Paper Empires: The Legal Dimensions of French and English Ventures in North America

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The New World! The very name conjures up virgin forests, pristine lakes and rivers, vast empty plains—an untouched wilderness ripe for exploration and settlement. But, of course, America was not a new world; it was an ancient land occupied for untold millennia by a multitude of peoples. Nevertheless, it is often said that when France and Great Britain first came to America, they treated it as if it were a vacant land—terra nullius—that could be appropriated by mere discovery or symbolic acts such as planting crosses or royal insignia.

According to this common account (which we will call the doctrine of a legal vacuum), the fact that most of the land was occupied by indigenous nations was brushed aside. As “pagan and uncivilized” peoples, Native Americans were not considered capable of holding territorial title, property rights, or jurisdiction over their countries, so when the French and British Crowns assumed sovereignty over an American territory, they asserted full title to the soil and complete jurisdiction, just as in a vacant country. The original rights held by the Native peoples were ignored; henceforth, their only rights were those granted or confirmed by the incoming sovereigns. Although this doctrine concedes that the British Crown (but not the French) made a practice of entering into treaties with the Indians for the purpose of “purchasing” lands, it treats this as a mere policy, born of prudence and benevolence, that did not involve recognition of their land rights.1

The doctrine of a legal vacuum has enjoyed widespread popularity, but it has not held the field unchallenged. A very different account—which we will call the doctrine of legal symbiosis—was set forth by Chief Justice John Marshall of the United States Supreme Court in such celebrated cases as Johnson and Graham’s Lessee v. McIntosh (1823)2 and Worcester v. Georgia (1832).3 These cases have had a significant influence, not only in American courts but also in Canadian, Commonwealth, and international jurisprudence.4 Nevertheless, they have often been misconstrued as espousing a sophisticated version of the doctrine of a legal vacuum. For this reason, they deserve detailed consideration.3

Chief Justice Marshall portrays relations between indigenous American peoples and incoming European powers as an organic process, evolving over an extended period, and envisages at least four distinct stages.

At the initial stage, prior to European contact, the indigenous peoples of America were independent nations, with their own laws and political structures, holding dominion over their territories. North America was not territrium nullius; it was the domain of a host of independent nations, vested with title and jurisdiction. Given this fact, the chief justice remarks, “it is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.”4 Europeans could not appropriate America by mere discovery any more than Native Americans could appropriate Europe. As we shall see shortly, however, Marshall assigned discovery a different role.

When European fishermen, traders, and adventurers started arriving on the shores of North America, the process entered a second stage. From the early days of contact, Marshall relates, the great states of Europe were driven by a thirst for new territories. To avoid conflict and war, they needed to establish a principle regulating the right of acquisition among themselves. And the principle they adopted was this: The discovery of a country gave title against all other European states, which title might be perfected by possession. The discovering nation had the exclusive right among European states to enter into relations with the Native peoples, to acquire lands from them, and to establish settlements. No other European state might interfere in the discovering state’s exclusive sphere of activity.7

This principle of discovery, Marshall indicates, was not part of the universal law of nations. It applied only to the European states that subscribed to it, to regulate their rights among themselves. As such, it could not affect the rights of indigenous Americans.

It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.8

The principle of discovery was a form of regional European law, which Marshall terms “the common law of European sovereigns respecting
American." This regional law supplemented but could not derogate from
the universal principles that formed the bedrock of international law. It was
an internal arrangement designed to diminish conflict among a group of
competing states, much like an agreement among rival companies to re-
spect one another's commercial spheres.

The principle of discovery did not dictate how a European state should
conduct its relations with the indigenous peoples located in its sphere.
Whether it maintained peaceful relations with these peoples or waged war
on them, whether it acknowledged their independence or tried to subject
them was an open matter. "Those relations which were to exist between the
discoverer and the natives, were to be regulated by themselves."[10] In fact,
such relationships varied greatly from European state to European state and
from one Indian nation to another.

Recognition of the regional principle of discovery led to the third stage,
which got under way when Europeans actually established perpetuating
colonies in North America and forged enduring links with indigenous nations.
Marshall hazards certain generalizations about the conduct of all the main
colonizing states at this stage, including Spain, Portugal, France, and Hol-
land.[11] However, his account focuses mainly on English practice, as adopted
and continued by the United States after the American Revolution.

Acting under the principle of discovery, relates Marshall, the English Crown
issued charters to various groups and individuals. These charters often
covered large sectors of America and purported to confer governmental rights
and title to the soil. They were issued at a time when the Crown had not yet
taken actual possession of the territories in question — they were still held
by independent native polities.

What effect did these charters have? According to the chief justice, they
took force between the Crown and its grantees and gave the grantees exclusive
rights of colonization that could be enforced in British courts against
other British subjects. The charters also took effect against rival European
states and their subjects, at least to the extent that the charters were backed
by a right of discovery, although in this case no method of enforcement
existed beyond diplomacy or war. However, the charters did not affect the
rights of Native American peoples. The Crown could not grant rights it did
not itself possess (nemo dat quod non habet), and at this stage it only had
a right of discovery that was good among European states. The grants "as-
serted a title against Europeans only, and were considered as blank paper so
far as the rights of the natives were concerned."[12] In particular, the charters
did not authorize the colonial authorities to govern Indian nations or seize
their lands. As Marshall says:

The extravagant and absurd idea that the feeble settlements made on the
sea-coast, or the companies under whom they were made, acquired legiti-
mate power by them to govern the people, or occupy the lands from sea to
sea, did not enter the mind of any man. They were well understood to
convey the title which, according to the common law of European sove-
eigns respecting America, they might rightfully convey, and no more. This
was the exclusive right of purchasing such lands as the Natives were willing
to sell.[13]

The colonial powers were soon locked in bitter internecine struggles for
trade, territory, and strategic advantage. They vied to secure Indian nations
as their allies, or at least to placate them and avoid their enmity,[14] creating
extensive networks of relations with indigenous groups. At this third stage
in the process, Marshall apparently thought these relations were broadly
equivalent to those maintained among sovereign powers under interna-
tional law, even if they sometimes took distinctive forms due to local needs
and customs.[15]

