Property Rights Claims of Indigenous Populations: The View from the Common Law

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I. A PERPETUAL PROBLEM

THE topic of this evening’s talk is the property rights of indigenous populations. At first blush, it seems imprudent to approach this topic without a detailed knowledge of the particulars of indigenous cultures. Yet my initial disclaimer is that any such localized knowledge is beyond my ken. Fortunately, however, a second way in which to approach the topic treats it as yet another arena in which to test general conceptions of property rights as they have developed under both the Roman and common law systems. The mission is to determine whether these principles, which were born and nourished in quite alien terrain, offer some guidance in understanding a set of interactions that took place under very different historical circumstances.

Pursuing this course of action is not offered as a simple exercise in apologetics for a dominant culture. The operative rules of Western legal systems (both Roman and common law) are phrased in both general and neutral terms. As with other neutral principles, these general propositions can, so to speak, come back to bite the hand that feeds them. That reversal of fortune can happen even with neutral principles adopted for partisan reasons. Foresight is imperfect, and some groups can often prevail under rules that were adopted with the view of advancing the interests and purposes of other groups, including their rivals. The requirement of neutrality does not fully constrain opportunism within the legal realm. But, it does crimp the style of those who might otherwise yield to legal temptation.

With that caveat in mind, the lesson I hope you take away from this exercise is that we need relatively few strong principles to understand the organization of political and legal systems. Correctly understood, these insights about property rights travel well between cultures whose internal practices diverge in important

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ways from each other. I regard this message as optimistic in an area that is torn by conflict, for it holds out the possibility of agreeing on a conceptual framework that might allow for the resolution of long-simmering disputes.

The treatment of indigenous property rights has enormous salience today. The arduous migration of peoples in search of better living conditions has often led to a clash of cultures. Sometimes culture clashes result in successful adjustments; sometimes in uneasy accommodations; and sometimes in outright violence. The issue of indigenous property rights is of obvious importance in the United States, given the interactions between the white settlers and—here the choice of words becomes critical—the Indian tribes (as they were described in the commerce clause) or, Native American tribes. The issue is, to say the least, also very critical to domestic politics in Canada, in Hawaii (given its separate origins and late annexation in the United States), in Australia, in South Africa, and in New Zealand where I lectured about this topic just recently.

Why does this topic have such urgency? It is not because of any distinctive modern twist. Quite the contrary, it is a perpetual problem. Similar conflicts, whose details are lost to recorded history, surely occurred more than 500 years ago in North America before the European discovery of America. The dynamic of indigenous rights conflicts needs only two self-evident truths to move into high gear. First, land is immobile. Second, people are mobile. Those two brute facts create two distinct scenarios. First, people manage to stumble into unoccupied territory, thereby raising no immediate conflict between separate tribes or kin groups. Or, alternatively, distinct tribes or groups will arrive in desired places that are already inhabited. The burning issue is to resolve the tension between the early and late arrivals.

Unfortunately, there are good reasons to expect frequent close encounters of the second kind. Generally speaking, primitive tribes (or for that matter, their modern equivalents) will seek out those lands that are most fertile, most arable, and most suitable for hunting and (later on) to farming. Ancient peoples (as rational calculators) often would rather brave the risk of fighting a locally-entrenched population than try to tame some inhospitable territory where their claims would be unchallenged, but which leave them as sole proprietors of places from which they could not eke out the means of sustenance. Once these conflicts arise, the somber historical truth is that the perceived necessities usually dominate immediate actions. Philosophical reflection is reserved for a later date, after decisive, often irreversible, and sometimes fatal steps have been taken.

Exile and extermination are not easily justified, nor are they quickly forgotten by the losers. Where the punishments are harsh, the resentments are deep; these resentments will surely come back to haunt deliberations at some later date when the past necessities look a bit less compelling even to the parties who used (and use) them to justify their actions. But, other times the scenario offers more than a ray of hope. A new population arrives, and instead of engaging in conquest, it engages in negotiation with the local populations. In some cases you got implicit understandings, and in other cases, for example, in New Zealand, full scale

1. "Congress shall have the power to regulate . . . commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.
negotiations complete with ratification proceedings took place. The upshot was the Treaty of Waitangi, signed on the New Zealand’s North Island in February of 1840. It is difficult to overestimate the importance of the treaty to the subsequent historical, cultural, and constitutional development of New Zealand. It can be rightly understood as New Zealand’s most important founding document. It represents the effort to substitute negotiation for conquest, and it is useful to contrast the Treaty (and its key provisions) with other approaches to indigenous populations.

