin's opinion has expressive language on the sovereign status of tribes. He speaks glowingly of the Indian title (both occupied and hunting territory) as being equal to or as "sacred as" whites' fee-simple. His opinion is an implicit repudiation of the doctrine of discovery (it is not mentioned in the case) as in any way diminishing the political status of property rights of tribes. He has an emphatic description of the applicability of international legal principles for the protection of tribal nations (and individuals) and their mutually agreed-upon agreements with European sovereigns. He, in addition, has express statements that the doctrine of conquest in no way affected tribal property rights and was completely irrelevant to the basic contractual relationship between tribes and European nations and the United States. Finally, he has a meticulous analysis of how the United States was legally and morally bound to uphold the treaties and agreements its predecessor, Spain, had entered into with tribes. The combination of these explicit and implicit statements serves as convincing proof that flatly challenges the often equivocal *M'Intosh* doctrines.

Before proceeding with an explanation of why there are such clear disparities in the two cases, several quotations from Baldwin's opinion are necessary.

On Indian title, Baldwin stated that one rule seemed to prevail in the former English colonies in America:

> that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of the individuals located on particular spots.
>
> Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.
>
> . . . [A]nd by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.
>
> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites . . . .

83. *Id.* at 758.

> . . . [I]t is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites.[84]

On the Indians' right to sell their lands, Baldwin stated:

> [Indians possessed the land] until they abandoned [it], made a cession to the government, or an authorized sale to individuals. . . .
>
> . . . .
>
> It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands . . . .
>
> . . . .
>
> [T]he King [of Spain] . . . most solemnly acknowledged that the Indians had rights of property which they could cede or reserve . . . .
>
> It may, then, be considered as a principle established by the king that the Indians were competent judges of the consideration on which they granted their lands . . . .
>
> . . . .
>
> . . . [T]here can be no reason perceived why deeds or grants, operating to confirm in full property to the purchasers from the Indians, lands thus guarantied to them, should not be held in a court of equity as valid as original grants of the royal domain.
>
> The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guarantied by Great Britain and Spain . . . .[85]

Regarding the doctrine of conquest, Baldwin stated:

> By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession . . . .
>
> . . . .
>
> . . . [The United States] could assume no right of conquest which may at any time have vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; nor did they take possession on any such assumption of right; on the contrary, it was done under

84. *Id.* at 745-46.
85. *Id.* at 746, 748, 749, 750, 758.

> the guaranty of Congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection.[86]

On the international standing of Indian tribes and their legal contracts with European sovereigns, Baldwin stated:

> [I]t was [the King of Spain's] orders to his officers to continue and confirm those relations which had previously existed, to consider, treat and protect the Indians as his subjects, and to give them new and most solemn pledges of his protection in all their rights, as individuals; and as nations or tribes, competent parties to treaties of mutual guaranty, for his, as well as their protection . . . .
>
> This was not done for slight reasons . . . both king and Indians [were bound] as contracting parties, in this respect as nations on a footing of equality of right and power. The consequence was that when once received into his protection as individuals, they became entitled by the law of nations and of the provinces, on the same footing as the other inhabitants thereof, to the benefits of the law and government . . . .[87]

On U.S. legal obligations in succeeding Spain, Baldwin stated:

> When [the U.S.] acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. . . .
>
> When [the U.S.] acquired and took possession of the Floridas, these treaties remained in force over all the ceded territory by the orders of the king . . . and were binding on the United States, by the obligation they had assumed by the Louisiana [Purchase], as a supreme law of the land which was inviolable by the power of Congress. They were also binding on the fundamental law of Indian rights . . . . It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, were we to decide that the Indians were not to be maintained in the

86. *Id.* at 749, 754.
87. *Id.* at 753-54.

> enjoyment of all the rights which they could have enjoyed under either . . . .[88]

Mitchel, as evidenced from these quotes, is vastly different from *M'Intosh*. Whereas *M'Intosh* stressed the discovery principle as the prime diminishing element to tribal political and property rights, *Mitchel* never even broached the doctrine. Whereas *M'Intosh* held that tribes could not convey their impaired right of occupancy to whomever they wanted, *Mitchel* held that the tribes' right of occupancy was not handicapped, was as sacred as the fee simple of whites, and could indeed be conveyed. Whereas *M'Intosh* relied on ethnocentric arguments of alleged tribal cultural inferiority as a significant factor that reduced Indian rights, *Mitchel* stated that even the hunting territory of tribes was entitled to protection and was equally as valid as the "improved" farm fields of Anglo farmers.

One explanation for the discrepancy in Baldwin and the Court's views hinges on the fact that in *Mitchel* the character of another sovereign, Spain, and by extension, that of the United States, was directly involved. The Spanish king, via his North American governors, had given his explicit sanction to the Indian deeds. As Baldwin stated:

> They [the deeds] are drawn up in great form; contain a perfect recognition of the Indian grants, and give to them all the validity which he [Spanish governor] could impart to them. They are made in the name of the king, executed and attested in all due formality, and their authenticity proved as public documents, and by the testimony of witnesses to the official documents.[89]

In *M'Intosh* the British monarchy was less explicitly involved, though there was some implicit involvement, a fact Cohen seems unaware of. In fact, the original land transactions of 1773 and 1775 involving the Illinois and Piankeshaw tribes and the Illinois and Wabash land company's representatives had been made with a certain amount of official sanction. As the land company asserted in a memorial to the House of Representatives in December 1810, their land transactions with the tribes, while lacking in public authority, were not made

> without any public treaty, or other act of notoriety. On the contrary, no conferences with Indians were ever more public or more notorious. The conferences were held at British military posts, in the view and presence of the British military and civil officers. They lasted a month each time. . . . And finally, the treaties, after having been interpreted to the Indians by the sworn

88. *Id.* at 754-55.
89. *Id.* at 728.