This situation changed in the fourth stage, as the Crown gained a greater
measure of influence and control over Indian nations. In some instances,
this control was achieved by degrees, as the outgrowth of a gradual process
of attrition and accommodation; in other cases, it was gained more rapidly,
through treaties or war. Either way, Indian peoples increasingly assumed
the status of domestic nations living under the Crown's protection. During
this stage, the Crown gained rights that were directly enforceable against
Native American peoples and affected their independence and land rights.
In Marshall's view, the move from the third to the fourth stage involved the
conversion of a right of discovery into a right of conquest,[16] or, as he puts it
elsewhere, the transformation of a merely dormant right into a right in
fact.[17]

Overall, by the early nineteenth century, Native American peoples within
the United States could be described as "domestic dependent nations,"[18]
that is, as "distinct, independent political communities, retaining their origi-
nal natural rights, as the undisputed possessors of the soil from time im-
memorial," subject only to a restriction on relations with other European
states.[19] While retaining internal autonomy, they are considered both by
the United States and by foreign states as being "so completely under the
sovereignty and dominion of the United States, that any attempt [by exter-
nal powers] to acquire their lands, or to form a political connection with
them, would be considered by all as an invasion of our territory, and an act
of hostility."[20]

At this fourth stage, the state held what Marshall describes as a "complete
ultimate title" to the soil, subject to an Indian "right of possession," which
the state alone could acquire.[21] This Native land title was a legal right, rec-
ognizable in the courts; it was not a mere function of policy. The Indians,
affirms Marshall, "were admitted to be the rightful occupants of the soil,
with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; nevertheless, their power to sell or otherwise transfer their land was now limited to a right of alienation to the Crown.22

Such, then, is Marshall’s doctrine of legal symbiosis. In its complex underpinnings and evolutionary character, it differs markedly from the more austere doctrine of a legal vacuum.

Which of these rival doctrines better reflects the historical record? I will begin to answer this with a review of the famous papal bulls of the late fifteenth century, which to a surprising extent shaped the legal debate during the succeeding century. I will then turn to the principal royal charters and commissions issued by the French and English Crowns regarding North America up to the early seventeenth century. These instruments provided the basic legal matrix for early imperial ventures in the continent and set the pattern for later colonizing efforts that eventually gave rise to the United States and Canada. Here may be found an authoritative and considered expression of state views, drafted by Crown officials of high standing and carrying the stamp of royal approval.

The Papal Bulls

From the initial stages of modern European exploration overseas, Spain and Portugal claimed exclusive rights in the newly encountered regions and tried to prevent other European states from invading their asserted spheres. These claims rested on various acts of discovery, settlement, and conquest, as well as a remarkable series of papal bulls. While we cannot make a detailed survey of Spanish and Portuguese claims here, it will be useful to consider these papal bulls briefly.23

As we will see, most of the bulls do not make outright grants of territory, as is often assumed. Instead, they extend recognition to past conquests and confer the faculty to make future ones. Moreover, the bulls do not treat infidel lands as terra nullius, acquirable by mere discovery or occupation. While presuming that Christians may justly make war on infidels (or at least some of them) and also appropriate their territories, the bulls generally recognize that such territories can only be acquired by conquest or some other method of achieving factual control.

We pick up the story with the papal bull Diutum diversarum of 1452, which grants to the King of Portugal the faculty to invade, search out, capture, vanquish, and subdue all Saracens, pagans, and other enemies of Christ whatsoever, and their dominions.24 The bull Romanus pontifex of 1455 confirms the earlier bull and extends its terms to Ceuta and all provinces, islands, harbours, and seas that the Portuguese sovereign subsequently acquires from the hands of infidels or pagans in adjoining or more distant parts.25

Specifically, it grants a “right of conquest” extending from Capes Bojador and Nea in West Africa through all Guinea and beyond toward the southern shore. This right is said to pertain to the King of Portugal “and not to any others.” Interestingly, the text stipulates that acquisitions made under the present “letters of faculty” shall pertain to the king “after they shall have been acquired,” distinguishing between the authority to acquire conferred in the bull and the process of acquisition proper.26 The bull also empowers the Portuguese sovereign to engage in trade with Saracens and infidels in the regions designated (except for trade in prohibited articles), and it forbids all other Christians to trade, navigate the seas, or even fish there without Portugal’s licence, on pain of excommunication or interdict.

When Columbus returned from his first voyage to America, Portugal claimed that the lands he had encountered lay within its exclusive sphere.27 The Spanish monarchs responded by quickly procuring from the Pope the famous bull Inter caetera of 4 May 1493.

This bull grants Spain dominion over all past and future acquisitions located beyond a meridian one hundred leagues west of the Azores or the Cape Verde Islands and exclusive rights of trade and travel there, while safeguarding rights acquired by Christian princes in “actual possession.”28 The Pope states that the grant is made to encourage the Spanish monarchs “to bring under your sway the said mainlands and islands with their residents and inhabitants and to bring them to the Catholic faith,” thus envisaging future acts of acquisition implementing the grant. This interpretation is supported by the bull Diutum diversarum, which was issued to Spain later that year, on 26 September,29 which confirms the bull of 4 May and gives full power “to take corporal possession of the said islands and countries and to hold them forever, and to defend them against whosoever may oppose.” It also forbids all persons not licensed by Spain to go to those regions, whether “for the purpose of navigating or of fishing, or of searching for islands or mainlands,” notwithstanding any papal grants previously made to other princes or parties, “providing however these grants have not gone into effect through actual and real possession, even though it may have happened that the persons to whom such gifts and grants were made, or their envoys, sailed thither at some time through chance.” This clause clearly indicates that the papal grants took effect only when the grantee assumed “actual and real possession.” Hence, casual discovery or exploration was not enough to bring them into effect.30