II. THE TENSION BETWEEN CONQUEST AND FIRST POSSESSION

I shall return to the Treaty in due course. By way of contrast, it is instructive to look back to examine some Roman materials that treat the law of conquest in close juxtaposition with the law of occupation. The connection is not entirely fortuitous, for primitive and ancient cultures alike spend a huge amount of intellectual energy addressing the question: how it is any person, or any tribe, comes to own property in any land or chattel? The time and energy devoted to the refinement of these first principles is far greater than it is in contemporary civilizations, where the stability of possession is regarded as a given on all sides. The contrast is evident if you ask what it is that property lawyers today do for a living. On their plate are the traditional questions of how land is conveyed, leased and mortgaged; but, it is also the group of lawyers that deal with zoning, tax increment financing, condominiums, planned unit developments, anti-growth ordinances, and regulatory takings. The matters pertain to finance, use, and regulation, not original acquisition.

These complex topics do not resonate with anyone who studies earlier systems of property law. Land use regulation occupied a small corner of the field. Roman law, medieval English law, and continental law all had to pay far more attention to initial and adverse possession, given the instability characteristic of so many societies before (and even in) modern times. Developing the right rules on relative title was no small matter, and that problem occupied the best minds of the day. To put the point in another way, our tendency today is to think about property as a subject of private law, where it is inextricably linked with commerce and trade. But, from the vantage point of Roman or medieval lawyers, property, sovereignty, territory, and government were very much intertwined. Ownership had a powerful political dimension that placed it at the heart of public law.

With that said, the Romans adopted the naive rule for property, which they regarded as “unowned” in the state of nature. Whatever the nagging philosophical doubts of subsequent generations, to the ancient lawyer, anyone who got there first

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3. See, e.g., INSTITUTES OF GAIUS § 66, at 83 (Francis De Zulueta, trans., Clarendon Press 2d ed. 1958) (1946) [hereinafter GAIUS], which talks first about the acquisition of property by occupation, which is sanctioned by natural law, and then addresses the analogous question of capture from the enemy thusly: "By natural law also things captured from the enemy become ours." Id. § 69.
4. See DAVID HUME, A TREATISE OF HUMAN NATURE 502 (L.A. Selby-Bigge ed., 2d ed. 1978) (1740)) (“It follows, therefore, that the general rule, that possession must be stable, is not apply’d by particular judgments, but by other general rules, which must extend to the whole society . . . .”).
had title by occupation. Subsequent takers could not challenge the legitimacy of their title. The same rules applied to wild animals under the rubric of the law of capture. The Romans adopted this rule, but in its defense, typically offered only the congenial if empty explanation, that treated the rule as one of natural reason—as if there were some logical necessity instead of some practical reason for its adoption. Since the initial possessor is in the right, it follows that the initial dispossessor is in the wrong. Accordingly, the law developed an elaborate set of procedures to allow the original owner to prevail against the initial dispossessor (who in turn, by the doctrine of relative title, could prevail against anyone who sought to wrest possession from him). "Prior in time is higher in right" was the guiding principle in the legal response to the problem of social order. Sometimes the point is put, "first come, first served" in the language of the street. But, here the two conceptions differ, and the rules of priority have greater generality than those which confine their attention to the first possessor only.

The question of conquest introduces a practical monkey-wrench into this tidy theoretical world. Your tribe or group takes over the territory of another; you kill their members or throw them off their traditional lands. What principle determines ownership if the question ever goes into litigation? The short answer is that God is on the side of the big battalions. The second to arrive control the courts that determine the law. It should come as no surprise that this law allows the latecomer to prevail in their own courts.

The juxtaposition of the rule of first (or prior) possession, and the rule of conquest builds a deep tension—I am tempted to call it a contradiction—into the fabric of private law. Prior in time is higher in right only when it does not matter all that much, which is not the way things work out in the political sphere. Now sovereignty and property are in deep tension: we won control of the game, and it does not matter when, or how, we got here at all. If you ask the Romans how it is that they reconciled these two strands of thought, what you see is a deliberate, scholastic evasion of the problem, which remains true to this present day. What they said in effect is title to properties is acquired by nations through conquest—full stop, period. Nothing is offered by way of justification; and a note of realism is then injected by the gloomy observation that any disagreement among sovereigns is typically resolved by resort to the law of war. Relations between tribes and between nations are governed by a second set of principles that run opposite to their jurisprudential intuitions on national justice and private disputes. That principle


6. The source of the difference is this. First in time, highest in right resolves any conflict between the initial possessor and those who take after him. But, if the initial possessor is out of the picture, a rule of first possession has no impact. The rule of prior in time is higher in right covers both situations, because it means that the second possessor prevails over the third on a doctrine of relative title even when the first possessor is out of the way. It has always been a source of irony in teaching property from Dukeminier & Krier's Property textbook to note that they mistranslate the Latin phrase "Qui prior est tempore potior est jure" to read as "Who is first in time is stronger in right." JESSIE DUKEMINIER & JAMES KRIER, PROPERTY 3 (4th ed. 1998). The correct translation is: "Who is prior in time is stronger in right." The case of the first possessor is a special case of the prior possessor who cannot be trumped.

