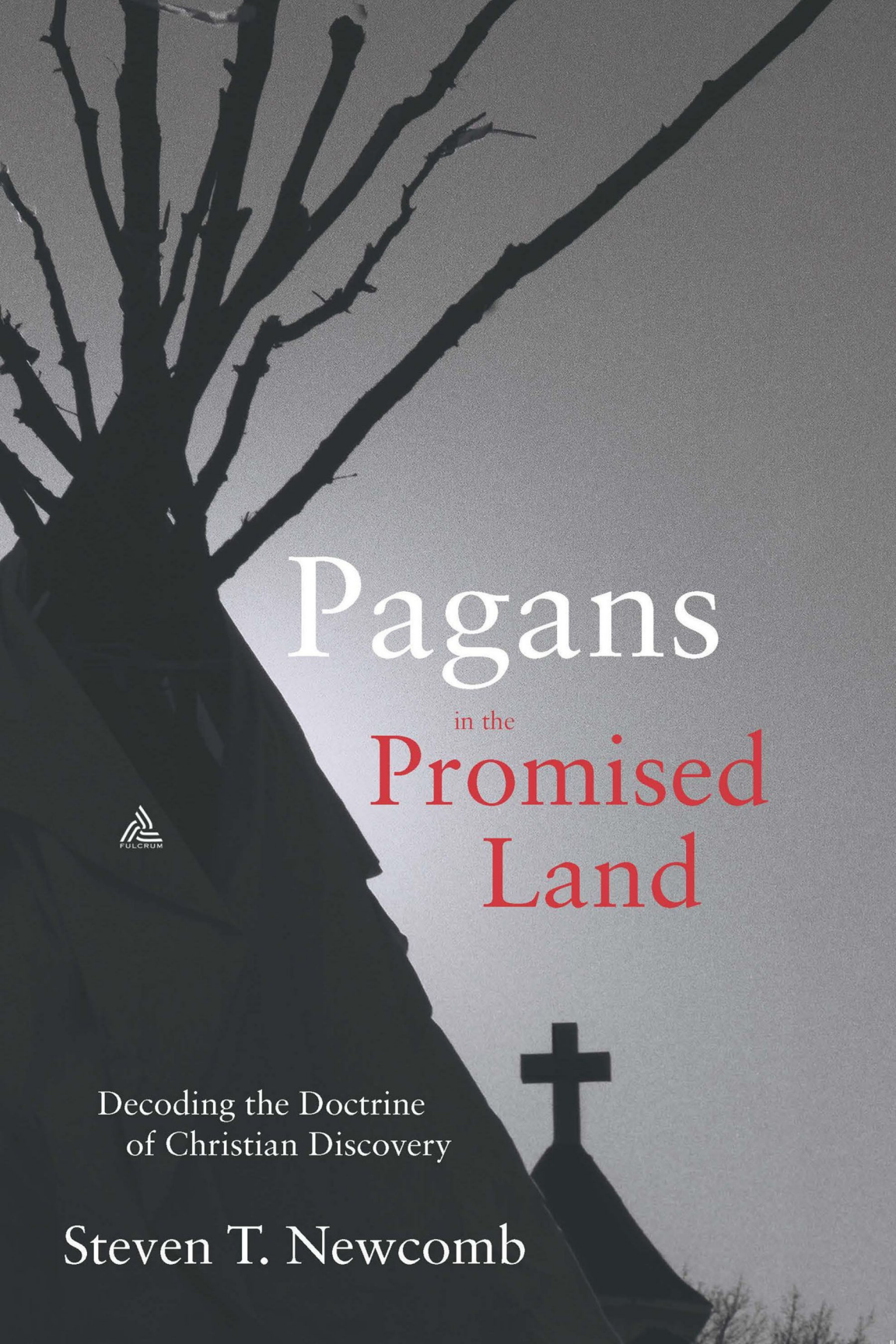
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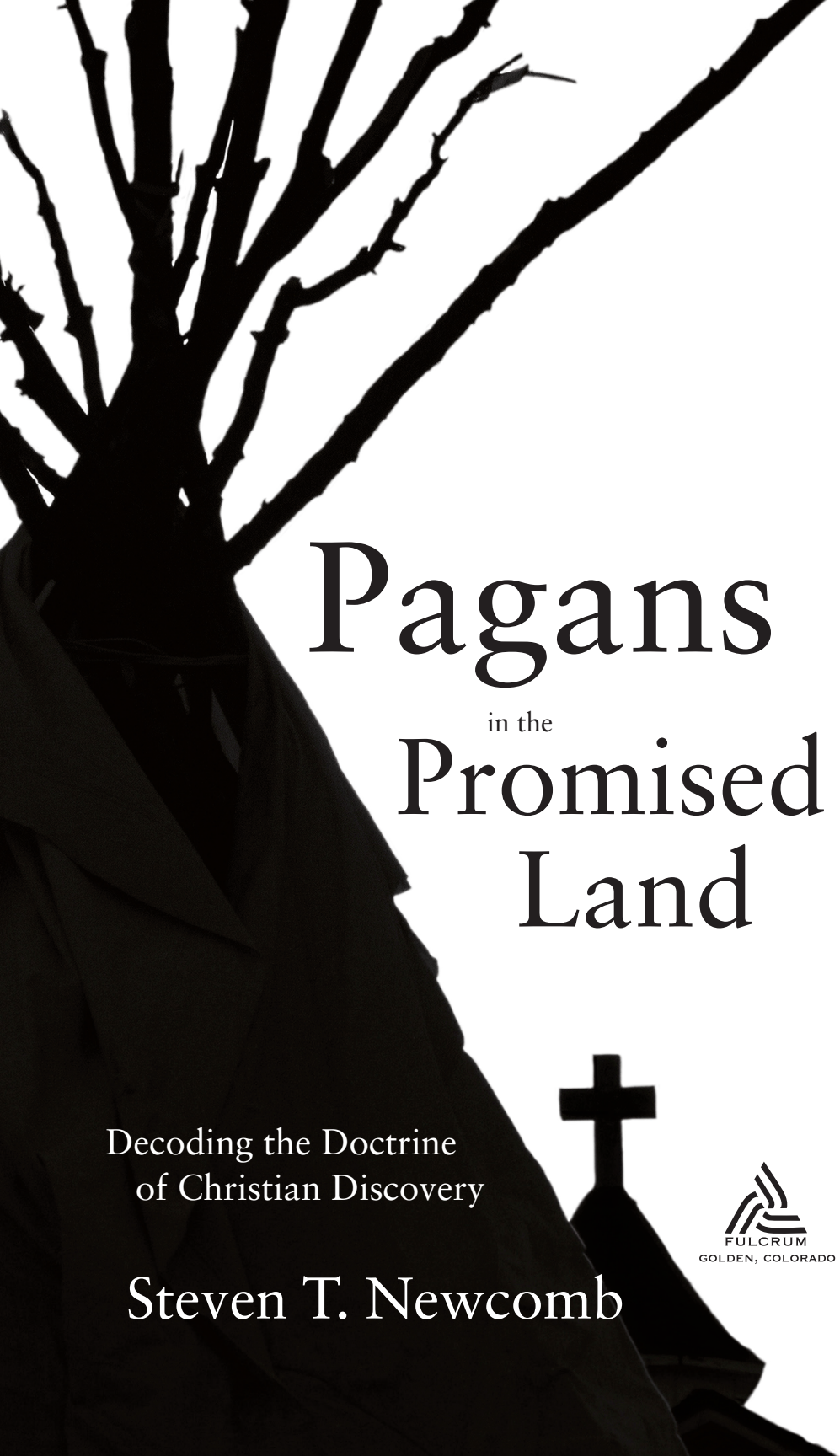

Pagans in the Promised Land

Decoding the Doctrine of Christian Discovery

Steven T. Newcomb

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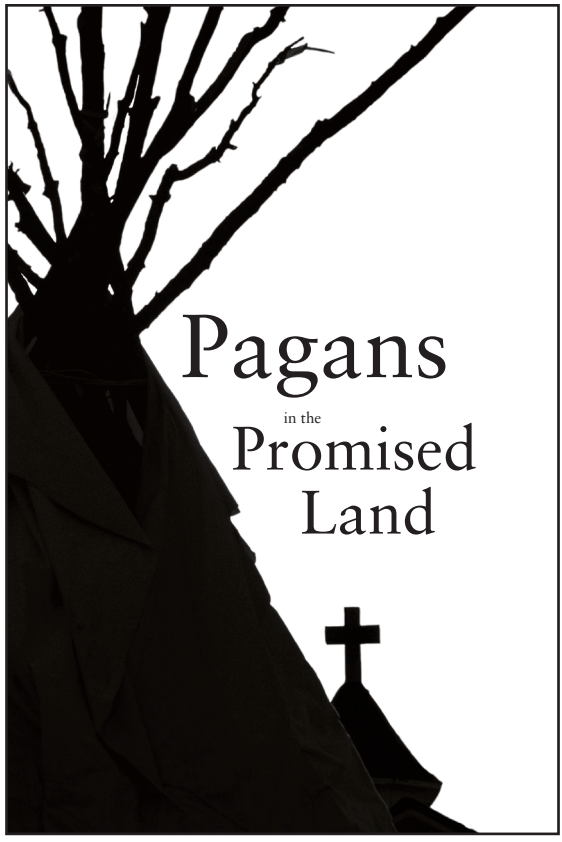
GOLDEN, COLORADO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In Honor of Tecumseh

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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 policies 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 lawgivers 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—is 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 not 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. M'Intosh*, 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 here.

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. M'Intosh* 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 exhumes 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

"doctrine of discovery" may be taken as incendiary in the context of the rise of the Christian right in U.S. politics, but it is supported by extensive scholarship and documentation.

The cognitive theory that decodes the founding doctrine of nationhood, property law, and federal Indian law also explains how that foundation is generally invisible today. Relying on standard legal concepts of precedent (stare decisis and res judicata), legal officials don't have to think about the conceptual basis for and conundrums of the foundation. They simply deploy the precedents. This is ordinary legal practice, which, as Karl N. Llewellyn wrote in *The Bramble Bush*, allows judges to apply a rule "without reexamination of what earlier went into" it.

Where a given rule is benign, we applaud the ordinary practice for its consistency and efficiency; but where the rule is problematic, ordinary practice is an obstacle to understanding and change. Cognitive theory shows us that a premise for rethinking any area of law is cognitive awareness: we must understand what it is that needs to be rethought. This requires a break with ordinary practice and an exercise of our human capacity for self-awareness and reflection. *Pagans in the Promised Land* provides us with this break, and encourages us to think anew about foundational legal issues.

—Peter d'Errico
professor emeritus of legal studies,
University of Massachusetts–Amherst,
June 2007

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.[1] 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 unconsciously, 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. M'Intosh*, 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 shied 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.[2]

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 and "absolute title" to 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.[3] 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 "fronts" and "backs," 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 our ancestors through the prism of their own conceptual systems and categories. Unfortunately, they understood our 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. M'Intosh* 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.

Acknowledgments

Let me begin by recognizing the American Indian Policy and Media Initiative at Buffalo State College in New York. The Initiative generously provided me with financial support to help finish this volume. Secondly, I would have never written this book without having been inspired as a teenager by Vine Deloria Jr.'s 1972 book *God Is Red*, particularly his mention of the *Inter Caetera* Vatican papal bull of 1493. Given that Fulcrum Publishing issued an updated version of *God Is Red* in 1994, I feel particularly gratified that Fulcrum is the publisher of *Pagans in the Promised Land*.

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.

A special thanks to my dear Kanaka Maoli friend Nalani Minton from Hawai'i, from whom I have learned so much. She has been a great source of spiritual inspiration and wisdom, particularly during years of conversation, as we traveled together in connection with the Indigenous Law Institute. She has contributed greatly to my understanding of the issues that our nations and peoples continue to face daily.

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. M'Intosh* 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 the foreword. I also want to thank Peter's wife, Angela Taylor, for her extended hospitality when Paige and I stayed at their house during the spring of 2002.

This book never could have been written without the influence of my former professor C.A. Bowers. Chet Bowers provided me, at an early time in my intellectual development, with paths of thinking and research that I have been following ever since. I am deeply indebted to him.

Professor Steven L. Winter, despite his busy schedule, patiently corresponded with me and was most helpful. That said, I do not know if he would endorse the views I have expressed in this book or the way I have applied cognitive theory to federal Indian law and policy. In any event, I cannot overstate my admiration for his brilliant and inspiring work.

My wife, Paige Giberson, was the one who first suggested that I write a book based on my research; her love and her unwavering support have been tremendously important as I struggled to complete this work. My special thanks also to my daughter Shawna for her patience with my many travels and time spent writing over the years.

Richard Williams, president of the American Indian College Fund, was tremendously supportive. Others deserving acknowledgment include my friends Valerie Taliman (Navajo); Glenn T. Morris (Shawnee), a professor at the University of Colorado at Denver and director of the Fourth World Center for the Study of Indigenous Law and Politics; Cheryl Campbell; and Mark Allen and Phoebe Mae, all of whom were very helpful and encouraging over the years. Thanks also to Sam Scinta at Fulcrum Publishing for believing in the value of this work, and to my editors, Haley Berry and Faith Marcovecchio, for their capacity to edit a challenging area of scholarship and for their many excellent suggestions.

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."[1] 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. M'Intosh*, 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 I 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.[3] This book will demonstrate why it is that by citing the *Johnson* ruling, U.S. representatives were unconsciously 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 metaphors LOVE IS A JOURNEY and LIFE IS A JOURNEY.[4] 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 OR 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.[5]

I have come to realize that federal Indian law is a conceptual system premised on the assumptive 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, by one estimate the Cherokee removal along the Trail of Tears during the wintertime of 1838 resulted in an overall population decline of some ten thousand Cherokees.[6]

Another example of Indian nations being considered subject to the authority of the United States is found in the 1887 General Allotment Act.[7] 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."[8] 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.[9] 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.[10] 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 or bands, but as individual citizens."[11]

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."[12] The Indians, he said, "are opposed to selling any part of their lands, as announced in their replies to speeches of the commissioners."[13] 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."[14] The 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.[15] 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 been framed by a number of scholars as an effort to come to terms with the fact that the relationship between the United States and Indian nations is almost impossible to define.[16] The difficulty with this way of framing the matter, however, is that it relies on a rationalist model of the human mind.[17] This model of the mind sees reason as operating in a "linear, hierarchical, propositional, and definitional" manner.[18] 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.[19]

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 cognitive research brilliantly highlighted by Steven L. Winter is that legal thinking is a product of the human imagination.[20] 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 Winter's 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.[21] 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.[22]

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."[23]

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.[24]

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.[25]

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."[26] 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 560 Indian "tribal entities" that are formally recognized by the federal government.[27] 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 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 the 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 radial categories and idealized cognitive models (ICMs).

Cognitive science studies the mind by investigating conceptual systems, or systems of thought.[1] This is accomplished in part through empirical research in such areas as psychology, linguistics, cultural anthropology, philosophy, and neuroscience.[2] Some cognitive scientists study what is known as the "cognitive unconscious," where, they say, most of our mental activity takes place.[3] 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 reason."[4] Based on some thirty years of work, their findings show that "our conceptual systems and our reason arise from our bodies."[5] 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.[6]

Steven Winter describes *mind* as "an embodied process formed in interaction with the physical and social world."[7] One of the most

surprising claims made on the basis of cognitive theory is that "all thought is irreducibly imaginative."[8] "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."[9] Thus the human imagination is said to be the central means by which we interact with and adapt to the social and physical world.[10] Furthermore, our dynamic imagination, says Winter, operates in a "regular, orderly and systematic fashion."[11]

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."[12] 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.[13] Metaphorical thinking involves imaginatively thinking of and experiencing one thing in terms of another.[14] Since we as humans automatically and unreflectively 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.[15] 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.[16]

The term *metaphor* is derived from the Greek *meta pherein* and means 'to carry over,' thereby "suggesting that the meanings and ideas associated with one thing are carried over to another."[17] 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.[18] 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."[19]

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 *indios*, *Indians*, or *American Indians* onto the indigenous peoples of this hemisphere.[20] Thus the misnomer *Indian* 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, jurists, 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."[21]

Image-Schemas

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-schemas, which are part of the structure and operation of the human imagination.[22] Image-schemas play a highly significant role in the conceptual system of federal Indian law. Such schemas 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.[24] 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.[25] An angelic blond 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."[26] 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 overtaken 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."[27]

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."[28] We habitually think and speak in terms of the concept of balance, either how to achieve it or to maintain it. It is our physical 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 *Justicia*.[29] 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.[30] 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

through space and bypasses one's head, which means that one did not understand the idea communicated. This conception of an idea going by one's head is related to the MIND IS A CONTAINER metaphor, on the basis of which the mind is conceptualized as a container that ideas go into or don't.[31]

The PART-WHOLE image-schema results from the fact that we "experience our bodies as structured wholes with identifiable parts," which is the experiential and bodily basis for the PART-WHOLE image-schema.[32] The part-whole structure of the human body leads to a cognitive phenomenon known as metonymy, a concept in which "the part stands for the whole."[33] Thus, for example, the concept *crown* used by John Marshall in the *Johnson* ruling refers to the iconic symbol worn on a monarch's head.[34] He used, *crown* as a metonymy (part) that stands for the entire monarchy (whole). An excellent example of a metonymy is the journalistic expression "The White House said today … ," in which the physical building of the White House is the PART that stands for the WHOLE of the entire executive branch of the U.S. government.[35]

The PART-WHOLE image-schema figures prominently in the conceptual system of federal Indian law, particularly when Indian lands are conceptualized as constituting a PART of the WHOLE territory of the United States. This role that the PART-WHOLE image-schema plays in federal Indian law is also intimately related to the CONTAINER image-schema that comes into play when the boundaries of the United States are thought of as forming a kind of container. "*In* the United States" is an expression predicated on the conception of the country of the United States as a container.

The CONTAINER image-schema is experientially grounded in the fact that the human body is a kind of container; it has an inside and an outside, a point made evident whenever we eat or drink something or eliminate wastes from our body.[36] It is on the basis of the CONTAINER schema that we unconsciously conceptualize a state as a location, which is predicated on the sense of "being in a bounded region of space."[37] An abstract state is thought of *as if* it were a physical container with rigid boundaries. A map of any of the respective states of the United States provides a graphic image of the concept of a state as a bounded region of space. But this sense of containment with rigid boundaries also comes into play when we refer to a mental state, such as "a state of confusion," or an emotional state, such as "a state of bliss." However, emotional states are also conceptualized as "entities within a person,"

in which case the person is conceived of as a container.[38]

The CONTAINER schema can also give rise to the image of a container-within-a-container.[39] This is well exemplified, for example, by the book title *The Nations Within: The Past and Future of American Indian Sovereignty*. The concept *Nations* in the title refers, of course, to American Indian nations, and the concept *Within* refers to the country of the United States. The title *The Nations Within* is structured by the unconscious image of a container-within-a-container and conveys the idea that Indian nations exist within the larger United States or, more accurately stated, within the American empire.[40] The CONTAINER image-schema and the metaphors it structures are highly instrumental in the patterns of reasoning used in federal Indian law.

For example, in 1886 the U.S. Supreme Court applied the CONTAINER image-schema in the case *United States v. Kagama*.[41] Deciding on an appeal dealing with a murder conviction of two Indians on the Hoopa Reservation, the Court "went back to geography, noting that 'Indians are *within* the geographical limits of the United States. The soil and the people within those limits are *under* the political control of the government of the United States, or the States of the Union.'"[42] The CONTAINER image-schema has been a powerful means of structuring the argument that American Indian nations are subject to the authority of the United States simply because those nations are conceptualized as being located "inside" or "within" the boundaries of the United States.[43] The CONTAINER image-schema employed in *Kagama* illustrates a metaphor commonly found in federal Indian law discourse: "INSIDE THE BOUNDARIES OF IS UNDER THE AUTHORITY OF."[44] It is partly on the basis of the PART-WHOLE and CONTAINER image-schemas that any given Indian nation is conceptualized as being *subject to* the plenary power and jurisdiction of the United States.

Another important image-schema found in federal Indian law and policy is the FORCE-BARRIER image-schema. This schema follows from the experiential fact that in the process of moving through the overall "journey" of life, we often have to deal with barriers, challenges, contests, or dramatic struggles that impede our movement.[45] We have already mentioned how American Indians have been historically viewed as backward because of the way and the extent to which they resisted what was considered to be (from a typical U.S. perspective of manifest destiny) the preordained forward momentum of the United States. The history of conflict between American Indian nations and the United States matches perfectly the FORCE-BARRIER

image-schema. Throughout the centuries, both the United States and the Indian nations have constantly found themselves in need of using some degree of effort or forceful activity in trying to overcome the barriers and challenging situations posed by the other.

Our bodily experience of spatial orientation, such as standing upright and sitting or lying down, gives us a definite sense of an UP and DOWN direction. Furthermore, when we are standing up, we are most in control of ourselves and of any given situation. This truism forms the basis for the UP-DOWN image-schema. The UP-DOWN and FORCE-BARRIER image-schemas partly structure the commonplace argument that the United States has an ultimate authority "over" Indian nations as a result of *the force* of conquest. This conception of the United States as having plenary authority *over* American Indian nations on the basis of conquest is also related to the metaphors HAVING CONTROL OR HAVING FORCE IS UP and BEING SUBJECT TO CONTROL IS DOWN.[46] These conceptions are used to frame the United States as being in control and therefore as *existing* UP, OVER, or ABOVE American Indian nations. From the perspective of the United States, Indian existence is *always* thought of as being DOWN, UNDER, BENEATH, or BELOW in relation to the United States.[47]

Image-Schemas and Federal Indian Law

Based on all these examples, we can begin to see how cognitive theory holds out the possibility of helping us understand that a given human conceptual system such as federal Indian law is reflective of our ability as humans to use the features and aspects of our embodiment to recognize certain predictable patterns in our everyday lives and to reason by making inferences on the basis of these recurring patterns.[48] Thus the conceptual system of federal Indian law is fundamentally reflective of and dependent on the physical activities that we as humans continually engage in with our bodies and the interactions of our bodies with our environment.[49]

The most fundamental kinds of embodied activities we as humans habitually engage in give rise to the various kinds of image-schemas already mentioned: SOURCE-PATH-GOAL, BALANCE, FORCE-BARRIER, PART-WHOLE, CONTAINER, OBJECT.[50] As humans, our imagination operates in a systematic and regularized manner on the basis of these and other image-schemas. These schemas, in turn, result in and structure a great number of conceptual metaphors and linguistic expressions that are regularly and systematically used by judges and

lawyers as they engage in the thought processes related to federal Indian law. Thus while some federal Indian law scholars, on the basis of critical legal studies, have contended that federal Indian law decisions and judgments handed down by the U.S. Supreme Court are often "arbitrary, capricious, and politically motivated,"[51] the tools of cognitive theory reveal that quite regular and systematic—and yet largely unconscious—cognitive operations are at play in the formation of those decisions and judgments.[52]

The SOURCE-PATH-GOAL, CONTAINER, FORCE-BARRIER, and UP-DOWN image-schemas give rise to a number of metaphors that are found in general legal thinking and that are also constitutive of federal Indian law. For example, as Winter has pointed out, we commonly think of both abstract thought and abstract social actions in terms of a purposeful motion or physical movement along a path toward some desired destination and in terms of the presence or absence of an obstacle on that path. The reason for this is that we think of and imaginatively experience abstract thought and abstract social action in terms of the features and aspects of physical mobility—"the experience of blockage, containment, and movement through space toward desired objects."[53] Cognitive theorists refer to this as a mapping, whereby, for instance, the aspects of physical mobility are "mapped onto abstract social or intellectual actions."[54] This particular mapping results in a number of what Winter terms correlative metaphors, which he lists as (1) CONSTRAINTS ON ACTIONS ARE CONSTRAINTS ON MOTION, (2) PURPOSES ARE DESTINATIONS, and (3) IMPEDIMENTS TO PURPOSES ARE OBSTACLES TO MOTION.[55]

One particular image of law that these metaphors lead to is the "laying down" of boundaries by a legitimate source of authority, whereby the boundaries are conceived of as impediments to purposes and, therefore, as obstacles to motion. Thus a linguistic expression regularly used to conceptualize lawmaking is "laying down the law." As Winter sums up the matter, "Our fundamental conception of law is premised on the metaphors ACTIONS ARE MOTIONS and CONSTRAINTS ON ACTIONS ARE CONSTRAINTS ON MOTION."[56] The boundaries "laid down" are the constraints on actions, which are understood and experienced as constraints on, or impediments to, motion. Thus, for example, many Indian people tend to unconsciously understand U.S. Supreme Court rulings and congressional acts as non-Indian conceptual boundaries that, despite our original indigenous independence, we as Indian people are supposedly obligated to abide by and stay

within. Such legal decisions and congressional statutes are understood to constrain our actions by constraining our motions. This coincides with Winter's explanation of how humans typically think about moral and legal obligations: "We understand our moral and legal obligations in terms of the CONSTRAINTS ON ACTION ARE CONSTRAINTS ON MOTION metaphor. Thus, we are *bound* by our promises and contracts, although we sometimes try to *get out of* such commitments by asking that the other party *release* us."[57]

Justice Joseph Story used the metaphorical concepts of *boundaries* and *constraints* to describe the Indians as being "*bound* to *yield* to the superior genius of Europe."[58] This suggests that, in comparison to the Indians, the Europeans had such a superior degree of intelligence that the Indians were obligated, bound, or destined to eventually surrender or relinquish themselves to the physical control of the Europeans and to hand over the possession of their lands to them as well. Story's characterization unconsciously frames the Europeans as using their "superior" intelligence to gradually place conceptual constraints, boundaries, or limits on the Indians, thereby restricting the ability of the Indians to move freely on their own ancestral lands in a traditional manner of their own choosing. This, of course, is the very effect that federal Indian law and policy ultimately has had on indigenous nations and peoples, cutting them off from their traditional territories and restricting them to much smaller reservations.

The boundaries conceptualized as laid down by law are conceived of as objects, but then so is law itself—including federal Indian law—conceived of as an object.[59] Winter points out that it is impossible to conceptualize law without thinking of it as an object.[60] In keeping with this image of law, a widely circulated legal textbook states, "The field of federal Indian law involves *a body* of law that regulates the legal relationships between the Indian tribes and the United States."[61] This general comment demonstrates the point made by Winter that we cannot think or talk about law without metaphorically conceiving of it as an object, in this case, as "a body." This metaphorical body of rules (legal categories of behavior) is used to "regulate" the relationship between the United States and the Indian peoples metaphorically conceptualized as Indian "tribes."[62] Winter has explained the etymology of the term *rule* in detail:

> 'Rule' is from the Latin *regula* ("straightedge") and *regere* ("to lead straight"). To comply with a rule is to act *pursuant* thereto

(from the Latin *prosequerae*, "to follow," also the source of "pursue"). The concept of a rule thus reflects the same metaphorical mapping that animates the "forest of constraint" trope: ACTIONS ARE MOTIONS, PURPOSES ARE DESTINATIONS, and CONSTRAINTS ON ACTIONS ARE CONSTRAINTS ON MOTIONS. In this mapping, legal rules are paths that guide action (i.e., metaphorical motion) along an authorized course.[63]

Federal Indian law is premised on the notion that the U.S. government has a *legitimate* plenary authority to place certain non-Indian conceptual constraints (otherwise known as laws, rules, and regulations) on originally free and independent American Indian nations. In terms of cognitive theory, federal Indian law presumes that the United States has a legitimate authority to "lay down" conceptual boundaries for American Indian nations and that once those boundaries are established, Indian nations are then obligated (bound) to obediently stay *within* (notice the CONTAINER schema) and move along the "paths" formed by those conceptual boundaries. As we proceed, we shall see that from an indigenous baseline perspective of an original free and independent existence, the presumption that the United States has a legitimate right to lay down numerous laws and policies for Indian nations is rooted in the idea expressed by Chief Justice John Marshall in the *Johnson* ruling that the first "Christian people" to discover lands inhabited by "heathens" has ultimate dominion over and absolute title to those lands.

Chapter 2

Metaphorical Experience and Federal Indian Law

In his 1882 "Annual Report of the Commissioner of Indian Affairs," U.S. Indian Commissioner Hiram Price commented on the need for the federal government to cooperate with religious societies in order to "civilize" the Indians:

> One very important auxiliary in transforming men from savage to civilized life is the influence brought to bear upon them through the labors of Christian men and women as educators and missionaries. This I think, has been forcibly demonstrated among the different Indian tribes by the missionary labors of the various religious societies in the last few years. Civilization is a plant of exceeding slow growth, unless supplemented by Christian teaching and influences. … In no other manner and by no other means, in my judgment, can our Indian population be so speedily and permanently reclaimed from the barbarism, idolatry, and savage life, as by the educational and missionary operations of the Christian people of our country.[1]

Applying cognitive theory to this kind of rhetoric reveals that what U.S. government officials such as Indian Commissioner Price took to be *literally* true—namely, that "Indians" lived a "savage" life, or a life of "barbarism" and "idolatry"—was merely *metaphorically* true from a Christian European perspective. The conception of Indian affairs as being akin to some huge Christian European reclamation project metaphorically conceives of American Indians as needing to be "reclaimed" or "recalled from wrong or improper conduct, by amending their character and behavior" or needing to be "rescued from an undesirable or unhealthy state."[2] This reference to an "unhealthy state" alludes to the fact that human moral systems view morality as a state of health.[3] The judgment that the Indians were savage "heathens" living in "an unhealthy state" led to the inference that they were living an immoral way of life. This in turn led to the conclusion that Christian European missionaries and educators needed to lead the Indians to a moral way of life, which, from

a Christian European perspective, was considered to be a "civilized" and "Christian" way of life.

Furthermore, Price's metaphor CIVILIZATION IS A PLANT is a use of inferences about plants (source domain) to reason about civilization (target domain). In this instance, the idea of civilization is being thought of and unconsciously experienced as if it were a plant, such as a vine, that, once planted, takes root and spreads outward. In this conception, civilization is thought of as something that is "planted" and "grows" to "fruition." This cognitive pattern is also partly motivated (made sense of) by the metaphor IDEAS ARE PLANTS that is embedded in the understanding of the relationship between the tradition of books (repositories of ideas) and Western civilization.[4] Price's metaphor conceptualizes the spread of civilization in terms of cultivation by planting or transplanting people (colonists) from one location to another.

In a 1938 address commemorating the founding of the town of Marietta, Ohio, one hundred and fifty years earlier, President Franklin D. Roosevelt provided an excellent example of the metaphors COLONIES ARE PLANTS and COLONIZATION IS PLANTING.[5] Roosevelt spoke of those who traveled across the Allegheny Mountains to begin colonizing the Ohio River Valley. He referred to an "organized army of occupation" that "transplanted … whole little civilizations that took root and grew."[6] These men and women, Roosevelt said, "were giving expression to a genius for organized colonization, carefully planned and ordered under law."[7]

The term *colonization* is derived from the Latin *colere*, 'to till, cultivate, farm (land).'[8] Thus colonization can be thought of in terms of the steps involved in a process of cultivation: taking control of the indigenous soil, uprooting the existing indigenous plants (peoples), overturning the soil (the indigenous way of life), planting new colonial seeds (people) or transplanting colonial plants (people) from another environment, and harvesting the resulting crops (resources) or else picking the fruits (wealth) that result from the labor of cultivation (colonization). Thus what is referred to as civilization may involve a process of colonization, which is a process by which an empire expands in land, population, wealth, and power.

Colonization is a process of imperial expansion by means of colonists, colonies, and a host of colonial and empire-expanding activities. However, another root metaphor of colonization is *colo,* 'to remove (solids) by filtering' and 'to wash (gold).'[9] From a Christian European colonizing perspective, the indigenous peoples are

considered as being among those solids (objects) that must be filtered out of (or expunged and washed from) the land in order to acquire that which is most valuable, such as gold and other minerals, and anything else that can be transmuted into wealth to fuel the economy and enrich the elite of the *imperium*.

This conception of a filtering process is also found in the term *colon*, which is the term for the large intestine of the digestive tract. In the dictionary, *intestine* is listed as another word for 'domestic' and, according to this usage, refers to being 'of or relating to the internal affairs of a state or country.'[10] Thus the phrase *domestic dependent nation*, coined by Chief Justice John Marshall in the 1831 *Cherokee Nation* ruling, could strangely, but quite accurately, be rephrased as "intestine (internal) dependent nation."[11] According to such a formulation, and the use of a CONTAINER schema, the United States as a country or state is unconsciously conceptualized as a political body (also referred to as a body politic) that is analogous to the human body, with Indian nations typically conceptualized as being inside or within the political "body" and geographical boundaries of the United States.