In 1494, Spain and Portugal adjusted their claims in the Treaty of Tordesillas, which draws a north-south line 370 leagues west of the Cape Verde Islands—270 leagues beyond the line fixed in the bull Inter caetera.31 Portugal was to possess exclusive rights of discovery, trade, and conquest east of the meridian, with Spain enjoying equivalent rights to the west.
Given the uncertain state of geographical knowledge, the line’s location was a matter of doubt, but it was often thought to run through Newfoundland and Brazil, thus leaving most of North and South America to Spain. A distinctive feature of these claims was their exclusivity. Spain and Portugal asserted a total monopoly, as against the rest of Christendom, on access, trade, exploration, colonization, conquest, conversion, and indeed all other activities within their notional spheres. These claims did not necessarily presuppose an existing territorial title to the lands and seas in question, nor would territorial title necessarily have imported such claims. European states normally gave the subjects of allied and friendly sovereigns free access to their territories for commercial and other peaceful purposes. However, the Iberian powers could not concede rights of access to their asserted overseas preserves without abandoning their principal claim, which, though entangled with pretensions to actual dominion, boiled down to the assertion that these spheres were closed to the rest of Christendom. In effect, Portugal and Spain asserted an exclusive right among European powers to exploit certain maritime routes they had pioneered, and to engage in trade and conquests in regions they were the first Europeans to visit. To claim that the papal bulls had granted Spain and Portugal complete title to vast and populous territories they had neither settled nor conquered was to invite the sort of derision that France and England later poured on such claims. But to argue that the Pope had given Spain and Portugal sole admittance among Christian states to the newly encountered regions was to take more defensible ground.

Whatever their merits, these claims could hardly be ignored by other European powers, for Spain and Portugal were prepared to back them by force, exercised at times with great ruthlessness. Throughout the sixteenth century, they managed to maintain a virtual monopoly on American colonization, if not on fishing and trade. Only in the seventeenth century did France and England succeed in establishing permanent settlements in North America, which were to lead in time to their domination of the continent. Nevertheless, from early days, the French and English Crown took an active interest in America. Even if their initial colonial forays bore little fruit, the legal terms in which these ventures were framed set the juridical mold for later, more successful efforts.

First we will consider France’s activities and then turn to England’s.

French Enterprises

What was the official attitude of France to the New World? If royal instruments were issued in connection with Jacques Cartier’s voyages of 1534 and 1535-36, they have not come to light. The first commission known to have been issued by the French Crown proper is that granted Cartier on 17 October 1540, which names him “captain general and master pilot” of an expedition to the lands of “Canada and Ochelaga and as far as the land of Sagunay, if he can reach there.” The goals of the expedition are described as “to penetrate further into the said countries; to converse with the said peoples thereof, and, if need be, dwell among them, the better to carry out our said intention and to do something pleasing to God, our creator and redeemer, and which may be for the promotion of his holy and sacred name and of our mother, the holy catholic church.” The commission does not assert pre-existing French rights to the countries named or explicitly authorize Cartier to acquire lands there for France. Much less does it grant him any lands, even in futuro.

Iberian claims in America are not mentioned, and the territories are portrayed as possessed in part by indigenous peoples. The commission refers to Cartier’s previous voyages, but it does not suggest he had previously laid claim to Canada and Hochelaga for France.

On 15 January 1541, a new royal commission was issued to Jean François de La Rocque, Sieur de Roberval. This commission took precedence over Cartier’s and transformed the voyage of exploration to one of conquest and colonization. Roberval is named lieutenant general of the expedition, with full power over all men and ships. The instrument does not assert pre-existing French rights to the territories mentioned, “Canada and Ochelaga and other adjacent lands.” Instead, their acquisition is presented as the expedition’s main goal. Roberval is mandated “to pass across and pass across again, to go and come from the said foreign countries, to land there, make entry, and put them in our hands, whether by amiable means or friendly agreements, if that can be done, or by force of arms, main forte and all other warlike means.”

This is the earliest known official expression of the French Crown’s intention to acquire American territories. Only two modes of acquisition are envisaged, peaceful agreement or war (“by amiable means . . . or by force of arms”) – in classical terminology, cession or conquest. There is no reference to acquisition by discovery, symbolic acts, or similar methods suited to terra nullius. Other passages make it clear that the Crown envisages no less than the reduction of the Inhabitants to French control, the imposition of French law, and the founding of settlements, forts, and missions. The text places one major limitation on Roberval’s authority to acquire territories: “Provided nevertheless that this not be land held, occupied, possessed, ruled, or under the subjection and obedience of any princes or potentates, our allies and confederates, and especially of our very dear and beloved brothers, the emperor and the King of Portugal.” In the process of disclaiming French designs on any territories that already belong to princes and rulers allied to the French Crown, the clause refers specifically to the Spanish Emperor and the King of Portugal. However, it only covers territories actually held by such rulers (“lands held, occupied, possessed, ruled, or under the subjection and obedience”). In so doing, the clause implicitly rejects Spanish
and Portuguese claims to the entirety of the New World and to a monopoly on acquisitions there.

Some writers have suggested that, by authorizing the conquest of indigenous peoples, or at least non-allied ones, the commission assumes that such peoples lack title to the territories they occupy. However, this interpretation confuses the question of territorial title with the distinct question of just grounds for war. To claim that one may justly invade and conquer a territory, whether infidel or Christian, is not to assert that the territory is legally vacant.

The main textual justification given for American conquests is religious: to further the spread of Christianity. Contemporary observers did not take this rationale very seriously, and historians have generally followed suit.

Nevertheless, the French Crown, while repudiating the papal bulls, as we will soon see, tried to legitimate its own ventures by invoking the same doctrine the bulls enunciated: that it is pleasing to God “that barbarous nations be overthrown and brought to the faith itself.”