7. See GAIUS, supra note 3, § 94, at 181.
could be summarized as one that says quite simply: No judge sitting in a court, which is created by a particular sovereign, is allowed to challenge the legitimacy of the sovereign's act, which put him there in the first place. It is the triumph of the principle of positive over natural law; it is the force behind the command, not the soundness of the rule that generates the command, that matters. The judge who happens to work for the winner, when that winner arrived on the scene in second place, is never in a position to honor the title of somebody who came first. Instead of appealing to principles of natural justice that were already accepted within his own system, the judge has to recognize who calls the shots, and dresses up his predicament with high sounding maxims, which go on to shape huge portions of the subsequent law. In the end, the king can do no wrong, no writ can run against the crown, given that the sovereign is the source of all law. The sacrifice here is quite large, for to make the principle of sovereignty work, it becomes necessary for the legal system to subordinate in its own partisan disputes the principles it uses as an umpire in disputes between its own citizens. Yet this retreat from principle takes place when the need for impartiality is the greatest. To make matters work, the assertion of self-interest has to be reconciled with, and tempered by, the practical demands of those conquered persons who fell under the rule of the conqueror. And, here again the classical Roman conception has gained ground. The claim of the prior inhabitants after conquest was not simply dismissed, but accepted by way of supplication or sufferance; it was a precarious claim, but not a claim protected as a matter of right. It occupied a twilight zone within the legal system. The historical writings on the question of conquest thus revealed a built-in tension between the philosophers who did not know or care about jurisdiction and sovereign power, and the lawyers for whom jurisdiction and sovereign power were the first issues that they had to confront.

What I want to do now is to fast forward by nearly 2000 years to examine the American response to right of conquest. My focal point for this discussion is a case that many have read in property and constitutional law, and perhaps forgotten. It holds great importance not because its facts are complicated or convoluted, but because they are simple and straightforward. Johnson v. McIntosh is the case; U.S. Supreme Court Chief Justice Marshall wrote the opinion in 1823. The case turns on a title dispute that arose at the end of the Revolutionary War. After the American rebels threw off the English government, the 1783 Treaty of Paris made it very clear that any rights the English sovereign had, or any grant the English sovereign had made to American subjects, was to be respected and enforced. The chains of title that started before the Revolutionary War survived that war and the transfer of sovereign power. It was (and is) clear that the key contest was between the two root titles. Thus, if A took possession of property before B, and conveyed it to A, after B conveyed that same property to B, then we have a situation where

8. As stated by Justice Holmes, "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal rights as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907).

9. See, e.g., GAIUS, supra note 3, § 7, at 67 (stating that ownership of the land in the Provinces belongs to the Roman people, who then give possession and enjoyment of that land to its residents).

10. 21 U.S. (8 Wheat.) 543 (1823).
A proceeds B, while B proceeds A. It would be utterly ruinous to adopt a system in which any contest of title between A and B was determined by the date at which they took title to the premises. By that rule A could not convey to B at all, lest the title be forfeited to B or A. Land would have to remain in the hands of its original owner to ward off the claims of outsiders, and all social gains from its free alienation would be lost. So, the rule prior in time is higher in right does not apply to A and B, who have the root titles to the rival chains. In our case, the plaintiff Johnson claimed his title "through the Piankeshaw and Illinois Indians who have conveyed a title unto me, which I now claim to be valid." The defendant McIntosh claimed title through a subsequent grant (in terms of its root) that had the imprimatur of the United States.

In thinking about this dispute, one question worth asking is how the Piankeshaw and Illinois Indians conveyed title. Chief Justice Marshall was a great Justice in part because he refused to fudge matters of fact in order to avoid difficult questions of principle. He did not quarrel with the idea that the chiefs had conveyed title. He did not invoke any principle of ethnic relativism to question whether the chiefs had, or could have had, full and complete authority, vis-à-vis their own people, to convey title to the disputed lands. In subsequent times, the question of whether chiefs could convey for their tribes, or indeed, whether the land was alienable at all, became constant sources of tension that provoked lots of litigation. But for Chief Justice Marshall the chain of title was perfectly coherent. An American title could rest on an Indian title, which in turn could rest quite comfortably on the principle of first possession. And, the one indisputable fact is the Indian tribes arrived first.