Thomas Hobbes, in the introduction to his work *Leviathan*, made precisely this analogy between the human body and the concept of a political commonwealth or state.[12] Hobbes characterized nature as "the Art whereby God hath made and governes the World."[13] The "Art of man," said Hobbes, "can make an Artificial Animal," and by doing so has "imitated" the "Art" of "God." Hobbes explained that man had seen that "life is but a motion of Limbs" and had realized that the beginning of life lies "in some principall part within" that "motion of Limbs."[14] Is it not reasonable to say, asked Hobbes,

> that all Automata (Engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the *Heart*, but a *Spring*; and the *Nerves*, but so many *Strings*; and the *Joynts*, but so many *Wheeles*, giving motion to the whole Body, such as was intended by the Artificer? *Art* goes yet further, imitating that Rationall and most excellent work of Nature, *Man*. For by Art is created that great LEVIATHAN, or STATE, (in latine CIVITAS) which is but an Artificiall Man; though of greater strength and stature than the Naturall, for whose protection and defence it was intended; and in which, the *Sovereignty* is an Artificiall *Soul*, as giving life and motion to the whole body;[15]

It is in keeping with this conception of the state as an "Artificial Man" that colonization can also be understood metaphorically as relating to digestion and assimilation. This imagery makes sense of U.S. policies to assimilate Indians "into" the social and political body of the United States (e.g., the U.S. government policy of Indian termination expressed in House Concurrent Resolution 108, passed in 1953). Such conceptions of assimilation are suggestive of COLONIZATION IS EATING, a metaphor that was reflected in a comment made in the mid-nineteenth century by Lewis Cass, who was deeply involved in Indian treaty making in the Great Lakes region. While Cass was a U.S. senator, and before he became secretary of state, he "once boasted in the Senate that he had 'a capacious *swallow* for territory.'"[16] The term *capacious* is structured by the CONTAINER image-schema and is derived from the French *capere*, 'to take or contain' and 'able to contain a great deal.'[17] And *swallow* refers to the following:

> **1 :** To take through the esophagus into the stomach : receive into the body though the mouth and throat … **b :** to eat hurriedly without careful chewing : gulp down … to cause to disappear : envelop completely : ENGULF, DEVOUR … APPROPRIATE … to receive something into the body through the mouth and throat …. syn. see EAT[18]

Behind the metaphor COLONIZATION IS EATING is the conception of the image of an empire, state, or commonwealth as a collective body or metaphorical person; the colonists sent forth by the empire constitute a corporate or colonial body that is authorized to engage in the process of "seizing," "eating," and "swallowing" indigenous lands. This collective body (composed of individual humans interacting in their social and cultural lives) arrives to a "new" continent with a colonizing, ravenous "hunger" (desire) for land. From an indigenous perspective, this collective colonizing body can be metaphorically thought of as a predator that pursues its indigenous spoil and prey; it sets out to catch, devour, and consume everything in sight (this correlates with the common expressions "this is a consumer society" and "we're in the belly of the beast"). This concept of the predator makes sense of Wheaton's statement in his *Elements of International Law*, that "the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors."[19]

Metaphorical Experience and Metaphorical Truth

The previous discussion leads to an observation made possible by cognitive research, namely, that a tremendous amount of what people take to be *literally* and *objectively* true in human experience—such as Indian Commissioner Price's statement that "civilization is a plant of exceeding slow growth"—is *metaphorically* true.[20] The concept of *literal truth* is premised on the idea that there is an objective world and that our language and our categories represent or "fit" the categories of the world as it really is, independent of our minds, brains, or bodies.[21] The findings of cognitive theory enable us to focus on the fact that our categories and concepts form an essential part of our *experience* of the world.[22] In other words, we experience the world and, indeed, our own lives, largely by means of our categories and our concepts. A tremendous amount of what we experience is shaped, structured, and enabled by metaphors and other cognitive or mental operations, which are products of our imagination and dependent on the kinds of bodies we have.[23]

As Lakoff and Johnson have put the matter, "Because our conceptual systems grow out of our bodies, meaning is grounded in and through our bodies. Because a vast range of our concepts are metaphorical, meaning is not entirely literal."[24] Thus much of our experience is imaginative, not in the sense of the usual dichotomy between what's real and what's imagined, but in the sense that without *imaginative metaphorical experience*, much of what we do experience as reality would not even be possible.[25] As humans, our metaphorical experience is a result of the way we use both our embodiment and the imaginative processes of our minds to interact with our physical and social environment.[26]

Federal Indian law and policy have always reflected the way the dominant Euro-American society has imaginatively and metaphorically projected a vast array of mental concepts onto indigenous nations and peoples. The following example may help illustrate the way that we as humans are constantly engaged in the process of imaginatively projecting metaphorical concepts onto ourselves, onto others, and onto the world around us in the course of our embodied interactions with our environment. Suppose I say to someone during a conversation, "See the bucket in front of that tree?" The question arises: Does a tree have a front or a back without us imaginatively projecting a front or back onto the tree? The answer is no. Attributing fronts or backs to trees involves a process of mentally (imaginatively) projecting

the conception of the front and back of the human body onto trees. It involves thinking of trees *as if* they have fronts and backs. This way of conceptualizing trees may very well give one the mistaken impression that fronts and backs of trees are literal and objective features of the physical world of trees.[27]

The above example about trees provides a means of making the point that people of European ancestry have historically succeeded in projecting their own imaginative categories and concepts onto the indigenous nations and peoples of this hemisphere, now known as the Americas. The ideas known as federal Indian law are a product or result of this multigenerational cognitive process. Categories and metaphorical concepts such as *Indians*, *tribes*, *primitive*, *heathen*, *pagan*, *infidel*, *backward*, *savages*, and *uncivilized* are no more descriptive of objective qualities or inherent characteristics of the indigenous peoples of the Americas than the terms *front* and *back* are descriptive of objective qualities or characteristics of trees.

Present-day indigenous nations and peoples of this hemisphere are now compelled to utilize the language and conceptual system of the dominating society as a means of thinking, speaking, and writing about our own existence while challenging certain negative, oppressive, and dominating concepts that have been mentally and, from an indigenous perspective, illegitimately imposed on our existence.

In order to rise to this challenge, it is necessary for us as indigenous people to internalize and deeply fathom the history of the dominant society's language and mental conceptions about American Indian existence. This is especially true if our ultimate desire is to contest and challenge many of those conceptions from an indigenous perspective for the benefit of indigenous nations. A key point here is that the categories and concepts of federal Indian law, including such concepts as *discovery*, *dominion*, *domestic dependent nation*, *tribe*, and so forth, are cultural and cognitive products of the dominating society. These terms are evidence of the various ways that the society of the United States has employed the human imagination to interact with the original indigenous peoples of this hemisphere in a dominating and subjugating manner.

When we remain oblivious to the empirical evidence that most abstract ideas, including the ideas found in federal Indian law, are metaphorical in nature, we fall into the trap of unreflectively treating those mental concepts (for example, "U.S. plenary power *over* Indians") as if they were *literally* true and as if they were *objective* features

of American Indian existence. Cognitive theory enables us to realize that federal Indian law is the result of non-indigenous cognitive processes, social practices and conventions, and cultural patterns, and of the way that members of the dominating society imaginatively project taken-for-granted categories and concepts onto indigenous peoples. The overall effect has been the traumatic intergenerational domination of American Indian existence.

For many generations, officials of the U.S. government (judges, legislators, and policy makers) have imaginatively devised the ideas known as federal Indian law and policy in their ongoing efforts to control, contain, reshape, remove, and, at times, even annihilate the original indigenous nations and peoples of this hemisphere. Ironically, although the meanings that are understood as constituting the "constraints" of federal Indian law are the result of imaginative processes that take place in the brain, even those of us who are indigenous have been educated and conditioned to think and talk about these constraints of federal Indian law as if they were something *external* that rule over us. However, because the ideas that constitute federal Indian law and policy are a product of the Euro-American imagination, this means that the constraints of federal Indian law and policy originated in and are the result of the Euro-American imagination and social conventions. We as Indian people become coparticipants in this process when we unconsciously assume that federal Indian law is an *external* constraint that rules *over* us.

After more than two centuries of being subjected to abusive U.S. federal policies, particularly the incarceration and tormenting of indigenous children in government and religious boarding "schools," we as indigenous people have gradually and unconsciously internalized the meanings of federal Indian law and policy. From a cognitive science perspective, those federal meanings have become part of the neural circuitry and structuring of our brains. As a result, non-Indian strands of meaning have become interwoven into our social and cultural lives as Indian people, thereby making the constraints of federal Indian law and policy an integral part of the fabric of our own imaginations and an integral part of the daily social interactions of Indian people in Indian communities. These observations provide a sense of the magnitude of the challenge our indigenous nations and communities face in the effort to decolonize our lives and our collective existence.

This being said, it nonetheless remains part of our fundamental sacred birthright as indigenous peoples to awaken to the imaginative

dimension of federal Indian law and policy and to begin using our own indigenous imagination, including our indigenous intellectual legacy and our cultural and spiritual values, to more effectively challenge the dominating mentality and behaviors of the U.S. government. One way to begin this process is by making ourselves aware of precisely how U.S. government officials have unconsciously used and continue to use metaphors and other cognitive operations, such as radial categories and ICMs (idealized cognitive models), as their means of dominating American Indian existence.

Radial Categories and Idealized Cognitive Models

According to the cognitive linguist George Lakoff, "Radial categories are the most common conceptual categories. They are not definable in terms of some list of properties shared by every member of the category. Instead, they are characterized by variations on a central model."[28] In the vernacular, the term *model* can be taken to mean 'a form of understanding.' Thus a radial category can also be said to consist of a central understanding (case or model) with variations on that understanding. Because the variations are related to the central understanding in different ways, they may have little or nothing in common with each other, other than the fact that they share a common connection to the central model or understanding.[29] The category *mother* is a prime example of a radial category. Lakoff points out that the radial category *mother* is made up of four submodels of understanding:

> (1) The birth model: the mother is the one who gives birth. (2) The genetic model: the mother is the female from whom you get half your genetic traits. (3) The nurturance model: your mother is the person who raises and nurtures you. And (4) The marriage model: your mother is the wife of your father. In the basic case, all conditions hold. But modern life is complex, and the category extends to all cases where only some of the conditions are met. Hence, there are special terms like birth mother, genetic mother, foster mother, stepmother, surrogate mother, adoptive mother, and so forth.[30]

The term *Indian* (meaning 'American Indian') is a radial category. One part of the central model or understanding of *Indian* is the "genetic" or "full-blood" model: The central case is an indigenous person from North America whose family has never procreated

with any non-indigenous people or the members of any other race. Examples of the category extending to "cases where *only some* of the conditions" of the central model are met yield such terms as *half-breed Indian*, *quarter-breed Indian*, *mixed-blood Indian*, and the entire blood quantum system of the Bureau of Indian Affairs. That we commonly categorize in terms of the "best examples" or "goodness-of-example ratings" for members of a given category is referred to as a "prototype effect."[31] The "best example" of the category *American Indian*, for example, is "a full blood," as reflected in the iconic image on the "Indian head nickel."

The prototype of a *bachelor* is an unmarried man of a marriageable age. *Bachelor* is often cited as an example of a prototype effect. According to the central model or case, the term *bachelor* is applied to "unmarried men only within the right context" within a given society with certain social expectations about marriage and men.[32] Thus, because of context, the pope, although he is an unmarried male, does not match the prototype. He is therefore not a good example of a bachelor. The pope diverges from "the prototypical or idealized conditions that form the presuppositions" that are part of the category *bachelor*.[33] There is, in other words, the prototype of a bachelor, which the pope does not match.

ICMs can be quite complex and comprehensive.[34] The concept *mother*, for example, is "a *cluster model* characterized by the convergence of several cognitive models, including a birth model, a nurturance model, and a marital model."[35] Thus ICMs provide us with a much more comprehensive means of understanding category structure. Winter has provided an excellent summary of ICMs:

> Lakoff's concept of an *idealized cognitive model* (ICM) provides a more general approach to this idea of category structure. Similar to Fillmore's notion of a frame, an ICM is a "folk" theory or cultural understanding that organizes knowledge of events, people, objects, and their characteristic relationships in a single gestalt structure that is experientially meaningful as a whole. For example, our understanding of the words "buy," "sell," "cost," "goods," "advertise," "credit," and so on are meaningful in terms of an ICM of commercial transaction that relates them together as a structured activity. The use of any of these words individually evokes an entire picture or model—that is, a holistic standardized account of some area of human endeavor.[36]

A further point that ought to become clear by the end of this book is that the *Johnson v. M'Intosh* ruling is itself an ICM, or paradigm, formed in part by a combination of the Conqueror cognitive model and Chosen People–Promised Land cognitive model. Together, these two models form a key part of the basis for and background of the dominating presumption that originally free and independent Indian nations are subject to the ideas and judgments, or laws and policies, of the United States.

Chapter 3

The Conqueror Model

The presumption that the United States has a plenary authority *over* Indian nations is predicated on a taken-for-granted understanding of the United States as a conqueror of American Indian nations and on the corollary viewpoint that Indian nations are "conquered and subdued nations."[1] This chapter posits that the plenary power doctrine can be ultimately traced to an ICM, the Conqueror model, that is embedded in the cultural consciousness of the dominant society of the United States. Just as words such as *buy*, *sell*, *advertise*, and *credit* evoke an ICM of commercial transaction, so too do words in the *Johnson* ruling such as *conqueror*, *conquer*, *conquest*, *dominion*, *discovery*, *crown*, and *potentate* evoke an entire picture, model, or ICM of the conqueror. Examining the Conqueror ICM is a good way to prepare for our later exploration of the Chosen People–Promised Land model and our analysis of the *Johnson* ruling in chapters 7 and 8.

A prototypical conqueror is implied in the Latin term *dominus* ('he who has subdued'), which is derived from the Sanskrit *domanus* ('he who subdues').[2] Both these terms suggest that it is the idealized conqueror's very nature to subdue and dominate, and for this reason it would be most unnatural, even impossible, for the conqueror to not engage in such actions. By conquering and subduing, the prototypical conqueror establishes and maintains a *state* of domination. In cognitive theory, we find two main metaphors that express a state of being: A STATE IS A BOUNDED REGION IN SPACE and STATES ARE LOCATIONS.[3] Thus the phrase *a state of domination* is unconsciously conceptualized as a region, area, or location of domination, exercised and maintained within well-defined boundaries.[4] A political entity known as a "state" (or nation-state), such as the United States of America, may therefore be understood from an indigenous perspective as shorthand for the more complete thought, "a state of domination," which correlates with the original founding of the United States as the American empire.[5]

From the conqueror's own perspective, he considers himself to have *the right* to subdue and to dominate, which includes the right to locate, conquer, possess, and occupy distant lands in the sense of a military and colonial occupation. Following the conception of

"rights as paths" in cognitive theory, *dominus* the conqueror is considered, from his own perspective, to have the absolute right to move unimpeded along a pathway that leads to successfully conquering and subduing.[6] On this basis, dominion can further mean "the right of possession" in order to conquer, subdue, and establish a reign of domination.[7] For the conqueror, domination is the optimal state of being; he thrives on domination in keeping with the metaphor mentioned above COLONIZATION IS EATING. The spoils and fruits of territorial expansion and domination "feed" the conqueror.

The ICM of the Conqueror posits a central figure, such as a king, monarch, emperor, or pope, who is considered divine or whose power is considered to come from or be derived from a divine source.[8] The presumption of the conqueror's divinity leads to the additional presumption that the conqueror has the "divine right" to exert control or force, which is understood as being UP, as reflected in the metaphor POWER IS UP. Conversely, those peoples whom the conqueror has subjected to his control are conceptualized as being DOWN in relation to the conqueror, as reflected in the metaphor LACK OF CONTROL IS DOWN. Furthermore, the conqueror is presumed to have the divine right not just to rule, but also to spread or expand his reign of domination outward by extending his rule to "new" lands by means of war or force of arms. This conception is found in the term *imperium*, or "a dominion, state or sovereignty, that would expand in population and territory, and increase in strength and power."[9] In order to find or "discover" additional lands that the conqueror can subdue, he must send representatives forth to search out, discover, and find *new* lands to conquer and subdue.

In the context of the Conqueror model, "to search out" or "to seek out" combines the sense of looking or searching for a location with the desire to attack and seize.[10] The presumption that the conqueror has the divine *right* to seek out and locate "new" lands in order to conquer and subdue them gives rise to the phrase *right of discovery* found in the *Johnson v. M'Intosh* ruling.[11] Hence the phrase *right of discovery* in the *Johnson* decision refers to the right of the conqueror to search out and locate new lands (new to the conqueror) in order to conquer, vanquish, and subdue them.[12] In this same context, the benign sounding phrase *voyage of discovery* refers to a voyage in search of new lands for the conqueror to conquer and subdue. Euphemistically, the act or event of having successfully located lands that can be conquered and subdued is called a discovery. Thus it is

within the context of the Conqueror cognitive model that the historical phrase *Age of Discovery* makes sense.

The Conqueror model also contains a submodel we shall call the Empire model, or model of *imperium*, which is the process by which the prototypical conqueror "reaches out" and "grabs" or "seizes" new lands in order to dominate those lands and the indigenous peoples living there.[13] A dominion, which was known in Roman law as *dominium*, may also be thought of as a "settled" state of domination. From a cognitive perspective, the concept *settled* is partly structured by the metaphors HAVING CONTROL OF FORCE IS UP and, conversely, BEING SUBJECT TO CONTROL IS DOWN.[14] A *dominion* may be conceptualized as a settled state of domination because, through a specific period of time, massive numbers of those who at first tried to fiercely resist the conqueror have, particularly in the case of the Americas, been killed by war or disease, and the surviving people have, by means of the conqueror's steady application of deadly or terroristic force, "settled down" and become "quiet" or "pacified."[15] Once the conqueror considers the indigenous peoples' spirit of resistance to have been successfully broken, they are then regarded as having been "tamed" and "domesticated" based on their willingness to live quietly "inside" or "within" the "domestic" space of the conqueror's domain, sphere, or state of empire and domination.[16]

According to Sir Henry Sumner Maine, "The view of Sovereignty taken by the earliest international jurists in the sixteenth and seventeenth centuries appears to me to be taken from Roman law. It is at bottom, *dominium*—dominion, ownership."[17] Inextricably related to the concept of *dominium*, however, is *dominatio*, which means, variously, 'mastery, control, irresponsible power, despotism.'[18] *Dominatio* also refers to monarchy, tyranny, and government of a single person or, in other words, the prototypical conqueror, the *domitor* ('master, lord governor, ruler'), *dominor* ('to be lord and master, rule, bear rule, reign, domineer'), and *dominatus* ('a tamer, subduer, vanquisher, conqueror').[19] These concepts enable us to infer that *dominium* and *dominatio* also refer to 'the activity or process that leads to successfully maintaining an already existing state of domination or to successfully *extending* the conqueror's (the despot's) domination over new additional lands.' *Dominatio* is achieved by means of armed *occupatio*, which is the process by which the conqueror overruns and militarily overtakes a "new" land in order to conquer, subdue, and dominate it.[20]

Those indigenous peoples who are already inhabiting a particular land when the conqueror "discovers" and invades their country are also considered to be occupying the land; but, in keeping with the *Johnson v. M'Intosh* ruling, theirs is an indigenous or original occupancy rather than a conquering one. Thus the conqueror context and the indigenous context suggest two entirely different types of occupation: the *domitor*'s or conqueror's *occupatio* and the occupation of the indigenous inhabitants who were already freely occupying the land in keeping with their own traditions long before the conqueror's invading forces arrived. Furthermore, the concept of *dominion* is partly structured by the CONTAINER image-schema, as illustrated by the following excerpt from a diplomatic letter from the American plenipotentiaries to the British plenipotentiaries in the negotiations leading to the 1814 Treaty of Ghent: "The United States claim, of right, with respect to all European nations, and particularly with respect to Great Britain, the entire sovereignty over the whole territory, and all the persons embraced *within the boundaries* of their dominions."[21]

The "Body" of the Conqueror

In the previous chapter, we examined how the philosopher Thomas Hobbes used the human body as a metaphorical source domain for the Leviathan, or political commonwealth.[22] Cognitive theory reveals that thinking of a political state in terms of the source domain of the human body makes perfect sense in light of the empirical evidence that humans think and reason in terms of the structure, function, activities and orientation of the human body. In keeping with this ordinary function of cognition, the Conqueror cognitive model involves a process of thinking and reasoning in terms of the prototypical conqueror's imaginary body. In other words, the prototypical conqueror is unconsciously imagined metaphorically in terms of the physical features and activities of a human body. Hence, the conqueror's imaginary body *metaphorically* has a life force, a head, eyes, a mouth, hands, feet, arms, a torso, legs, tendons, colon, and so forth. The conqueror's prototypical body is imagined *as if* it were physically engaged in the specific types of functions and activities of conquering, subjugating, and colonizing.

Numerous images are used to conceptualize the conqueror's actions. Thus subduing and dominating can be metaphorically thought of in terms of the conqueror using rope or shackles to tie or

bind the people he is subduing. On the basis of such images, a nation or people forced into subjection by a conqueror are referred to as having been "forced into bondage." Other such images are the conqueror forcibly using his feet to trample the people he is subduing or using his hands to crush the people. Subduing can be thought of in terms of the conqueror using his feet to step up on the people as one would step up on a stool or in terms of the sound and the feel of the vibration made by conqueror's soldiers marching forcibly on their way to wage war. Subduing can be metaphorically thought of in terms of the graphic image of the conqueror forcing his foot on the neck of someone who has been conquered. With these kinds of images, we can think of the prototypical conqueror in terms of him permanently maintaining control over the people he has subdued by using his life force (this derives from the sense of the conqueror's imaginary body having a life force) to move his feet, hands, and arms in order to exercise and maintain control. This leads to the conqueror being thought of in terms of using "force of arms" to maintain control, of forcing "new" lands under his "feet."

It is important to remember that an ICM "does not 'fit' actual situations in a one-to-one correspondence."[23] Rather, an ICM "captures our 'normal' expectations as they are shaped by cultural practices and conditions."[24] An ICM, in other words, references a general template or pattern of understanding of some prototype.[25] For example, in the *Johnson* ruling John Marshall wrote a lengthy section that drew upon the prototype of what he termed "the conqueror."[26] He did not write about any *specific* conqueror in history; rather, he wrote in terms of a conqueror ICM.

Thus Chief Justice Marshall's discussion of conquest in the *Johnson* ruling provides evidence of his use of the Conqueror model in the Court's decision. "The title by conquest," wrote the chief justice, "is acquired and maintained by force."[27] As seen above, use of the metaphor FORCE references the life force and arms of the conqueror's prototypical imaginary body. Then, explaining *who* it is that determines the limits (think boundaries) of the "title by conquest," Marshall wrote, "*The conqueror*" prescribes its limits.[28] Also derived from the Conqueror model is an ICM of domination, which, as indicated in the above etymology of *dominium*, *dominor*, and *dominator*, entails a structured network of understandings or metaphors of absolute ownership and dominating control.

The Domination model is encoded in Marshall's use of the concept

dominion in the *Johnson* ruling. The significance of the term *dominion* as used in federal Indian law is revealed by means of the Latin verb *domo*, 'to subdue' (to force under obligation), 'to subjugate' (to force under a yoke), 'to put into subservience' (to force to serve under someone), 'to tame' (to break the spirit of through the use of coercion or force), 'to domesticate' (to forcibly limit to the domicile of the lord, *dominor* or *dominus*), 'to cultivate' (to colonize), 'to till' (overturn the indigenous soil).[29] Such concepts, and the Domination cognitive model as a whole, provide a useful repertoire of mental processes and physical behaviors for establishing and maintaining the mental, social, and cultural patterns of domination found in federal Indian law, otherwise known euphemistically as "dominion." In *New Worlds for Old*, William Brandon provides a detailed etymology of *dominion*:

> The Old World idea of property was well expressed by the Latin *dominium*: from "dominus" which derived from Sanskrit "domanus,"—"he who subdues." "Dominus" in the Latin carried the same principle meaning, "one who has subdued," extending naturally to signify "master, possessor, lord, proprietor, owner." "Dominium" takes from "dominus" the sense of "absolute ownership" ["He who has subdued" is framed as the absolute owner] with a special legal meaning of "property, right of ownership." … "Dominatio" extends the word into "rule, dominium," and … "with an odious secondary meaning, unrestricted power, absolute dominium, lordship, tyranny, despotism." Political power grown from property—dominium—was, in effect, domination.[30]

The terms *lord*, *master*, *possessor*, *proprietor*, and *owner* all refer to the Conqueror model, which may also be referred to as an ICM of domination. The Domination cognitive model posits a conqueror who holds property as a result of having successfully subdued lands and peoples, which can be metaphorically conceptualized in terms of the conqueror having imposed control by the forcible use of his hands and arms. The conception of political power being "grown" from property employs the metaphor POLITICAL POWER IS A PLANTING IN THE GROUND (political power "grows" from control of the ground up). The conqueror achieves victory by "planting" himself in one place (this is symbolized by the "planting" of royal flags) and achieving absolute control of the physical ground through the successful and "vanquishing exercise of the hands" and by "force of arms." The

conqueror's goal is to achieve absolute control of the ground—of the land, in other words—for it is by this means that the prototypical conqueror will be understood variously as lord, master, possessor, proprietor, and owner of the ground, or property. In keeping with the metaphor ACTIONS ARE MOTIONS, the conqueror may be conceptualized as having the divine right (unrestricted ability) to move unhindered along any path or to move unimpeded along whatever new paths he chooses to create, which will enable him to continue to subdue indigenous lands and peoples all the more effectively.[31]

Conqueror Moral Reasoning

In his book *Moral Politics*, George Lakoff explains that a great deal "of moral reasoning is metaphorical reasoning."[32] He points out that "many people may not be aware that we commonly conceptualize morality in terms of financial transactions and accounting."[33] Lakoff continues:

> If you do me a big favor, I will be *indebted* to you, I will *owe* you one, and I will be concerned about *repaying* the favor. We not only talk about morality in terms of paying debts, but we also think about morality that way. Concepts like retribution, restitution, revenge, and justice are typically understood in such financial terms.[34]

The term *due*, which is embedded in the word *subdue*, is derived from the Latin *debere*, 'to owe.'[35] Meanings associated with *due* include 'owed or owing as a debt,' 'owed or owing as a necessity : fated, inevitable.'[36] According to Lakoff, "The basic reward-punishment schema is one in which one person has authority over another."[37] This, of course, matches the top-down hierarchical structure of the Conqueror model, because, in keeping with the metaphor CONTROL IS UP, the conqueror is presumed to have authority *over* those he has subdued and *over* those he intends to subdue. The concept of debt in the metaphorical system of moral accounting relates to punishment in the Conqueror model because, as Lakoff explains, "a punishment is retribution by a person in authority."[38] He expands on this point as follows:

> Rewards and punishment are moral acts; giving someone an appropriate reward or punishment balances the moral books. An important special case arises when the person in authority

> gives an order. That order imposes an obligation to obey. The obligation to obey is a metaphorical debt. You *owe* obedience to someone who has authority over you. If you obey, you are paying the debt; if you don't obey, you are refusing to pay the debt—an immoral act, equivalent by moral arithmetic to stealing, a crime. When you disobey a legitimate authority, it is moral for you to be punished, to receive something of negative value or have something of positive value taken from you. Moral accounting then, of course, says that the punishment must fit the crime.[39]

This explanation is unsurprisingly in keeping with another definition of *due*: 'owed or owing in accordance with natural or moral right' and 'satisfying, or capable of satisfying a need, requirement, obligation or duty.' An example of this concept is "walking all the while in due fear of the Lord."[40] Thus in the context of the Conqueror model, the one depicted as walking in fear is pictured as having an obligation and a duty to walk in "fear of the Lord." This is because obedience is something that, from the conqueror's perspective, is "owed" to him at all times, and refusal to pay that ever-present "debt" of submission to the earthly Lord conqueror may result in extremely harsh punishment, even death. Furthermore, because the legitimacy of the conqueror's authority is deemed to come from a divine source, from his perspective it is considered fated and inevitable that all people must submit to the conqueror's authority. This, of course, makes complete sense when one thinks of the obligation and duty that a "subject" is presumed to have to one who "subdues" or to "one who has subdued."

Thus the moral system of the conqueror works in terms of an accounting of what, in his estimation, is owed to him by those whom he has already conquered, but also by those he intends to but has not yet conquered. In the context of the conqueror's moral system, the "divine right" to conquer and subdue includes the divine right to forcibly convince "new" peoples in "new" lands that they owe the conqueror tribute and obedience. Because the conqueror deems himself to be divine, or else to be imbued by "God" with divine authority, this means that even those peoples he has not yet subdued nevertheless have, from the conqueror's viewpoint, a duty and an obligation to obey him and pay tribute to him. Those who do not immediately recognize this obligation—by dutifully bowing before the conqueror with an attitude of meekness and submission when he arrives to their country to conquer and subdue them—must be "justly" dealt with in

the harshest and most coercive terms. This is because the conqueror's so-called divine authority includes the responsibility to teach those whom he is destined to conquer and subdue the moral lessons that, from the conqueror's viewpoint, they are required to learn. This is a requirement within the Conqueror cognitive model; the conqueror is divinely *required* to teach those who owe him unquestioning and unwavering obedience the moral lessons that they are divinely required to learn.

The resulting sense of conqueror morality leads to arguments that automatically justify conquest and the process of conquering (e.g., George W. Bush's "preemptive war," his decision to invade and occupy Iraq). In the morality system of the Conqueror model, coercion, terror, fear, and dread are considered the most effective means of winning and ensuring absolute and continued obedience to the conqueror's authority (think "shock and awe").[41] No one is completely free except the conqueror, and free*dom* in this context refers to the conqueror being absolutely free to conquer, subdue, and establish and maintain a reign or state of domination. Those who live under his reign or within his "state of domination" are free to do so, but are not free to liberate themselves. The conqueror is considered in*dom*itable because he is deemed "incapable of being subdued." (In this context, *in* means 'not able to be,' *dom* means 'subdued or conquered'). The divine source of the conqueror's authority makes him a sovereign, which, in keeping with Jean Bodin, means that he has 'supreme power over citizens and subjects, unrestrained by the laws.'[42] Because the prototypical conqueror is regarded as absolutely unrestrained by laws, he is considered to be absolutely free, or, as L. Oppenheim put it in the early twentieth century, a sovereign state that has "supreme authority, an authority that is independent of any earthly authority, both within and without the borders of the Country."[43] According to the conqueror worldview, it is self-evident that the conqueror is being most virtuous, morally sound, and obedient to God when he uses the tools of coercion, terror, fear, and dread to fulfill "God's will" by conquering and subduing new lands and new peoples not yet conquered. (This is the basis for the Vatican's call in a number of papal bulls or documents for barbarous non-Christian nations to be subjugated, as well as the reference in those documents to lands "not previously discovered by any other Christian prince or people." In the context of the Conqueror cognitive model, this phrase is correctly interpreted to mean 'not previously discovered by any other invading and conquering Christian prince or people'.)

The *Requerimiento*

The view that the conqueror has a responsibility to teach the indigenous peoples he intends to conquer and subdue the moral lessons that, from his viewpoint, they are required to learn, led to the development of one of the most bizarre documents in history. The text of the Spanish *Requerimiento* (the Requirement) serves as a cognitive and cultural artifact of the Conqueror cognitive model during the so-called Age of Discovery.[44] Written in 1514 by jurist Palacios Rubios of the Council of Castile, this document perfectly demonstrates the way Christian Europeans applied the Conqueror cognitive model to the indigenous nations of the so-called New World and illustrates the conqueror morality system.[45] In the opening line, King Ferdinand and his daughter Doña Juana (she was the product of Ferdinand's marriage to Queen Isabella, who died before the *Requerimiento* was written) are referred to as "subduers of the barbarous nations,"[46] which may also be accurately phrased as "conquerors of the barbarous nations."

Addressed to "barbarous" non-Christian nations that were considered destined to be subdued, the *Requerimiento* declares that, from a Christian standpoint, "the Lord our God, Living and Eternal, created the Heaven and the Earth" and that he created "one man and one woman, of whom you and we, and all the men of the world, were and are descendents, and all those who came after us."[47] In the five thousand years that the *Requerimiento* said had transpired since God created the world, "it was necessary that some men should go one way and some another, and that they should be divided into many kingdoms and provinces, for in one alone they could not be sustained."[48]

Out of all "these nations," says the document, "God our Lord gave charge to one man, called St. Peter, that he should be Lord and Superior of all the men in the world, that all should obey him, and that he should be the head of the whole human race, wherever men should live, and under whatever law, sect, or belief they should be; and he gave him the world for his kingdom and jurisdiction."[49] The *Requerimiento* correlates with the point made previously that the Conqueror model posits a central figure, such as monarch (whether king, queen, or pope), who is considered divine or whose power is considered to come from a divine source. In Latin, the phrase *God our Lord* is *God our dominus* or, in other words, 'God who has subdued.'[50] This subduing deity is characterized in the *Requerimiento* as having given "charge to one man" that he should be "Lord" (*dominus*, master, possessor, ruler, lord, owner) and "Superior" (*super*

means 'above') of all men in the world.[51] As a subduer (conqueror) of all men in the world, "all should obey" Peter, and he "should be the head of the whole human race."[52] "God our Lord" (*dominus*) gave Lord (*dominus*) Peter "the world for his kingdom and jurisdiction."[53] The *Requerimiento* continues by saying that God our Lord "commanded" Peter

> to place his seat in Rome, as the spot most fitting to rule the world from; but also he permitted him to have his seat in any other part of the world, and to judge and govern all Christians, Moors, Jews, Gentiles, and all other sects. This man was called Pope, as if to say, Admirable Great Father and Governor of men. The men who lived in that time obeyed that St. Peter, and took him for Lord, King, and Superior of the universe, so also they have regarded the others who after him have been elected to the pontificate, and so has it been continued even till now, and will continue till the end of the world.[54]

Having provided a view of the history of the world from the perspective of the Conqueror cognitive model, the *Requerimiento* continued by explaining that the pope had "donated" indigenous lands to King Ferdinand and his daughter Queen Juana:

> One of these Pontiffs, who succeeded St. Peter as Lord [subduer] of the world, in the dignity and seat which I have before mentioned, made donation of these isles and Tierra-firme to the aforesaid King and Queen and to their successors, our lords, with all that there are in these territories, as is contained in certain writings which passed upon the subject as aforesaid, which you can see if you wish.[55]

Here is evidence of the way that the Conqueror model presumes the divine authority to extend imperial rule over *new* lands by granting those lands to the conqueror's representatives who are charged with the responsibility of conquering and subduing them. This granting away of inhabited indigenous lands is the same pattern pointed out by Chief Justice John Marshall in the *Johnson* ruling when he said that the monarchs of Europe had "asserted the ultimate dominion to be themselves; and claimed and exercised as a consequence of this ultimate dominion, a power to convey the soil, while [the soil

was] yet in possession of the natives."[56] This presumes that the prototypical conqueror has the divine right to use his ideas to "donate" to those of his own choosing lands already inhabited by and belonging to indigenous peoples. This is perfectly in keeping with the conqueror morality system. For the conqueror considers himself as already owning the indigenous lands by divine right, and as therefore having the right to donate those lands to whomever he chooses.