The commission gives Roberval full authority regarding land, including the power to grant it “in fief and seigniory” and on other terms. The precise wording merits attention. The king grants “full power and authority over those lands that he shall have been able to acquire for us in this voyage.” Note the future tense. Roberval’s powers extend only to such lands as he is able to acquire for the Crown. Similar thinking underlies an earlier passage, in which Roberval is authorized to “decree, prescribe and order all things that he shall deem to be good, useful, and proper ... both on sea and land, in places and parts that shall be reduced to our obedience.” Once again the text looks to the future; the Crown’s realms were still to be won.

Cartier set sail for Canada on 23 May 1541 with five ships and a large company of men. Roberval departed the following year with some two hundred souls, the nucleus of an intended settlement. On reaching Newfoundland, he met Cartier’s ships, destined for France and bearing gold and “stones like Diamants, the most faire, polished and excellently cut that it is possible for a man to see.” When Roberval ordered Cartier to accompany him back to Canada, Cartier slipped away at night and returned to France. The “gold” and “diamonds” proved worthless, and the hopes of François I collapsed. With them died French interest in Canada for the time being. Roberval and the remnants of his colony were brought back the following year.

The granting of a royal commission to Cartier precipitated a diplomatic storm. The Spanish ambassador remonstrated with the French Constable, Montmorency, who replied that Cartier’s destination lay in new lands not held by the Spanish or Portuguese Crowns, adding that “to uninhabited lands, although discovered, anyone may go.” Spain protested that the commission violated the Truce of Nice and the papal bulls. But, related the Spanish ambassador, the French King replied as before, that he could not desist from giving the said licence to his subjects for any place whatever, but at least they will not touch at places belonging to your Majesty, nor go to the parts not discovered by his predecessors, and belonging to his crown more than thirty years before the ships of Spain or Portugal sailed to the new Indies; and as to what I told him that permission to navigate these parts was conceded to your Majesty’s predecessors by the Pope, and applied to them, he answered that the Popes hold spiritual jurisdiction, but that it does not lie with them to distribute lands among kings, and that the Kings of France, and other Christians, were not summoned when the partition took place; and in conclusion, Sire, I have not been able to settle anything but that his subjects shall not go to your lands or ports. In truth, I think he has in mind the populated and defended places, because he said that passing by and discovering with the eye was not taking possession.

The Spanish monarch decided to seek the Pope’s intervention and argued that the French enterprise contravened the 1538 truce, concluded under papal auspices, and further that it was “to our prejudice, and that of the said most Serene King of Portugal, holding, as we do hold, the title and right to the Indies from the Apostolic See.” The Cardinal of Toledo was unenthusiastic about the latter point. He advised the emperor that, in making an approach to the Pope,

“The claim [to the Indies] should be chiefly based on the fact that your Majesty discovered, conquered and has settled, at great cost, these lands, and continued in peaceful possession, and also the proximity of your Majesty’s lands with these lands; and not insist too much upon the concession or permission of his Holiness, both because this might give rise to difficulties, and especially because of the little importance the French King attaches to it.”

In reply, Charles V agreed that the papal concession should be downplayed and that stress should be laid on the other grounds mentioned.

It would be interesting to learn how the Pope disposed of the matter. Unfortunately, we know only that, in the sanguine opinion of the Spanish ambassador in Rome, the pontiff’s initial reaction seemed “very favourable” and that he showed “a disposition to maintain justice for his Majesty [the Spanish King] and uphold the concession of the Apostolic See,” but prudenty requested to see the texts of the Truce of Nice and the papal bulls.
before deciding. Copies were forwarded to the Spanish ambassador in Rome, but we hear no more of the matter after that. The French Crown apparently became involved, for the emperor had earlier mentioned to the Cardinal of Toledo that "although we have learnt that his Holiness has approached the said King [of France] through the medium of his nuncio in France, we have no news of the decision come to."

Additional light on French attitudes is provided by an exchange between François I and the Portuguese ambassador late in 1541. The French monarch is reported as saying that "he intended to proceed with conquests and voyages, which we were right as well as that of other princes of Christendom, and intended to preserve friendship and good understanding with certain princes of the Indies." The latter statement takes for granted that Christian princes may maintain peaceful relations with infidel rulers on a basis of equality.

These fragmentary representations of French views, once or even twice removed from source, must be used with caution. However, they suggest the following outlook about the New World. According to the French, territorial title cannot be derived from papal bulls because the Pope's jurisdiction is spiritual, not temporal. Neither can title be based on mere discovery or exploration — “passing by and discovering with the eye” — nor can this even furnish an embryonic title adequate to exclude other powers, for, in the phrase attributed to the French Constable, “to uninhabited lands, although discovered, anyone may go.” To merit respect, a territorial claim must be backed by a substantial and continuing exercise of authority involving settlement or military control, for only the “populated and defended places” are recognized as Spanish domains. Moreover, France is entitled to establish relations of peace and friendship with independent indigenous princes in America, without interference by other European powers.

Nevertheless, the French position has its twists. Note the French monarch’s undertaking to confine his activities to parts “discovered by his predecessors, and belonging to his crown more than thirty years before the ships of Spain and Portugal sailed to the New Indies.” This is the first time the French Crown is known to have asserted existing rights in the New World. Paradoxically, it is linked with French discoveries supposedly made years before Columbus. That this occurs in the course of a statement rejecting the efficacy of “passing by and discovering with the eye” perhaps illustrates the tendency to claim for oneself the benefit of principles denied to others. Still, the gist of the French position is clear: to reject Iberian claims to exclusive access to the New World and to dominion over territories neither settled nor controlled.

With the first French colonizing effort in North America a failure, France did not press territorial claims there. A separate article to the 18 September 1544 Treaty of Crépy-en-Laonnois between France and Spain refers to the fact that the Spanish Emperor maintains that he and the King of Portugal have a good and just title, under treaties between them, to “all the lands of the Indies, whether on islands or mainland, discovered or to be discovered.” France, neither admitting nor denying this claim, agrees to leave the Iberian powers in peace “in all matters concerning the said Indies, discovered and to be discovered, without directly or indirectly undertaking any enterprises there whatever, in whatsoever place or part there be.” A proviso allowing French trade in those parts aroused suspicion, and Spain apparently never ratified the article. Nevertheless, it is interesting that France was willing to concede, if not the entirety of Iberian pretensions, at least the absence of a competing French claim. And in 1543, on Spain’s insistence, François I forbade expeditions to Spanish dominions overseas.