McIntosh's title to land was second in time as of its origin, but it did come through the U.S. government. He rode the wrong horse, which had the right backer. So place yourself in the shoes of Chief Justice Marshall to ask what decision you will reach in this competition between the earlier and later title. Do this, moreover, in the context of Indian tribes in the American West during the 1820s. The case presents him with little that is new by way of conflict. But he decides the case in favor of the home team.

Let me now briefly review his arguments. Marshall begins with the claim that any society has the right to prescribe the general rules whereby property is acquired and preserved. Of course to some extent his claim has got to be right. It would be weird and self-defeating to assert that a well-run state was incapable of creating rules over property rights. What Marshall does not mention, however, is that the state, including the United States, typically does not invoke any far-flung conception to establish the rules that govern property rights in disputes between its own citizens. Rather, a well-functioning state respects the rule, prior in time is higher in right, as outlined above. But, in this case one grantee traces his origin back to the sovereign. Chief Justice Marshall will not question the authority of his employer in its own courts. He has not deviated an iota from the Roman position.

Knowing that might makes right, it seems clear that the defendant McIntosh is a fore-ordained victor. Chief Justice Marshall, however, like any judge sitting in

11. Id. at 550.
12. See id. at 550, 554-55, 557.
13. See id. at 559.
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any court, feels enormously uneasy about endorsing the might makes right principle. So, he cleverly reaches out for rationales that might soften the impact of that crude sovereign command. Casting about for suitable arguments, Marshall’s backed-handed, ironic half tongue-in-cheek prose is very difficult to capture unless you read the words aloud. In the end, he concludes that the principle that lays behind the sovereign claim is that of discovery. Discovery allowed those people of superior genius—that is Marshall’s phrase for Europeans—to temper their disagreements over the division of the new world. In a nutshell this principle said: That nation which discovers a particular territory first has the first shot at its occupation and control.

This approach deals in a sensible way with what is today termed the issue of “inchoate title,” and the issue comes up all the time. Today, for example, when my friend and I were driving around looking for a parking place, I came across a woman whose car stopped, waiting to enter a parking space that was being vacated by a man backing his car out. I asked my friend, in anticipation of this lecture, “are you going to take the parking space if you can grab it first?” He said “no.” I asked why not, and he said, “because she’s waiting for it.” I responded “You are a living embodiment of the principle of inchoate title at common law. You know you have the right to occupy any space that you are poised to enter at the first immediate opportunity, such that anybody else who tries to win under the so-called first possession rule will be regarded as an interloper.”

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14. See id. at 589 (“Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.”). Elsewhere he writes: “Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued.” Id. at 590.

15. See id. at 567.

16. “[T]he great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.” Id. at 572-73.

17. See id. at 584.

18. As an aside, there are marginal cases for all clear principles. Years ago as I was driving north looking for a parking place on South Columbus Drive near the Art Institute in Chicago, I just happened to see ahead a man pulling out of a space on a block that was otherwise filled with cars. Confident of my good fortune, I waited behind until he pulled out, and then pulled forward to back in, only to find my way blocked by a car that had pulled up behind me. That car had been waiting at the south end of the block when I drove past it, and its driver thought that he had the right to the first space that came free on the block, which he was prepared to enforce in a visible way. My wife vetoed further confrontation, but I still grumbled a bit about the matter as I paid my way into the city garage. I have never seen the practice duplicated. Nor am I sure that I am right about how it should come. Certainly in a world of queuing he would have the advantage over me. Indeed (to continue this diversion) the reason why banks and airlines have single queues for service is to avoid the risk that a person who arrives later on line A is served before someone who arrives earlier on line B. The effort here is to avoid strategic behavior (wife in one line, husband in the other), which happens when separate queues are created. The cost of the new system is, of course, the administrative expense of setting up the dual queuing relationships.
about parking spots in the garages or parking lots in Bowling Green and Toledo is what the Spanish, Portuguese, and English had in the late fifteenth and early sixteenth centuries. It was essentially their version of spheres of influence. It worked very well in a regime of mutual respect: the English won’t kill the Spanish, and the Spanish won’t kill the Portuguese. But people are not parking spaces, so that it also meant each of them had to leave to slaughter any local inhabitants who stood in their way. They developed a system where they could parcel out countries among themselves, but they did so in a way which meant indigenous populations had no rights. It is not as though the rule is useful; it is the kind of rule that only appeals to the sovereign in the sovereign’s own court. It is not the type of argument that is likely to impress anybody outside the jurisdiction who wants to advance and protect the particular Indian clients. That is the first argument that Chief Justice Marshall makes, it is not a very good one and he knows it is not a very good one.