The *Requerimiento* continued by notifying the indigenous nations of the full implication of their lands having been donated by the pontiff to King Ferdinand and Queen Juana:

> So [therefore] their Highnesses are kings and lords [*domini*, subduers] of these islands and land of Tierra-firme by virtue of this donation: and some islands, and indeed almost all those [indigenous peoples] to whom this has been notified, have received and served their Highnesses, as lords and kings, in the way that subjects ought to do, with good will, without any resistance, immediately, without delay, when they were informed of the aforesaid facts. And also they received and obeyed the priests whom their Highnesses sent to preach to them and to teach them our Holy Faith; and all these, of their own free will, without any reward or condition, have become Christians, and are so, and their Highnesses have joyfully and benignantly received them, and also have commanded them to be treated as their subjects and vassals; and you too are held and obliged to do the same. Wherefore, as best we can, we ask and require you that you consider what we have said to you, and that you take the time that shall be necessary to understand and deliberate upon it, and that you acknowledge the Church as the Ruler and Superior of the whole world, … and the high priest called Pope, and in his name the King and Queen Doña Juana our lords, in his place, as superiors and lords and kings of these islands and this Tierra-firme by virtue of the said donation, and that you consent and give place that these religious fathers should declare and preach to you the aforesaid.[57]

The phrase *their Highnesses* uses the UP-DOWN image-schema and the metaphor CONTROL IS UP to conceptually position the monarchs above the indigenous people. The document goes on to say that the indigenous people have a clear choice to make: Either accept the terms of the notice given to them by acknowledging the monarchs

as the lords and kings of the islands and Tierra-firme, or refuse to accept. The *Requerimiento* describes what would happen if they decided to accept:

> If you do so, you will do well, and that which you are obliged to do to their Highnesses [acknowledge yourselves as their subjects and vassals], and we in their name shall receive you in all love and charity, and shall leave you your wives, and your children, and your lands, free without servitude, that you may do with them and with yourselves freely that which you like and think best, and they shall not compel you to turn Christians, unless you yourselves, when informed of the truth, should wish to be converted to our Holy Catholic Faith, as almost all the inhabitants of the rest of the islands have done. And, besides this, their Highnesses award you many privileges and exemptions and will grant you many benefits.[58]

The words *free* and *freely* are strange in this context. The *Requerimiento* has already made it clear that the king and queen of Castile and Leon fully intend to extend their rule over the lands of the indigenous peoples and that the indigenous peoples are fully expected to consider themselves subjects and vassals of the monarchs. Thus the framework offered to the indigenous people is that they will be "free" to live and move about with their wives and children as they like and think best, but within a context of conquest, subjection, and subduing power. If, however, the indigenous people should decide that they want to remain in their own country, completely free and independent of the pretensions of the monarchs of Castile and Leon, on their own lands, in keeping with their accustomed independent lifestyle, then the *Requerimiento* draws upon the Conqueror model to spell out in no uncertain terms what the consequences of this resistant course of action will be:

> But, if you do not do this, and maliciously make delay in it, I certify to you that, with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses

> may command; and we shall take away your goods, and shall do you all the mischief and damage that we can, as to vassals who do not obey, and refuse to receive their lord [*dominus*, subduer], and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their Highnesses, or ours, nor of these cavaliers who come with us. And that we have said this to you and made this Requisition, we request the notary here present to give us his testimony in writing, and we ask the rest who are present that they should be witnesses of this Requisition.[59]

Priests used to read the *Requerimiento* in Latin at the edge of Indian villages before the Spanish conquistadores (conquerors) would lay siege to them. The Indians were, of course, unable to understand Latin, and thus were not able to understand the demands being placed on them. On reading the *Requerimiento,* the great Indian advocate Bartolomé de Las Casas said that he "could not decide whether to laugh or weep."[60]

The *Requerimiento* is an excellent example of Christian Europeans, on the basis of a claim of divine right, formally "laying down" the "rule of law" for indigenous nations and peoples. But because of the brutality and viciousness of the genocide that accompanied the forced imposition of the *Requerimiento* on indigenous peoples, it is much too euphemistic to refer to that document as an example of Christian Europeans laying down the rule of law. Given that the term *law* suggests the exercise of a *legitimate* authority by a distinct people or a nation upon themselves for their own benefit, it is inapt to use the term *law* when referring to the illegitimate and coercive domination of one people or nation by another people or nation. When, from an indigenous perspective, we reject out of hand the Christian Europeans' false claim that God sent them to take over and colonize the indigenous lands of "the Americas," it is self-evident that the Christian Europeans had no *legitimate* authority over indigenous nations and their ancestral territories. What the Christian Europeans claimed in the name of law on the unconscious basis of the Conqueror cognitive model was nothing other than a right of empire and domination, which was integral to the dominating mentality of Christendom.

Chapter 4

Colonizing the Promised Land

In order for the reader to better understand the connection between the *Johnson* ruling and the Old Testament, this chapter provides a brief summary, from an indigenous perspective, of some of the key aspects of the Chosen People–Promised Land model as found in the Bible. The Chosen People–Promised Land cognitive model serves as a significant part of the conceptual and religious backdrop of the "right of discovery" in the *Johnson* ruling. This model is the source of the perspective that the American people of the United States are a new "chosen people" analogous to the chosen people of the Old Testament.[1] According to this view, and in keeping with the Conqueror model, "God" is considered to have granted the United States the divine right to conquer and subdue the "heathen" or "pagan" lands of North America.

As mentioned previously in our discussion of the Conqueror cognitive model, the English term *the Lord* translates into the Latin term *dominus*, 'he who has subdued.' Thus, for example, the phrase *the Lord* in the King James Version may be accurately rephrased as *dominus*, or 'He who has subdued.' This is the basis for the phrase *the Lord conqueror*, as used in this chapter, from an indigenous perspective. In another context, and from a chosen-people perspective, *the Lord* would certainly be metaphorically framed in a more positive way. Referring to the Lord (God) in the Old Testament as a subduer or conqueror is not used in an effort to be provocative. From an indigenous perspective, given the etymology of *dominus* and the passages from the Old Testament cited below, it is entirely accurate to frame the Lord of the Old Testament in terms of the Conqueror cognitive model.

In the narrative of the Old Testament, God created Adam and Eve as the first man and woman. After considerable genealogical detail, the Bible tells the story of Moses, Noah, and Noah's three sons, Shem, Ham, and Japheth. God is then depicted as destroying the first world by a great flood, but Noah and his offspring survive by building an ark in which they live with all the varieties of animals while waiting out the storm. The Old Testament narrative goes on to tell the life story of Abram, the son of Te'rah. When Abram marries Sarai, the story of how the chosen people came to be "chosen"

by their deity, Yahweh, begins to emerge. One purpose of the Old Testament genealogy is to illustrate that Abram (who is eventually renamed Abraham) was a direct descendent of Adam and Eve, to whom the commandment of Genesis 1:28 was given, to "subdue the earth, and exercise dominion over all living things."

In chapter 12 of Genesis, we find the following: "Now the Lord said to Abram, 'Get thee out of thy country, and from thy kindred, and from thy father's house, unto a land that I will show thee: And I will make of thee a great nation, and I will bless thee, and make thy name great.'" From this passage it is clear that the Lord (*dominus*) of the Old Testament had already located a land that he was about to show Abram. Furthermore, "Get thee out of thy country …" is written in the imperative voice. It is a direct command. Thus the Lord directs Abram to embark on a journey of colonization by leaving his father's house and moving far away "unto a land" the Lord is about to show him.

As the story of Abram's journey continues, we are told that Abram and his wife Sarai, along with Abram's nephew, Lot, took "all their subsistence" along with "the souls [people] that they had gotten in Ha'ran, and they went forth into the land of Canaan," which was the land that the Lord (conqueror) showed Abram. Thus begins a colonial adventure story: Abram, Sarai, and the people accompanying them may be accurately understood as colonial settlers moving forward into a "new land," which, for them, had the potential to become a "new world." In Genesis 12:5, we are told that Abram and his fellow travelers "went forth to go into the land of Canaan: and into the land of Canaan they came."

Since the Lord (*dominus*) was sending Abram forth into the land of Canaan, which was already inhabited by indigenous peoples, and since "He" intended that Abram and the chosen people would conquer and subdue the Canaanites, Moabites, Hittites, and other peoples, the Lord may be understood as the conquering spiritual commander or leader of this colonizing expedition. In fact, in relation to the indigenous Canaanites and the land of Canaan, the Lord of the Old Testament perfectly matches the prototype of the conqueror. He is depicted as being divine and as having a desire to extend his rule to the *new* land of Canaan by means of Abram and his followers. This suggests that the Lord had gone out ahead of Abram and the others and "discovered" the land of Canaan before he told Abram about it and directed Abram and his people to conquer and subdue the land the Lord had "promised" them.

Old Testament as Colonial Adventure Story

How do we know that the colonial adventure story of Abram and his fellow companions includes indigenous peoples? Because of the Old Testament's acknowledgment that the land of Canaan was inhabited at the time that Abram and his fellow colonists arrived there. Genesis 12:6 states the following: "And the Canaanite was then in the land." Notice that the passage does not say that the land belonged to the Canaanites or that the Canaanites were the rightful owners of the land, only that the Canaanites were "in the land." But despite the presence of indigenous peoples in the land of Canaan prior to Abram's arrival there, we are told in the next line that the Lord appeared to Abram and said: "Unto thy seed [offspring] will I give this land." The Lord, as the conquering leader of the colonial expedition, "promised" the land of the Canaanites to Abram and the Hebrew people.

Later, the Old Testament narrative explains how Abram eventually became Abraham, the father of the "chosen people." It is also the story of how the indigenous land of Canaan came to be regarded, from a colonizing perspective, as the promised land of the so-called chosen people. This Old Testament narrative, in other words, is the origin of the Chosen People–Promised Land cognitive model, which is further elaborated upon in the Old Testament and which would eventually and unconsciously become part of the cultural and religious background of the *Johnson v. M'Intosh* decision.

We might say that the story of the Lord's promise to the chosen people is the tale of a divine land grant, analogous to a papal bull and to the various royal colonial charters that were issued by Christian European monarchs during the Age of Discovery. From a biblical point of view, the Lord of the Bible gave Abram and his people the right to take possession of the land of Canaan, despite the fact that indigenous peoples were already living there. Another linguistic expression of *the right to take possession* is 'the right of possession,' or 'dominion.'[2] Thus the aforementioned biblical tale is also the story of how the Lord (*dominus*) granted the chosen people the conquering right to subdue and exercise dominion over the land of Canaan, in keeping with the Lord's commandment of Genesis 1:28. We might say, therefore, that this story of the Lord's land grant to the chosen people frames Abraham and the Hebrews as destined to be the subjugating masters or lords of the land of Canaan.

The story that Chief Justice Marshall tells about the Age of Discovery in the *Johnson* ruling contains a number of the same

conceptual patterns found in the Old Testament story of Abraham and the chosen people. One example is Marshall's statement in *Johnson* that the Christian European potentates assumed the "ultimate dominion" to be "in themselves" with regard to the newly "discovered" lands of the hemisphere.[3] Similarly, the story of the Lord promising the land of Canaan to the chosen people portrays him as possessing and exercising dominion in relation to "the promised land."

We find an identical pattern in the *Johnson* ruling when Marshall said that the Europeans "claimed and exercised as a consequence of their assertion of ultimate dominion, a power to grant the soil while yet in the possession of the natives."[4] Similarly, the Old Testament portrays the Lord (*dominus*) as a conqueror who "claimed and exercised as a consequence of this [his] assertion of ultimate dominion, a power to grant the soil, [to Abram and the chosen people] while yet still in the possession of the [Canaanites]." In the *Johnson* ruling, Marshall said that the land grants made by the different nations of Europe "have been understood by all [Europeans] to convey a title to the [European] grantees."[5] Applying Marshall's language to the Old Testament, we may say that the grant by the Lord to Abram has "been understood by all" who believe in the Bible "to convey a title to the grantees," namely, Abram and the chosen people.

From the perspective of the chosen people, the Canaanites were considered to have no right to resist the divine will of the Lord (conqueror). *Right* was deemed to be on the side of the Lord, which placed the "pagan" Canaanites in the opposing category of the *wrong*. The only way for the Lord's will to be carried out was for the chosen people to exercise their deity-given right of possession by conquering and subduing the Canaanites and by exercising dominion by seizing and taking possession of the land of Canaan. Furthermore, the Lord's grant of the land of Canaan to Abram on behalf of the chosen people was made *independent of the will* of the Canaanites and other indigenous peoples of the region. This means that the Canaanites and other indigenous peoples had no ability to stop the Lord from "promising" the land of Canaan to his chosen people. This is similar to the point that John Marshall made in his 1831 decision in *Cherokee Nation v. Georgia* that the United States asserted title to the lands of the Indians "independent of their will."[6] It is also similar to the point that Marshall made in the *Johnson* ruling that the Europeans "exercised, as a consequence of this [their claim of] ultimate dominion, a power to grant the soil, while yet in possession of the natives."[7]

In Genesis 15:7, we find the Lord (conqueror) telling Abram, "I am the Lord [*dominus*] that brought thee out of Ur of the Chaldees, to give thee this land to inherit it." After dark on that same day, the Lord conducted a ceremony with Abram, a three-year-old goat, a three-year-old heifer, a three-year-old ram, a turtledove, and a young pigeon. Then the Lord made a covenant (treaty) with Abram, saying, "Unto thy seed have I given this land, from the river of Egypt unto the great river, the river Euphrates:" Notice that a colon appears after the word *Euphrates* at the end of this previous sentence, thereby indicating that a list of things is to follow. The colon makes it clear that the Lord (conqueror) is not merely giving *the land* to Abram; he is also giving Abram *the indigenous peoples* who were already living in the "promised land" of Canaan. Thus:

> Unto thy seed have I given this land, from the river of Egypt unto the great river, the river Euphrates: The Kenites, and the Kenizzites, and the Kadmonites, and the Hittites, and the Perizzites, and the Rephaims, and the Amorites, and the Canaanites, and the Girgashites, and the Jebusites.[8]

From the foregoing passage and the sentence "I am the Lord [*dominus*] that brought thee out of Ur of the Chaldees, to give thee this land to inherit it," it is clear that Abram and the Hebrews are to "inherit" *both* the land *and* the indigenous peoples. Given that an inheritance is a form of property, this section of the Old Testament provides the theological rationale for regarding indigenous peoples as a form of property subject to the sovereignty and dominion of the chosen people. The Lord's supposed divine grant to Abram of both the land and the indigenous peoples living there makes Abram a lord, or, in this instance, "He who *will* subdue the promised land" because "he has the divine right to conquer and subdue" the land of Canaan and the indigenous peoples living there.

In Genesis 17, we find Yahweh conducting the naming ceremony previously mentioned:

> And I will make my covenant [treaty] between me and thee, and will multiply thee exceedingly. … and God talked with him [Abram], saying, As for me, behold, my covenant is with thee, and thou shalt be a father of many nations. Neither shall thy name any more be called Abram, but thy name shall be Abraham; for

> a father of many nations have I made thee … and I will establish my covenant between me and thee and thy seed after thee in their generations for an everlasting covenant, to be a God unto thee and to thy seed after thee. And I will give unto thee, and to thy seed after thee, the land wherein thou art a stranger, all the land of Canaan, for an everlasting possession."[9]

In the ceremony described above, the Lord sealed his treaty-covenant with Abram, and then renamed him Abraham, 'father of many nations.' Thus with this ceremony, the Lord made the Hebrews his chosen people, selected by him to carry out the divine command to take over the land of Canaan for an "everlasting possession." That the indigenous peoples of Canaan are being considered the *inherited property* of the chosen people is further clarified by Psalms 2:8, in which the Lord tells the Hebrew King David, "Ask of me and I shall give to thee the heathen for thine inheritance, and the uttermost parts of the earth for thy possession." Given that the phrase *uttermost parts of the earth* means 'all the parts of the earth,' King David had but to ask on behalf of the Hebrew people and the Lord would give them the divine right to take possession of *all the lands of the earth*. But Yahweh also promised that David and the Hebrew people would receive as part of their colonizing "inheritance" the pagan or heathen peoples of Canaan in the same way that property is inherited and possessed (i.e., "I shall give to thee the heathen for thine inheritance …").

Seeding the Promised Land with Colonizers

The tradition of colonization is associated with the metaphor SEED as found in Genesis 17, which depicts the deity of the Old Testament saying to Abram that the promised land was being given "unto thee, and thy seed after thee." That the terms *cultivate* and *colonize* are both derived from the Latin term *colere* points out that there is a correlation between cultivation and colonization.[10] Thus planting "seed" can also interpreted in terms of human propagation and planting colonists in a new land for purposes of colonization. This is why the English, for example, often referred to colonies as plantations (propagations).[11] An example of this is found in the title of a book by the English preacher John Cotton: *God's Promise to His Plantations*.

However, colonization has a militaristic side as well in relation to the Conqueror model. According to Rear Admiral Samuel Eliot

Morison, colonization is "a form of conquest in which a nation takes over a distant territory, thrusts in its own people and controls or eliminates the native population."[12] The "history of colonization … is also that of war and the exploitation of races and nations one by the other."[13] Thus in the narrative of the Old Testament, the Lord and his chosen people were the conquering colonizers of the land of Canaan, and the Lord assigned the chosen people two colonial tasks in keeping with the metaphor of Abraham's seed, both of which can be stated figuratively in terms of cultivation. The first task was to extirpate or "uproot" the non-Hebrew Canaanites from the "promised" land. The second task was to "replant" (repopulate) the promised land with the seed (offspring) of Abraham.[14]

During the fifteenth, sixteenth, and later centuries, the monarchies and nations of Christendom lifted the Old Testament narrative of the chosen people and the promised land from the geographical context of the Middle East and began carrying it over to the rest of the globe. Genesis 1:28's directive to subdue the earth and exercise dominion over all living things, for example, and Psalms 2:8's mention of the "uttermost parts of the earth" provided a cognitive basis for the globalization of the Chosen People–Promised Land model during the Age of Discovery. The monarchs of Christendom and their seafaring subjects imaginatively projected themselves into the Old Testament narrative of the chosen people and the promised land. Accordingly, they conceived of themselves as having been commanded by God to take possession of the "uttermost parts of the earth." They therefore assumed themselves to possess the divine right to mentally *apprehend* ("discover") and physically *apprehend* (seize and take possession of) all heathen or pagan lands throughout the world, a right previously ascribed to Abraham and the Hebrews in relation to the land of Canaan. Thus it is the Chosen People–Promised Land cognitive model that is part of the background that motivates (makes sense of) the so-called right of Christian discovery in the *Johnson* ruling. In keeping with this cognitive model, we might call it the divine right of Christian discovery.

The presumption by Christian potentates that they had the divine right to take possession of heathen lands (lands not possessed by any Christian prince or people) was a direct result of their belief that God had previously commanded the Hebrews to take possession of Canaan and that they, as Christians, had "become" God's "new chosen people."[15] All religiously unconverted regions of the planet

metaphorically became, from Christendom's biblical viewpoint, promised lands. From such a perspective, the peoples of Christendom could claim that specific passages of the Bible proved that they had a divine Christian "mandate" and, therefore, the right to possess, capture, vanquish, and subdue any non-Christian peoples and their lands throughout the world. As one scholar has framed the matter:

> Christianity and classic philosophy helped form preconceived views of the New World peoples and the relation of Christian nations to them. European religious, ethical, and commercial standards provided the justification for conquest of native peoples and their territories in the New World. In the centuries following the European discovery of the Americas, various concepts were put forward to promote expansion, and *all presumed the superiority of the Christian nations over the heathen nations*.[16]

One clear example of how Christian Europeans identified themselves with the Hebrews of the Old Testament is found in Portugal's crusading efforts to conquer areas along the western African coast during the Age of Discovery. Prince Henry of Portugal dedicated his entire adult life to fighting infidels in his bid to make Christendom victorious throughout the world. C. Raymond Beazley explains how the Portuguese conceptualized themselves in terms of the Old Testament and how, "in the fervor of the Sacred War," the Portuguese

> take into their mouths the very language of the Chosen People, and, thirsting for a fresh encounter with the Muslims, [they] call upon Almighty aid for that flood-tide which nature was delaying. If God, they cried, had once made clear the way for the children of Israel through the Red Sea and had turned back the sun at the prayer of Joshua, could he not show as great a favor to his Chosen People [the Portuguese], and make the waters of Arguim Bay to rise before their time?[17]

Yet another example of the conquistadors of Christendom viewing themselves in the terms of the chosen people of the Old Testament is provided by Enrique R. Lamadrid in the essay "Luz y Sombra: The Poetics of Mestizo Identity." Under the subheading "Chosen People, Promised Land," Lamadrid writes,

> In 1521 Tenochtitlan, their fabled city on the lake, was razed by bearded Iberian marauders mounted on war horses and armed with steel and gunpowder. By the end of the sixteenth century, the descendents of the ambitious invaders headed north across the same vast wilderness, no longer as adventurers, but as families in search of a homeland.
>
> In their chronicles, these children of the True Cross likened themselves to the children of Israel in their odyssey across the Sinai. Guided by the hand of the same God across the Mesoamerican desert, his chosen ones were delivered from suffering by his Mercy. When all seemed lost and the flocks were dying of thirst, clouds gathered, and blessed rain poured down in the desolate place named Socorro del Cielo, for heaven's deliverance. When the people joyfully crossed their own Jordan, the Rio Grande del Norte, it was into their own *promised land* of Nuevo Mexico, their new querencia.[18]

The monarchs and conquistadors of Christendom transformed Yahweh's command to the Hebrews to take over the land of Canaan into a globalized Christian version of the same doctrine. In keeping with a Christian perspective, the Old Testament story was changed from "Yahweh's command to the Hebrews" into "God's command to the Christians" to take possession of all the lands throughout the world that had not yet been subdued and possessed by Christians forced under Christian *imperium* and *dominium*. With more than one monarchy or nation vying for territory in non-Christian regions of the world, it became necessary for them to devise a rule that could be used to keep competition and the potential for war at a minimum.

The globalization of the Chosen People–Promised Land model by the monarchies and nations of Christendom is the larger and tacit context of Chief Justice Marshall's statement that "as they [the Christian Europeans] were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as *the law* by which the right of acquisition, which they all asserted, should be regulated as between themselves."[19] This principle, said Marshall, was "that discovery gave title to the government by whose subjects, or by whose authority, it [discovery] was made."[20]

In short, the so-called right of discovery in the *Johnson* ruling is grounded in the background cultural and religious belief that

the chosen people will one day fulfill God's will by taking over all the non-Christian parts of the earth as a promised and everlasting possession. Even though from a Christian viewpoint it is God's will and therefore inevitable that one day all the "heathen" lands of the earth shall be possessed by Christians, this work had not yet been completed, thus necessitating further "discoveries" by the seafaring nations of Christendom. We see this attitude reflected, for example, in the *Inter Caetera* papal bull's claim of the right to locate, assume dominion over, and take possession of those "lands not possessed by any Christian prince."[21]

However, the right of Christian discovery was slightly different from the Old Testament story of the chosen people and the promised land. When the potentates of Christendom (whether popes or monarchs) granted others "the right" to discover, acquire, conquer, subdue, and possess "heathen" lands, they thereby assumed the role that the Lord played in the Old Testament story of the Hebrews and the promised land. In a sense, the Christian grantees who received the authorization to discover and possess non-Christian lands assumed the role of Abraham. Behind such grants was the belief that the pope or the king truly represented God and that God, through the divine agency of the potentate, had granted Christians the right to fulfill Genesis 1:28 to *subdue* and exercise *dominion* over the heathen lands of the earth. Genesis 1:28 was the basis for the assertion that the Christian discovery of some geographical region previously unknown to the Christian world "gave" the Christian discoverers a title to those lands as an "inheritance" and "everlasting possession."

Borrowing from the story of the Hebrews of the Bible, the English colonizers portrayed North America as England's Canaan. Like the Hebrews of old, the English considered themselves to be a people chosen by God for a special commission to colonize the North American Canaan. As a consequence, the English believed that "a Christian nation had not only the right but the obligation to take possession whenever possible of lands not already occupied by another Christian people."[22] As Sir Henry Sumner Maine put the matter, "In North America, where the discoverers or new colonists were chiefly English, the Indians inhabiting that continent were compared almost universally to the Canaanites of the Old Testament, and their relation to the colonists was regarded as naturally one of war almost by Divine ordinance."[23]

J. M. Roberts says that the ideas and myths of Judaism became

"generalized through Christianity to become world forces."[24] One such world force was "the Jewish view that history was a meaningful story, providentially ordained, a cosmic-drama of the unfolding design of the one, omnipotent God for His Chosen People."[25] Another powerful idea of the Christian world was the belief that God's covenant with the Hebrews was a guide for right action toward the Canaanites and other non-Hebrews. "The Law" of the Old Testament laid down specific instructions for conquering and even exterminating the non-Hebrew indigenous peoples living in the land Yahweh had promised to his chosen people.

As Christian monarchies began to globalize the Old Testament covenant tradition during the Age of Discovery, they also borrowed Old Testament instructions for how to take possession of "promised" heathen and pagan lands. Deuteronomy 20:10–18 exemplifies such instructions:

> When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be that all the people that is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it: and when the Lord thy God hath delivered it into thine hands, thou shalt smite every male thereof with the edge of the sword: but the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou take unto thyself; and thou shalt eat the spoil of thine enemies, which the Lord thy God hath given thee. Thus shalt thou do unto all the cities which are very far off from thee, which are not of the cities of these nations.

As the narrative continues, the deity Yahweh commands the Hebrew soldiers to apply cold-blooded and, from a contemporary viewpoint, genocidal behavior toward the indigenous peoples living in the lands that Yahweh promised the Hebrews.

> But of the cities of these people, which the Lord thy God doth give thee for an inheritance, *thou shalt save alive nothing that breatheth*: *but thou shalt utterly destroy them*; namely, the Hittites, and the Amorites, the Canaanites, and the Perizzites, the Hivites, and the Jebusites; as the Lord thy God hath commanded thee.[26]

The following is an example of the Portuguese crusaders applying the language of the chosen people to themselves, referring to their attacks on non-Christian Africans during which they put into action the genocidal behavior described in the book of Deuteronomy:

> In the earlier Portuguese expeditions along the African mainland, and especially from 1435 to 1455, the crusading spirit is constantly, not to say brutally, prominent. The pioneers of this time ("the Christians", in the clear and simple language of the *Chronicle of the Guinea*), "sent out to do service to God and to the Infant [Prince Henry]", sailing under the banners of the Order of Christ and mindful how the governor of that order "toiled every day more and more in the war against the Moors", not only raid the "tawny Saracens" of the Sahara to obtain guides and interpreters for future progress, but fight, kill, burn, sack, capture, and destroy, with all the zeal of a holy war. Thus, "our Lord God, Who giveth a reward for every good, willed that for the toil they had undergone in His service they should obtain victory over their enemies", says Azurara of the earliest successful slave-hunting in the Bight of Arguim. When the battle was over, all praised God for such a victory, "for that he had deigned to give such help to a handful of His Christian people"; "He from Whom cometh down every good thing" was pleased that the Christians should at last have complete victory over their enemies, the historian records in other places.[27]

The claim by Christian monarchs of a "right to discover and possess" was also a claim of "the right" to kill and plunder non-Christians. This right of plunder is also found in the Old Testament covenant tradition. For example, in Deuteronomy we find that the Lord told his chosen people how they were to behave when "He" brought them into the land they were instructed to possess. Thus:

> When the Lord thy God shall bring thee into the land whither thou goest to possess it, and hath cast out many nations before thee, the Hittites, and the Girgashites, and the Amorites, and the Canaanites, and the Perrizzites, and the Hivites, and the Jebusites, seven nations greater and mightier than thou; And when the Lord thy God shall deliver them before thee; *thou shalt smite them*, and utterly destroy them; thou shalt make no covenant with them, nor show mercy unto them: Neither shalt thou make marriages with

them; thy daughter thou shalt not give unto his son, nor his daughter shalt thou take unto thy son.[28]

In return for following these "divine" mandates, Yahweh promised to give the Hebrews "great and goodly cities," which they did not build, "houses full of all good things," which they did not fill, wells, which they did not dig, and vineyards and olive trees, which they did not plant. All these were part of the "spoils" of the enemies that Yahweh commanded the Hebrews "to eat."[29] The phrase *to eat the spoil of thine enemies* corresponds, of course, with the metaphor COLONIZATION IS EATING.

During the Crusades, we find the Christian crusaders exhibiting the exact same behavior prescribed in the above passages from Deuteronomy. In 1095 A.D., Pope Urban III declared the First Crusade and made it known that whatever infidel lands or property the Christians managed to locate (discover) and seize (possess) would belong as spoil to the Christians who first seized it.[30] When the Christians successfully sacked Jerusalem in 1099, they seem to be directly following the conceptual system found in Deuteronomy, to "utterly destroy" religious enemies. The Archbishop of Tyre described the gruesome and horrific scene visited upon the infidels by the devout crusaders:

> The rest of the [Christian] soldiers roved through the city in search of wretched survivors who might be hiding in the narrow portals and byways to escape death. These were dragged out into public view and slain like sheep. Some formed into bands and broke into houses where they laid violent hands on the heads of families, on their wives, children, and their entire households. These victims were either put to the sword or dashed headlong to the ground from some elevated place so that they perished miserably. Each marauder claimed as his own in perpetuity the particular house which he had entered, together with all it contained. For before the capture of the city the pilgrims had agreed that, after it had been taken by force, whatever each man might win for himself should be his forever by right of possession [discovery], without molestation. Consequently the pilgrims searched the city most carefully and boldly killed the citizens.[31]

The brutal way that Jerusalem was sacked and the Moslem inhabitants methodically killed illustrates an important point. The

Christian crusaders, who claimed the divine right to take over the lands and property that were in the previous and rightful possession of another people, were thereby claiming that they had the divine right to violently "convert" (wrongfully, unlawfully, and violently appropriate the rightful property of another) the land and property of "unbelievers." The Christians claimed that it was right to do what would ordinarily be considered wrong because they deemed their religious enemies to be on the wrong side of God.

Conceptual patterns and attitudes derived from the Old Testament covenant tradition have had a tremendous ability to persist in Christian European thought over time. In 1557, for example, more than four centuries after the sacking of Jerusalem, Pedro de Santander, an official of the Catholic Church, advocated that Phillip II, the king of Spain, should follow the Old Testament covenant tradition in his treatment of the Native peoples of Florida:

> This is the Land of Promise, possessed by idolators, the Amorite, Amulekite, Moabite, Canaanite. This is the land promised by the Eternal Father to the Faithful, since we are commanded by God in the Holy Scriptures to take it from them, being idolators, and, by reason of their idolatry and sin, to put them all to the knife, leaving no living thing save maidens and children, their cities robbed and sacked, their walls and houses leveled to the earth.[32]

The Old Testament right of possession (plunder) described by Santander illustrates that when the chosen people go forth to seize and possess the land and property of pagan peoples, they fully intend to engage in a hostile takeover of the promised land. The Old Testament claim of a divine right to possess the lands of indigenous peoples is, in reality, the claim of a divine right to terrorize, conquer, and subdue indigenous peoples and to take over, possess, and profit immensely from their lands and resources.