War resumed between France and Spain in 1552, and the five-year truce concluded at Vaucelles on 5 February 1556 provided in a separate article that, for the duration, French subjects would not sail to or trade in the Spanish Indies without Spain’s licence. Within a year, hostilities recommenced and continued until the Treaty of Cateau-Cambrésis on 3 April 1559. The question of French travel to the Indies was discussed at length in the preliminary negotiations for the treaty. Spain claimed a monopoly on western navigation, citing the papal concession and the expenses of discovery. France urged in response that “the sea should be common,” professing willingness to exclude its subjects from lands actually possessed by Spain or Portugal, but not from “places that, if indeed they have been discovered, nevertheless do not obey either the Kingdom of Castile or that of Portugal.” In the end, the treaty did not mention the Indies, and the earlier French insistence on factual control as a prerequisite for title in the New World had resurfaced.

In March 1577, the Marquis de la Roche, with hopes of making his fortune in the fur trade, secured a royal commission regarding Canada. The document authorizes him to go to “the new lands [Terres neuves] and other adjacent lands and there to raid, seize, besiege and make his own each and all of these lands that he will be able to make himself master of, provided that they do not belong to our friends, allies and confederates of this Crown.” La Roche receives no more than the power to conquer or otherwise make himself master of whatever lands he can — lands not yet belonging to the French Crown. The commission sees the acquisition of territory as a process involving settlement and the establishment of effective French rule. La Roche is empowered “to have such fortresses built, constructed, erected, fortified, and strengthened as he shall think necessary in order to retain, preserve, occupy, hold and possess them under our protection, and to enjoy and use them.” No mention is made of the indigenous peoples, nor is the Marquis explicitly authorized to conquer and rule them, but as much is implied. A supplementary commission issued on 3 January 1578 makes this plain by
stating that la Roche "has the power to conquer and take certain lands and countries, newly discovered and occupied by barbarous people." Further along in this second commission, la Roche is named "Governor and our Lieutenant General and Viceroy of the aforesaid new lands [Terres neuves] and countries that he will take and conquer from the said barbarians." La Roche was governor by anticipation; his realms were still to be won. The title remained a hollow one. It appears that la Roche's expedition of 1578 never even reached North America. 

Ten years later, Jacques Noël, in association with one Chaton de la Jannaye, secured royal letters patent granting a twelve-year monopoly on trade, both in furs and minerals, with Canada and adjacent lands. This document, dated 14 January 1588, refers to the voyages made by Jacques Cartier and proceeds to renew the powers granted in the commission of 1540. The text deals mainly with trade and mining and merely touches on the territorial question. The grantees are instructed to "converse and negotiate by all peaceful means [voies de douceur] with the said savages" and to work toward their conversion. They are authorized generally "to do in our name and under our authority all works and undertakings of conquest [toutes les ouvres et ouvertures de conquêtes] by all due and lawful means in order to bring the said lands under our control." This monopoly excited such protests among the merchants of Saint-Malo that on 9 July, Henri III rescinded it, with the exception of mines, and it was never put into effect.

In 1597, la Roche once again secured the King's blessing for an expedition to Canada, and this one was apparently successful. On 12 January 1598, he secured fresh letters patent appointing him lieutenant general in the countries of "Canada, Hochelaga, Newfoundland [Terre-neuves], Labrador, the Great Bay of Norembegue and lands adjacent to the said provinces and rivers, the said countries being of great length and extent and not inhabited by the subjects of any Christian prince."

The wording arguably suggests that the territories named were already French domains, but other sections of the instrument correct this impression. In a preamble, the King refers to the early voyages to Canada and the power previously given to Roberval "for the conquest of the said countries" and goes on to observe, "Which not having not been carried out at that time due to the important affairs that arose for this Crown, we have resolved, in order to complete such a noble undertaking and such a holy and laudable enterprise, to give the responsibility of carrying out this conquest to a valiant, experienced personage, in place of the late Sieur de Roberval."

The French Crown portrays conquest as essential to securing territorial title and admits the failure of earlier attempts. La Roche is authorized to reduce ports, towns, forts, and habitations to the obedience of the King, "whether by peaceful means or amicable agreement, if possible, or by force of arms, main force and all other hostile means." He is also given powers of disposal over such lands "as he is able to acquire for us." In fact, he managed only to maintain a small colony for five years on Sable Island, a rib of sand in the Atlantic some hundred miles off the coast of Nova Scotia.

On 22 November 1599, Pierre Chauvin de Tonnetuit obtained from the king a grant of a trade monopoly in Canada, the Acadian coast, and other countries in New France. La Roche protested and, in January 1600, Henri IV commissioned Chauvin anew as one of la Roche's lieutenants and confined his monopoly to the St. Lawrence River. That year, Chauvin built a small establishment at Tadoussac and left a handful of colonists. Most failed to survive the winter, and the rest were brought back the next year.

These renewed efforts were followed with concern in Spain, whose claims - now merged with those of Portugal - to the New World continued undiminished. The Spanish ambassador to France, Juan Tassis, officially protested to the French King in July 1601, arguing that the establishment of a Spanish fort in Florida meant possession of the whole land, even if it was "somewhat far" from the St. Lawrence River, since their soldiers could not cover the entire territory. He requested that the French sailings cease. But Henri IV replied that, "nature allowed him to look for conquests as well as anyone else, provided it were not land that belonged to his friends." He pointed out that, in Canada, the only inhabitants were the Native peoples, so the French could go there as they pleased. God, after all, had not given the whole world to Spain.