Chief Justice Marshall thus comes up with a second argument to bolster his initial foray. It is basically a variation on the just compensation argument used in takings cases. Essentially we can identify only two legitimate ways government can acquire title to private property. Conquest is not one of them. The first legitimate way is to offer cash to buy property. The great advantage of this approach is that it is the path of least resistance. Much of the land acquired by the United States and the individual states is done through voluntary purchase, without explicit resort to the eminent domain power. The second legitimate fashion is to take the land, but to make an offer as determined by a neutral party, as is done in ordinary condemnation cases. What is the form of compensation? Usually it is cash. Chief Justice Marshall, however, cleverly justified the European takeover of the Indian territories by noting they were amply compensated. What form of compensation had the Europeans provided them? In Marshall’s mind, the benefits were not in cash, but in kind. Here there is philosophical precedent for the basic position. Scottish philosopher David Hume made the basic point long before Marshall.

19. Marshall made the point as follows:

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 hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. . . .

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our Courts.

Id. at 587-88 (emphasis added). Later Marshall noted: “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.” Id. at 588.


21. See id. at 568.
Property must be stable, and must be fix’d by general rules. Tho’ in one instance the public be a sufferer, this momentary ill is amply compensated by the steady prosecution of the rule, and by the peace and order, which it establishes in society. And even every individual person must find himself a gainer, on ballancing the account; since, without justice, society must immediately dissolve, and every one must fall into that savage and solitary condition, which is infinitely worse than the worst situation that can possibly be suppos’d in society.  

Marshall points to two such implicit benefits: Christianity and civilization. “The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence”—gains which we could confer upon them because of the “superior genius” of Europe. As a specialist in takings law, I have long stressed the theme of implicit in-kind compensation. The point here quite simply is that the just compensation requirement, whether as a matter of economic or constitutional theory, does not require that the state provide cash compensation whenever it takes property or, in what amounts to a partial taking, restrict the state’s use. Instead it may provide a landowner with other forms of benefits that are a sufficient substitute. Chief Justice Marshall anticipated this principle, and perceived its general appeal. For example, if the state takes land for a highway from a given individual without giving him a dime, the individual now has one less acre of land with an abutting highway in its stead. But, the acreage the individual retains may now be worth twice as much, so why should the state be required to fork over land to that individual? When the dust settles, he has land worth $200 where before the invocation of state power he had land worth $100. The realities were not lost on ordinary citizens, and in colonial times landowners actively sought to get the government to build highways on or near their properties, or offer the land for free, because so great were the benefits of greater access to markets and of the security deriving from an internal system of transportation.

Given this rosy scenario, it is a fair question to ask: Why use the eminent domain power at all when people are vying to have their lands taken? Sometimes a takings power is required to overcome the coordination problem that arises when the land of many individuals has to be assembled into a highway. One bad actor could disrupt the entire operation by holding out for a lion’s share of the gain. The threat of state compulsion (which carries with it the risk of abuse) is meant to negate that holdout risk. By the same token, however, the holdout who is forced to succumb to the collective will is not wiped out altogether, but receives instead compensation for the property surrendered. That compensation in turn must be calibrated and supplied. The usual way to measure implicit in-kind benefits is by their return value to the individual who has been forced to surrender land or lose values to the common project. The reason the approach worked with the highway cases is that

22. Hume, supra note 4, at 497.
23. McIntosh, 21 U.S. (8 Wheat.) at 573.
the individuals who gained the highway (especially when built with public moneys) received abundant in-kind compensation, so that the constitutional requirement was satisfied without the fuss and bother of financial calculations. 25

The origins of the theory of in-kind compensation predate the McIntosh decision. So, how does this theme play out when the analysis moves up a level, to take into account the treatment of the Piankeshaw Indians? A bit of reflection should show you that the tight logic that explains the highway cases does not carry over. Indeed this appeal to the theme of just compensation strikes me as just wrong. One element of the compensation theme stresses the issue of subjective value. The rule requires that what is given in exchange be valued by the people who receive it: it is not satisfied by showing that we think that we have provided them with something of value. So, the question that the critic wants asked is this: Do the Piankeshaw want a civilization that the Europeans were determined to impose on them whether they wanted it or not? Or were the benefits of civilization solely to force other cultures to abandon their own traditions and to take second fiddle in ours? What Chief Justice Marshall frames as a benefit could be recharacterized as a detriment, or even as a totalitarian excess. It is not as though the Europeans who conquered native tribes had tribal welfare as their dominant objective.