Chapter 5

The Chosen People–Promised Land Model

As we have seen, from an indigenous perspective the phrase *right of discovery* in the *Johnson* ruling is correctly understood in terms of the Conqueror model and the Chosen People–Promised Land model. Thus a key part of the cultural, religious, and conceptual background of the *Johnson* ruling is an unconscious understanding that "God" granted to the United States the divine right to conquer, subdue, and exercise dominion over the lands of North America. The Chosen People–Promised Land cognitive model has become an integral part of the cultural and cognitive makeup of the United States. That Old Testament mental model has served as the basis for the presumption that originally free and independent American Indian nations are subject to the ideas and judgments (laws and policies) of the United States.

As explained in the previous chapter, the Old Testament portrays the "chosen people" as having received a promise from the Lord (conqueror). This promise included a command that the chosen people were to go forth, subdue, seize and occupy the land of Canaan, the "promised land." The story treats the fact that many indigenous peoples were already living in those promised lands as entirely irrelevant. We may surmise that the indigenous "pagans" or "heathens" living there considered themselves to be in rightful possession of the land. From the perspective of the Lord and the chosen people, however, we can use an idea expressed in the *Johnson* ruling to say that the Lord's covenant (treaty) with the chosen people gave them "ultimate title" to the promised indigenous lands of Canaan. The task of subjugating, taking over, and acquiring the promised land as per the Lord's command required that the chosen people make room for themselves by removing the indigenous "pagans" or "heathens" already living there. The Lord is portrayed as having guided the chosen people to this end by giving them precise instructions on how to deal with the Canaanites and other pagan peoples.

Anders Stephanson, in *Manifest Destiny*, expresses the Chosen People–Promised Land model quite aptly as it was applied by Christians to North America:

> For Europeans, land not occupied by recognized members of Christendom was theoretically land free to be taken. When practically possible, they did so. The Christian colonizers of the Americas—including the Spanish and the Portuguese—understood theirs as sacred enterprises; but only the New England Puritans conceived the territory itself as sacred, or sacred to be. As the appointed bearers of the true Christian mission, they made it so by being there. To the same degree, England was thereby desacralized. This, then, was the New Canaan, a land promised, to be reconquered and reworked for the glory of God by His select forces, the saving remnant in the wilderness.[1]

An explanation of the above passage in terms of cognitive theory is that for the "Christian colonizers of the Americas," the Chosen People–Promised Land cognitive model was the basis for drawing an analogy between the lands of North America and the land of Canaan in the Old Testament. This entails the lands of North America being conceived of as "land free to be taken." Based on Anderson's description of the English colonizers, we may understand them as conceiving of themselves as existing on an exalted or "higher" plane in relation to pagan, unchosen peoples. It follows from this assumption of their own "elevated" existence that the colonizers considered themselves to possess a higher power of judgment. By means of their mental abilities, including their power of judgment, they fully intended to conquer, rework, and redesign "pagan" and "heathen" lands of North America "for the Glory of God."

Metaphorically Experiencing Indian Lands as Promised Lands

As mentioned previously, when forms of reasoning found in the Old Testament narrative are used to reason about American Indian lands, the result is that Indian lands metaphorically become conceptualized—from the viewpoint of the United States—as the "promised land" of the "chosen people" of the United States. A similar metaphorical mapping deflects attention away from any specific acknowledgment of Indian people. This framing serves to keep the indigenous nations and peoples out of focus, thereby drawing attention away from the question of the rightfulness of taking the land away from those who are already in possession of it.

There is ample evidence to show that prominent leaders of the United States have applied the Chosen People–Promised Land

cognitive model as a way of thinking about and experiencing the identity of the United States, both in relation to the lands of the North American continent and, by means of words such as *pagan*, *heathen*, and *infidel*, in relation to the American Indians. Once one begins looking for evidence of the Chosen People–Promised Land model in the historical record, it seems ubiquitous. "In 1776," for example, "Benjamin Franklin proposed to the Continental Congress that the image of Moses leading the Israelites across the Red Sea should appear on the Great Seal of the United States."[2] Thomas Jefferson proposed that the Great Seal of the United States depict the Israelites moving into the promised land guided by clouds and fire, thereby drawing an analogy between the chosen people of the Old Testament and the people of the United States.[3] Jefferson's and Franklin's suggested imagery for the Great Seal matches a remark from Abiel Abbott's Thanksgiving sermon of 1799: "It has been often remarked that the people of the United States come nearer to a parallel with Ancient Israel, than any other nation upon the globe. Hence *Our American Israel* is a term frequently used; and common consent allows it apt and proper."[4]

Some years ago, when I visited the Whitman Mission Museum in Walla Walla, Washington, I found another example of the metaphorical connection between the Old Testament and the United States. The museum is located where the physician and Presbyterian minister Marcus Whitman and his wife, Narcissa, founded a Christian mission settlement in the territory of the Cayuse Indians. When numerous deaths among their people caused the Cayuse to suspect Whitman of poisoning them and their children, a number of Cayuse took matters into their own hands by killing the minister and his wife. Today the museum reminds visitors of the Whitmans' story with paintings, old photographs, beadwork, frontier tools, life-size mannequins dressed as Cayuse Indians, and two mannequins modeled after the Whitmans.

During a ten-minute National Park Service video shown to museum visitors, the narrator said that Whitman had helped "carve a nation from a wild and beautiful land." The film narrator went on to explain how Whitman had traveled from the Oregon Territory to the East Coast and then returned to the Oregon Territory by accompanying a large wagon train with 140 wagons and a thousand settlers. Then, applying the Chosen People–Promised Land model to the story, the narrator declared, "In a very strong symbolic sense, this first

wagon train was leading a whole populace into the promised land." Here, then, is an example of the National Park Service—an official agency of the U.S. government—using the metaphorical framework of the Old Testament as a means of portraying the colonization of the Indian lands of North America to the American public. This association is so much a part of the cultural and cognitive makeup of the United States that the biblical analogy seems unremarkable to both the U.S. employees showing the film and the audience viewing it.

The film conceptualized the wagon train moving across the continent on the Oregon Trail *in terms of* the Old Testament model of the chosen people moving into the promised land of Canaan. In keeping with all the features and inferences of the Chosen People–Promised Land model, the Cayuse Indians—and all other Native nations—are, unconsciously conceptualized in terms of the Canaanites or other non-Hebrew "pagan" peoples. In other words, the Chosen People–Promised Land model results in the American Indian nations and peoples of North America being metaphorically conceptualized in the cognitive unconscious as pagans in the promised land of North America. A number of inferences follow from the Chosen People–Promised Land model (e.g., Deuteronomy 20:10–18), such as that indigenous peoples are to be removed (e.g., Indian Removal Act), put into a condition of servitude (e.g., enslavement of the Indians of California in the Spanish-Catholic missions), exterminated to make room for the chosen people of the United States (e.g., massacres at Sand Creek and Wounded Knee), and assimilated into the "body politic" of the larger society (e.g., the assimilationist U.S. policies of Termination and Relocation in the 1950s and '60s).

A speech delivered by President Reagan at Independence Hall in Philadelphia provides yet another example of the United States being metaphorically framed in terms of the Old Testament of the Bible. The occasion was the two-hundredth anniversary of the U.S. Constitution. In his address, Reagan employed the Chosen People–Promised Land model to reason about the U.S. Constitution. Reagan said that the Constitution is no ordinary document, but "a covenant with the Supreme Being to whom our founding fathers did constantly appeal for assistance."[5] Use of the word *covenant* is meant to evoke the Old Testament covenant that Yahweh formed with his chosen people. In this instance, the U.S. Constitution is the target domain that is being thought of in terms of the source domain of Yaweh's covenant or treaty with his chosen people. When President Reagan applied this

source domain to the United States, he drew a correlation between the American people and the chosen people of the Old Testament and another correlation between the Old Testament promised land and the North American continent.

A book published the same year as Reagan's speech helped explain the Old Testament religious and conceptual context for Reagan's claim of a connection between the U.S. Constitution and "the Supreme Being." *A Covenanted People: The Religious Origins of American Constitutionalism* claims that ever since the pilgrims first established the Massachusetts Bay Colony in 1620, "Americans have believed they are a chosen people, singled out by God for a special commission" to take over and colonize the "promised lands" of North America.[6] This is yet another example of how the American people have traditionally thought of themselves in terms of, and associated themselves with, the metaphorical image of the chosen people of the Old Testament.

In his speech at Independence Hall, Reagan also used the Chosen People–Promised Land cognitive model in reference to a quote by George Washington about an "invisible hand" that conducts the affairs of men. Reagan mentioned how Washington had once said that every step the American people have taken toward their status as an independent nation seems to have been guided "by some providential agency."[7] Providence is, of course, understood to refer to a deity and 'divine guidance or care.' According to Reagan, when Washington made this statement, he was no doubt "thinking of the great and good fortune of this young land: the abundant and fertile continent *given us*."[8] By referring to the continent as having been "given" to the American people, Reagan was invoking the commonplace belief that is also part of the Chosen People–Promised Land model that some "providential [divine] agency" had gifted or given the Indian lands of the North American continent to the United States.

According to theologian Walter Brueggemann, an essential part of the covenant tradition of the Old Testament is this very concept of the chosen people "in quest of the land Yahweh promised to them."[9] Another quote from theologian Geoffrey R. Lilburne helps us see more specifically how Reagan's belief that this continent was given to the United States correlates with the Old Testament view that the Hebrew's deity Yahweh had given the lands of the Canaanites to Abraham and the Hebrew people "for an everlasting possession." The promised land, said Lilburne, was "a 'gift' *given* by God to His Chosen People to be

their 'inheritance for ever' or at least until the next upheaval."[10]

Reagan could have cited two other quotes from George Washington to draw a metaphorical parallel between the United States and the Old Testament promised land. One is found in a letter that Washington wrote to David Humphreys regarding Indian lands north and west of the Ohio River, the Old Northwest Territory. "Rather than quarrel about territory," wrote Washington, "let the poor, the needy, and the oppressed of the earth, and those who want land, resort to the fertile plains of our western country (the Ohio Valley), the second land of promise, and there dwell in peace, fulfilling the first and great commandment" of the Bible.[11] The other quote is found in a letter Washington wrote to the Marquis de Lafayette in 1785:

> I wish to see the sons & daughters of the world in Peace & busily employed in the more agreeable amusement, of fulfilling the first and great commandment—*Increase & Multiply*: as an encouragement to which we have opened the fertile plains of the Ohio to the poor, the needy & the opressed of the Earth; any one therefore who is heavy laden, or who wants land to cultivate, may repair thither & abound, as in the Land of promise, with milk and honey.[12]

Washington's comment about "the first and great commandment" was made in reference to the biblical passage Genesis 1:28, "Be fruitful and multiply, and replenish the earth and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over living things that moveth upon the earth." Two key words in the passage are *subdue* and *dominion*. A Hebrew term for *subdue* (*kabas*), 'to tread down upon' or 'to bring into bondage,' conveys the image of a conqueror placing his foot on the neck of the conquered. It also means 'to rape.' The Hebrew word for dominion is *rdh* (sometimes spelled *radah*), 'to rule,' 'to trample,' or 'to press.'[13]

Law and Religion

Rousas John Rushdoony, an advocate of dominion theology, contends that "every system of law is religious in origin."[14] Because the Chosen People–Promised Land cognitive model serves as a key part of the cultural and cognitive background of federal Indian law, Rushdoony's statement is most certainly true in this context: The *Johnson* decision is religious in origin because of the categories "Christian

people" and "heathens" that John Marshall wrote into that ruling. It is also religious in origin because Marshall claimed in the Johnson ruling that a "discovery" by "Christian people" of the lands of North America resulted in the "diminishment" of Indian "rights to complete sovereignty as independent nations." A detailed analysis of the Johnson ruling in Chapters 7 and 8 will demonstrate the Christian religious basis for the Supreme Court's claim that the independence of Indian nations was 'diminished' by the right of Christian discovery.

Like law, every system of religion is a system of constraints; indeed, the term *religion* is derived from the Latin *ligio*, 'to bind' and the prefix *re-*, 'to do something repeatedly.' From an indigenous perspective, *religio* is 'to bind repeatedly and continuously by psychological means of persuasion.' Federal Indian law is a conceptual system of *religio* to the extent that it originates in the Conqueror and Chosen People–Promised Land cognitive models or in the belief that a divine being or spirit (such as "the Lord" of the Old Testament) has commanded a particular group of people to have, do, acquire, or take that which another group of people already have in their possession. Because the command is attributed to a particular deity or, to use George Washington's term, "providential agency," the people who believe they have been given that command also believe that they possess the divine right or the inviolable moral power to have, do, or acquire what the deity commands, even if it involves taking that which already belongs to someone else. Because it is a deity that is considered to have issued the command, the directive is considered to be divine *law* by those it benefits and therefore, from the viewpoint of the faithful, *must* be followed in a habit of obedience, which is one conception of law.[15] Thus:

> The most self-conscious pursuit of destiny under God in the New World was enacted by the Puritans of Massachusetts Bay, and the most articulate colonial spokesmen for the theme of American destiny were the Puritans. Ecclesiastical and civic leaders in New England conceived of America as a place where a Protestant Reformation of church and society could be completed—a task that had not been carried out in England and Europe. They envisioned their journey to these shores less as an escape from religious persecution than as a positive mission for the construction of a model Christian society. They were on an "errand into the wilderness"; their purpose was to build a holy commonwealth in which the

> people were covenanted together by their public profession of religious faith and were covenanted with God by their pledge to erect a Christian society. … They believed that, like Israel of old, they had been singled out by God to be an example for the nations (especially for England). …
>
> … John Winthrop, first governor of the Bay Colony, gave the theme one of its earliest and most pointed expressions. Winthrop's *Model of Christian Charity*, written aboard the flagship *Arbella* as it led the Puritan expedition toward the Promised Land, briefly spelled out the terms of the Puritan covenant (terms founded on a divinely ordained social order in which "some must be rich, some poore") and captured both the anticipation and the dread that arose in the heart of Puritan New Israel as it struck a covenant with Jehovah.[16]

Scholars have long recognized a connection between Christian thought and the history of the United States. What they have neglected, however, is the story of how the conquering Chosen People–Promised Land model became the principal foundation and cognitive basis of federal Indian law by way of the U.S. Supreme Court decision *Johnson v. M'Intosh*.[17] Justice Oliver Wendell Holmes observed that the "rational study of law is still to a large extent the study of history." I would slightly expand his comment to "the rational study of law is to a large extent the study of the history" *of ideas*.[18] As a product of the mental processes (thoughts and ideas) of non-Indian intellectuals, federal Indian law is a result of and massive accumulation of ideas (meanings). What has not been sufficiently understood, however, is that federal Indian law by means of the *Johnson* ruling is a mental by-product of the background cultural belief that the Christian God promised the lands of North America to the peoples of Christendom, who traveled across the Atlantic Ocean to this hemisphere, where they claimed permanent rights of Christian European discovery and dominion, which the United States then claimed for itself.

Chapter 6

The Dominating Mentality of Christendom

The term *dom* in the word *Christendom* evokes the ICM of the Conqueror. However, most people are completely unfamiliar with the term *dom* as it relates to the Conqueror model. Just as the alien in Arnold Schwarzenegger's movie *Predator* cloaked itself with an energy field of invisibility, the Conqueror cognitive model and meanings embedded in the term *dom* remain cloaked, as it were, in the language of the dominant society. Even though such terms are in plain sight, so to speak, their now antiquated meanings remain at the level of the cognitive unconscious and are therefore able to evade detection and critical reflection. In one context, however, *dom* is 'lord,' or 'subduer.' In the context of the Conqueror model, the term *dom*, found in concepts such as free*dom*, king*dom* and Christen*dom*, suggests, 'a region, place, or state that has been subdued and dominated.'[1]

The nineteenth-century political philosopher Francis Lieber revealed that the word *freedom*, so commonly understood as a synonym for the word *free*, is actually derived from the German word *freithom*, 'baron's estate,' which is the estate over which a baron has dominion.[2] *Baron* is a rank and status within a larger feudal system of monarchy. Thus the context of *freithum* (freedom) in Western Christendom is that of monarchy, which is a system that posits a ruler or monarch who is divine or has been imbued by God with divine power to rule, conquer, and subdue. Like the M. C. Escher paintings of paths that continuously loop back into themselves and lead nowhere, the feudal conceptual "paths" of the Conqueror model always return to and never deviate from the premise of a divine right of empire and domination.

As Robert A. Williams has shown in his book *The American Indian in Western Legal Thought*, federal Indian law and policy are, to a great extent, an outgrowth of the imperial mentality of Christendom, extending back to medieval Europe.[3] The term *imperial*, of course, refers to the concepts, activities, and processes of empire, and empire-building.[4] *Christendom* is a term that refers to Christian imperialism. Indeed, one meaning given for the word *Christendom* is 'the portion of the world in which Christianity prevails or which is governed by Christian principles.'[5] To prevail means variously 'to

gain victory, to win, or to triumph' or, in other words, 'to come out on top.'[6] The metaphorical conception of being *on top* is structured by the UP-DOWN image-schema and the CONTROL IS UP and POWER IS UP metaphors.

The concepts of *empire*, *empire-building*, and *prevailing* are all embedded in the concept *Christendom*. These concepts, all of which are related to the Conqueror model, constitute an orderly, systematic, regularized, and coherent set of meanings that conceptualize Christians as *always* being rightfully "in control" and therefore positioned "over" and "above" non-Christians. This is a key to understanding the two religious categories—Christian people and "heathens"—that are contained in the *Johnson* ruling.[7]

Because metaphorical thinking involves thinking of and understanding one conceptual domain in terms of another conceptual domain, whenever U.S. government officials think about and understand the domain of Indian nationhood and land rights *in terms of* the ICM of the *Johnson* ruling, they are metaphorically reasoning about Indian nationhood and land rights in terms of the Old Testament narrative and the religious categories (Christian people and "heathens") embedded in the *Johnson* ruling. These religious terms, in combination with the Supreme Court's reference to "ultimate dominion" in the *Johnson* ruling, tacitly invoke the Conqueror model and the ancient dominating mentality of Christendom within the conceptual framework of a U.S. Supreme Court ruling. For this reason, whenever U.S. government officials apply the *Johnson* ruling to American Indian nations, they are unconsciously applying the Conqueror model and the dominating mentality of Christendom to American Indian nations.

Columbus: A Vector of the Mentality of Christendom

As we shall see, a taken-for-granted belief in the Old Testament covenant tradition became a central feature of the imperial mentality of Western Christendom, a mentality that, for example, Christopher Columbus (Cristóbal Colón) carried with him on his famous voyages. In keeping with that tradition, the conquering mentality of Western Christendom has become an integral part of the unconscious mental attitude of U.S. government officials toward originally independent Indian nations.

When the thirteen British colonies declared themselves to be thirteen independent "states"—collectively called "the United States

of America"—the imperial mentality of Western Christendom became institutionalized as a central part of the collective consciousness of the society of the United States. The historic connection between the ancient mentality of Christendom and the United States is well symbolized by the National Columbus Memorial and Fountain, located at Union Station Plaza in Washington, D.C., which stands just five blocks north of the U.S. Capitol building. A globe representing Earth, encircled by four eagles, rests on top of the monument. A fifteen-foot statue of Christopher Columbus wrapped in a medieval mantle faces the U.S. Capitol building. According to one description, the Columbus statue "stands in front of the pylon in the bow of a ship with its prow extending into the upper basin of the fountain terminating with a winged figurehead representing democracy."[8] Here, then, is an attempt to symbolically link the legacy of Columbus to the "democracy" of the United States. This effort seems quite odd, however, considering that Columbus is not known for exemplifying any tradition of democracy. He was a product of medieval Europe, which was fraught with feudalism.[9]

On the west side of the Columbus Memorial is a statue of a muscular American Indian man, wearing only a breechcloth. Although the Indian man's body is facing directly west, his head is turned so that he is looking back over his left shoulder out the corner of his eye at the Capitol building. (Perhaps the artist intended to symbolize the need for "the Indian" to always be looking over his shoulder in anticipation of what the United States is planning to do to him next.) On the north side of the memorial is a wall bearing the faces of Queen Isabella and King Ferdinand and the following inscription: "To the memory of Columbus, whose High Faith and indomitable courage gave to mankind a New World."

This mention of a New World in relation to the classic story of Columbus coincides with the fact that every human reality is cognitively and socially constructed when humans, both individually and collectively, combine meanings with everyday activities and interactions. As Peter L. Berger has noted, "Every human society is an enterprise of world-building." Berger further points out that "religion occupies a distinctive place in this enterprise."[10] This acknowledgment of the role that religion plays in the cognitive and social construction of reality is apropos in light of what some people now consider Columbus's "evangelizing" legacy in the so-called New World. In an online article titled "The Faith of Columbus the Evangelizer," the National Columbus Celebration Association (NCCA)

attempts to draw a connection between the founding and development of the United States and Columbus's supposed efforts at evangelization. The article emphasizes the role that the Catholic faith and Christian religion played in Columbus's life:

> At the end of September 1500, Columbus had been brought back from Santa Domingo in chains. The royal court was at Seville, and he stayed for a number of months at the Carthusian monastery of Las Cuevas across the Guadalquivir River from the city. There he developed a collection of detailed notes which he himself described as "A notebook of authorities, statements, opinions and prophecies on the subject of the recovery of God's Holy City and mountain of Zion, and on the discovery and evangelization of the islands of the Indies and of all the other peoples and nations.[11]

"God's Holy City" refers to Jerusalem, and the "mountain of Zion" refers to an ancient Jebusite stronghold located on the southeast hill of Jerusalem at the junction of the Kidron Valley and the Tyropoeon Valley.[12] When the Hebrew king David captured the fortress of Zion by defeating the Jebusites, he renamed it Zion, "the City of David."[13] Jesus Christ is considered to have set his stronghold on Mount Zion.[14] By placing Columbus's life within this biblical context, the NCCA calls attention to Columbus's fervent belief in the Old Testament and his lifelong desire to wage a crusade against the Moslems to militarily win Jerusalem for the Christian world.[15] These themes draw attention to the connection between the narrative of the Hebrews in the Old Testament and the tradition of Christian crusade and evangelization, which Columbus is said to have represented. These connections illustrate that the context of the category *Christian people* during the Age of Discovery—the context in which that category is used in the *Johnson* ruling—is inextricably linked to the conceptual framework of the Old Testament narrative of the chosen people and the promised land, a narrative that Columbus brought with him to the indigenous lands that would eventually come to be called the Americas.[16]

Some people have also attempted to draw a link between Columbus and the "national consciousness" of the United States, a connection that seems well-reflected and embedded in the architecture of the U.S. Capitol. The Department of American Studies at the University

of Virginia, for example, has pointed out that

> nineteenth century Americans were in search of a history, a pantheon of heroes to reflect their aspirations and national character. With the increasing fragmentation of the age, Americans sought a hero who could cut across regional, political, and ethnic boundaries. They discovered Columbus and installed him in their pantheon, the Capitol, with increasing frequency throughout the 1800s. Although representations may vary, the message is always the same: Columbus was the first "founding father", providing a history and hero everyone could agree upon, whose success lay in his piety, industriousness, ingeniousness, and bravado.[17]

The elevation of Columbus to the mythological status of a culture hero in the United States resulted in the installation of the Columbus Doors at the east entrance of the Capitol Rotunda in the mid-nineteenth century. The doors are engraved with images portraying Columbus's life story. The top panel, or lunette, of the doors depicts Columbus standing with his sword drawn and the royal standard raised. He is depicted ceremonially "taking possession" of the first Taino island at which he arrived, which he named San Salvador (Holy Savior). A Christian cross stands behind him. According to one explanation, "The Rotunda is the heart of the U.S. Capitol, containing emblems of what have been considered important events in U.S. history: paintings and reliefs of the signing of the Declaration of Independence, important events during the Revolution, and the discovery and founding of the country. The gateway, the Columbus Doors, to the display of these icons is symbolically just as important." The Columbus Doors stand seventeen feet tall, weigh twenty thousand pounds, and are said to "make a powerful statement not only about their subject, Christopher Columbus, but the importance of Columbus to the *national consciousness*" of the United States.[18]

Interpreted from an indigenous perspective, both the Columbus Doors at the U.S. Capitol and the Columbus Memorial at Union Station symbolize a connection between Christendom's invasive arrival to this hemisphere and the founding of the United States of America. Embedded in the architecture of the U.S. Capitol building via the Columbus Doors is a reminder of the fact that Columbus was an agent of Christendom's intense desire to conquer and overtake the indigenous lands of this hemisphere. From an indigenous standpoint, Columbus's

subjugating behavior toward indigenous peoples, in keeping with the Conqueror model and Chosen People–Promised Land model, makes it impossible for his life to represent the values of liberty, justice, democracy, and the rule of law associated with the United States. That is, however, unless these concepts are interpreted in the context of a model of empire and domination.

Of course, in light of its historic treatment of American Indian nations and peoples, it is also impossible for the actions of the United States to represent liberty, justice, democracy, and the rule of law unless these concepts are interpreted in the context of the American empire and its multigenerational bid for continental domination and exploitation. Indeed, the destructive actions of Columbus and the United States toward indigenous peoples do make sense within the context of the empire-building values and dominating mentality of Western Christendom, and in light of the fact that the United States was founded as an empire, or imperial republic.[19]

Not quite three centuries after Columbus made landfall in this hemisphere, the Euro-American "founding fathers" worked hard intellectually to create the political and legal framework of "the United States of America." The world they desired to create was one in which American Indians would either be eliminated altogether and all Indian lands successfully overtaken or, alternatively, a world in which the vast majority of Indian lands would be successfully colonized and seized by the United States and the Indians successfully forced to live under the imperial dominion, power, and control of the United States. The founders of the republic known as the United States of America envisioned the rise and expansion of the American empire. Accordingly, they saw the originally free and independent American Indian nations standing in the way of the planned *imperium* of the United States.[20]

The University of Virginia's Department of American Studies casts Columbus as a founding father of the United States, and the NCCA draws a link between Columbus and the national consciousness of the United States, despite the dark and murderous side of Columbus's legacy. Those organizations apparently do not see any contradiction between the image of Columbus as a founding father of the United States and the historic image of Columbus instituting Conqueror model "justice" by ordering the hands cut off of male Indians who did not obey him by bringing a requisite amount of gold to him and his men.[21] Those who promote Columbus as a cultural hero do so despite the fact that as a symbol of "justice" Columbus

had over three hundred gallows erected on many different indigenous islands in order to hang Indians at the "bar of justice," thirteen at a time, the number corresponding to Jesus and the twelve Apostles.[22] The Indians who were hung were left slowly strangling to death; a fire was built beneath them so that they would die an agonizing death tormented by the flames.[23]

For these reasons, those who consider Columbus as one of the original founding fathers of the United States ought to be asked to explain how it is possible to reconcile Columbus's murderous values and actions with the professed values of the United States, values such as liberty, freedom, democracy, and the rule of law. Those who want to continue to hold Columbus up as a model of all that they say is good about the United States must account for the fact that the Spanish admiral is prototypical of the Conqueror model and of those horrific and destructive forces of colonization that desired and worked hard to strip indigenous peoples of their free and independent existence. There is no getting away from the fact that Columbus's murderous and subjugating actions are very much a part of the legacy of Christendom and of Christian evangelization during the Age of Discovery. Yet reflecting a positive assessment of Columbus's legacy, the NCCA says:

> The Association seeks to honor not only the memory of Columbus and his historic achievements in linking the Old World and the New, but also *the higher values that motivated and sustained him in his efforts and his trials*. ... This Columbus Day 2001 marks the 500th anniversary of the Discoverer's most elaborate and significant written expression of his faith. It is a document that librarians have named the Libro de las profecias, or Book of Prophecies, much ignored by historians until relatively recent years, though it probably provides the best insight available into his thinking and motivations.[24]

Given that the NCCA refers to the "higher values that motivated and sustained" Columbus, we may cynically pose the rhetorical question, In what way did the horrendous deeds that Columbus and other conquering Christian crusaders committed against American Indians demonstrate and reflect higher values? Of one thing we can be certain: the heinous conduct toward the Indians of this hemisphere by Columbus and other Christian Europeans was illustrative of the dominating and crusading mentality of Western Christendom. Columbus was a

product of "a new crusading spirit [that] swept through western Christendom" in the mid-fifteenth century.[25] Paolo Emilio Taviani points out that it was this "spirit" of crusade that "nourished the impetus of the Portuguese to expand overseas, not only for down to earth commercial reasons, but in the fervent hope of spreading Christianity and converting heathens." He further says that Columbus "was a part of" this same crusading spirit.[26] Delno C. West and August Kling, in their English publication of the above-referenced *Libro de las profecias*, declare "that the vision of Columbus was one of a missionary and a crusader."[27] This crusading militaristic mentality of Christendom is revealed in the concepts and metaphors found in the numerous biblical passages that Columbus celebrated as reflecting the "higher" values he cherished most. For example, West and Kling cite a passage from the Latin Vulgate Version of the Bible that reads as follows:

> O clap your hands, all ye nations: shout unto God with the voice of joy, for the Lord is high, terrible: a great king over all the earth. He hath subdued the people under us: and the nations under our feet. … God shall reign over the nations.[28]

This biblical passage is reflective of the dominating mentality of Christendom, which Columbus carried with him to the Caribbean and which subsequent waves of conquistadors and colonizers carried with them to the indigenous hemisphere that lay across the Atlantic Ocean west of Christendom. Columbus was self-conscious in his use of the Bible. He considered his use of the Bible, especially the prophecies of the Old Testament, to be "a Christian use of Jewish materials."[29] According to West and Kling, Columbus thought that "Christians are not the 'children of Abraham according to the flesh' but have been grafted into the covenant people at the point at which the Jewish people rejected the Messiah, and the Gentiles have become 'children of Abraham according to faith.'"[30]

Certain biblical passages that Columbus admired reveal that the phrase *higher values* used by the NCCA can be understood as a cynical play on words. One such "higher value" is illustrated by the phrase *the Lord is high*, which can be interpreted to mean that the Lord is above everything and everyone else. The linguistic expression that depicts the Lord as being "high" is structured by an UP-DOWN image-schema and by the metaphors GOOD IS UP and CONTROL IS UP; e.g., the use of terroristic force is one of the surest ways of gaining

control over a given population, and gaining the upper hand. Accordingly, the reference to the Lord being terrible also associates the concept of *the Lord* with "terror or great fear; dreadful, awful," as in the expression "the dread sovereign." Also reflective of this dominating mentality is another one of Columbus's favorite biblical passages: "The Lord who is just will cut the necks of sinners."[31] It makes perfect sense that an earthly "lord," such as Admiral Columbus, would consider it virtuous and just to model himself and his actions after the dreadful and terrible "Lord in heaven." Such images unconsciously structure mental concepts of status, rank, and existence. Again, on the basis of the UP-DOWN image-schema, the earthly representatives of the Lord are considered to *exist* "above" or "over" all unbelievers. The phrases found in Psalms—of "people under us" and "nations under our feet"—suggests a conceptual framework of domination whereby one people is mentally pictured or metaphorically imagined as existing over and on top of another people, or over and on top of many other peoples.[32]

The Up-Down Structure of Federal Indian Law and Policy

As mentioned previously, the historical context of Christendom serves as the backdrop of the phrase *Christian people* in the *Johnson* ruling and of Chief Justice Marshall's claim that the Europeans "asserted the ultimate dominion to be in themselves."[33] This is why the *Johnson* ruling is correctly interpreted in terms of Christendom's conceptual, cultural, and imperial framework of domination. It is this framework that, from an indigenous perspective, is well symbolized by the Columbus monument in front of Union Station Plaza and by the tenton Columbus Doors in the Rotunda of the U.S. Capitol. This context of domination is in keeping with the Lord being conceptualized as exercising power "over all the earth" because he is *domanus*, 'He who subdues,' and *dominus*, 'He who has subdued.'[34] Indeed, this etymology is further documented by the Latin translation for the term *the Lord* in the *Libro de las profecias*: *dominus*.[35] Numerous Old Testament biblical passages—such as those quoted earlier—reveal that at the heart of the mentality and religion of Christendom is the intention and desire to conquer and subjugate "heathen" nations and force them "under the feet" of Christians, which is in keeping with the overall tenor of the *Johnson* ruling. Another such passage is found in Deuteronomy:

> For thou art an holy people unto the Lord thy God: the Lord thy God hath chosen thee to be a special people unto himself, *above all people* which the Lord thy God shall deliver thee; thine eyes shall have no pity on them.[36]

The phrase *above all other people* again uses the UP-DOWN image-schema to conceptualize the Hebrews as existing *over* all the other peoples of the Earth. When this same conceptual framework is applied to the United States, the United States becomes conceptualized as existing *over* the indigenous peoples of North America. This conception is expressed through statements such as "Congress has plenary power *over* Indian affairs." In cognitive theory, an UP-DOWN image-schema structures the metaphorical expression "over Indian affairs." The metaphors GOOD IS UP and BAD IS DOWN also rely on the UP-DOWN image-schema. These, in turn, as mentioned previously, are related to the metaphors CONTROL IS UP and LACK OF CONTROL IS DOWN. Those, such as American Indians, who are assigned to the category *down* are conceptualized as being not in control. Consistent with the metaphor GOOD IS UP, those who consider Christians to be good reflexively and unconsciously consider Christians to be up. And since Christians are conceived of as being up, they are also conceived of as being in control of those peoples who are conceptualized as being down, thus leading to the metaphorical expression (in keeping with the Conqueror model) "under their feet." According to the imperial mentality of Christendom, Christians are *always* conceptually positioned as existing above and in control of non-Christians. This is because Christians considered themselves to have been "raised up" by God in relation to non-Christians.