On 8 November 1603, a royal commission was granted to Pierre du Guay, Sieur de Monts, which spells out in unusual detail the official attitude of the French Crown with respect to the acquisition of American territories and relations with their Native inhabitants. De Monts is named the King's lieutenant general in respect to the King in the territories of Acadia, extending from the fortieth degree of latitude up to the forty-sixth; that is, on a modern map, from New Jersey north to the mid-point of Cape Breton Island. The King does not presuppose an existing French title to the lands in question, nor does he grant them as such to de Monts. Rather, he empowers the latter, as his deputy, to extend the King's authority as far as possible within the stated limits and to subdue the inhabitants, thereby bringing them to the true knowledge of God. In effect, as with earlier instruments, the commission confers a faculty to acquire territories not as yet held by the Crown.

In any territories that he secures, de Monts is authorized to pass laws as close as possible to the laws of the King, and further, "to treat and contract to the same effect peace, alliance and confederation, friendship, correspondence and communication with the said peoples and their Princes or others having power and authority over them." The wording assumes that treaties with the indigenous peoples will be a principal means of extending French influence and authority. The Crown acknowledges the independent status of these peoples and their capacity to conclude treaties of peace and
friendship, as well as alliances. De Monts is instructed to observe such treaties scrupulously, provided that the indigenous peoples do likewise. If they default, he is empowered to wage war against them to bring them to such reason as is judged necessary for the honour of God and the establishment and preservation of the King’s authority among them, or at least to the extent necessary for de Monts and other subjects to live with them in full confidence and liberty and to deal and trade with them amicably and peacefully. In other words, if the outright submission of the indigenous groups cannot be secured, de Monts should strive to maintain sufficient influence among them to enable the French to settle nearby and trade with them in security. De Monts is also authorized to confer honours and offices upon the Indians, apparently with a view to bringing indigenous systems of rank and authority within an overall structure dependent upon the French King. The commission goes on to empower de Monts to appropriate as much land as he wishes for his own purposes and to grant lands to others, conferring such titles, rights, and powers as he sees fit.

Aside from the proclaimed religious motivation, the main rationale given for establishing a settlement in Acadia is to facilitate the fur trade. The King notes how fruitful the possession and settlement of these places could be for himself and his subjects, in view of the great profit that could be realized from contacts with the local peoples and the trade and commerce flowing therefrom. Trade was henceforth to play a large role in French colonial policy and profoundly affect French attitudes and policies toward the indigenous peoples. A flourishing commerce in furs depended on friendly relations with the Indians, preferably to the exclusion of other Europeans. Equally important, however, was the need to preserve the American interior as the hunting grounds of their Native inhabitants. Dispossession would destroy the fur trade.

For a time, the de Monts commission was used as a model for comparable instruments. The operative sections on the establishment of the King’s authority and relations with indigenous peoples reappear virtually word for word in Champlain’s commissions of 1612 and 1625. It was in this period that the French first succeeded in establishing small permanent settlements in Canada, the nucleus of the colony of New France – but that is a story we cannot follow here.

What conclusions flow from this survey? In the material reviewed, there is little to show that the French Crown viewed North America as terra nullius, vacant land appropriable by discovery or token occupation. The Crown recognized that most American territories were occupied by independent indigenous peoples. These peoples had the capacity to enter into peaceful relations with France on a basis of juridical equality. The Crown explicitly envisaged treaties of alliance, along with treaties of peace, friendship, and commerce.

Nevertheless, the Crown held that it might also justifiably seek to bring indigenous peoples under its rule, using peaceful means wherever possible but also force if necessary, citing mainly the need to bring infidel nations to the true knowledge of God. The Crown saw only two methods of acquiring sovereignty over indigenous peoples: peaceful agreement or war. Acts of discovery and token occupation were not considered applicable in this context.

The same outlook permeated French attitudes to the claims of its imperial rivals. By and large, France rejected European claims to title or exclusive rights of access to any American territories not actually settled or controlled by their claimants. Iberian pretensions based on the papal bulls were dismissed, as were claims founded on mere discovery or token occupation.

**English Enterprises**

France was not the only European state to challenge the Iberian monopoly on the New World. Soon after Columbus’s landfall, the English Crown started dabbling in American ventures. On 5 March 1496, Henry VII issued letters patent to the Venetian John Cabot and his sons, empowering them to sail to all parts of the eastern, western, and northern seas to discover and investigate heathen and infidel lands “in whatsoever part of the world placed, which before this time were unknown to all Christians.” The instrument authorizes them to erect the royal banners and ensigns in any town, city, castle, island, or mainland newly found by them, and also to “conquer, occupy and possess” such places “as our vassals and governors, lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction.” The patent also grants exclusive rights of access to any places discovered, prohibiting Englishmen from sailing there without licence, on pain of confiscation.

We might note that discovery is mentioned merely as the prelude to acts of conquest, occupation, and possession, by which dominion and title shall be acquired. Any territories acquired pass to the sovereign and are held by the patentees as his vassals. The patent does not cover specific lands or embody territorial claims; it grants a general faculty to conquer new territories.

Cabot sailed west in 1497 and made a landfall somewhere in North America, perhaps in Maine, Nova Scotia, or Newfoundland, where he raised the banners of both England and Venice. He was apparently lost at sea during a second voyage the following year. A contemporary unofficial source recounts that Cabot set up the royal standard on the new land, thereby taking possession for the king. However, there appears to be no evidence that the Crown itself adopted or advanced such a claim at the time.

The letters patent granted to Richard Warde, Thomas Ashurst, and others in 1501 reiterate in more elaborate form the concepts expressed in Cabot’s
patent of 1496, as does the instrument issued in 1502 to a similar group including Hugh Elliot and Thomas Ashurst.\textsuperscript{101} The Crown authorizes the patentees to discover infidel lands hitherto unknown to Christians anywhere in the world, to raise the royal banners, and to "enter and seize" any towns or other places in the king's name and to "occupy, possess and subdue these" as the king's vassals, governors, and lieutenants, "the property, title, dignity and suzerainty of the same being always reserved to us."\textsuperscript{102} The 1502 instrument specifically excludes infidel lands first discovered by the King of Portugal or any other princes whatsoever, friends or confederates, "and in possession of which these same princes now find themselves."\textsuperscript{103} This proviso suggests that discovery in itself carries no rights without possession and implicitly clips the wings of Portuguese and Spanish pretensions.