It is not that this set of questions is wholly without replies. But it is difficult to give a set of replies that puts all, or even most of these concerns, at ease. For one thing, the relationships between Europeans and Indian tribes were not constant across all places and all tribes. One strong relationship characteristic between the European settlers and the Indian tribes in the Eastern United States before Marshall wrote his opinion in 1823 was the extensive use of treaties that involved the normalization of relations and the sale of territories—practices that got rid of some of the sting of European entry. But, we have no demonstration of whether, or if so how, that was true in this particular case. Looking at these issues, a somewhat beleaguered Chief Justice Marshall concluded that he did not seek to evaluate the change in circumstances to decide whether there were benefits, detriments, or neither. He just presumed his point to make the paradigm work, and then let his sovereign do exactly as it pleased. 26

25. For a somewhat different view, see Frank Michelman, Tutelary Jurisprudence and Constitutional Property, in Liberty Property, and the Future of Constitutional Development 127, 130 (Ellen Frankel Paul & Howard Dickman eds., 1990) (citing William Treanor, Note, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694 (1985)) ("Thus, while the early practice would characteristically omit compensation in the case of public roads built across unimproved land, it would pay when the land was improved. Treanor suggests no motivation for payment other than prevailing precepts of good governmental practice or political morality."). Note that a more precise explanation is available. Improved land is worth far more, so that the net balance is likely to get altered if it can be taken on the same terms as unimproved land. The prohibition also gives the roadbuilder an incentive for sound location of the road in question, and removes the tendency for individuals to seek to place the road on the neighbor's property where it does them great benefit and little harm. The rule provides that owners owe a duty of lateral support for the land of the neighbor, but not the improvements erected on it. See Corporation of Birmingham v. Allen, 6 Ch. D. 284, 289 (C.A. 1877) (per Jessel, M.R.). I discuss the point in Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49, 94-96 (1979).

26. See McIntosh, 21 U.S. (8 Wheat.) at 587.
Yet, it is too easy to glide over the difficulties stated in this problem. Someone now has to face the unenviable task of deciding what it is the sovereign wants to do. That problem requires some collective deliberation even under an emperor, and the Roman precedents make it clear the right of conquest does not normally bring with it the extermination of the local population. So, how then does the sovereign proceed? Surely, it cannot be by taking direct and immediate possession of all the homes, shops, and farms of local residents and artisans. The recognition of the right of occupancy was the payoff from this caution. Until a title by occupancy was disturbed, it continued to receive respect, notwithstanding the change in sovereign control. All disputes between individuals and the conquered nation were resolved just as they were before. So, the key question was whether the conquering sovereign decided to stay its hand.

On this question it is possible to detect important shifts in attitudes between the events of Chief Justice Marshall’s day and today. Thus, Marshall again does not mince words when he notes that the grants involved in McIntosh were not grants of sovereign power, that is, grants that respected the local land titles on the ground. Rather, they were styled as grants of ownership and sovereignty. "A charter intended to convey political power only, would never contain words expressly granting the land, the soil, and the waters."27 As a rule of construction this conclusion is unexceptionable, even for those who think the charters should have been more respectful of the rights of indigenous people. But, Marshall was not one to indulge in the modern practice of twisting language in order to pretend that unpleasant results were not intended by charters, or, one might add, statutes. He played the game of interpretation with supreme indifference to the substantive content of the outcome. The modern cases that have followed McIntosh have protected the sovereign claims, even in circumstances where the native tribes were not subdued by conquest, but allowed to continue in the occupation of their lands.28

Yet, once again, a change in attitude toward conquest becomes critical whenever state grants are less expressive of their coverage scope. Thus, the standard default provision holds that the ordinary private relationships between individuals survive conquest. Now, it is necessary for the state grantee to clearly establish his title to private lands. When the modern indigenous claims are recognized in many of these countries, it is not because people have rejected the 'sovereign might makes right' paradigm which dominated Chief Justice Marshall. Rather, they changed views on the minor premise, and were much more reluctant to say that the government’s ownership was meant to disrupt private relationships. Raise the bar high enough, and by degrees the default provision hardens into a substantive rule of law, which reflects the newer sensibilities.

So, how did they work this transformation in presumptions? They reintroduced natural law arguments through the back door. The courts say something like: "We will assume we have a sovereign, but we believe that our sovereign is a just

27. *Id.* at 580.

sovereign, who will not act unjustly. We will construe grants accordingly unless and until we have very clear evidence to suggest the contrary.” That shift becomes evident as we move from the eighteenth to the nineteenth century in, for example, the New Zealand and Australian settings, where the willingness of the sovereign to disrupt local tribal and governance arrangements within territories was not nearly so strong as it had been 100 years before. By this time, the default rule against loss of private rights held strong, so that native tribes and populations had done quite well in sustaining their claims against the political sovereign.