Conversely, within the conceptual framework of the Old Testament the existence of "pagan" or "heathen peoples" (indigenous peoples) is always structured as being DOWN (under, beneath, or below) in relation to the Hebrews, or chosen people. This suggests the following dualities:

over	above	up	Hebrews	Christian
under	beneath, below	down	non-Hebrews	heathens, pagan, infidel

This same framework is found in the deep structure of the *Johnson* ruling, and in federal Indian law generally:

civilized	Christian people	United States
uncivilized, savage	heathens, pagans	American Indian

From the point of view of the Old Testament, the Hebrews—and later the Christians—are always viewed as existing in a permanent or cardinal position of superiority. Thus the categories *Hebrews* and *Christians* are always viewed as existing on a higher (UP) plane than non-Hebrews and non-Christians (DOWN). On a related note, the UP-DOWN image-schema is also embedded in the word *sovereign*. Jean Bodin defined sovereignty as "supremacy *over* citizens or subjects unrestrained by the laws."[37] Sovereignty's prefix *sover-* contains the word *over* and is derived from the Latin *super*, meaning 'over' or 'above.'[38] When the words *sover* and *reign* are combined (and contracted by dropping one *r*), we get the word *sovereign*, 'to reign over' or 'to reign from above.' Thus those considered superior, and therefore wielding supremacy (e.g., the United States), are conceptualized as UP in relation to those who are considered inferior, who are conceptualized as existing DOWN (e.g., American Indian nations) in relation to those who are said to be superior and to possess "supreme power."

Even when the explicitly religious terminology of the Old Testament framework is dropped in favor of more secular language, the cognitive deep structure of the dominating mentality of Christendom illustrated thus far remains active. Thus no matter which secular term is used, whether it be Europeans, the Euro-Americans, the Americans, the United States, the federal government, and so forth, such entities are conceptualized as permanently existing UP (over, above) as compared to the Indian nations conceptualized as permanently existing DOWN (under, beneath or below) in relation to the United States.

A fascinating example of U.S. government officials using the UP-DOWN image-schema against American Indians is found in a confidential U.S. State Department document that the United States sent to the United Nations Social and Economic Council in 1987.[39] The document was issued in response to a formal complaint that traditional Hopi elders (Kikmongwis) had filed against the United States. Hopi elders charged that the United States, over generations, had violated Hopi human rights. The document says, in part: "The United States is being charged with violating two basic rights—the right to self-determination and the right to own property. In order for the United States to adequately respond to these allegations, it is necessary to outline the historical origin and development of the American

law doctrines of tribal sovereignty and original indian [*sic*] title or aboriginal title."[40] In the foregoing sentence, an attentive reader will notice that U.S. government officials spelled the word *Indian* with a lowercase *i*, even though, according to the standard rules of the English language, the word *Indian* is always capitalized because it is a proper noun.[41]

U.S. government officials who drafted the document went on to provide what they said was a "History of the Doctrine of Tribal Sovereignty":

> It is clear that the concept of tribal sovereignty has been recognized by the United States Supreme Court as derived from international law subject to modifications by the Congress of the United States. The doctrine of tribal sovereignty, as first set forth in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) has been explained most succinctly by Felix Cohen, considered by many to be the preeminent authority on federal indian [*sic*] law, in his "Handbook of Federal Indian Law," (P. 122-123 U.N.M. Ed. 1971): "From the earliest years of the republic, the indian [*sic*] tribes have been recognized as 'distinct, independent, political communities', and as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus, treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, rather than as the direct source of tribal powers. This is but an application of the general principle that "it is only by positive enactments, even in the case of conquered and subdued nations, that their laws are changed by the conqueror."[42]

In the above passage, we find the UP-DOWN image-schema being used by U.S. government officials by spelling the word *Indian* with a lowercase *i*. By contrast, *Federal Government* is spelled with an uppercase *F* and *G*. This contrast was clearly intended to indicate that the United States exists UP, or on a higher plane, in relation to Indian nations, and that Indian nations are DOWN in relation to the United States. This is in keeping with the characterization of Indian nations as "tribes" (a demeaning term used by "states" as a technique of political subjugation) and as "conquered and subdued nations." What makes the spelling of the word *Indian* with a lowercase *i* most remarkable is

that Felix Cohen's *Handbook of Federal Indian Law* spelled the word *Indian* in the usual manner, with a capital *I*. Thus by placing quotation marks around the excerpt from Cohen's Handbook, the U.S. representatives who drafted the confidential document for the UN Social and Economic Council made it seem as if Cohen himself had spelled the word *Indian* with a lowercase *i*, which he had not.

The U.S. document provides additional examples of the word *Indian* being spelled with a lowercase *i* while using an UP-DOWN image-schema as a basis for explaining the U.S. government's view of "tribal sovereignty":

> The whle [*sic*] course of [U.S.] judicial decision on the nature of indian tribal powers is marked by adherence to three fundamental principles: 1) An indian [*sic*] tribe possesses, in the first instance, all the powers of a sovereign state. 2) Conquest renders the tribe subject to the legislative power of the United States and in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its power of local self-government. 3) Their [the Indians'] powers are subject to qualification by treaties and by express legislation of Congress, but, save as that expressly qualified, full powers of internal sovereignty are vested in the indian [*sic*] tribes and in their duly constituted organs of government.[43]

Although the abovementioned document was drafted by U.S. government officials in the twentieth century to be delivered to the United Nations, its tenor is fully in keeping with the ancient dominating mentality of Christendom that successfully constructed a "New World Empire" in "the Americas." As grammarian and rhetorician Antonio de Nebrija put the matter with considerable insight in the mid-fifteenth century when addressing Queen Isabella, "Your Majesty, language is the perfect instrument of empire."[44] Cognitive theory enables us to take this observation to a deeper level by noting that not merely language but human cognition (conceptualization and categorization) is "the perfect instrument of empire." As Michel Foucault observed, "On the soft fibers of the brain is founded the unshakable base of the soundest of empires."[45] Because language, conceptualization, and categorization are powerful human instruments for the cognitive and social construction of reality, it is possible to understand

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."[46] 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. M'Intosh* ruling and the aggregate of ideas known as federal Indian law and policy.

Chapter 7

Johnson v. M'Intosh

Johnson & Graham's Lessee v. M'Intosh 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 Piankeshaw Indians (otherwise known as the Kaskaskias).[1] Some four decades later, in 1818, the U.S. government sold 11,560 acres of land to William M'Intosh in what had by that time become the state of Illinois.[2] The lands that M'Intosh had purchased and occupied were said to be "contained within the lines of the 1775 land purchase from the Piankeshaws."[3] 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 M'Intosh, who had purchased his lands from the United States?[4]

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."[5] According to Lindsay G. Robertson, William M'Intosh "was financially ambitious, and this certainly played a role in his decision to collude with the Illinois and Wabash Companies."[6] Like the earlier case *Fletcher v. Peck* (1810), involving the massive Yazoo land fraud in Georgia, *Johnson v. M'Intosh* was the result of the two sides committing a fraud upon the Court.[7] Robertson has documented that the Illinois and Wabash land companies and William M'Intosh 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 M'Intosh (William Henry Winder of Baltimore and Henry Maynadier Murray of Annapolis) and be "opposing" counsel.[8] 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 Companys" that were suing their client.[9]

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.[10] 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."[11] The preposition *in* 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.[12] (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."[13] 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 had to reason 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."[14] 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 ascendancy.[15]

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.[16] 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.[17] 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 *Cornet v. Winton*, 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 Colvin'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 extirpated 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 descendents to perpetual bondage. *Under these 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 (UP) 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

dominion" 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 monarchs 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.[21] Therefore, one possible way of interpreting Marshall's concept of an exchange is to view the Christian European monarchs as having *conceptually* (imaginatively) 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. M'Intosh,* 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."[22] 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."[23] 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."[24]

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 recognise 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.[25]

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 vicarship of Jesus Christ, which we hold on earth, do … give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered towards the west and south. … With this proviso however that none of the islands

> 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 depute 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.[26]

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."[27] 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.[28]

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."[29] 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:

> 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-Christians. 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*, not-withstanding 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 recognised. 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*."[1] 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.[2]

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.[3] But interpreting the concept of an Indian title of occupancy within the context of the royal charters of England, as Marshall did,[4] reveals that the more important significance of the *Johnson* ruling is Marshall's mention of "ultimate dominion."[5] 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."[6] 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."[7] 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."[8]

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 *occupatio*,[9] 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.[10] 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.[11] 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.[12]

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]."[13] 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 conceives 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 GRASPING. 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."[14] 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 bounded region of space.'[15] One reason, or basis, for claiming that the Europeans had "ultimate title" to the continent would be the bare fact that the Europeans 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.[16] 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."[17] 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."[18] 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."[19] 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 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.[20] 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."[21] 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."[22] 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."[23]

Did the United States Adopt the Doctrine of Discovery?

"Have the American States rejected or adopted this principle [of discovery]?" asked Marshall.[24] 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.[25] 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."[27] 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."[28] Something is either in or out of the category, depending of 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,"[30] 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.[31]

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

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.[34]

It would be quite natural for the reader to conclude that Marshall was simply putting forth rules of conquest 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.[35]

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."[36] 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."[37] 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 mediately, through its [the crown's] grantees or deputies."[38]

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.[39] 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."[40] 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?

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*."[41] 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:

> 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 [that principle] becomes the law of the land, and cannot be questioned.[42]

Abstracted from the above paragraph and stated in a more direct language, Marshall's "new rule" was predicated on pretending to convert the discovery of an inhabited country into conquest. Fold in Marshall's reference to "Christian people" and "natives, who were heathens," based on the royal charters of England, and his new and different rule of conquest becomes pretending to convert the Christian discovery of a heathen country into conquest.

Marshall's use of the terms *pretension* and *convert* also deserve closer scrutiny. Previously, we mentioned that *convert* is 'to appropriate another's property, without right, to one's own use.' A *pretension* is 'an assertion or declaration whose truth is questioned : an allegation of doubtful value : PRETEXT … specious allegation, a pretext; a claim to something, such as a right.'[43] A *pretense* 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.'[44] 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.[45]

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."

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.

Chapter 9

The Mental Process of Negation

By categorizing indigenous peoples as heathens, Chief Justice Marshall was conceptualizing them in terms of what they were *not*.[1] 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.[2] 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."[3] 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.

Res Nullus

James Truslow Adams identified such a mental process of negation when he wrote, "A heathen was considered as nullus, hence his property had no owner, and American soil could be appropriated by whoever first found it."[4] Someone categorized as not existing is, quite logically from the viewpoint of the one categorizing, the owner of nothing. Thus the category *nullus* served the purpose of mentally assigning indigenous peoples to a category of political nonexistence so far as a completely free and independent nationhood was concerned, as against Christian European nations.

The term *nullus* is derived from the Latin *null*, indicating 'none, not any,' 'invalid,' and 'void.' The term *void* is derived from the Latin *vacuus*, meaning 'empty.'[5] The concept of *a void* is unconsciously structured in terms of an empty CONTAINER image-schema, as indicated by the linguistic expression *into the void*. The rhetoric of Governor John Winthrop Sr. of Massachusetts Bay provides an example of the use of this concept. As Francis Jennings points out, "Responding to scrupulous objections against seizing Indian property, Winthrop declared in 1629 that most land in America fell under the legal rubric *vacuum domicilium* because the Indians had not 'subdued it' and therefore had only a 'natural' and not a 'civil' right to it."[6] Similarly, the category *nullus* was a means of unconsciously constructing an imaginary schema of a container that was conceived of as either nearly empty or completely empty. Such an imaginary container or emptiness could also be conceptualized as a vacuum, opening, or space to be "filled in" with whatever conceptual content the Christian Europeans desired, such as "ultimate dominion," "absolute title," and "heathen occupancy."

From a cognitive theory perspective, the metaphor NULLUS involves thinking of the target domain Indians in terms of the source domain of a void. This enabled the Christian Europeans to mentally render all indigenous-held lands as vacant and devoid of human inhabitants, even though those lands were clearly inhabited and possessed by indigenous peoples. Hence Marshall's mention of the need for the United States to engage in a "pretension" of "conquest," thereby leading to an interpretation that the Indians did not possess "rights to complete sovereignty, as independent nations" and therefore only held a title of "occupancy" subject to the dominion of the United States.

The Supreme Court's use of a mental process of negation against American Indian nations in the *Johnson* ruling is in keeping with a particular part of the tradition of Roman law. Christian European

efforts to prevail against non-Christian peoples everywhere on earth during the so-called Age of Discovery involved cognitive processes as well as military ones, and some of these mental processes were borrowed from the ancient Romans. According to one view of Roman law, at the outbreak of hostilities enemies' lands were declared to be *nullius*, or 'nobody's property.'[7] The enemy of the Romans was declared to be 'a nobody,' meaning legally and politically nonexistent to the Roman empire. This mental art of war cleverly "rendered" enemy lands "vacant" and therefore "open" for the taking.[8]

The Roman process of taking possession of enemy lands was known in Roman law as *occupatio*, meaning occupation. According to the nineteenth-century scholar B. A. Hinsdale, *occupatio* in Roman law was the 'taking possession of that which, at the moment, is the property of no man, with the view of acquiring property in it for yourself.' The Roman term for such land was *res nullius*, and there were two kinds: "property that never had had an owner, and property that had no owner at the time of the appropriation." Categories of things that were considered to have never had an owner included "lands *newly discovered*, or never before cultivated." The kinds of things that had no owner at the time of the appropriation under Roman law included "movables that have been abandoned, lands that have been deserted, and the property of an enemy."[9] According to Sir Henry Sumner Maine, "In all these objects the full rights of dominion were acquired by the occupant who first took possession of them as his own."[10] This view, then, would serve to explain Marshall's contention in the *Johnson* ruling that the Christian Europeans "asserted the ultimate dominion to be in themselves" with regard to the "discovered" lands of the continent.[11] But there is something else going on here as well. A degree of confusion immediately arises because, as mentioned previously, we have Marshall's use of the term *occupancy* in the *Johnson* ruling referring to the American Indians' title to their lands, and, according to Maine, we have the Roman concept of *occupatio* referring to "the occupant who first took possession" of enemy lands or "newly discovered" lands. According to Maine, Roman *occupatio* included full rights of dominion[12] whereas, according to the Supreme Court's conception in *Johnson*, the Indian title of occupancy did not include dominion.[13] The difference between Marshall's Indian title of occupancy and the Roman concept of *occupatio* can be explained on the basis of a new category, *nullus*, that Hinsdale said originated with the Catholic Church. As Hinsdale explained:

> Thus, the habit of regarding an enemy's property as "nobody's" property originated in "the assumption that communities are restored to a state of nature by the outbreak of hostilities, and that in the artificial-natural condition thus produced, the institution of private property falls into abeyance, so far as concerns the belligerents." On this point the dogmas of the lawyers "amounted to an unqualified assertion that enemy's property of every sort is *res nullius* to the other belligerent." As soon as men begin to rise above the level of facts accomplished, and to cast about them for theories, they shrink from pleading brute force as a claim to anything; they seek to find some basis of moral right, even when violence is the real basis of the claim; and of this tendency no better illustration can be given than these refinements of the Roman lawyers.[14]

Hinsdale identified a direct connection between the Roman law principle of *res nullius* and the *Johnson v. M'Intosh* ruling,[15] but with a religious twist that will be explained momentarily. Hinsdale cited Sir Henry Sumner Maine's observation that "occupancy and the rules into which the Roman lawyers expanded it, are the sources of all modern international law on the subject of the capture in war, and of the acquisition of rights in newly discovered countries." However, Hinsdale said that Maine had failed to recognize "that the application of the Roman doctrine to the New World in the sixteenth and seventeenth centuries was made by means of a new definition of *nullus*."[16] In other words, according to Hinsdale's reading of Francis Lieber, the meaning of the pre-Christian Roman law doctrine of *nullus* was changed during the so-called Age of Discovery.

Hinsdale began his explanation of this "new definition" of *res nullius* by noting that "the maritime powers did not acknowledge the savages as their enemies, or plead the conqueror's rights in relation to their Western claims." Chief Justice Marshall, said Hinsdale, was of the opinion that "the English possessions in America were not claimed by right of conquest, but of discovery" and "such was the claim of the other powers that divided the New World."[17]

Next we see a different category of negation enter into Hinsdale's explanation: the seafaring powers of Europe "had not seized the possessions of their enemies by force, but had occupied *what belonged to nobody*."[18] This is an extremely important point, for the use of the category *nobody* suggests that our indigenous ancestors were

conceptualized as nonexistent nobodies and that our respective homelands were conceived of as not belonging, with dominion, to our respective Native nations in any sense that Christian powers were obligated to respect. Expanding on this point, Hinsdale went on to say:

> Practically, discovery, when consummated [by possession], was conquest, but theoretically, it was something very different. An enemy overcome in battle was *nullus* according to the Roman law, but another definition, and one more consonant with the temper of the times, was now adopted. This definition was supplied by the Roman [Catholic] Church.
>
> The new definition of *nullus* was, a heathen, pagan, infidel, or unbaptized person. "Paganism, which meant being unbaptized," says Dr. Lieber, "deprived the individual of those rights which a true jural morality considers inherent in each human being." The same writer also states that the Right of Discovery is founded "on the principle that what belongs to no one be appropriated by the finder," but this principle becomes effectual only when supplemented by the Church definition of *nullus*. That definition supplied the lacking premise in the demonstration. Grant that *res nullius* is the property of the finder; that an infidel is *nullus*; that the American savage is an *infidel*, and the argument is complete. That the Church, one of whose great duties is to protect the weak and helpless, should have supplied one-half the logic that justified the spoliation and enslavement of the heathen, is one of the anomalies of history.[19]

In the previous quote, we find Hinsdale making a direct connection between the Roman law concept of *res nullius*, the Catholic Church's religious concept of *nullus* (notice the different spellings of the two terms), and the *Johnson v. M'Intosh* ruling. Indeed, Hinsdale is describing a mental process whereby our Native ancestors were metaphorically conceptualized, on the basis of the Christian religion, as pagans, infidels, or heathen savages. Hinsdale continued by saying, "We have seen that the Roman law furnished a full legal justification for the appropriation of the New World by the Christian nations."[20] If the Christian nations of Europe had simply regarded the Native peoples as their enemies and treated them on that basis, that would have been "the simple and direct path to the predestined goal."[21] Instead, said Hinsdale, those nations "chose a different path"

that was tied directly into the conceptual system of the Old Testament and the Christian religion:

> It is pertinent to say that to use the Church definition rather than the Roman one, was more in accordance with the theological temper of the times. That definition would also well blend with the missionary aspect of discovery and colonization, to which many Frenchmen and Spaniards gave much attention. At all events, while the dogmatic habit of mind was not strong enough to establish the Popes' donations in public law, it was strong enough to cause the acceptance of the new definition of *nullus*.[22]

According to this conceptual framework, by categorizing our respective Native nations as politically nonexistent, either partially or entirely, for lack of Christian baptism, some Christian European thinkers, as Hinsdale pointed out, deemed the ancestral lands of indigenous nations to be *terra nullus*, or vacant lands over which a Christian ruler could legitimately claim "dominion." And even though Francisco de Vitoria, who is considered the founder of the "law of nations" (international law),[23] was of the opinion that non-Christians were humans with a right of liberty, property, and dominion,[24] this was not the conceptual path that the U.S. Supreme Court chose to follow in the *Johnson* ruling.

Heathen Occupancy and Christian Dominion

Marshall said in the *Johnson* ruling that from the viewpoint of Great Britain, "no distinction was made between vacant lands and lands occupied by Indians."[25] Why? Because, as Francis Lieber pointed out, from a Christian European perspective, peoples who were unbaptized were regarded as lacking "those rights which a true jural morality considers inherent in each human being."[26] On the basis of this conceptual framework, despite whatever "human" characteristics Christian Europeans considered indigenous peoples to possess, this did not prevent a "discovering" Christian European empire from claiming "dominion" over indigenous nations and their lands.[27] By categorizing our indigenous ancestors as heathens, pagans and infidels, the Christian Europeans were also categorizing our ancestors as less than human, even akin to monsters. A nineteenth-century Scottish scholar of international law explained the conceptual framework and categories of Christendom as follows:

> Christendom is now the unity, of which Christ's vicar on earth is the head, and the crusaders give a practical direction to this idea, while on the theoretical side, at a later date, it is worked out by the Spanish and Dutch jurists. They divide mankind into 1) believers, (2) infidels and heretics, and (3) heathens. International law, which is tacitly or expressly assumed to be the private civil law of Rome, applies to the first. Towards the second [category] war is the normal and proper attitude; and as to the third, if they do not at once accept the Gospel when offered, war is justifiable. This is exactly the old Greek division, believers being put for Hellenes, infidels and heretics being equivalent to barbarians, and the heathen being outside monsters.[28]

Notice above that international law is said to only apply to the first category, the believers of Christendom. Thus Christendom's international law principle of *occupatio* was the act of a Christian people or Christian power claiming the right to take possession of lands inhabited by indigenous peoples deemed by Christian Europeans as heathen, monstrous, or less than human. When Christians *claimed* possession of lands categorized in the dominating mentality of Christendom as "occupied" by heathens or monsters, the Christians were also considered, from their own viewpoint, as having already acquired dominion over those lands, despite the presence of the indigenous nations that were already living there.[29] This, after all, is the point of the *Johnson* ruling. Thus we have an explanation of the distinction between Christian European *occupatio*, which was conceptualized as including dominion, as opposed to the heathen occupancy that Marshall, on behalf of the U.S. Supreme Court, ascribed to the American Indian nations and conceptualized as lacking dominion.[30]

Because Marshall conceptualized the Christian Europeans' title to the lands of the continent as including dominion, this title was characterized as entailing such concepts as *perfect independence*, *ultimate title* or *absolute title* based on the potentates of Christendom having asserted (conceptualized) "the ultimate dominion to be in themselves."[31] On the other hand, the Supreme Court's category of a heathen title of occupancy was considered to be devoid of dominion, as against any Christian European power and, later, as against the United States.[32] This is the underlying rationale behind the plenary power doctrine by means of which the United States currently

claims an ultimate authority over American Indian nations. It was Marshall's view, as expressed in *Johnson*, that "dominion" was a category applied exclusively to any "Christian prince or people" and then later to the United States as the political successors of a "Christian prince or people."[33] Accordingly, within the conceptual framework of the *Johnson* ruling, the concept *dominion* was not included as part of the conceptualization of the category *natives, who were heathens*. In the *Johnson* ruling, a "Christian prince or people" had "dominion" by right of "discovery," but "heathens" did not.[34]

Because the perfect independence that Marshall attributed to "civilized" nations was automatically assumed to include dominion, Christian European mental categories of negation served an exceedingly useful purpose in the development of the ideas that eventually came to be known as federal Indian law and policy. Such categories of negation were able to preempt and nullify any presumption of American Indian dominion or "complete sovereignty, as independent nations" so that Native nations would never be able to checkmate U.S. claims of dominion over indigenous lands on the continent. As Joseph Story put the matter on the basis of an UP-DOWN image-schema and the *Johnson* ruling, "For many purposes, they [the Indians] were treated as independent communities, at liberty to govern themselves; so always that they did not interfere with the paramount rights of the European discoverers."[35]

Christian Europeans Mentally Apprehend Indigenous Nations and Lands

Prior to the Christian European invasion of the Western Hemisphere, indigenous nations were physically and mentally free and independent of the ideas and judgments of Western Christendom. Another way of stating this is to say that before the Christian Europeans traveled to this hemisphere with their intention to conquer and subdue, they obviously had no control whatsoever over the indigenous peoples of the Americas. Therefore, from an indigenous perspective the free and independent existence of indigenous nations can be regarded as the baseline for all further discussions about American Indian existence. The conceptual system of federal Indian law and policy is designed to negate this baseline by pretending that from the very moment the Christian Europeans first set eyes on this hemisphere, the European mind "apprehended" the existence of indigenous nations and peoples.

The verb *apprehend* is derived from the Latin *apprehendere*, 'to grasp mentally, or seize.' The term is also related to *prehensile*, meaning 'adapted for seizing or grasping esp. by wrapping around.'[36] In cognitive theory, the sensorimotor or bodily basis of the verb *apprehend* is the ability of the human hand to grasp something.[37] As mentioned in chapter 1, this physical act of grasping is used as a means of imaginatively conceptualizing mental action with regard to ideas; UNDERSTANDING IS GRASPING is the metaphor that expresses this concept. When ideas (target domain) are conceptualized in terms of the physical ability of the human hand to link with a physical object by grasping it (source domain), the result is the conceptual metaphor that enables us to conceive of ideas as OBJECTS that we "grasp" or "apprehend," or, in other words, "understand."[38]

However, the term *apprehend* also has two other meanings that relate to the claim of "Christian discovery." As we saw in our analysis of the *Johnson* ruling, in keeping with the conceptual metaphor KNOWING IS SEEING, the concept *discovery* (as in the "discovery" of America) entails the idea of seeing something for the very first time and therefore knowing that it exists. Along these lines, *to apprehend* suggests variously 'to come to know,' 'the result of apprehending with the intellect,' or 'apprehending mentally: opinion, conception.'[39] The term also can be extended to the area of law enforcement, where it is understood as 'to apprehend a suspect' or, in other words, 'to arrest' or 'seize' someone.[40] Such terminology is related to Justice Story's use of the phrase *temporary and fugitive purposes* in reference to the American Indian possession of the land.[41] Fugitives "from justice" are to be "apprehended" and held, so that the "wheels of justice" can "turn" and the proper amount of punishment meted out to the one guilty of transgressing (crossing over) the boundary of "the law" being enforced.

Although indigenous nations were certainly free of European ideas and judgments before the strangers from Christendom invaded the continent, once those strangers had invaded, indigenous nations and peoples were no more capable of stopping the pale-skinned strangers from *mentally apprehending them* (categorizing and conceptualizing them) than indigenous nations and peoples were capable of stopping the strangers from thinking altogether. Chief Justice Marshall alluded to this point when he said of the U.S. government in the ruling *Cherokee Nation v. Georgia*, "We assert a title to their [the Indians'] land *independent of their will*."[42] This point, however, can also be expanded beyond the specific issue of land title, for it is

also true that indigenous peoples could not stop the U.S. government officials from *mentally* assigning them to such categories as *less than free* or *subject to the authority or dominion of the United States*.

Why Indian Nations Continue to Be Rightfully Free

Today, the aggregate of ideas known as federal Indian law and policy posits that indigenous nations and peoples ceased being free as soon as Christian Europeans began mentally categorizing them as less than free. This presupposes, however, that indigenous nations and peoples are subject to the mental processes of the Christian Europeans, and it also assumes a particular understanding of causation: for, according to this viewpoint, the Christian European mental activity of categorizing and conceptualizing is tacitly considered *the cause* that has had *the effect* of "making" indigenous peoples no longer free and independent. But given our initial acknowledgment that the indigenous peoples were originally free and independent of the Christian Europeans both physically and *mentally*, from an indigenous perspective it follows that indigenous peoples were also *rightfully* free and independent of the Christian European *mental activity* of categorization and conceptualization. The Europeans could categorize and conceptualize to their hearts' content, but the indigenous nations still remained rightfully independent of European ideas and judgments. In other words, according to this perspective it is impossible for the ideas and judgments of the Christian European mind to have *caused* indigenous peoples to no longer be rightfully free. Indeed, according to this view, the original independence of indigenous nations would permanently prevent Christian Europeans from ever *legitimately* making indigenous nations and peoples *un*free by means of Christian European categorization and conceptualization.

These observations raise a curious paradox for the United States. Before one can presume, as the *Johnson* ruling does, that indigenous nations ceased being free and independent *as a result* of Christian European *mental activity* (categorization), it is first necessary to explain how originally independent indigenous peoples had become subject to the mental activities of the Christian Europeans to begin with. Once we posit that the indigenous peoples were *independent* of the *mental activity* of the Christian Europeans, then Christian European mental activity could not have *caused* independent indigenous peoples to be subject to Christian European mental activity. So then what caused indigenous peoples to cease being rightfully free and independent? The

answer is nothing did. Indigenous nations and peoples continue to this very day to be *rightfully* free and independent of the United States and of the mental activity of U.S. government officials. However, federal Indian law is predicated on the view that the U.S. government has a legitimate plenary authority of dominion over American Indian nations on the basis of the "extravagant pretension" that Christian people discovered heathen lands during the so-called Age of Discovery.

One way that U.S. government officials have tried to get around the conceptual predicament of original American Indian independence has been for U.S. officials, following the judicial legacy of Chief Justice Marshall, to simply *pretend* that the *physical and mental* invasion of this continent by Christian Europeans (typically referred to as discovery) *caused* the indigenous peoples to no longer be rightfully free of Christian European ideas and judgments. As this book has clearly demonstrated, the twin ICMs of the Conqueror and the Chosen People–Promised Land have provided the basis for pretending that the mere physical and mental presence of Christian Europeans on the continent *caused* the indigenous peoples to no longer be free. This viewpoint rests on the following presumption: As soon as Christians invasively enter the territorial space of non-Christians, the non-Christians immediately cease to have "perfect independence." Why? Because "heathen" nations must give way to God's will as expressed in Genesis 1:28. In other words, it is "God's will" that Christians exert and maintain supremacy over non-Christians by subduing the earth and exercising dominion (domination) over all living things.

By unconsciously presuming themselves to have a rightful mental power of judgment over "heathens," the Christians were able to deem (judge) the Indians as being not entitled to continue living an independent and free way of life. On the basis of a biblical viewpoint that the chosen people are providentially assigned the task of subduing the earth and exercising dominion over all living things, the Christians considered themselves to be chosen people divinely obligated to "save" the heathen nations by subjugating them, euphemistically referred to as "civilizing" them. This was to be accomplished by breaking the heathen nations apart and then turning the members of those nations into individual Christians who would become, by means of a gradual process of assimilation, either the subjects of a Christian European monarchy or the citizens of a Christian European state. From this point of view, the heathens are destined by God to be saved and *reduced* to Christian European "civilization."[43]

Chapter 10

Christian Nations Theory: Hidden in Plain Sight

Although it is widely assumed that Indian nations are legitimately subject to the thoughts and ideas constructed by U.S. government officials, this position is certainly challengeable from an Original Nations and Peoples' perspective. After all, we as indigenous people are able to think back to our ancestors' experience, free and independent of Christian domination, in this hemisphere for thousands and thousands of years before the empires of Christendom ever invaded. On the basis of this sacred birthright of being originally free, our respective indigenous peoples certainly have the right to demand that the United States openly declare the official theory that would serve to explain, from its perspective, precisely *how* our respective indigenous nations *supposedly* became legitimately subject to the ultimate governmental authority of the United States.

In his useful handbook, *The Rights of Indians and Tribes*, Stephen L. Pevar touched on this issue when he wrote, "Many people question the federal government's right to govern Indians and believe that Indian tribes have not lost their independence. The U.S. government strongly disagrees, and its courts have consistently upheld the federal government's power over Indians and its right to intervene in their affairs."[1] To support his comments, Pevar cited the 1832 Supreme Court ruling *Worcester v. Georgia* and several other Supreme Court rulings.[2] He went on to say that

> for many reasons, Congress may be wrong in presuming it has the right to govern Indians. For persons interested in pursuing this subject, there are many sources that can be consulted. In all probability, however, the federal government will continue to exercise its power over Indians and tribes, and this book proceeds on that assumption. The old saying of "might makes right" controls the relationship between Indians and the United States. The federal government will never permit Indians to be truly self-governing, nor will it return their land.[3]

Besides claiming that the Treaty Clause and the Commerce Clause of the U.S. Constitution give the Unites States authority

over Indian nations, Pevar identified another theory that he said the United States has used to justify the assumption of federal control over Indians.[4] One way the Supreme Court has justified such control, said Pevar, "is a rule of international law which states that 'discovery and conquest [give] the conquerors sovereignty over the ownership of the lands thus obtained.'"[5] The quote is taken directly from the Supreme Court ruling *Tee Hit Ton Indians v. United States*.[6] Pevar continued with his own commentary, saying, "In other words, to the victor belongs the spoils." Then, citing *Johnson v. M'Intosh*, Pevar noted that the Supreme Court had decided "that, by virtue of the 'discovery' of North America by the Europeans and the 'conquest' of its inhabitants, the federal government is entitled to enforce its laws over all persons and property within the United States."[7]

Next, using what we have identified as the Conqueror cognitive model, Pevar, by means of *Tee Hit Ton*, provided an official theory put forth by the U.S. government that would purport to explain *how* indigenous nations supposedly underwent a transformation from being free and independent to being subject to the ultimate authority of the United States and U.S. government officials. Evidence of the Conqueror model in Pevar's prose is the quote from *Tee Hit Ton* just mentioned; when Pevar cited the phrase *the conquerors* along with the word *conquest*, he thereby unconsciously invoked the ICM of the Conqueror. The argument expressed by the Supreme Court in *Tee Hit Ton*, in other words, is that the United States had proven much stronger than the Native nations and physically conquered them. Therefore, so the argument goes, successful "conquest" gave the United States "the right of conquest" in relation to the Indian nations. Pevar provides no indication that the Christian religion plays any part in this argument about conquest. In other words, when Pevar said that the United States has ultimate control over Indians because of a "rule of international law which states that 'discovery and conquest [give] the conquerors sovereignty over the ownership of the lands thus obtained,'" he said nothing at all about Christianity.