Both letters patent state that after the grantees have found, acquired, and subdued any lands, the King will grant and does thereby grant them the right to possess as much as they "are able to inhabit, take possession of, hold and maintain," to be held of the Crown by fidelity alone.\textsuperscript{104} Thus, the grants operate in futuro; they dispose of unspecified territories not as yet held by the Crown. The allotted task of the grantees was to acquire such territories, whose geographical extent depended on the success of their efforts. Both instruments also provide for the establishment of colonies of Englishmen. Although voyages were subsequently made, no efforts at settlement seem to have ensued.\textsuperscript{105}

Elizabeth I's letters patent of 1578 to Sir Humphrey Gilbert, and its near twin, issued to Sir Walter Raleigh in 1584, are similarly unspecific.\textsuperscript{106} They authorize the acquisition of any remote, heathen, and barbarous lands that are not "actually possessed," in the sense of being already "planted or inhabited," by any Christian prince or people in amity with Her Majesty.\textsuperscript{107} Again, emphasis is placed on factual possession. The charter envisages that, when new lands are discovered, the patentees shall proceed to possess and inhabit them, or conquer them if necessary.\textsuperscript{108} Indeed, the patentees' rights are contingent upon the establishment of a colony within six years. When a colony is founded, the patentees will hold exclusive rights of colonization and trade within a two-hundred-league radius.\textsuperscript{109} The instruments confer rights to "all the soyle of all such lands, countries, & territories so to be discovered or possessed as aforesaid," with full power to dispose thereof in fee simple or otherwise according to English law, as near as may be convenient, to be held of the Crown by homage and the payment of a fifth part of all gold and silver gotten.\textsuperscript{110} The wording indicates that this grant is conditional and operates in futuro.

These two charters primarily envisage the planting of colonies of Englishmen overseas, rather than the conquest of infidel peoples, although conquest is not ruled out. The powers of government and legislation bestowed on the grantees relate principally to settlers, and it is stipulated that all laws shall be agreeable, as near as may be convenient, to the laws and policy of England.\textsuperscript{111} However, the grantees' efforts to plant colonies in America did not prosper.

These charters presuppose that title to New World territories might be secured only by conquest or settlement, according to whether they were occupied or vacant. When in 1580 the Spanish ambassador protested Drake's violation of Spain's asserted sphere, Elizabeth I dismissed his claims. The Pope, she stated, had no prerogative to grant the New World to Spain or to oblige princes who did not owe the Pope obedience, "and that only on the ground that the Spaniards have touched here and there, have erected shelters, have given names to a river or promontory: acts which cannot confer property." This donation of res alienae (property of another) was void, and Spain's imaginary proprietorship could not prevent other princes from trading in these regions or from founding colonies in places where Spaniards were not residing. Without possession, the queen remarked, prescription was of no avail.\textsuperscript{112}

The instruments just reviewed contemplate future acquisitions in indeterminate regions and specify the relative rights of the Crown and its grantees to any lands secured. The royal charter for Virginia on 10 April 1606\textsuperscript{113} is the first English instrument to assign definite geographical limits to such enterprises and was perhaps influenced by the 1603 French commission to de Monts, which employs this device. The London Company is authorized to plant a settlement at any coastal point between thirty-four and forty-one degrees of latitude, and the Plymouth Company receives similar powers between thirty-eight and forty-five degrees. The most northerly parallel intersects the eastern coast of Nova Scotia north of Halifax and cuts across the Bay of Fundy to meet the mainland near the present border between Canada and the United States. The charter conveys exclusive territorial rights extending fifty miles north and south and one hundred miles inland of the initial settlements; however, the existence and location of these rights depend on the founding of a settlement.\textsuperscript{114}

The charter refers to "Territories in America, either appertaining unto us, or which are not now actually possessed by any Christian Prince or People."\textsuperscript{115} One purpose of the settlements is the acquisition of new territory for the Crown, and the process is apparently assumed to be peaceful. The instrument does not speak of conquering the local peoples, though it permits the grantees to defend themselves.\textsuperscript{116} The Crown expresses the hope that the colonists may bring the true knowledge of God to the "Infidels and Savages, living in those parts" and in time lead them "to human Civility, and to a settled and quiet Government."\textsuperscript{117} The Crown also authorizes the expulsion of any people who settle or trade in the colonies' precincts without the grantees' licence.\textsuperscript{118} These exclusive rights of settlement and trade operate against other English subjects and other Europeans, but evidently not against
the indigenous inhabitants. The monopoly on trade with the Indians is one of the privileges bestowed, and this trade would depend on their continued presence.\(^{119}\)

The London and Plymouth companies are given certain rights over the territories in their future colonies, including “all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments, whatsoever.”\(^{120}\) Oddly, this grant does not seem to carry powers of disposal, for it is later provided that the King shall grant lands to persons named by the local council, to be held as of the manor at East Greenwich in free and common socage.\(^{121}\) We will discuss in due course the effect of such provisions on the rights of the indigenous peoples, but we might note that there was apparently no intent to drive them away. Royal instructions of 20 November 1606 ordain, on threat of severe punishment, that His Majesty’s subjects shall “well entreate” the Indians, and further that “all just, kind and charitable courses, shall be holden with such of them as shall conforme themselves to any good and sociable trafficke and dealing,” whereby they may be brought to the knowledge of God and the obedience of the King.\(^{122}\)