I do not have time (nor the knowledge) to go into this development in any great detail. But, I do wish to return again to the philosophical ironies that arise in dealing with the rights of indigenous peoples. Thus far I have spoken broadly about the problems of conquest. The alternative to conquest is, of course, contract, that is, treaties between nations. Here again natural law theory accords a high place to voluntary agreement, and finds no reason to retreat from that position with regard to treaties entered into between nations and tribes. Let me briefly return again to the situation in New Zealand where relationships between Europeans and Maori are governed by the 1840 Treaty of Waitangi. The importance of this Treaty for contemporary New Zealand life cannot be overstated, and much of this has to do simply with the question of numbers. No matter how difficult and delicate the issues of indigenous people in the United States, the problem cannot become a nation-breaker because the indigenous populations are too small in number. How one counts descendants is always a problem in a world of intermarriage, but still the estimates of indigenous populations hover about the one percent figure. But, with New Zealand, the numbers are far higher, subject again to the same intermarriage caveat. There, the local understandings do hold the risk of destabilizing a nation, given a large Maori population in a small nation of about 3.5 million individuals. If you want the amount to scale with the American situation, you would have to assume there are 50 to 55 million people in this country where Native American extractions have perceived themselves as second-class citizens.

Understood in its own terms, the negotiation of the Treaty of Waitangi reveals a level of messiness that is proportionate to its overall importance within the New Zealand setting. Before the arrival of the English, the North and South Island were occupied by Maori tribes, which often clashed with each other. Their own tribal boundaries and the methods by which they organized land holdings were quite different from our own. The question of land ownership is not easy to define when tribes camp and move on, for it is often a matter of genuine delicacy to decide whether they have moved about from one part of their holdings to another, or whether, in the alternative, they first occupy and then abandon certain lands. The Maori did not think about the ownership question in the terms that are congenial to Western thought, and it is not clear how they would have fielded questions about their internal system of land control. After Captain Cook “discovered” New Zealand, the English came in substantial numbers before 1840 and were to some extent welcome because of what they could offer to sell by way of trade. They purchased land in individual transactions from various Maori who may or may not

30. For a detailed account, see generally CLAUDIA ORANGE, THE TREATY OF WAITANGI (1987).
have had title, by deals which may or may not have been properly concluded. This practice continued for at least ten or fifteen years before the Treaty until New Zealand contained a fairly large smattering of British settlers. At this point relations become strained, and things got a little uneasy until the Colonial Office dispatched Captain Hobson to New Zealand to negotiate a treaty that would bring British Sovereignty to New Zealand.

By 1840 the British and the Maori entered into the Treaty of Waitangi. There is of course an enormous question of how it is to be validated, given the large number of separate tribes that have to pass on it before it is approved. But, even if we put aside the complexities of the ratification debate, the Treaty is only a page or two long, and contains its fair share of interpretive difficulties. Let me mention just a couple critical points to give a flavor of what is at stake.

First, the Treaty (in its English version) guarantees to all the native Maori tribes “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess . . . ”. This is a major concession to local rights and the quid pro quo from the English versions of the Treaty (it is less clear in the Maori versions of the treaty) is that the British Crown will assume sovereignty over the islands, and they in turn will treat all the local citizens who are Maori in extraction as having equal dignity with the English. Even in the English version, this system is, compared to the brutal practices of conquest from ancient times forward, a model of political detachment and self-restraint. The mechanism for the control of land, however, creates many unwelcome complexities because it notes the Maori act both as individuals and as tribes, which is the import of the phrase “individually or collectively possess” just quoted above. But, the Treaty does not say in which cases it is possible for individuals, and in which cases it is necessary for groups to convey property. The Treaty also provides, however, that the Crown has a right of preemption, which means only the Crown or its designated individuals can purchase the land. This provision has both a good and a bad side. The good side is that it prevents unscrupulous shysters from taking over the land by swindle and artifice. Their transactions are voided by the preemptive right. The bad side is that the Crown now has a monopoly on dealing with Native Tribes. This favoritism lets that one preferred buyer get a very attractive price for the land, which would have been worth far more in an open economy. Once this Treaty is put into place all sorts of transactions take place, and just as you would expect people get sloppy. There are various transactions that take place between the Maori and the white

31. See generally Treaty of Waitangi, supra note 2.
32. Id. at art. II.
33. See id. at art. III. “The Queen of England acknowledges and guarantees to the Chiefs, the Tribes, and all the people of New Zealand, the entire supremacy of their lands, of their settlements, and of all their personal property.” ORANGE, supra note 30, at 262.
34. See Treaty of Waitangi, supra note 2, at art. III (“In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.”).
35. See id. at art. II (“But the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate . . . ”).
population, which do not go through the Crown. There are some transactions that
that do not go through the Crown, subject to allegations of irregularity associated with the sale.
The movement from conquest to Treaty was designed to eliminate the tension
between title by conquest and the general rule of first possession. But, while the
Treaty solves one large problem, it creates many smaller problems in its stead,
which have to be sorted out over the generations.