> interpreters of the British Government, were attested by its civil and military officers.[90]

Furthermore, the original petitioners, William Murray et al. (the Illinois Company) and Lord Dunsmore et al. (the Wabash Company), who, as mentioned earlier, had first petitioned the Congress under the confederation in 1781, actually received a favorable report from a House Committee in 1792 supporting their petition. As committee member Rep. Samuel Livermore (Fed.-N.H.) stated:

> In the opinion of the committee, the said deeds, being given by the Indians, proprietors of the soil, before the declaration of the Independence of the United States, for a valuable consideration, bona fide paid, are sufficient to extinguish the Indian title to the lands therein described: and, therefore, that, on the principles of justice and equity, the United States should agree to the proposal aforesaid made by the petitioners.[91]

This report, however, was accompanied by an adverse report and the land company's efforts were stonewalled yet again. The land company continued to petition the Congress periodically (from 1781 to 1816) for settlement of their claims, but with no success. In 1818 the United States ceded the same acreage to M'Intosh, thus leading to the *M'Intosh* decision.

A second possible explanation for the disparity in opinions involves the fact that Mitchel et al., in contrast to the plaintiffs in *M'Intosh*, had the benefit of several congressional laws which required the federal government to execute the provisions of the Spanish-American treaty, one of which involved protection of the property rights of Florida inhabitants. Later laws allowed individuals to institute claims against the United States for losses they may have sustained.[92] The Supreme Court, as a coordinate branch of the federal government, was deferring to the will of the legislature which had enacted laws to protect individual property rights.

Finally, Baldwin stressed that the Supreme Court was acting as a "court of equity" under the congressional laws which allowed private claims to be brought before the Court. As a court of equity, Baldwin noted that the court

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90. Memorial No. 177 to the House of Representatives, 11th Cong., 3d Sess., Concerning the Illinois and Wabash Land Companies (Dec. 21, 1810), *in* AMERICAN STATE PAPERS, *supra* note 11, at 111-12.

91. Report No. 12 to the House of Representatives, 2d Cong., 1st Sess., Concerning the Illinois and Wabash Land Companies (Apr. 3, 1792), *in* 1 AMERICAN STATE PAPERS, *supra* note 11, at 22 (Walter Lowrie ed., Duff Green 1834). The proposal referred to by Livermore was one in which Murray and Dunsmore were willing to consider a surrender of all the lands they had secured in both deeds on the condition that "the United States reconvey to the company one-fourth part of the said lands." *Id.*

92. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 716 (1835).

was compelled to give the same attention to "imperfect, inchoate, and inceptive titles as legal and perfect ones" and that the Court was required to "decide by the same rules on all claims submitted to us, whether legal or equitable."[93]

Regardless of how we perceive the question of private-vs.-public purchases of Indian lands, the involvement of legislative authority, or the judiciary's actions as a court of equity, these matters do not minimize or detract from the more profound issues we have addressed in examining both *M'Intosh* and *Mitchel*: tribal political status, whether equal to European States and the federal government (*Mitchel*) or "diminished and impaired" entities (*M'Intosh*); aboriginal title to land and the aborigines' right to dispose of the same to whomever they chose, a right recognized in *Mitchel* but denied in *M'Intosh*); and the internationally established legal obligations of the United States to enforce and protect tribal rights previously acknowledged by another foreign power, obligations which were affirmed in *Mitchel* but negated in *M'Intosh*.

Based on the historical, political, and legal record examined, it is clear that the *Mitchel* decision is a far more accurate inquiry into the recognized rights of tribes to both property and sovereignty; rights unaffected by either the doctrine of discovery or the doctrine of conquest. In *M'Intosh*, history was "discarded" and Marshall meticulously established the legal fiction of discovery and conquest to rationalize the diminution of tribal sovereignty and tribal property rights. But in *Mitchel*, Baldwin drew from and relied upon the historical record and the fact of tribal independence.[94] The fact that the decision was unanimous, that it was written by Henry Baldwin, and that it was rendered a dozen years after *M'Intosh* should give legal, historical, and political scholars pause to reconsider this powerful case and to question its relative obscurity over the last century-and-a-half. A synthesis of *Mitchel* principles with the *Worcester* doctrines can effectively thwart the *M'Intosh* ruling, which is historically and legally unsound.

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93. *Id.* at 733.

94. *See* Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989). Deloria points out that the "mythical, doctrinally determined history [typified in the *M'Intosh* decision] . . . will be replaced with a more accurate history [typified in the *Mitchel* case] only with exceptional difficulty and hardship." *Id.* at 223. Deloria notes that the "raw data of federal Indian law" is the gross accumulation of all the relevant historical documents and policies produced by the events derived from the interactions of hundreds of tribes with non-Indian settlers and their elected officials. *Id.* at 204. But, although this data is primarily political and historical in nature it has been "clothed in a legal/political vocabulary" to give the appearance that the federal government consistently followed the Rule of Law. It is, therefore, imperative that solid historical analysis should be the basis of court decisions and research by scholars. *Id.*