But what if Pevar had approached the issue differently? Suppose, for example, that he had provided his readers with a religious explanation as to why the United States is said to have an ultimate authority over Indian nations. Indeed, suppose Pevar had written about a rule of the international law of Christendom that states that *Christian* discovery and conquest gives the Christian conquerors sovereignty over and ownership of the heathen lands thus obtained. Such

an explanation would, of course, premise the U.S. government's claim of ultimate control over Indians on a Christian religious conceptual foundation and would frame the presumption of U.S. control in terms of a distinction between the categories *Christian* and *heathen*. For Pevar to provide such an explanation would be for him to identify the Christian Nations Theory in U.S. law—that is, the United States has the right to exercise ultimate control over American Indian nations simply because Christians "discovered" non-Christian lands and simply because Christians supposedly succeeded in conquering the "heathen" nations of North America.

This book has already presented a tremendous amount of evidence pointing to the religious basis for the United States' claim of authority over Indian nations. And as it turns out, anyone willing to dig below the surface of Pevar's citation of *Tee Hit Ton* will find yet more evidence of the Christian Nations Theory and the dominating mentality of Christendom underlying the U.S. government's claim that it has the right to exert ultimate control over Indian nations. The Christian Nations Theory is an official yet covert theory developed by U.S. government officials to explain how free and independent indigenous nations went from being free to being regarded as supposedly subject to the ultimate governmental authority of the United States. In 1835, just one year before the publication of Henry Wheaton's *Elements of International Law*, Judge John Catron (on the basis of the *Johnson* ruling) declared that the United States has the right to coerce Indians into obedience, based on the international law of Christendom, or the Law of Nations. One hundred and twenty years after Catron issued his decision in *State v. Foreman*, Justice Stanley Reed, writing for the majority of the U.S. Supreme Court, used a similar line of reasoning in *Tee Hit Ton* to claim that Christian discovery gave the Christian nations sovereignty over, ownership of, and title to "heathen" Indian lands.

Before we delve more deeply into the *Tee Hit Ton* ruling, however, we can pick up the trail of the Christian Nations Theory by examining an excerpt from Judge Catron's 1835 ruling in *State v. Foreman*.[8] In his decision, Judge Catron, who was later appointed by President Andrew Jackson to the U.S. Supreme Court,[9] stated the following on behalf of the Supreme Court of Tennessee:

> We maintain, that the principle declared in the fifteenth century as *the law of Christendom*, that discovery gave title to *assume*

> *sovereignty over* and to govern the unconverted natives of Africa, Asia and North and South America, has been recognized as a part of the national law [the law of nations], for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial, unless the case of Worcester has formed an exception in these states. That, from Cape Horn to Hudson Bay, it [this principle] is acted upon as the only known rule of sovereign power, by which the native Indian is coerced; for conquest is unknown to him in the international Sense. Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution, this continent never could have been inhabited by our ancestors. To abandon the principle now, is to assert that they were unjust usurpers; and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground.[10]

Above we find Judge Catron saying that, during the Age of Discovery, it was *the law* of Christendom that discovery by Christian powers gave the discoverers a right to "assume sovereignty over and to govern unconverted [unbaptized, non-Christian] natives." Thus Catron, on behalf of the Supreme Court of Tennessee, not only asserted that Christian powers have "the right to coerce obedience" from the non-Christian indigenous peoples, but also that this religiously grounded right of coercion is validly exercised by the U.S. government and had, in fact, become "the law of the land" in the United States. This religiously premised theory of Christian nationalism thus begins to explain *how* indigenous nations supposedly went from being free to being considered subject to the ultimate governmental authority of U.S. government officials. Judge Catron wrote his ruling in *State v. Foreman* just twelve years after Chief Justice Marshall handed down his ruling in *Johnson v. M'Intosh*. Are there more recent occasions when the U.S. Supreme Court explicitly acknowledged that the Christian Nations Theory is the basis of the United States' claim of authority over Indian nations? As a matter of fact, there are.

In the 1955 ruling *Tee Hit Ton*, the Supreme Court held that "an identifiable group of American Indians belonging to the Tlingit

Tribe of Alaskan Indians" was "not entitled to compensation under the Fifth Amendment for the taking by the United States of certain timber from Alaskan lands in and near the Tongass National Forest allegedly belonging to the Tee Hit Ton Indians."[11] Justice Stanley Reed delivered the Court's opinion, and under the heading "Indian Title," Reed wrote for the majority:

> The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[12]

The above passage was written on the basis of the Conqueror model and on the basis of the presumption that American Indians are subject to the mental processes of U.S. government officials, particularly the members of the U.S. Supreme Court. The phrase *after conquest* is highly instructional; by this phrase, the Court was also implying the kind of existence Indian nations had *before* conquest.[13] By implication, before conquest the Indian nations had exercised independent "'sovereignty,' as [the United States] use[s] that term," but after conquest those Indian nations were considered by the Court to only hold a "claim" to their own lands, which Reed referred to as "original Indian title, or permission from the whites to occupy." Thus the Court seemed to be saying that after conquest, the Indians were only able to continue inhabiting their ancestral lands if the whites gave them permission to do so.

Given the Court's phrase *after conquest*, one could easily conclude that conquest is the basis for the presumption that Indians are

subject to the thoughts and ideas of U.S. government officials. In fact, Reed clearly gave this impression, on the basis of the Conqueror model, in the very same sentence that Stephen L. Pevar quoted in his book.[14] According to Justice Reed, "This position of the Indians has long been rationalized by the legal theory that discovery and conquest gave *the conquerors* sovereignty over and ownership of the lands thus obtained. 1 Wheaton's *International Law*, c[hapter] V."[15] Here is where a truly discerning eye is needed in order to notice the subtle transition in *Tee Hit Ton* from the Conqueror model to the Chosen People–Promised Land model. As will be discussed later, Justice Reed's citation of Wheaton's *Elements of International Law* takes us immediately back to the issue of Christianity and the distinction between the concepts *Christians* and *heathens* that invoke the Chosen People–Promised Land cognitive model. First, however, we need to examine an earlier dissenting decision that Justice Reed wrote some nine years earlier, in 1946, a decision that brings us back once again to the *Johnson* ruling and Christian discovery.

When Justice Reed used the phrase *discovery and conquest* in *Tee Hit Ton*, he was referring to two specific activities that he said "gave the conquerors sovereignty over and ownership of the lands thus obtained." But Reed's argument in *Tee Hit Ton* is further illuminated by his dissenting decision in *United States v. Alcea Band of Tillamooks*, a case that dealt with the concept of original or aboriginal Indian title. In *Alcea Band*, the Supreme Court had awarded the Tillamooks in Oregon monetary compensation for a federal taking of aboriginal title lands.[16] In Reed's dissent, however, he argued that the majority had wrongly awarded the Alcea Band monetary compensation. He based his argument on a theory that he said the Supreme Court had put forth in *Johnson v. M'Intosh*.[17] Reed characterized the *Johnson* ruling as expressing the theory "that *discovery by Christian nations* gave them sovereignty over and title to the lands discovered."[18] Notice below how similar the language from Reed's *Alcea Band* dissent is to his later wording for the Court in *Tee Hit Ton*:

> *Alcea Band of Tillamooks*: "discovery by Christian nations *gave* them *sovereignty over and title to* the lands discovered."
>
> *Tee Hit Ton*: "discovery and conquest *gave* the conquerors *sovereignty over and ownership of* the lands thus obtained."

And notice how many of the exact same words appear in both decisions:

> *Alcea Band*: "discovery," "gave," "sovereignty over," and "title to the lands"
>
> *Tee Hit Ton*: "discovery and conquest," "gave," "sovereignty over," and "ownership of the lands"

In his dissent in *Alcea Band*, Reed explicitly mentioned "Christian nations," which he said was part of the theory expressed by the Court in *Johnson*. However, in the majority ruling that Reed delivered in *Tee Hit Ton*, he replaced the religious phrase *Christian nations* with the secular phrase *the conquerors*. If we reconfigure Reed's writing in *Tee Hit Ton* so that it is conceptually consistent with his religiously framed argument in *Alcea Band of Tillamooks*, we get "discovery and conquest [by Christian nations] gave them [the Christian nations] sovereignty over and ownership of the lands obtained." Interestingly, this way of framing the majority ruling in *Tee Hit Ton* is supported by Reed's citation of chapter 5 of Wheaton's *Elements of International Law*.[19] However, reference to chapter 5 appears to be in error, for the only passage in Wheaton's *Elements* dealing extensively with Indian land rights is found in part 2, chapter 4, section 5, under "Rights of Property," which states in part:

> The Spaniards and Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims.[20]

Because Justice Reed in his majority ruling in *Tee Hit Ton* referenced the above religious language by citing Wheaton's *Elements* as an official source, we may conclude that *Tee Hit Ton* expresses the view (consistent with Reed's dissent in *Alcea Band*) that although the Indians "were permitted to occupy" their traditional "lands under the Indian title [of occupancy], the conquering [Christian] nations

asserted the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss." The time frame of Wheaton's explanation is the Age of Discovery, and the context is the Christian world's commitment to the Chosen People–Promised Land model, as exemplified by the Vatican papal bulls of conquest and crusade issued in the fifteenth century. This is made evident in the following passage from chapter 4 of Wheaton's *Elements*, which, owing to its vital importance, has been quoted at length:

> Hence the famous bull, issued by Pope Alexander VI. in 1493, by which he granted to the united crowns of Castile and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands but of the seas in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretension solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America; taking care to keep to the eastward of the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland disregarded the pretended authority of the papal see, and pushed their discoveries, conquest, and settlements, both in the East and the West Indies; until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* [original emphasis] nation; and the patent granted by Henry VII. of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels"; and "to subdue, occupy, and possess these territories, as his vassals and

> lieutenants." In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties." *It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives.*[21]

Wheaton summed up by saying that the Indians' "title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader."[22] In support of this quote and the lengthy passage above, Wheaton included a footnote that referred to his own report of the *Johnson v. M'Intosh* ruling when he was the official reporter for the U.S. Supreme Court. Wheaton's use of the concept *savage tenant of the forest* comports with Justice Reed's statement in *Tee Hit Ton* that the "nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States … is sometimes termed original Indian title or *permission from the whites to occupy*."[23]

Wheaton's religiously framed commentary above, written on the basis of the *Johnson* ruling, provides the context within which to understand Reed's later remarks in *Tee Hit Ton*. Because it was Reed himself who explicitly said in his dissent in *Alcea Band* that the *Johnson* ruling contains a theory about rights that follow from "discovery by *Christian nations*," and because it was Reed, for the majority of the Court in *Tee Hit Ton*, who cited the *Johnson* ruling and Wheaton's religiously premised commentary above, we may correctly and accurately add the modifier *Christian* to the Court's mention of "discovery" and "conquest" in *Tee Hit Ton*. Thus it was the Court's view in *Tee Hit Ton*, in keeping with the Conqueror and Chosen People–Promised Land models, that "[Christian] discovery" and "[Christian] conquest" gave "the [Christian] conquerors" sovereignty over and title to lands inhabited by what Wheaton referred to as "the heathen nations of the other quarters of the globe." On this basis, as Wheaton noted, Indian rights were said to be "subordinate to that of

the first Christian discoverer." This, then, is a fuller and more explicit explanation of the Christian Nations Theory that underlies federal Indian law, a theory that most present-day scholars choose to leave out of their commentary.[24]

Conclusion

A Sacred Regard for All Living Things

When Chief Justice Marshall applied the concepts *Christian people* and *heathens* to the issues of American Indian independence and Indian land title, he wove those religious categories, along with the ideas of Christian discovery and dominion, into the conceptual fabric of U.S. law. Explaining the concept of *discovery*, the esteemed Hunkpapa Lakota scholar Vine Deloria Jr. says that "with the Pope's approval, in the [1494] Treaty of Tordesilla [between Spain and Portugal] the doctrine of discovery was broadened so that any Christian nation could 'discover' lands previously unknown to Europeans and was immediately vested with legal title regardless of the claims and rights of the existing inhabitants."[1] Deloria is certainly correct, with one small but important amendment: In the *Inter Caetera* papal bull of 1493, Pope Alexander VI did not use the term *Europeans* to express the "right of discovery"; he used the term *Christian*.[2] According to the pope's decree, any Christian king, prince, or nation could "discover" and assume dominion over lands previously known to non-Christians but unknown to *Christians*.[3]

The verbatim language of the 1493 *Inter Caetera* papal bull reveals that the presumed right of discovery did not extend to lands "in the actual possession of any Christian king or prince." Indeed, in the *Inter Caetera* papal bull, Pope Alexander VI included "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 … is hereby to be understood to be withdrawn or taken away."[4] In other words, the document was written so as to protect the land rights of any Christian monarch, such as the Portuguese king, but not the land rights of non-Christian indigenous nations; the document called for non-Christians to be "subjugated" for "the propagation of the Christian empire."[5]

The political philosopher John Locke provided insight into the mentality of Christendom that gave rise to the discovery doctrine when he said that although we as humans are all "creatures of the same species and rank," nonetheless an "Undoubted Right to Dominion and Sovereignty" may be created by "a manifest declaration of the Master's will."[6] The capital *M* on the word *Master* indicates that

Locke had a deity in mind. Expressed from a cognitive standpoint, Locke's statement may be interpreted to mean that some humans, in the name of "a manifest declaration of God's will," may succeed at privileging themselves by metaphorically setting themselves "over" and "above" other humans. This is the privileging function that the pretensions of "Christian discovery" and "dominion" in the *Johnson v. M'Intosh* ruling serve by metaphorically setting the United States "over" and "above" indigenous nations and peoples, in keeping with the legacy of the fifteenth-century Vatican papal bulls.

Although this book has focused almost exclusively on the *Johnson* ruling, the documentation provided has been an attempt to make explicit the background conceptual framework that will enable the reader to makes sense of federal Indian law as a whole, and of more contemporary U.S. Supreme Court decisions. In recent decades, there have been many instances when the Court tacitly applied the ICMs of Christian discovery and dominion to cases under its review without ever overtly invoking any religious terminology. That is the beauty of the Court's ability to rely on old precedent without having to retrace the path of reasoning followed by an early Court. Whenever the Court cites the title of a well-established precedent such as the *Johnson* ruling, it employs the technique of metonymy (the part stands for the whole). The title "stands for" the entire case, with all the intricacies of reasoning employed by the Court in that particular case, including all of the citations that it relied upon by looking back to a yet earlier time. Thus in 1978, for example, in *Oliphant v. Suquamish Indian Tribe*, Justice Rehnquist cited the *Johnson* ruling as a means of claiming that complete Indian independence had vanished at some time in the past. And the Court was able to do this in such a way that the religious background of the *Johnson* ruling was kept well hidden from view.[7]

In his ruling for the majority in *Oliphant*, Justice Rehnquist lifted a key line from the *Johnson* ruling while adding his own editing to John Marshall's language. "'[T]heir rights to complete sovereignty, as independent nations,'" quoted Rehnquist, "'[are] necessarily diminished … by the original fundamental principle, that discovery gave exclusive title to those who made it.'" Rehnquist thereby replaced Marshall's past tense "were diminished" with the present tense "are diminished." With this technique, Rehnquist reaffirmed for a new generation the religious basis of Marshall's original claim about a supposed diminishment of Indian sovereignty and independence on

the basis of the Conqueror and Chosen People–Promised Land cognitive models.[8]

Another recent example of the Court's tacit use of the doctrine of Christian discovery and dominion in contemporary case law is *Nevada v. Hicks*. The case centered on Darrell Hicks, a member of the Fallon-Paiute Shoshone Tribe and a former Paiute-Shoshone police officer. His home on the reservation had been searched by State of Nevada and Fallon-Paiute game wardens. They were investigating Hicks for allegedly killing a California bighorn sheep, a protected species, on lands off the reservation. Hicks sued the Nevada game wardens in Fallon-Paiute court, accusing them of having violated his civil rights. Thus a key question became whether an Indian court has jurisdiction over state government officials for a search conducted on a reservation so long as they were investigating an alleged crime off the reservation.[9]

A review of the court filings in *Nevada v. Hicks* reveals that a central part of the debate between the attorneys for Mr. Hicks and the attorney general of Nevada (joined by seventeen other states through a joint *amicus curiae* filing) was the contemporary significance of the doctrine of discovery. The State of Nevada's brief explicitly said, for example, that the attorneys for Mr. Hicks had been "unpersuasive" in their efforts "to render the doctrine of discovery of no present significance." The State of Nevada turned to the discovery doctrine as a means of claiming that the sovereignty of an Indian government is such that its courts could not have jurisdiction over officers of the State of Nevada. Nevada's brief stated, "It … remains indisputable—and undisputed by Hicks himself—that the doctrine [of discovery] served as the basis for the Court's characterization of tribes as 'domestic dependent nations' in *Cherokee Nation v. Georgia*." To their credit, the attorneys for Mr. Hicks did attempt to challenge the discovery doctrine by tracing it back to the period of the Crusades and the *Inter Caetera* papal bull, but in the end, the Supreme Court sided with the State of Nevada. The Court did not explicitly mention the discovery doctrine, but its reasoning about the status of Indian nations ("tribes") in relation to the United States followed patterns of reasoning in keeping with the *Johnson* ruling.[10]

That eighteen states felt comfortable making the doctrine of discovery a key part of their legal strategy in *Nevada v. Hicks* at the beginning of the twenty-first century indicates that the most likely response to the arguments put forth in this book will be at least twofold. The

first argument will most likely be that the doctrine of discovery is now a well-established and intrinsic part of U.S. law and therefore cannot be tampered with. The second closely-related argument will likely be that it is "too late" for us as Indian people to advocate removing the theological framework of "Christian discovery" from federal Indian law. Of course for the society of the United States to advance these arguments is to contend that indigenous nations and peoples must simply acquiesce in a 184-year-old Supreme Court precedent predicated on the Old Testament story of the chosen people and the promised land, and on a 500-year-old belief that a Christian people has the divine right to subjugate "heathens" and assume dominion over their lands.

The underlying argument is that we as Indian people ought to learn to quietly accept an admitted judicial "pretension" of Christian conquest based on religious and cultural prejudice. It is to argue that we ought to simply ignore a ridiculous non-Indian judicial assertion that Indian "rights to complete sovereignty, as independent nations" and to territorial integrity were (or "are") impaired, diminished, denied, or, in other words, negated, simply because our indigenous ancestors *were not Christians* at the time that Christendom invaded this hemisphere. To say that we as contemporary indigenous peoples may not successfully challenge the right of Christian discovery and dominion in U.S. law on religious or other grounds is to suggest that federal Indian law will always rest on a subjugating religious ideology and that "the state" (in this case the federal government of the United States and the states of the Union) may treat Old Testament religious tenets (e.g., Genesis 1:28 and Psalms 2:8) as part of the background context of "the supreme law of the land" in the United States.

In an article dedicated to Winter's *A Clearing in the Forest*, philosopher Mark Johnson referred to law as "a many-splendored, ongoing human accomplishment."[11] In Johnson's estimation, non-Indian law is a laudable, praiseworthy, and legitimate institution and practice. Yet when viewed from an indigenous perspective, how can we as indigenous people ever consider the *thoughts* and *ideas* called federal Indian law and policy to have been a *legitimate* means of dispossessing our respective Indian nations and peoples from the vast majority of our lands and as a *legitimate* means of destroying the traditional lifeways of our respective peoples? Why should we be expected to acknowledge *that* as legal or lawful? And why should we be expected to consider the *Inter Caetera* and other Vatican papal bulls to be a legitimate background of U.S. "law" in relation to American Indian

nations, particularly given the presumption of a separation of church and state in the United States and given that Christianity is not to be preferred over other religions in U.S. law?

Even the way that the U.S. government interprets Indian treaties is influenced by the doctrine of discovery. Vine Deloria Jr. commented that "the treaties with Native Americans have been negotiated, ratified, and concluded under a cloud of impotence so clear that promises have dissolved into rhetoric when put to the judicial test." This, said Deloria, is because federal Indian law

> actually begins with a sleight-of-hand decision [the *Johnson* ruling] that proclaimed that the United States had special standing with respect to ownership of the land on which the Indigenous People lived. This nefarious concept was called the "Doctrine of Discovery." Originating early in the European invasion of the Western hemisphere, this doctrine, as articulated by the Pope in the famous Bull Inter Caetera, by which he gave to Spain all lands hitherto discovered or to be discovered in the world. It was, as it turned out, the greatest real estate transaction [fraud] in history.[12]

American Indian nations were rightfully free and independent when they made treaties with the United States. And even according to the international law of Christendom, a smaller nation could accept the protection of a more powerful nation without losing its independence.[13] In keeping with this perspective, Indian nations that accepted the protection of the United States are entitled to retain their free and independent existence, with full territorial integrity. Yet despite the well-understood norm in federal Indian law that an Indian treaty is to be interpreted liberally in favor of the Indians and as the Indians would have understood the terms of the treaty at the time it was negotiated and signed, the United States has tacitly interpreted all Indian treaties within the context of the doctrine of discovery and the *Johnson* ruling.[14] Thus Christian discovery and dominion serve as the context that the U.S. government uses for interpreting Indian treaties with the United States.

This book has only dealt with relatively few of the thousands of statutes and legal decisions that have been developed by the U.S. government regarding Indian issues. Yet, again, with regard to those statutes and cases, Vine Deloria Jr. pointed out how "all efforts to revise, systematize, and comprehend the … statutory and case laws

dealing with the natives in the United States have been passed and decided under the shadow of this doctrine" of discovery.[15] Because other books have dealt quite capably with U.S. statutes and legal decisions dealing with Indians, the aim of this work has been to use some of the findings of cognitive theory to account for the *mentality* of empire and domination that has resulted in the assumption that originally free and independent Indian nations and peoples are now subject to the plenary power and dominion of the U.S. government. This same mentality has also resulted in Indian people losing before the U.S. Supreme Court more than 80 percent of the time, more often than convicted criminals seeking reversals of their convictions.[16]

In the introduction, I said that this book was intended to assist indigenous nations and peoples on the path toward liberation and healing. Cognitive science and cognitive theory indicate that an essential part of this decolonizing process must occur in the mind. Along these lines, Oglala Lakota elder Mathew King once said, "Only one thing's sadder than remembering you were once free, and that's *forgetting* you were free. That would be the saddest thing of all. That's one thing we Indians will never do."[17] As profound as this statement is, it unfortunately assumes that we as Indian people are no longer free today, because the United States is considered to have a dominating control of American Indian existence. Such a perception deflects attention away from those areas in which we already have the ability to freely exercise our self-determination on a daily basis: through our personal lives, our professional lives, our family lives, our community lives, our ceremonial lives, and through the reaffirmation of the continuing existence of our respective indigenous nations.

The fact remains that U.S. government officials cannot ultimately control the way we think, what we imagine, where we direct our attention, or how we use our language. Given our human capacity for thought and action, despite whatever constraints that may exist for us, we are nevertheless already free, within the context of those constraints, at this very moment. It is up to us to strengthen our capacity for conceptualization and action for our own indigenous liberation and healing and to do so on the basis of our own languages, cultures, and ceremonial/spiritual traditions.[18] Because we are embodied beings who live socially and culturally in community with others, within a given ecosystem on Mother Earth, we unavoidably exist within a network of constraints; yet we also have the human ability to jointly construct reality within the sacred web of life and to powerfully affirm

our human rights, regardless of the illegitimate pretensions of the United States and U.S. government officials.

Steven L. Winter points out that the revolutionary findings of cognitive theory provide us with a refreshing new insight into "the issues of meaning and autonomy in human affairs."[19] Because of the history of U.S. government officials imaginatively imposing their thoughts and ideas on our respective peoples in the name of "law," we as Indian people have been socialized into the habit of thinking of non-Indian "law" *as if* it were a kind of external physical force or "authority that rules over us." Yet Winter points out that what is called law is "but one consequence of more pervasive cultural processes of meaning-making."[20] As Mark Johnson put the matter with considerable clarity:

> The application of cognitive science to law rests on the following assumption: Law is a human creation of human minds dwelling in human bodies, in human societies, operating within human cultural practices. And so, to understand how law works, one must know how all these aspects of human experience and thought work. To oversimplify, we have got to know how the "mind" works, and that is precisely the focus of the cognitive sciences.[21]

By understanding and appreciating how the human mind works, we will be better equipped to understand how U.S. government officials have, both consciously and unconsciously, used the power of the human mind to perpetuate the dominating myth that the United States has plenary power over our lives as indigenous nations and peoples. There is an insightful quote attributed to Adolph Hitler that speaks to the psychology of domination and the myth of U.S. plenary power over Indian nations: "One cannot rule by force alone. True, force is decisive, but it is equally important to have this psychological something which the animal trainer also needs to be master of his beast. They must be convinced that we are the victors."[22] We as indigenous nations and peoples have the ability to assume the cognitive and psychological position that the United States is not the victor, because we live on, despite a history of genocide, and because we have inherited a sacred birthright from our indigenous ancestors, which is the right as the original nations and peoples of the continent to exist free of all forms of domination. However, it would be the height of folly to turn to the U.S. government and wait for its officials to

"recognize" or "legitimize" our sacred birthright of a free existence.

Most federal Indian law scholarship endeavors to make sense of federal Indian law with reference to the professed values of liberty, freedom, justice, equality, and the rule of law. Scholars who take this approach tend to decry the fact that U.S. legal decisions do not live up to these values. Such efforts, however, fail to account for the fact that the background context of these values is the historical truth that the United States of America was founded as the "American empire" by breaking away from the British empire.[23] "We have laid the foundation of a great empire," declared George Washington. And on another occasion he stated, "It is only in our united character, as an empire that our independence is acknowledged, that our power can be regarded, or our credit supported among foreign nations."[24] Understanding that the United States was founded as an imperial enterprise enables us to understand why federal Indian law, beginning with the *Johnson* ruling, is more correctly understood in terms of the Conqueror model and in terms of the values embedded in imperial Roman conceptions such as imperium, *dominatio*, *occupatio*, *domo*, *dominus*, and so forth.

Accordingly, the dominating moral system that underlies federal Indian law and policy is the same moral system that underlies U.S. foreign policy; it is predicated on the presumption, in keeping with the Conqueror model and the Chosen People–Promised Land model, that the United States has a divine right of empire, not simply in North America, but throughout the world. Ezra Stiles, president of Yale University, capably expressed this attitude in a sermon in May 1783 when he predicted that in the future "the Lord shall have made his American Israel, high above all nations."[25] This use of an UP-DOWN image-schema to conceptualize the "high" *imperium* of the American empire is also reflected in the expression "the United States has plenary power *over* Indian affairs," which is usually understood to mean that the United States has plenary power over Indian *nations*. Unfortunately, this same type of thinking has been extended and perpetuated around the world by U.S. foreign policy throughout many generations and is now being extended across the globe by the Bush administration. Today, powerful forces both within and without the federal government envision the United States maintaining an imperial plenary power on a planetary basis.

From 1783 to the late nineteenth century, the American empire focused on extending its territorial control over Indian nations within

the area that it claimed in the continent of North America. It was only cutting its teeth. The United States next worked to grab territory from Mexico and then moved into the Pacific during the Spanish-American War. U.S. foreign policy was at this time directed toward desires to take control of Cuba, Puerto Rico, the Philippines, Guam, the Virgin Islands, Hawaii, and so forth. During the twentieth century, the United States extended its imperial influence around the globe to such an extent that it now has, by one estimate, some 725 overseas military bases.[26]

Until quite recently, the identity of the United States as an empire, which the U.S. Supreme Court explicitly noted on two occasions, was never particularly problematic for the American people, because the empire's attention was focused on the rest of the world.[27] A dramatic shift began to occur, however, when, in September 2000, the Project for the New American Century, a think tank based in Washington, D.C., issued a report titled "Rebuilding America's Defenses: Strategy, Forces and Resources for a New Century."[28] "As the twentieth century draws to a close," declared the project's founding Statement of Principles, "the United States stands as the world's most preeminent power." The report said that "the United States is the world's only superpower, combining preeminent military power, global technological leadership, and the world's largest economy."[29] Furthermore, "At present the United States faces no global rival. America's grand strategy should aim to preserve and extend its advantageous position as far into the future as possible."[30]

The report announced the need for a significant "military transformation" based on experimentation with "new technologies and operational concepts" and by seeking "to exploit the emerging revolution in military affairs."[31] Based on such underlying root metaphors as *domo, dominus,* and *dominatio,* the Project for the New American Century advocated that the United States put intensive energy and monies into such a transformation as the path to "Creating Tomorrow's *Dominant* Force." However, the report also noted that "the process of transformation, even if it brings revolutionary change, is likely to be a long one, absent some catastrophic and catalyzing event—like a new Pearl Harbor."[32] The attack on the World Trade Center and the Pentagon, exactly one year to the month from the date on the Project for the New American Century report (September 2000), was the catalyzing event that set an array of transformative changes into motion that are still being played out.

Suddenly, after 9/11, the term *American empire*, which used to be treated as a political slur directed at the Establishment by the Left, began to be used at the beginning of the twenty-first century as a badge of honor by many on the Right. As President Bush's adviser Karl Rove stated in a 2002 interview, "We're an empire now, and when we act, we create our own reality. And while you're studying that reality—judiciously, as you will—we'll act again, creating other new realities, which you can study too, and that's how things will sort out. We're history's actors … and you, all of you, will be left to just study what we do."[33] Other thinkers, however, have given a more sober assessment of the imperial political trends developing in the United States after 9/11. In his impressive book *The Sorrows of Empire*, political scientist Chalmers Johnson wrote:

> American leaders now like to compare themselves to imperial Romans, even though they do not know much about Roman history. The main lesson for the United States ought to be how the Roman Republic evolved into an empire, in the process destroying its system of elections for its two consuls (its chief executives), rendering the Roman senate impotent, ending forever the occasional popular assemblies and legislative comitia that were at the heart of republican life, and ushering in permanent military dictatorship.[34]

It now appears that the country the visionary Shawnee leader Tecumseh called a "great serpent" may be about to turn back on itself. President George W. Bush, in the manner of an imperial ruler, has been consolidating power to a startling degree, in the name of a "unitary Executive." By doing so, he has been exhibiting all the classic signs of the Conqueror cognitive and behavioral model. Key signs include the invasion and occupation of Iraq, passage and renewal of the Patriot Act, the rendition and torture of "detainees" in secret prisons, and the passage on October 17, 2006, of the Military Commissions Act. This bill is said to have suspended the 791-year-old Great Writ of habeas corpus for noncitizens and legal residents of the United States and, perhaps, even for U.S. citizens.[35]

On that same day, in a private ceremony in the Oval Office, Bush signed the John Warner National Defense Authorization Act for Fiscal Year 2007, which authorized more that $500 billion for the Pentagon. The bill contained a rider that authorizes Bush or any future U.S. president to declare martial law, federalize the National

Guard without the consent of the governors of the respective states, and use U.S. troops inside the United States. The United States has ominously moved in the direction of some version of totalitarian rule, perhaps involving a declaration of martial law and internment camps for undesirables and political dissidents.[36]

Thus this book's critique of the mentality and behaviors of empire and domination is much wider in scope than would seem to be indicated by reference to federal Indian law and policy and the liberation of indigenous nations and peoples. As humans, we urgently need to learn how to make meaning—cognitively, socially, and culturally—by establishing human conventions that accentuate a love of life and an abiding appreciation of the immense beauty of life rather than conventions that lead to further unbridled exploitation, domination, greed, and the resulting destruction of the fabric of life. Because of the way that indigenous nations and peoples have been ridiculed for centuries as "primitive," "savage," "uncivilized," "heathen," and "pagan," could it be that the world has been deprived of a source of spiritual and cultural wisdom rooted in indigenous values, wisdom very much needed by the planet at this time?