To make matters worse, the Treaty of Waitangi has little if anything to say about
the question of prescriptive rights, which allows possession over long periods of
time to cure any defects in the manner in which title is acquired. That rule works
wonders when a formal legal rule requires that specific words be spoken, that
certain witnesses be present, or that certain formalities attach to written documents.
Careless people often forget to do these things, or do them incorrectly. But, with
the passage of time the defects in form are forgotten so that it becomes possible for
the original buyer, or his heir or donee, to convey good title to some stranger 50 or
100 years later. The system of title will unravel (as it has in Eastern Europe after
the massive political unrest) if these defects in form are allowed to vitiate the
original transactions in perpetuity. Yet, the Treaty of Waitangi never addresses the
question of whether or how these prescriptive rights are acquired. So the principle
of finality that private law regimes seek is not provided for explicitly in the Treaty,
and has to be read in as part of a system of background norms of legal conveyances.
Without it you have an open wound that continues to fester over time. The problem
is only made worse because the lack of clear conviction on prescription in the
current scene translates into a lack of resolve on the issue of finality. It is possible
to run historical investigations of the circumstances surrounding the signing of the
Treaty and the early land grants once, twice, and still again. That has happened in
New Zealand with the creation in 1975 of the Waitangi Tribunal whose major
function is to examine what forms of redress should be provided for injustices done
to the Maori pursuant to, or in spite of, the Treaty of Waitangi. At this point the
role of the Treaty is reversed. No longer does it mark a once-and-for-all transition
to an integrated system of sovereignty for the British and the Maori in which all
future issues are legislative, not constitutional issues. Instead, the Treaty itself
becomes a generative source of new obligations that are always vetted before the
standing Tribunal. That entire mode of doing business makes it harder to normalize
political relationships between the British and the Maori.

So, where does this tangled history, of which I have given just a glimpse, leave
us? For me, it raises two kinds of issues. One of them is a deep conviction: the
more you know about any particular sequence of titles, conquests, conveyances, and
transfers, the less confident you are in your judgments as to how these disputes
should be worked out. There is too much uncertainty and there are too many factual
variations to handle at once. The problem is, moreover, not unique to the
intersection of Western and indigenous populations. It arises in Eastern Europe
when first the Nazis, and then the Communists, dispossess people of their land. It
is possible to snarl titles in the space of a generation or two. But, these questions

36. See generally Richard A. Epstein, Past and Future: The Temporal Dimension in the Law
of Property, 64 Wash. U. L. Q. 667 (1986); Thomas W. Merrill, Property Rules, Liability Rules, and
have to be resolved, and in most cases that settlement should be for hard cash, as opposed to the return of land that is often altered beyond recognition, done on a once-and-for-all basis. Having said that, it is hard to dictate terms in the abstract without a clearer sense of the particulars of each case.

My second point stresses again the ironic intersection between philosophy and politics. The academic literature on the left makes its living attacking the primitive Lockean notion that individuals acquire property when they "mix" their labor with the land. That theory is often said to stand in the way of an equitable distribution of resources within society. But, it is just this theory of original acquisition that fuels the indigenous claims and makes it hard for those of us with more conservative inclinations to dismiss them out of hand. Now, every lawyer and anthropologist who testifies on the issue will emphasize the priority of possession of indigenous populations. The Lockean norms that are derided abstractly turn out to be decisive in dealing with intercultural conflicts.

With that stated, I sit here in a kind of delightful, but enigmatic, position. I have always had an inordinate fondness for the first possession rule, and will happily defend its place in the legal hierarchy against any and all comers. I think the principle has as much relevance to the key claims of indigenous populations as it does the claims of everyone else. But, lest it appear that I am squarely in their camp, recall that I give equal weight to the rule of prescription, the validity of treaties, and the principle of finality. If you put the two halves of the debate together, the subtle appreciation of the rich theory of property rights shows that the upshot is a mess. The conceptual resolution of this problem is every bit as inelegant as the practical ones I have talked about. But, perhaps there is this silver lining. If the question is a mess for one side, then it is also a mess for the other side. A fuller appreciation of the issues of sound treaty interpretation and practice should convince all sides of the vulnerabilities of their position. Once that is understood people might see the dangers in excessive attachments to their own view. They may then be able to achieve that frame of mind that allows them to inch forward toward a sensible compromise of an issue that could flare up into a major source of social tension. The stakes are high everywhere this problem arises, but with patience and goodwill, perhaps some sensible accommodation can be reached, which will allow us then to go forward in greater harmony with the business of life.