Historian Gregory Schaaf, in his remarkable book *Wampum Belts and Peace Trees*, deals extensively with the Lenape nation, with whom the early colonists had extensive relations. Schaaf provides a beautiful summary of the Lenape worldview that enabled the people to live a spiritual life of liberty:

> Lenape philosophy was an ancient form of democracy. Traditional Lenape recognized not only the rights of all men, but those of all women. They also believed human beings should respect life—animals, plants, and even tiny insects—because all had been made by the Creator for a purpose. According to the Lenape the mountains, the rivers, the Earth, and the heavens above were created in harmony for a divine purpose. They viewed the entire universe as alive with spiritual power.[37]

Schaaf also wrote that "among traditional native people, the right to liberty meant more than just political freedom for male landowners and the abolition of slavery for some races. Liberty encompassed the divine right of everyone and everything to exist in a natural state as the Creator had intended."[38] Another quote attributed to the great Shawnee leader Tecumseh well expresses some clues that may

lead to a much-needed transformative paradigm that is to be found in indigenous knowledge:

> Love Your Life, Perfect Your Life, Beautify All Things in Your Life.
> Seek to Make Your Life Long and Its Purpose the Service
> of Your People.
> Prepare a Noble Death Song,
> for the Day When You Go Over the Great Divide.
> Always Give a Word of Salute When Meeting or Passing
> a Friend,
> or Even a Stranger When In a Lonely Place.
> Show Respect to All People and Grovel to None.
> When You Arise in the Morning,
> Give Thanks for the Food
> and for the Joy of Living.
> If You See No Reason for Giving Thanks,
> the Fault Lies Only With Yourself.
> Abuse No One and Nothing,
> for Abuse Turns the Wise Ones Into Fools
> And Robs the Spirit of its Vision.[39]

There is the old cliché about things getting darkest just before the dawn. The way out of this dark period in which we now find ourselves must involve a positive cognitive paradigm shift away from the mentality and behaviors of empire and domination reflective of the Conqueror model and the Chosen People–Promised Land model of the Old Testament, including the doctrine of Christian discovery and dominion in the *Johnson v. M'Intosh* ruling. Although it is beyond the scope of this work to do more than mention it, the wisdom to be found in the traditional knowledge of our Original Nations and Peoples provides one possible path and a means of achieving the much-needed transformative paradigm. But it is not merely for the sake of humans that we must shift away from the "subdue" and "dominion" mentality and behaviors traced to the Old Testament and ancient Christendom. We must also do so for the sake of all living things, including Mother Earth and our future generations. As the Original Nations and Peoples of Great Turtle Island, we must invite the world to walk with us on this beautiful path of life in keeping with a central teaching of indigenous law: Respect the Earth as our Mother, and Have a Sacred Regard for All Living Things.

Notes

Preface

1. For an overview of Winter's work and the area of cognitive legal studies, see *Brooklyn Law Review*'s publication of works from a conference in celebration of the publication of Winter's *A Clearing in the Forest*. *Brooklyn Law Review* 67, no. 4, (Summer 2002), entire issue titled "Symposium: Cognitive Legal Studies: Categorization and Imagination in the Mind of Law."
2. A single noteworthy exception is Steven McSloy, "'Because the Bible Tells Me So': Manifest Destiny and American Indians," *St. Thomas Law Review* 9, no. 1 (Fall 1996): 37–47.
3. A notable exception is Peter d'Errico, professor emeritus, Univ. of Massachusetts–Amherst. Peter was the first scholar who encouraged me to continue to pursue my interest in the religious aspect of the *Johnson* ruling. Peter's excellent paper "Indian Sovereignty, Now You See it, Now You Don't" at www.umass.edu/legal/derrico/nowyouseeit.html is a must-read for anyone wanting to grasp the contradictory way in which the U.S. Supreme Court has dealt with the concept of American Indian sovereignty in federal Indian law.

   Because of the heavy emphasis he places on Christianity (going back to the Crusades) in his book *The American Indian in Western Legal Thought*, Robert A. Williams is the most likely candidate to have discussed the implications of the categories *Christian people* and *heathens* in the *Johnson* ruling. At the end of his book, Williams cites Joseph Story's statement in his *Commentaries on the Constitution of the United States* that "as infidels, heathens, and savages, they [the Indians] were not allowed to possess the prerogatives belonging to completely sovereign, independent nations." Unfortunately, however, Williams immediately veers away from the implications of the religious dimension of Story's statement and the religious categories in the *Johnson* ruling. He does so by asserting that the doctrine of discovery is a "secular" doctrine, thereby indicating that it is not specifically religious or linked to the Bible or Christianity. In his book *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*, Robert J. Miller does briefly discuss Christianity in relation to the doctrine of discovery, but he does not trace this to the Old Testament. For all his book's strengths, he does not discuss the importance and

implications of the religious categories *Christian people* and *heathens* in the Johnson ruling or the idea that the *Johnson* ruling, to a great extent, constitutes a religiously grounded paradigm.

Introduction

1. Steven L. Winter, *A Clearing in the Forest* (Univ. of Chicago Press, 2001), 88–92.
2. "Moore's Crusade: Alabama Judge Answering only to God's Law," *San Diego Union-Tribune* editorial, August 23, 2003, B-12; CNN, "Ten Commandments Monument Moved," www.cnn.com, November 14, 2003, www.cnn.com/2003/LAW/08/27/ten.commandments; "Prayer and Arrogance in Alabama," www.positiveatheism.org/writ/moore09.htm.
3. Lorne W. Craner, assistant secretary of state for the Bureau of Democracy, Human Rights, and Labor; Ralph F. Boyd Jr., assistant U.S. attorney general, "Reply of the United States to Questions from the UN Committee on the Elimination of Racial Discrimination," Geneva, Switzerland, August 6, 2001. At www.state.gov/g/drl/rls/rm/2001/4486.htm.
4. Winter, *Clearing in the Forest*, 12–14.
5. At present, there are some 56 million acres of Indian reservation land in the United States, and approximately 11 million acres of this is allotted land. Indian Land Working Group Web site, www.ilwg.org/impact.htm; Political science professor Glenn T. Morris points out that "the total acreage of the United States is approximately 1.9 billion acres. Today, the BIA [Bureau of Indian Affairs] claims that it holds 56 million acres of land in trust for Indian nations and individuals. The process by which the indigenous nations lost control of 1.85 billion acres of land remains a mystery not only to non-Indian people but also to most Indians. *Johnson*, a fabricated case and a controversy in its whole, provides a smoke screen of fictionalization in the legal rationalizations that obscure the methods through which the United States created its unique brand of colonialism and implemented it against a variety of indigenous peoples." Glenn T. Morris, "Vine Deloria, Jr., and the Development of a Decolonizing Critique of Indigenous Peoples and International Relations," in *Native Voices: American Indian Identity and Resistance*, ed. Richard A. Grounds, George Tinker, and David E. Wilkins (Lawrence: Univ. of Kansas Press, 2003), 112.
6. www.cr.nps.gov/nr/twhp/wwwlps/lessons/118trail/118facts3.htm; Russell Thornton, "The Demography of the Trail of Tears Period: A New Estimate of Cherokee Population Losses," in *Cherokee Removal: Before*

and After, ed. William L. Anderson (Athens, GA: Univ. of Georgia Press, 1991), 75–95.

7. "An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act or Dawes Act), Statutes at Large 24, 388–91, NADP Document A1887," www.csusm.edu/nadp/a1887.htm; Harold E. Fey and D'Arcy McNickle, *Indians and Other Americans: Two Ways of Life Meet* (New York: Harper and Brothers, 1959), 67, 72, 72–75;"In total disregard of the treaties, the Dawes Act was implemented. Individual tribal members were allotted—160, 80, and 40 acre—parcels. Remaining reservation (treaty) lands were declared surplus and sold to non-Indians through surplus land sales. This action was in direct violation of the treaty agreements and resulted in Indians losing title to 90 million acres of land." From Indian Land Working Group Web site, www.ilwg.org/impact.htm; See also "What were the results of Allotment?" www.csusm.edu/nadp/asubject.htm.
8. Fey and McNickle, *Indians and Other Americans*, 74.
9. Ibid.
10. Ibid., 68.
11. Ibid., 67.
12. Ibid., 65.
13. Ibid.
14. Ibid., 65–66.
15. The Marshall Trilogy includes *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia* 31 U.S. 515 (1832).
16. Sharon Obrien, "Tribes and Indians: With Whom Does the United States Maintain a Relationship," *Notre Dame Law Review* 66 (1991): 1461–62 (noting the difficulty of defining the relationship between Indians and the federal government).
17. Winter, *Clearing in the Forest*, 8–12.
18. Ibid., xiv.
19. Ibid., 1–21.
20. Ibid.
21. George Lakoff and Mark Johnson, *Philosophy in the Flesh* (Univ. of Chicago Press, 1999), 9–15.
22. Winter, *Clearing in the Forest*, 5. "Of course, any survey of the area will reveal that cognitive science is a contentious field still dominated by traditional rationalist assumptions about mind and reason. But the outlines of an alternative, more productive view are already in place. … The emerging picture is of a human rationality more subtle and complex

than anything even conceivable under the standard view."

23. L. A. Alderman, *The Identification of the Society of the Cincinnati with the First Authorized Settlement of the Northwest Territory at Marietta, Ohio, April Seventh, 1788* (Marietta, OH: E. R. Alderman and Sons, 1888).
24. Helen Hornbeck Tanner, "The Glaize in 1792: A Composite Indian Community," *Ethnohistory* 25, no. 1 (Winter 1978): 26.
25. Vine Deloria Jr., "Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States," in *The State of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 271–73; Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: Univ. of Minnesota Press, 2005), 61; David H. Getches, Charles F. Wilkinson, and Robert A. Williams Jr., *Federal Indian Law: Cases and Materials*, 5th ed. (St. Paul, MN: West Group, 2004), 340–76.
26. This conception of the relationship between Indian nations and the United States is traced to the U.S. Supreme Court ruling *Cherokee Nation v. Georgia* (1831), in which Chief Justice Marshall used an analogy to say that the relation of Indian nations to the United States "resembles that of a ward to his guardian."
27. The Federal Register of July 12, 2002 (vol. 67, no. 134) Notices, 46327–46333, lists 562 "tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes."

Chapter 1: A Primer on Cognitive Theory

1. Lakoff and Johnson, *Philosophy in the Flesh*, 10. Lakoff and Johnson point out that cognitive science is "a relatively new discipline" that over the past thirty-plus years "has made startling discoveries." For instance, it has discovered "that most of our thought is unconscious … in the sense that it operates beneath the level of cognitive awareness, inaccessible to consciousness and operating too quickly to be focused on."
2. George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (Univ. of Chicago Press, 1987), xi. See also Winter, *Clearing in the Forest*, especially chap. 2, "Embodiment."
3. Lakoff and Johnson, *Philosophy in the Flesh*, 11–15.
4. Ibid., 12.
5. Ibid.
6. Ibid., 16–44.

7. Winter, *Clearing in the Forest*, xii.
8. Ibid., 5.
9. Ibid., xii.
10. Ibid., 6. "Imagination, therefore, is dependent on the kinds of bodies we have and on the ways in which those bodies interact with our environment."
11. Ibid., 6.
12. George Lakoff and Mark Johnson, *Metaphors We Live By* (Univ. of Chicago Press, 2007), 3.
13. Ibid., 6. Winter points out that "in cognitive theory, metaphor … refers to a tightly structured set of conceptual mappings in which a target domain is understood in terms of a source domain of more readily comprehended embodied or social experiences." He continues: "This conceptual mapping is conventionally represented by means of a mnemonic of the form TARGET-DOMAIN-IS-SOURCE-DOMAIN. But this is only a representation; the metaphor is the set of conceptual mappings and not the mnemonic. Similarly, it is important not to confuse the metaphor, which is the conceptual mapping, with the many metaphorical expressions that are its linguistic manifestations." (Winter, 13).
14. Ibid., 5. Thus we are in the habit of thinking of argument in terms of war. The conceptual metaphor is ARGUMENT IS WAR. See, for example, Lakoff and Johnson, *Metaphors We Live By*, 3–6. Or, the conceptualization LIFE IS A PURPOSEFUL JOURNEY, which entails understanding life *in terms of* a journey.
15. Lakoff and Johnson, *Philosophy in the Flesh*, 16–17.
16. In *United States v. Lara*, 541 U.S. 193 (2004), the problematic nature of federal Indian law was reflected in Justice Clarence Thomas's reference to federal Indian law as "schizophrenic." See Williams, *Like a Loaded Weapon*, 158–60.
17. Winter, *Clearing in the Forest*, 12; Linda L. Berger, "What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law," *Journal of the Association of Legal Writing Directors* 2 (2004): 174. Available at http://ssrn.com/abstract=591669.
18. See Winter, *Clearing in the Forest*, chap. 2, "Embodiment."
19. Ibid.; Lakoff and Johnson, *Philosophy in the Flesh*, 60–68.
20. Ian Wilson, *The Columbus Myth: Did Men of Bristol Reach America before Columbus?* (London: Simon and Schuster, 1991), 8.
21. Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* (Garden City, NY: Anchor Books, 1966), 89. "Reification is the

apprehension of human phenomena as if they were things [objects], that is, in non-human or possibly suprahuman terms. Another way of saying this is that reification is the apprehension of the products of human activity *as if* they were something else than human products—such as facts of nature, results of cosmic laws, or manifestations of divine will. Reification implies that man is capable of forgetting his own authorship of the human world, and further, that the dialectic between man, the producer, and his products is lost to consciousness. The reified world is, by definition, a dehumanized world."

22. Winter, *Clearing in the Forest*, 12–19; See also chap. 5, "Compositional Structure."
23. Ibid., 15–17.
24. Ibid.
25. Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (New York: Hill and Wang, 1995), xi–xii.
26. Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, 1965), 48–49.
27. Ibid.
28. Winter, *Clearing in the Forest*, 58.
29. Ibid, 16.
30. Berger, "What Is the Sound?" 176. Berger writes, "Metaphor is a projection and an expansion: "To conceive of understanding as grasping, for example, is to gain a sense of 'grasp' as a cognitive operation without losing or supplanting its physical meaning" (citing Winter, *Clearing in the Forest*, 65).
31. Winter, *Clearing in the Forest*, 66.
32. Ibid., 15.
33. Lakoff and Johnson, *Metaphors We Live By*, 35–40.
34. *Johnson* at 587. "All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."
35. Lakoff and Johnson, *Metaphors We Live By*, 36.
36. Winter, *Clearing in the Forest*, 15. "Some objects (like our bodies) are so configured as to contain other objects (our *in*sides)."
37. Lakoff and Johnson, *Philosophy in the Flesh*, 52.
38. Lakoff and Johnson, *Metaphors We Live By*, 50.
39. Winter, *Clearing in the Forest*, 15.
40. *Downes v. Bidwell*, 182 U.S. 244, 286, (1901).

41. *United States v. Kagama*, 118 U.S. 375.
42. Deloria, "Trouble in High Places," 274–75. (emphasis added).
43. Another example of the use of the CONTAINER image-schema by the U.S. Supreme Court is found in the 1831 decision *Cherokee Nation v. Georgia*, in which Chief Justice Marshall, on behalf of a majority of the Court, said of the Cherokee Nation: "They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility" (at 17–18). The term *invasion* is derived from the Latin, *invadere*, 'to invade,' which is 'a hostile entrance or armed attack on the property or territory of another for conquer or plunder.' *Webster's Third International Dictionary*, s.v. "invasion." Thus the conception of a hostile "entrance" *into* "a territory," is structured by the CONTAINER image-schema.
44. Ibid.
45. Winter, *Clearing in the Forest*, chap. 5, "Compositional Structure."
46. Lakoff and Johnson, *Metaphors We Live By*, 15. The physical basis of metaphors of CONTROL: "Physical size typically correlates with physical strength, and the victor in a fight is typically on top."
47. Joseph Story, *Commentaries on the Constitution of the United States with a Preliminary View of the Constitutional History of the Colonies and States Before the Adoption of the Constitution*, vol. 1, with notes and additions by Thomas M. Cooley (Boston: Little, Brown and Co., 1873), book 1, sec. 7, 8. Referring to the Indians as "aboriginal inhabitants," Story said, "The latter were admitted to possess a present right of occupancy, or use in the soil, which was *sub*ordinate to the ultimate *dom*inion of the discoverer." (emphasis added).
48. Winter, *Clearing in the Forest*, 12–21. "The very capacity of the brain to recognize patterns and form concepts depends on … structures of bodily experience. These basic structures or *image-schemas*—such as BALANCE, PART-WHOLE, OBJECT, SOURCE-PATH-GOAL, FORCE-BARRIER, and CONTAINER—provide structure to human thought and a measure of apparent unity and determinacy in our interaction with the world."
49. Lakoff and Johnson, *Philosophy in the Flesh*, 17. "These findings of cognitive science are profoundly disquieting in two respects. First, they tell us that human reason is a form of animal reason, a reason inextricably tied to our bodies and the peculiarities of our brains. Second, these results tell us that our bodies, brains, and interactions with our environment provide the mostly unconscious basis for our everyday metaphysics,

that is, our sense of what is real."

50. Winter, *Clearing in the Forest*, 15.
51. David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court* (Austin: Univ. of Texas Press, 1997), 5.
52. Winter, *Clearing in the Forest*, 6.
53. Winter, *Clearing in the Forest*, 16. It is important to realize that what are referred to as metaphorical "maps" or "mappings" are the result of physical neural linkages in the brain. Winter explains that "each neuron has an axon that makes contact across a synapse with the body (soma) or dendrite of another. Electrical activity down the axon causes the release of a chemical neurotransmitter that … induces or inhibits the electrical activity of the next neuron. …

    These neurons are organized in networks ('neural nets') consisting of groups or 'populations' of hundreds or thousands of neurons linked together by these synaptic connections." (Winter, 28). For a detailed explanation, see Winter, chap. 2, "Embodiment," 22–42. As Lakoff and Johnson state, "The maps or mappings are physical links: neural circuitry linking neuronal clusters called *nodes*. The *domains* are highly structured neural ensembles in different regions of the brain." (*Metaphors We Live By*, 256. [original emphasis].)
54. Ibid.
55. Ibid.
56. Ibid., 17.
57. Ibid.
58. Story, *Commentaries on the Constitution of the United States*, sec. 5, 7.
59. Winter, *Clearing in the Forest*, 4, 18, 334–39.
60. Ibid.
61. Getches, Wilkinson, and Williams, *Federal Indian Law*, 1.
62. See generally Morton Fried, *The Notion of Tribe* (Menlo Park, CA: Cummings Pub. Co., 1979). *Tribes* (and the adjective *tribal*) seems to be the term preferred by the U.S. government because it is politically inferior to the term *nation*. This is why the indigenous peoples in Canada insist on being referred to as First Nations. Thus I assiduously avoid the term *tribe* and use instead, whenever possible, *Indian* or *indigenous nations* and *peoples*. The concept *tribe* (derived from *tri* meaning "three") emerged in the Latin language in reference to the three main divisions of the over population: the Latins, the Etruscans, and the Sabines.
63. Winter, *Clearing in the Forest*, 206.

Chapter 2: Metaphorical Experience and Federal Indian Law

1. Francis Paul Prucha, ed., *Documents of United States Indian Policy*, 2nd ed. (Lincoln: Univ. of Nebraska Press, 1990), 157.
2. *Webster's Third New International Dictionary*, s.v. "re-claim."
3. George Lakoff, *Moral Politics: How Liberals and Conservatives Think* (Chicago: Univ. of Chicago Press, 2002), 41–43.
4. Winter, *Clearing in the Forest*, "Ideas are plants," 19.
5. Franklin D. Roosevelt, "Address of the President, Marietta, Ohio, July 8, 1938, 9:30 A.M." (NLR-PPF-1820-ISTCARBON-SE24), Franklin D. Roosevelt Library, Hyde Park, NY, 1.
6. Ibid.
7. Ibid.
8. Charles Verlinden, *The Beginnings of Modern Colonization* (Ithaca: Cornell Univ. Press, 1970), ix.
9. *Oxford Latin Dictionary,* s.v. "colo."
10. *Webster's Third New International Dictionary*, s.v. "intestine."
11. *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet.) 1831.
12. Thomas Hobbes, *Leviathan*, ed. Richard Tuck, rev. ed. (Cambridge Univ. Press, 1996), introduction.
13. Ibid.
14. Ibid.
15. Ibid.
16. Julius W. Pratt, *America's Colonial Experiment: How the United States Gained, Governed, and In Part Gave Away a Colonial Empire* (New York: Prentice Hall, 1950), 5. (emphasis added).
17. *Webster's Third International Dictionary*, s.v. "capacious."
18. Ibid., s.v. "swallow."
19. Henry Wheaton, *Elements of International Law*, 3rd ed. (Philadelphia: Lea and Blanchard, 1846), 210.
20. Lakoff and Johnson, *Philosophy in the Flesh*, 45–73.
21. Ibid., 21–22.
22. Ibid., 19. "Living systems must categorize. Since we are neural beings, our categories are formed through our embodiment. What that means is that the categories we form are *part of our experience!* … Categorization is thus not a purely intellectual matter, occurring after the fact of experience. … It is part of what our bodies and brains are constantly engaged in."
23. Ibid.
24. Ibid., 6.
25. Winter, *Clearing in the Forest*, "What is Metaphor," especially page 65. "Metaphor is the imaginative capacity by which we relate one thing to

another and, in so doing, 'have' a world." Also, "Metaphors are our way of having a reality."

26. Lakoff and Johnson, *Philosophy in the Flesh*, 18. "Categorization is, for the most part, not a product of conscious reason. We categorize as we do because we have the brains and bodies we have and because we interact in the world as we do."
27. Ibid., 34–35.
28. Lakoff, *Moral Politics*, 7–8.
29. Winter, *Clearing in the Forest*, 71. "Much of our categorization takes the form of *radial categories*. A radial category consists of a central model or case with various extensions that, though related to the central case in some fashion, nevertheless cannot be generated by rule. Because they may derive from the central case in different ways, the extensions may have little or nothing in common with each other beyond their shared connection to the central case."
30. Lakoff, *Moral Politics*, 8.
31. Winter, *Clearing in the Forest*, 85–88. In *Moral Politics,* George Lakoff points out that "[a] prototype is an element of a category (usually a subcategory or individual member) that is used to represent the category as a whole in some sort of reasoning. *All prototypes are cognitive constructions used to perform a certain kind of reasoning; they are not objective features of the world*." (9, original emphasis). Winter points out that robins and sparrows are judged "better" (more prototypical) examples of the category *birds* than, say, ducks, owls, or penguins. (76).
32. Ibid., 86. Citing Charles Filmore: "The noun *bachelor* can be defined as an unmarried adult man, but the noun clearly exists as a motivated device for categorizing people only in the context of a human society in which certain expectations about marriage and marriageable age obtain. Male participants in long-term unmarried couplings would not ordinarily be described as bachelors; a boy abandoned in the jungle and grown to maturity away from contact with human society would not be called a bachelor; John Paul II is not properly thought of as a bachelor." See also page 88: "'Bachelor' produces prototype effects because, as Lakoff explains, … bachelorhood holds of unmarried men only within the right context."
33. Ibid., 87.
34. Ibid., 88.
35. Ibid., 91.
36. Ibid., 88.

Chapter 3: The Conqueror Model

1. United Nations Economic and Social Council, E/CN.4/GR.1987/7/Add.12 30 Sept. 1987, 19.
2. William Brandon, *New Worlds for Old: Reports from the New World and Their Effects on the Development of Social Thought in Europe, 1500–1800* (Athens: Ohio Univ. Press, 1986), 121.
3. Lakoff and Johnson, *Philosophy in the Flesh*, 52, 179–81, 203–4. Also, Lakoff and Johnson, *Metaphors We Live By*, 30.
4. Ibid.
5. Richard W. Van Alstyne, *The Rising American Empire* (New York: W. W. Norton, 1960), 1–10.
6. Winter, *Clearing in the Forest*, 337–38.
7. Hobbes, *Leviathan*, 81. Hobbes stated that "the right of possession is called Dominion."
8. See generally John Neville Figgis, *The Divine Right of Kings* (Cambridge Univ. Press, 1914).
9. Van Alstyne, *Rising American Empire*, 1.
10. *Webster's Third New International Dictionary*, s.v. "seek." "1. obs. : to follow or advance against or to attack: pursue" but also "to go in search of : look for : search for."
11. *Johnson* at 576.
12. *Johnson* at 576–77. The phrase *right of discovery* only appears once in the *Johnson* ruling, and that is found in the context of Marshall's discussion of the various royal charters of England from the fifteenth and sixteenth centuries. The intention to conquer and subdue non-Christian lands is explicitly expressed in the first Letters Patent issued by King Henry VII to John Cabot and his sons, dated March 5, 1496. This charter declared that the Cabots "may conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to conquer, occupy and possess, as our vassals and governors lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands discovered." See James A. Williamson, *The Cabot Voyages and Bristol Discovery Under Henry VII* (Cambridge: Published by the Hakluyt Society at the Univ. Press, 1962), 204–5.
13. Van Alstyne, *Rising American Empire*, 1–3, text and footnotes.
14. Lakoff and Johnson, *Metaphors We Live By*, 15.
15. Hans Koning, *Columbus: His Enterprise* (New York: Monthly Review Press, 1976), 83–84. "The Columbus brothers now set out to extend their dominion over the entire island [of Hispanola] and to see to the

'pacification' of the Indians. This word has become familiar to us from our Vietnam War, and was already in use then with the same hidden meaning." This pattern is certainly seen in the Spanish colonization of the islands of the Caribbean. Bartolomé de Las Casas said, for example, that on the islands of Jamaica and Puerto Rico there "had once been above six hundred thousand souls, and I believe above a million, and yet today there are no more than two hundred persons on each, all having perished without faith and without sacraments." In *An Account, Much Abbreviated, of the Destruction of the Indies, with Related Texts*, ed. Franklin W. Knight, trans. Andrew Hurley (Indianapolis: Hackett Publishing, 2003), xlviii.

16. Much is made of the Vatican bull *Sublimis Deus* issued by Pope Paul III in 1537, a document that declared Indians to be "truly human." The Pope further said that the Indians were to be respected in their property and not to be enslaved. However, the political context for this papal document was the conception of the Christian empire (*christiani imperii*) and the Spanish empire. In other words, Indians were declared to be human and therefore eligible for Christian "salvation" (baptism), but the document regarded the Indians as being "free" under and within the political *dominium* (domination) of the Christian empire as represented by the Spanish and Portuguese empires. From the perspective of the dominating mentality of Christendom, it was as impossible for Christian Europeans to conceive of an indigenous existence free of the Christian empire as it is for a typical American today to conceive of a legitimate existence free of capitalism. For an excellent treatment of the United States as empire, see William Appleman Williams, *Empire as a Way of Life: An Essay on the Causes and Character of America's Present Predicament along with a Few Thoughts about an Alternative* (New York: Oxford Univ. Press, 1980).
17. Henry Sumner Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge 1887* (New York: Henry Holt, 1888), 55.
18. From Notre Dame University Web site. www.archives.nd.edu/cgi-bin/lookup.pl?stem=dom&ending=atio.
19. F. P. Leverett, ed., *A New and Copius Lexicon of the Latin Language; Compiled Chiefly from the Magnum Totius Latinitatis Lexicon of Facciolati and Forcellini, and the German Works of Scheller and Luenemann* (Boston: J. H. Wilkins and R. B. Cater, and C. C. Little and James Brown, 1844), 268.
20. Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (Boston: Beacon Press,

1963), 238–39.

21. *American State Papers: Foreign Relations, III, 720* (Washington, DC: Gale and Seaton, 1832). At http://memory.loc.gov/ammem/amlaw/lwsp.html.
22. Hobbes, *Leviathan*, introduction.
23. Winter, *Clearing in the Forest*, 88.
24. Ibid.
25. Lakoff, *Moral Politics*, 5.
26. *Johnson* at 589.
27. Ibid.
28. Ibid. (emphasis added).
29. *A New and Copius Lexicon of the Latin Language*, s.v. "domo." "to subdue, conquer, overcome, vanquish, break or tame wild animals."
30. Brandon, *New Worlds for Old*, 121.
31. Winter, *Clearing in the Forest*, 337. Winter points out that "the notion of a legal right is a conceptual counterpart of the idea of a rule. Both are understood in terms of the legally defined behaviors or *metaphorical paths* marked out by the law."
32. Lakoff, *Moral Politics*, 5.
33. Ibid.
34. Ibid.
35. *Webster's Third New International Dictionary*, s.v. "due."
36. Ibid.
37. Lakoff, *Moral Politics*, 51.
38. Ibid.
39. Ibid.
40. *Webster's Third New International Dictionary*, s.v. "due."
41. See generally Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (New York: Henry Holt, 2007).
42. As quoted in Sterling Edmunds's *The Lawless Law of Nations: An Exposition of the Prevailing Arbitrary International Legal System in Relation to Its Influence upon Civil Liberty, Disclosing It as the Last Bulwark of Absolutism against the Political Liberation of Man* (Washington, DC: John Byrne and Co., 1925), 4–5.
43. Ibid.
44. Lewis Hanke, "The 'Requerimiento' and its Interpreters," *Indice de los Numeros 1, 2, 3 y 4 de la Revista de Historia de América, Marzo, Junio, Septiembre y Diciembre de 1838* (Mexico: Instituto Panamericano de Geografía e Historia, 1938), 25–34.
45. Anthony Pagden, *The Fall of Natural Man: The American Indian and*

the Origins of Comparative Ethnology (New York: Cambridge Univ. Press, 1982), 51.
46. Hanke, "The 'Requerimiento,'" 26.
47. Ibid.
48. Ibid.
49. Ibid.
50. *A Latin Dictionary Founded on Andrews' Edition of Freund's Latin Dictionary*, s.v. "dominus."
51. Ibid.; *Webster's Third New International Dictionary*, s.v. "super."
52. Hanke, "The 'Requerimiento,'" 26.
53. Ibid., 27.
54. Ibid., 26.
55. Ibid., 27.
56. *Johnson* at 577.
57. Hanke, "The 'Requerimiento,'" 27.
58. Ibid.
59. Ibid., 28.
60. Ibid.

Chapter 4: Colonizing the Promised Land

1. See generally McSloy, "'Because the Bible Tells Me So."
2. Hobbes, *Leviathan*, 81.
3. *Johnson* at 574.
4. *Johnson* at 577.
5. *Johnson* at 574.
6. *Cherokee Nation* at 17. "They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases."
7. *Johnson* at 574.
8. Genesis 15:18–21 [Authorized (King James) Version].
9. Gen. 17:2–8 (AV).
10. Verlinden, *Beginnings of Modern Colonization*, ix.
11. Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge Univ. Press, 1995), 25–40.
12. Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford Univ. Press, 1965), 34.
13. Henry C. Morris, *The History of Colonization, From the Earliest Times to the Present Day*, vol. 1 (New York, London: Macmillan Co., 1904), 10.
14. Gen. 12:7 (AV). "And the Lord appeared unto Abram [Abraham], and

said, Unto thy seed will I give this land." In Genesis 13:15, we find the Lord saying, "For all the land which thou seest, to thee will I give it, and to thy seed for ever." And in Genesis 17:8 we find, "And I will give unto thee, and to thy seed after thee, the land wherein thou art a stranger, all the land of Canaan, for an everlasting possession; and I will be their God." Along these lines, Tzvetan Todorov, in *The Conquest of America*, quotes Las Casas as writing of Cristóbal Colón (Columbus), "His surname was Colón, which means *repopulator*." Tzvetan Todorov, *The Conquest of America: The Question of the Other*, trans. Richard Howard (New York: Harper and Row, 1984), 26. Of course, the genocidal precursor to "repopulation" is "depopulation" of the indigenous peoples.

15. Delno C. West and August Kling, trans. *The Libro de Las Profecias of Christopher Columbus* (Gainesville: Univ. of Florida Press, 1991), 34–35.
16. Linda Parker, *Native American Estate: The Struggle over Indian and Hawaiian Lands* (Honolulu: Univ. of Hawaii, 1989), 1. (emphasis added).
17. C. Raymond Beazely, "Prince Henry of Portugal and the African Crusade of the Fifteenth Century," in *The American Historical Review* 16, no. 1 (London: MacMillan Co., 1911), 21. (emphasis added).
18. Miguel Gandert, with essays by Enrique R. Lamadrid, Ramón A. Gutiérrez, Lucy R. Lippard, and Chris Wilson, *Nuevo México Profundo: Rituals of an Indo-Hispano Homeland* (Santa Fe: Museum of New Mexico Press, 2000), 3. (emphasis added).
19. *Johnson* at 573. (emphasis added).
20. Ibid.
21. Frances Gardiner Davenport, ed., *European Treaties Bearing on the History of the United States and Its Dependencies to 1648* (Washington, DC: Carnegie Institution of Washington, 1917), 62.
22. Alfred E. Cave, "Canaanites in a Promised Land," *American Indian Quarterly* XII, no. 4 (Fall 1988): 279.
23. Maine, *International Law*, 73–74.
24. J. M. Roberts, *The Pelican History of the United States* (New York: Penguin Books, 1983), 259.
25. Ibid.
26. Deuteronomy 20:16–17 (AV). (emphasis added).
27. Beazley, "Prince Henry of Portugal," 19.
28. Deut. 7:1–3 (AV). (emphasis added).
29. Deut. 6:10–11 (AV).
30. Frederick Turner, *Beyond Geography* (New York: Viking Press, 1980), 80.
31. Ibid.

32. John Keats, *Eminent Domain: The Louisiana Purchase and the Making of America* (New York: Charterhouse, 1973), 62.

Chapter 5: The United States Adopts the Chosen People–Promised Land Model

1. Anders Stephanson, *Manifest Destiny* (New York: Hill and Wang, 1995), 6.
2. Barry A. Kosmin and Seymour P. Lachman, *One Nation Under God: Religion in Contemporary American Society* (New York: Harmony Books, 1993), 21. See also Richard S. Patterson and Richardson Dougall, *The Eagle and the Shield: A History of the Great Seal of the United States* (Washington: U.S. Government Printing Office, 1976), 7–18.
3. Ibid.
4. Conrad Cherry, ed., *God's New Israel: Religious Interpretations of American Destiny* (Chapel Hill: Univ. of North Carolina Press, 1988), frontice page.
5. President Ronald Reagan, "200th Anniversary of the Signing of the Constitution: The Triumph of Human Freedom, *Vital Speeches of the Day* 54, no. 1 (October 15, 1987): 3.
6. Donald S. Lutz and Jack D. Warren, *A Covenanted People: The Religious Origins of American Constitutionalism* (Providence, RI: John Carter Brown Library, 1987), introduction.
7. Ronald Reagan, "200th Anniversary of the Signing of the Constitution," *Vital Speeches of the Day*, 3.
8. Ibid. (emphasis added).
9. Geoffrey R. Lilburne, "Theology and Land-Use: Moving Toward A Christian Land-Care Ethic," *Vital Speeches of the Day* 53, no. 5 (December 15, 1986), 141.
10. Ibid. (emphasis added).
11. Lawrence B. Evans, ed., *Writings of George Washington* (New York: G. P. Putnam's Sons, 1908), 498.
12. Ibid., 501.
13. Peter DeVos, Calvin DeWitt, Eugene Dykema, and Vernon Ehlers, *Earth Keeping in the '90s: Christian Stewardship of Natural Resources*, ed. Loren Wilkinson (Grand Rapids, MI: Wm B. Eerdmans Publishing Co., 1980), 286–87.
14. Rousas John Rushdoony, *The Institutes of Biblical Law* (Nutley, NJ: Craig Press, 1973), 3–4.
15. Andrew W. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Univ. of Toronto Press, 1990), 5.

16. Cherry, *God's New Israel*, 26–27.
17. However, to his credit, Francis Jennings made the comment regarding the conception of Indians as "savages": "To invade and dispossess the people of an unoffending civilized country would violate morality and transgress the principles of international law, but savages were exceptional. Being uncivilized by definition, they were outside the sanctions of both morality and law. The condition of savagery therefore involved more than aesthetic sensibilities, and *the chief justice [Marshall] of a country espousing separating church and state could show now official concern about Indians' lack of Christianity as criterion [of their] legal status [in the United States].*" (Jennings, 60). (emphasis added).
18. Oliver Wendell Holmes Jr., "The Path of Law," 10 *Harvard Law Review* 457 (1897): 7. Available at www.constitution.org/lrev/owh/path_law.htm.

Chapter 6: The Dominating Mentality of Christendom

1. See John Boag, *The Imperial Lexicon of the English Language, Exhibiting the Pronunciation, Etymology, and Explanation of Every Single Word Usually Employed in Science, Literature, and Art*, vol. 1 (Edinburgh: A. Fullarton and Co., 1860), 428. "Dom, düm, used as a termination, denotes jurisdiction, or property and jurisdiction; primarily *doom*, judgment; as in king*dom*." On page 429, under "DOOM," we find, "[Sax. *dom*,] v. t. To judge Unusual. To condemn to any punishment, to consign by a decree or sentence. To pronounce sentence or judgment on. To command authoritatively. To destine; to fix irrevocably the fate or direction of. To condemn, or to punish by penalty.—n. Judgment; judicial sentence. Condemnation; sentence; decree; determination affecting the fate or future of another; *usually* a determination to inflict evil, sometimes otherwise. The state to which one is doomed or destined. Ruin; destruction."
2. Francis Lieber, *On Civil Liberty and Self-Government* (Philadelphia: J. B. Lippencott and Co., 1859), 37–38. "The German language has but one word for our Freedom and Liberty, namely, Freiheit [freehood]; and Freithum (literally freedom) means, in some portions of Germany, an estate of a Freiherr (baron)." Speaking of feudal systems, the eminent legal scholar Felix Cohen said that Chief Justice Marshall's decision in *Johnson* was written in such a way that "the needs of feudal land tenure theory were fully respected." This suggests that the term *dominion* in the *Johnson* ruling should also be interpreted in keeping with its application in feudal law theory, the overall context of which is monarchy.
3. See generally Robert A. Williams, *The American Indian in Western*

Legal Thought (New York: Oxford Univ. Press, 1990).

4. *Webster's Third New World International Dictionary*, s.v. "imperial."
5. Ibid., s.v. "Christendom."
6. Ibid., s.v. "prevail." One example of the word *prevail* is found in the term *prevailment*, which refers to 'power to prevail or dominate: VICTORY.'
7. *Johnson* at 577.
8. National Columbus Celebration Association, "The National Columbus Memorial and Fountain," 1, www.columbuscelebration.org/memorial.htm.
9. See generally Ewart Lewis, *Medieval Political Ideas*, vol. 1 (London: Routledge and Kegan Paul, 1954). For an insightful understanding of feudalism in the Middle Ages, see generally Marc Bloch, *Feudal Society*, vol. 1, "The Growth of Ties of Dependence," trans. L. A. Manyon (Univ. of Chicago Press, 1974).
10. Peter L. Berger, *The Sacred Canopy*: *Elements of a Sociological Theory of Religion* (Garden City, NY: Doubleday, 1967), 3.
11. National Columbus Celebration Association, "The Faith of Columbus the Evangelizer," 1, www.Columbuscelebration.org/Articles/evangelizer.htm.
12. "Zion Holy Mountain of God—Lady Virgin Mary," www.theworkofgod.org/ZION.htm.
13. Ibid.
14. Ibid.
15. B. A. Hinsdale, *The Discovery of America: A Commemoration Address Delivered in University Hall, October 21, 1892* (Ann Arbor: Univ. of Michigan, 1892), 26–27.
16. Ibid., 27. "At the close of the fifteenth century, the line separating believers and infidels was sharply drawn, and the idea that the true religion can be propagated only by persuasion still lay below the spiritual horizon of men. In the long struggle between the Cross and the Crescent, the Spanish temper had been whetted to the sharpest edge. Ecclesiastics taught that America was the new Land of Promise, and that Christians adventuring into it might emulate Israel under the lead of Joshua."
17. "The Columbus Doors: A History," 1, http://xroads.virginia.edu/~CAP/COLUMBUS/colhome.html.
18. Ibid. (emphasis added).
19. See generally Williams, *Empire as Way of Life*.
20. Walter Lowrie and Matthew St. Clair Clarke, eds., *American State Papers*: Foreign Relations, vol. 3 (Washington, DC: Gale and Seaton, 1832), 719. Available at the Library of Congress website, http://memory.loc.gov/ammem/amlaw/lwsp.html. The passage cited reads: "The United

States, while intending never to acquire lands from the Indians otherwise than peaceably, and with their free consent, are fully determined, in that manner, progressively, and in proportion as their growing population may require, to reclaim from the state of nature, and to bring into cultivation every portion of the territory contained within their acknowledged boundaries. In thus providing for the support of millions of civilized beings, they will not violate any dictate of justice or of humanity; for they will not only give to the few thousand savages scattered over that territory an ample equivalent for any right they may surrender, but will always leave them the possession of lands more than they can cultivate, and more than adequate to their subsistence, comfort, and enjoyment, by cultivation. If this be a spirit of aggrandizement, the undersigned are prepared to admit, in that sense, its existence; but they must deny that it affords the slightest proof of an intention not to respect the boundaries between them and European nations, or of a desire to encroach upon the territories of Great Britain."

21. Koning, *Columbus*, 85–87.
22. Howard Zinn, "Columbus and Western Civilization," www.geocities.com/Howardzinnfans/Cday.html. See also John Dyson, *Columbus: For Gold, God, and Glory* (New York: Simon and Schuster, 1991), 161. "Then, erecting a Holy Cross and gallows as symbols of faith and justice, and cutting a handful of grass to represent his taking control of the land, Columbus formally claimed it in the name of the Queen of Castile and named it San Salvador (Holy Savior)."
23. Bartolomé de Las Casas, *Account of Destruction,* 9–10.
24. National Columbus Celebration Association, "The faith of Columbus the Evangelizer" (preamble to the bylaws of the National Columbus Celebration Assocation), www.columbuscelebration.org/Articles/evangelizer.htm. (emphasis added).
25. Paolo Emilio Taviani, *Christopher Columbus: The Grand Design* (London: Orbis, 1985), 314.
26. Ibid., 316.
27. West and Kling, trans., *Libro de Las Profecías*, 2. West and Kling used the Latin Vulgate Version of the Bible and the Douay-Rheims Bible to translate Columbus's favorite biblical passages from his *Libro de Las Profecias*. As they point out, "The vocabulary and style of the translation have been patterned after the Douay Version of the Bible because it presents to contemporary readers an impression nearest in English to that of the Vulgate [Bible] in the time of Columbus." (96).
28. Ibid., 117, citing Psalms 46:2–4, 9 (AV).
29. West and Kling, trans., *Libro de Las Profecías*, 45.

30. Ibid.
31. Ibid, 129.
32. Another of Columbus's favorite biblical passages that is reflective of the dominating mentality of Christendom is Ps. 22:27–28: "All the ends of the earth shall remember, and shall be converted to the Lord: And all the kindreds of the Gentiles shall adore his sight. For the kingdom is the Lord's; and he shall have dominion over the [Gentile] nations"(AV).
33. *Johnson* at 577.
34. Steven T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power," *N.Y.U. Review of Law and Social Change* 20 (1993): 306.
35. West and Kling, trans., *Libro de Las Profecias*, 128. The Latin text of Ps. 128:4 reads "*Dominus iustus concidet cervices peccatorum*."
36. Deut. 7:6 (AV). (emphasis added).
37. Edmunds, *Lawless Law of Nations*, 4–5.
38. *Webster's Third New International Dictionary*, s.v. "super."
39. United Nations Economic and Social Council (ECOSOC), E/CN.4 /GR.1987/7/Add.12 of 30 September 1987 (a hearing by the Human Rights Commission regarding a complaint made on behalf of the Hopi people against the United States), 18–20.
40. Ibid., 19.
41. John C. Hodges, Mary E. Whitten, Winifred B. Horner, and Suzanne S. Webb, *Hodges' Harbrace Handbook*, 14th ed. (Boston: Heinle and Heinle, 2001), 158.
42. United Nations ECOSOC document, 19.
43. Ibid.
44. See Morris, "Vine Deloria Jr. and Development," 103–5.
45. Michel Foucault, *Discipline and Punishment*, 2nd ed., trans. Alan Sheridan (Vintage Books, 1995), 103.
46. United Nations ECOSOC document, 19–20.

Chapter 7: *Johnson v. M'Intosh*

1. *Johnson* at 548–56.
2. Ibid. at 560.
3. Ibid.
4. Ibid. at 563.
5. Eric Kades, "History and Interpretation of the Grand Case of *Johnson v. M'Intosh*," *Law and History Review* 19, no. 1 (Spring 2001): 99–100, http://historycooperative.press.uiuc.edu/journals/lhr/m19.1/kades.html at 92.

6. Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford Univ. Press, 2005), 61.
7. Ibid., 29–36. For an explanation of the fraud behind the case *Fletcher v. Peck* 10 U.S. (6 Cranch) 87 (1810), see Albert J. Beveridge, *The Life of John Marshall*, vol. 3 (Boston: Houghton Mifflin, 1919), 546–602.
8. Ibid., 62–63.
9. Ibid., 64.
10. *Johnson* at 572.
11. Ibid. (emphasis added).
12. Ibid.
13. Ibid. (emphasis added).
14. Ibid.
15. *Johnson* at 572–73.
16. Ibid. at 573. My use of the term *appetite* in reference to colonization employs the conceptual metaphor COLONIZATION IS EATING.
17. Lakoff and Johnson, *Metaphors We Live By*, 16.
18. *Cornet v. Winton,* 2 Yerg. (1826), at 152–53. (Judge Haywood's opinion) (emphasis added).
19. *Johnson* at 573.
20. Ibid. This mention of "unlimited independence" is synonymous with Marshall's previous mention of "perfect independence" attributed to "civilized nations."
21. David Carney, *All about Myth* (New York: Adastra, 1990), 1–2. Carney noticed that this same sentiment was historically manifested in the Christian European colonization of Africa. He referred to this as "a forced exchange of land for the Christian religion" and remarked that this "was hardly a fair or acceptable commercial exchange or a manifestation of Christian love." In his estimation, it was nothing other than "hypocrisy."
22. *Johnson* at 573.
23. Ibid. (emphasis added).
24. Ibid.
25. Story, *Commentaries on the Constitution*, bk. 1, chap. 1, sec. 5.
26. Davenport, ed., *European Treaties*, 77.
27. Ibid., 23.
28. Story, *Commentaries on the Constitution*, sec. 6. (emphasis added).
29. Ibid. (emphasis added).
30. *Johnson* at 576. (Marshall's italics).
31. *Johnson* at 576–77. (emphasis added).
32. Thomas Hobbes, *Leviathan*, chap. 15, 81.

Chapter 8: Converting Christian Discovery into Heathen Conquest

1. *Johnson* at 574. (emphasis added).
2. Story, *Commentaries on the Constitution*, sec. 153, 136–37. "For many purposes, they [the Indians] were treated as independent communities, at liberty to govern themselves; so always that they did not interfere with the paramount rights of the European discoverers."
3. See generally Felix Cohen, "Original Indian Title," *Minnesota Law Review* 32 (1942): 28–59.
4. *Johnson* at 579.
5. *Johnson* at 574.
6. *Johnson* at 577.
7. *Johnson* at 574.
8. Ibid.
9. Maine, *International Law*, 69–87. "The acquisition by a State of unappropriated territory, has been much influenced by the Roman Law. What takes place may still be described by the Roman phrase *occupatio*. The fundamental rule is the same in the original and in the derivative system. In order that new lands may be appropriated, there must be physical contact with them, or physical contact resumable at pleasure, coupled with an intention to hold them as your own." (69). See Maine's discussion at 71–74 of the "question as to the degree in which the occupation of new land by a savage or barbarous tribe would bar occupation by civilised settlers … " "There is no doubt," stated Maine, "that international practice started with the assumption that the native indigenous title might be neglected on the ground that the inhabitants found in the discovered countries were heathens." He also pointed out, however, that discovery had to be accompanied by formal acts of possession on the part of the discoverer.
10. *Johnson* at 588.
11. Along these lines, Joseph Story used the phrase *temporary and fugitive purposes* to refer to Indians' possession of the land. Story, *Commentaries on the Constitution*, 35–36. Francis Jennings notes that after the Indian uprising against the English in 1622, English colonist Samuel Purchas's "chief pronouncement was that the Indians had become 'Outlawes of Humanity," which, of course, implies a "fugitive status" for the Indians. (Jennings, 81). This formulation also suggests that the Indians existed "outside" or beyond the constraints of English or Christian law.
12. *Johnson* at 573.
13. *Johnson* at 574.
14. *Johnson* at 573.

15. Lakoff and Johnson, *Philosophy in Flesh*, 178–96.
16. Ibid., 196–202.
17. *Johnson* at 587. "The United States, then, have unequivocally acceded to that great and broad rule [of discovery] by which its civilized inhabitants now hold this country. 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." Here Marshall used the word *sovereignty* in lieu of the synonymous term *dominion*. See also Cohen, "Original Indian Title," 28–59. At no time does Cohen mention a view that in the opinion of the U.S. government, the Indians were presumed to have a right of dominion that would exclude Christian European powers from their lands.
18. *Johnson* at 587.
19. Lakoff and Johnson, *Metaphors We Live By*, 33–34.
20. *Johnson* at 587–88.
21. *Johnson* at 579.
22. *Johnson* at 585.
23. *Johnson* at 588.
24. *Johnson* at 584.
25. *Johnson* at 588.
26. Ibid.
27. Winter, *Clearing in the Forest*, 9. According to the standard rationalist model, "Categories are organized in terms of the common properties that are the necessary and sufficient criteria of [category] membership."
28. Ibid., 62–64.
29. Ibid.
30. *Johnson* at 588.
31. *Johnson* at 588–89.
32. *Johnson* at 589.
33. Ibid.
34. *Johnson* at 589–90.
35. *Johnson* at 590. (emphasis added).
36. Ibid.
37. *Johnson* at 591.
38. Ibid.
39. Ibid.
40. Ibid. (emphasis added).
41. Ibid. (emphasis added).

42. Ibid. (emphasis added).
43. *Webster's Third International Dictionary*, s.v. "pretension."
44. Ibid., s.v. "pretense."
45. *Johnson* at 591.

Chapter 9: The Mental Process of Negation

1. The term *heathen* is 'applied to persons or races whose religion is neither Christian, Jewish, nor Moslem.' *Oxford English Dictionary*, 2nd ed., 1989, 75. The term *neither* is derived from the Middle English term '*neither* or *naither*, not either of two.' *Webster's Third International Dictionary*, 1514. *Heathen*, in other words, means not Christian, not Jewish, and not Moslem.
2. *Webster's Third New International Dictionary*, s.v. "negate" and "negation."
3. *Johnson* at 574.
4. James Truslow Adams, *The Founding of New England* (New York: Atlantic Monthly Press, 1930), 41–42.
5. *Webster's Third New International Dictionary*, s.v. "null," s.v. "void."
6. Francis Jennings, *Invasion of America*: *Indians, Colonialism, and the Cant of Conquest* (New York: W. W. Norton and Co.), 82.
7. B. A. Hinsdale, "The Right of Discovery," *Ohio Archæological and Historical Quarterly* 2, no. 3 (December 1888): 363.
8. Ibid., 363–64.
9. Ibid., 363.
10. Ibid.
11. *Johnson* at 574.
12. Hinsdale, "Right of Discovery," 363.
13. Nowhere in the *Johnson* ruling does the Court suggest that the Indian possessed dominion over their lands that was capable of excluding or barring European claims of dominion.
14. Hinsdale, "Right of Discovery," 363–64.
15. Ibid., 367.
16. Ibid., 364.
17. Ibid.
18. Ibid. (emphasis added).
19. Ibid., 364–65.
20. Ibid., 365.
21. Ibid.
22. Ibid.
23. James Brown Scott, *The Catholic Conception of International Law:*

Francisco de Vitoria, Founder of the Modern Law of Nations, Francisco Suárez, Founder of the Modern Philosophy of Law in General and in Particular of the Law of Nations (Washington, DC: Georgetown Univ. Press, 1990), foreword, vii. "The Seventh International Conference of American States, *Resolves*: To recommend that a bust of the Spanish Theologian, Francisco de Vitoria, be placed in the headquarters of the Pan American Union, in Washington, as a tribute to the professor of Salamanca who, in the sixteenth century, established the foundations of modern international law."

24. Ibid., 487. With regard to "Title by Discovery," Vitoria said: "… the barbarians were the true owners, both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant, as is expressly laid down in the aforementioned passage of the *Institutes*. And so, as the object in question [the lands of the Americas] was not without an owner, it does not fall under the title we are discussing." Vitoria therefore concluded that the title of discovery "gives no support to a seizure of aborigines any more than if it had been they who had discovered us." (De Indis, sec. 2). Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington, 1842* (Buffalo, NY: William S. Hein Co., 1982), 34–35. "The *Relecciones Theologicae* of Francis de Vitoria is a book which has become remarkably scarce, although it passed through at least six editions, from the first edition published at Lyons in 1557, to the latest published at Venice in 1626 …. The fifth Relection enumerates the various titles by which the Spanish assumptions of sovereignty over the new world and its inhabitants had been vindicated. The author asserts the natural right of the Indians to *dominion* over their own property and to sovereignty over their own country. He denies the assertion of Bartolus and the other civilians of the school of Bologna that 'the emperor is lord of the whole world,' or that the pope could confer dominion over those parts inhabited by infidel barbarians." (emphasis added).

25. *Johnson* at 596. For a religious explanation of this lack of a distinction between "vacant lands" and "lands inhabited by Indians," see Benjamin Munn Ziegler, *The International Law of John Marshall: A Study of First Principles* (Chapel Hill: The University of North Carolina Press, 1939), 44: "One of the oldest means by which nations have acquired territory has been through the discovery of previously unoccupied lands." In an accompanying note, Ziegler commented: "The term 'unoccupied lands' refers of course to the lands in America which when discovered

were 'occupied by the Indians' but 'unoccupied by Christians'."

26. Francis Lieber, *Contributions to Political Science: Including Lectures on the Constitution of the United States and Other Papers*, vol. 2 of Leiber's Miscellaneous Writings (Philadelphia: J. B. Lippencott and Co., 1881), 22–25.
27. The bull *Sublimis Deus*, issued by Pope Paul III in 1537, declared Indians to be "truly human," that they should not be enslaved, and that they should be protected in their property. However, from the perspective of the papacy and the Spanish crown, this was considered true *within the dominion* and sovereignty of the Spanish empire. Interpreted within this context, the Indians were to be "free" beneath and within whatever odious constraints were coercively imposed upon them by the Spanish crown and the Catholic Church.
28. William Galbraith Miller, *Lectures on the Philosophy of Law, Designed Mainly as an Introduction to the Study of International Law* (London: Charles Griffin and Co., 1884), 404.
29. *Johnson* at 574. "While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves." This clearly distinguishes between a "native," or what Marshall referred to elsewhere as "heathen," occupancy and Christian European "dominion." See also Wheaton, *Elements of International Law*, 3rd ed., 210.
30. Wheaton, for example, said that he had endeavored in his *Elements of International Law* "to trace the origin and progress of those rules of international justice so long acknowledged to exist, and which have been more or less perfectly observed by the Christian nations of modern Europe." (Preface to Wheaton's 3rd ed., xv). See also Theodore D. Woolsey, *Introduction to the Study of International Law*, 5th ed. (New York: Charles Scribner's Sons, 1879), 3. "[W]e define international law to be the aggregate of the rules which Christian states acknowledge, as obligatory in their relations to each other, and to each other's subjects. The rules also which they unite to impose on their subjects, respectively, for the treatment of one another, are included here, as being in the end the rules of action for the states themselves. Here notice: 1. That as Christian states are now controllers of opinion among men, their views of law have begun to spread beyond the bounds of Christendom, as into Turkey, China, and Japan. 2. That the definition cannot justly be widened to include the law which governs Christian states in their intercourse with savage or half-civilised tribes; or even with nations on a higher level, but lying outside of their forms of civilization." See also James Lorimer, *The Institutes of*

the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities (Edinburgh: William Blackwood and Sons, 1883–84), 113. He observes that in international law "[p]lenary political recognition has hitherto obtained only between Christian nations." This full (plenary) political recognition entailed full rights of political dominion over territory, which Vattel terms rights of "empire" and "domain." Emmerich de Vattel, *The Law of Nations; or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, ed. Joseph Chitty (Philadelphia: T & J. W. Johnson Co., Law Booksellers, 1859), 97–98.

31. *Johnson* at 574.
32. Ibid.
33. *Johnson* at 576–78.
34. According to Joseph Story, the colonizing nations of Europe "claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession [of lands] by, the Indian natives, but as a right acquired by discovery." Story, *Commentaries on the Constitution*, 135–36. Story also cited Marshall as having said in the *Johnson* ruling, "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 [Indian] right [of occupancy]. This is incompatible with an absolute and complete title in the Indians." Story, *Commentaries on the Constitution*, sec. 38. "The right of the State to its public property or domain," said Wheaton, "is *absolute*, and excludes that of its own subjects as well as other nations." (*Elements of International Law*, 3rd. ed., 208)(emphasis added). Thus, in keeping with this view, to say that the Indians did not have "an absolute and complete title" to their lands was equivalent to saying that they did not have a right of dominion that would be able to exclude Christian European claims to grant away their lands.
35. Story, *Commentaries on the Constitution,* 136–37. The term *paramount* is derived in part from the Latin *amont*, 'above,' and *mont*, 'mountain.' Accordingly, the first definition listed for the term is 'having a higher or the highest rank or authority.' The second listing is 'superior to all others as in power, position, or importance.' Returning to the concept of *lord* (dominus), under "paramount" we find 'a lord paramount: a supreme proprietor or ruler.' *Webster's Third New International Dictionary*, s.v. "paramount."
36. *Webster's Third New International Dictionary*, s.v. "apprehend," s.v. "prehensile."
37. Winter, *Clearing in the Forest*, 52.

38. Ibid.
39. *Webster's Third New International Dictionary,* s.v. "apprehend."
40. Ibid.
41. Story, *Commentaries on the Constitution*, 135. "The territory over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals."
42. *Cherokee Nation v. Georgia* at 17. (emphasis added).
43. James Axtell, *The European and the Indian: Essays in the Ethnohistory of Colonial North America* (New York: Oxford Univ. Press, 1981), 45–46.

Chapter 10: Christian Nations Theory: Hidden in Plain Sight

1. Stephen L. Pevar, *The Rights of Indians and Tribes: The Basic ACLU Guide to Indian Tribal Rights*, 2nd ed., American Civil Liberties Union (Carbondale and Edwardsville: Southern Illinois Univ. Press, 1992), 47.
2. Ibid.
3. Ibid., and note 1 at 71.
4. Ibid., 48.
5. Ibid.
6. Ibid.; *Tee Hit Ton Indians v. United States*, 348 U.S. 272, 279 (1955).
7. Ibid., and note 5 at 71.
8. *State v. Foreman*, 16 Tenn. (8 Yer.) 256, 277 (1835).
9. William Draper Lewis, ed., *Great American Lawyers: The Lives and Influence of Judges and Lawyers Who Have Acquired Permanent National Reputation, and Have Developed the Jurisprudence of the United States*, vol. 4 (Philadelphia: John C. Winston Co., 1908), 241–76.
10. *State v. Foreman* at 277. (emphasis added).
11. *Tee Hit Ton* at 272.
12. Ibid. at 279.
13. Use of the term *conquest* here does not suggest that this author concurs with the view that Indian nations were conquered or that conquest occurred. The intention is to simply reiterate what the Court said.
14. See note 7 of conclusion (below).
15. *Tee Hit Ton* at 279. (emphasis added).
16. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 57, (1946).
17. Ibid. at 58.
18. Ibid. (emphasis added).
19. Wheaton, *Elements of International Law*, 3rd ed., 209.
20. Ibid., 210.

21. Ibid., 210–11. (emphasis added).
22. Ibid., 211.
23. *Tee Hit Ton* at 279. (emphasis added).
24. Nell Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *The Hastings Law Journal* 31 (July 1980): 1215–85. (Newton neglected to mention Justice Reed's synopsis of the *Johnson* ruling, to wit, "discovery by Christian nations gave them sovereignty over and title to the lands discovered.")

Conclusion

1. Vine Deloria Jr., "Conquest Masquerading as Law," in *Unlearning the Language of Conquest*: *Scholars Expose Anti-Indianism in America*, ed. Wahinkpe Topa (Four Arrows), aka Don Trent Jacobs (Austin: Univ. of Texas Press, 2006), 96.
2. Davenport, ed., *European Treaties*, 75–78.
3. Ibid., 77. "We of our own accord, … and out of the fullness of our apostolic power, by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do … give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered. … With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered … be in the actual possession of any Christian king or prince."
4. Ibid.
5. Ibid., 76. Davenport translates the Latin *deprimantur* into the English 'overthrown.' Thus it is the pope's expressed desire "that barbarous nations be overthrown and brought to the faith itself." John Boyd Thacher, however, in *Christopher Columbus: His Life, His Works, His Remains* (London: G. P. Putnam's Sons, 1903), 141, translates this line as "that barbarous nations [be] subjugated and brought to the faith itself." All this was to being done, declared Pope Alexander VI, for "the propagation of the Christian Empire," or, in Latin, "*imperii Christiani propagationem*."
6. John Locke, *Two Treatises of Government*, 2nd ed., ed. Peter Laslett (New York: Cambridge Univ. Press, 1970), 287, stating that because we are all "Creatures of the same species and rank" only such a manifest declaration of the Master's will can create an "Undoubted Right to Dominion and Sovereignty."

7. *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978). For an excellent explanation of *Oliphant* and its relation to the doctrine of discovery, *Tee Hit Ton*, the *Johnson* v. *M'Intosh* ruling, and a number of other important cases, see Robert A. Williams Jr.'s book *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005), 97–122.
8. Williams, *Like a Loaded Weapon*, 98–99. In an illustration of the UP-DOWN and CONTAINER schemas and the metaphor INSIDE OF IS UNDER THE JURISDICTION OF, in *Oliphant* Rehnquist wrote: "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." Notice too that this passage employs the metaphors ACTIONS ARE MOTIONS and CONSTRAINTS ON ACTION ARE CONSTRAINTS ON MOTION.
9. *Nevada v. Hicks*, 533 U.S. 353 (2001).
10. Ibid. The filings of plaintiff, defense, and amicus states are available online at FindLaw.com, http://supreme.lp.findlaw.com/supreme.court/docket/2000/mardocket.htm #99-1994.
11. Mark Johnson, "Law Incarnate," *Brooklyn Law Review* 67, no.4 (2002): 962.
12. Deloria, "Conquest Masquerading as Law," 96.
13. Wheaton, *Elements of International Law*, 3d ed., 74. "A weak power does not surrender its independence and right to self-government by associating with a stronger and taking its protection."
14. Deloria, "Conquest Masquerading as Law," 96. The most recent instance in which the U.S. Supreme Court has cited the doctrine of discovery is the very first endnote in Justice Ginsberg's decision in the case *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). "Under the "doctrine of discovery," *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 234 (1985) *(Oneida II),* "fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States." *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 667 (1974) *(Oneida I).*
15. Ibid., 96–97.
16. Morris, "Vine Deloria Jr. and Development," 97; 143, note 86. Morris cites David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States Rights, Color-Blind Justice and Mainstream Values*,

and says that "Getches exposes the astounding statistic that, the past ten terms of the Rehnquist Supreme Court, indigenous interests have lost 82 percent of their cases. Getches concludes that this record of defeats is the worst of any litigant group appearing before the Supreme Court, even worse than that of incarcerated criminals seeking reversal of their convictions."

17. Harvey Arden, *Noble Red Man: Lakota Wisdomkeeper Matthew King* (Hillsborough, OR: Beyond Words Publishing, 1994), 82.
18. For an excellent treatment of indigenous decolonization, see Taiaiake Alfred's book *Peace, Power, Righteousness*: *An Indigenous Manifesto* (Don Mills, ON: Oxford Univ. Press, 1999).
19. Winter, *Clearing in the Forest*, 332–57.
20. Ibid.
21. Johnson, "Law Incarnate," 951.
22. Quoted in James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven, CT: Yale Univ. Press, 1990), 49.
23. Van Alstyne, *Rising American Empire*, 1–27.
24. Richard W. Van Alstyne, *Genesis of American Nationalism* (Waltham, MA: Blaisdell Publishing Co., 1970), 3.
25. Ibid., 58–59.
26. Chalmers Johnson, *The Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (New York: Henry Holt, 2004), 154. This number does not include the additional U.S. military bases recently built in Iraq or the U.S. Embassy in Iraq, which is said to be the size of Vatican City.
27. See *Loughborough v. Blake*, 18 U.S. 5 Wheat. 317 (1820) and *Downes v. Bidwell*, 182 U.S. 244 (1901).
28. The Project for the New American Century, "Rebuilding America's Defenses: Strategies, Forces and Resources for a New Century" (Washington, DC: Project for the New American Century, 2001). Available at www.newamericancentury.org/RebuildingAmericasDefenses.pdf. This quote is found on the page that directly follows the title page.
29. Ibid., i.
30. Ibid., 50.
31. Ibid.
32. Ibid., 51. (emphasis added).
33. Gary Younge, "Bush is now the embarrassing uncle the Republicans just can't hide," *The Guardian*, August 20, 2007. Available online at www.guardian.co.uk/Columnists/Column/0,,2152378,00.html.
34. Johnson, *Sorrows of Empire*, 15.
35. Keith Olbermann, "The Beginning of the End for America: Olbermann

addresses the Military Commissions Act in a special comment," October 19, 2006. www.msnbc.msn.com/Id/15321167/from/ET/.

36. Steven T. Newcomb, "Bush's Unprecedented Power: Will Congress Reverse This Dangerous Trend?" *Indian Country Today*, November 17, 2006, www.indiancountry.com/content.cfm?id=1096414017; See "National Security Presidential Directive/NSPD-51, Homeland Security Presidential Directive/HSPD-20," signed by President George W. Bush on May 9, 2007, http://whitehouse.gov/news/releases/2007/0509-12.html. Thomas Jefferson School of Law professor Marjorie Cohn has written that "The National Security and Homeland Security Directive, signed on May 9, 2007, would place all governmental power in the hands of the President and effectively abolish the checks and balances in the Constitution." "Don't We Have a Constitution, Not a King?," www.alternet.org/story/52801.
37. Schaaf, *Wampum Belts*, 3.
38. Ibid.
39. This quote was published on the back of a booklet published by the National Service Points of Life Foundation. See *The Honor of Giving: National Grantmaking and Philanthropy in Indian Country*, Wingspread, June 23–25, 2002 (on file with the author).

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www.ienearth.org

Indigenous Law Institute
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International Indian Treaty Council
http://treatycouncil.org

Nativeweb
www.nativeweb.org

Seventh Generation Fund
www.7genfund.org

Western Shoshone Defense Project
www.wsdp.org

Writings by C. A. Bowers
www.c-a-bowers.com

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