The Virginia charter was superseded with respect to the London Company by a second instrument issued three years later. As with its predecessor, the Virginia charter of 1609 describes the territories slated for colonization as either pertaining to the Crown or not actually possessed by any Christian prince or people. So it does not necessarily claim they were already English domains.\(^{123}\) Paradoxically, and by contrast with the 1606 instrument, the charter grants the London Company title and powers of disposal to all lands within the specified limits. The operative language refers comprehensively to “all the Soils, Grounds, Havens, and Ports, Mines, as well Royal Mines of Gold and Silver, as other Minerals, Pearls, and precious Stones” and so on, stipulating that the lands shall be held as of the manor of East Greenwich and providing that the London Company may under its own seal convey particular portions of the lands.\(^{124}\) The Crown grants all rights “which We, by our Letters Patents, may or can grant” in as ample a manner as has heretofore been granted to any party undertaking discoveries, plantations, or trade in foreign parts.\(^{125}\)

The colony is assigned definite boundaries, defined by coastal points located two hundred miles north and south of Cape Comfort, and drawn thence “up into the Land throughout from Sea to Sea, West and Northwest.”\(^{126}\) According to a common interpretation, the southern boundary ran due west to the Pacific, while the northern boundary extended inland in a northwesterly direction. The latter limit, as described on a modern map, runs from a coastal point near Delaware Bay due northwest to Lake Erie, which it traverses near the eastern end, and then cuts across southern Ontario, through Lake Huron and Lake Superior, and finally across Manitoba and the Northwest Territories to meet the Arctic Ocean. The colony thus takes in a large part of the continent and a major portion of western Canada.

How are we to interpret this remarkable instrument? Is it, like its predecessors, a mere conditional grant of territory that takes effect only upon actual settlement or conquest? Or is it an effective annexation and unconditional grant of territory by the Crown that takes immediate effect?

The answer lies somewhere in between. On the one hand, as already noted, the charter envisages that the territories described are not necessarily English domains as yet. Moreover, the Crown only recognizes the rights of other Christian princes to territories that are “actually possessed.”\(^{127}\) Again, the King states that the rights conferred are as ample as those granted to previous adventurers,\(^{128}\) yet those earlier grants depended on an actual conquest or settlement. Nevertheless, the King lays down definite boundaries for the colony and authorizes the company to expel persons settling or trading there without licence, thus claiming exclusive rights as against other European powers, if not the Indians themselves.\(^{129}\)

On balance, the charter is best understood not as claiming an existing territorial title but as asserting exclusive rights of colonization, trade, and territorial expansion within a certain area vis-à-vis other Christian states. In reaction to the monopolistic pretensions of other European powers, England carves out an exclusive sphere of its own in the New World. However, it stops short of claiming a complete existing title to the lands described. The right to acquire such a title is one of the exclusive privileges claimed against the rest of Christendom, and the responsibility for implementing this project is entrusted to the company.

Meanwhile, the Plymouth Company, the second of the two companies founded under the charter of 1606, had failed to establish a permanent colony. A royal charter of 1620 puts the enterprise on a new footing, granting a council established at Plymouth powers and rights similar to those entrusted to the London Company in 1609.\(^{130}\) The rights relate to a territory named New England, which is defined as ranging from forty to forty-eight degrees of latitude throughout the mainland, from sea to sea.\(^{131}\) The territory comprises a huge swath extending from New Jersey, north to the Baie des Chaleurs, then due westward to the Pacific. Where its boundaries conflict with those of Virginia, it is provided that the latter shall prevail.\(^{132}\)

Many provisions of the charter resemble those of the Virginia instrument of 1609 and do not require separate consideration. The Crown grants to the council all lands within the defined precincts “not actually possessed or inhabited by any other Christian Prince or Estate,” to be held as of the manor of East Greenwich, with power of disposal.\(^{133}\) It also empowers the council to purchase, take, and receive lands, whether from the Crown itself or other persons, in “any other Place or Places whatsoever.”\(^{134}\) The wording is broad enough to cover purchases of Indian lands.
On the surface, the land provisions suggest that the territories are already English domains, but the preamble tells another story. The King mentions two main reasons for issuing the charter: to advance the Christian religion, and also "to stretch out the Bounds of our Dominions, and to replenish those Deserts with People governed by Lawes and Magistrates." The same idea recurs in a later passage, where the King speaks of the enterprise as tending "to the Inlargement of our own Dominions."

These references suggest that the acquisition of territory was the charter's goal rather than its premise. The connection between title and actual possession is stressed in the charter, which asserts that no subjects of any other Christian sovereign are "actually in Possession" of the lands, whereby any right might accrue to them. It recites how plague and warfare among the Indians have depopulated the territory, so that for many leagues there remain no people "that doe claime or challenge any Kind of Interests therein, nor any other Superiour Lord or Souveraigne to make Claim thereunto."

The time has now come, concludes the King, for these large and goodly territories, "deserted as it were by their natural Inhabitants," to be possessed by His Majesty's subjects.

In 1621, James I granted to Sir William Alexander the barony of Nova Scotia, or New Scotland, in America. The boundaries are described as running from the southern tip of the Nova Scotia peninsula, across the Bay of Fundy, up the St. Croix River and northwestern to the St. Lawrence River, thence following the shore east to the Gaspé Peninsula, cutting across to the headland of Cape Breton, and finally running southwesterly along the Nova Scotia coast back to the starting point. The territory comprises the whole of present-day Nova Scotia, New Brunswick, and Prince Edward Island, as well as part of Quebec. The charter encroaches upon the limits of New England, but it appears that the Plymouth Company had previously relinquished its rights to the area in question. As with the instruments of 1609 and 1620, the King grants all lands within the defined precincts, with full powers of disposal.

A distinctive feature of this charter is its elaborate treatment of relations with the indigenous peoples. The King states that his subjects should "cultivate peace and quiet with the native inhabitants" and grants Alexander and his deputies free and absolute power of arranging and securing peace, alliance, friendship, mutual conferences, assistance, and intercourse with those savage aborigines and their chiefs, and any others bearing rule and power among them; and of preserving and fostering such relations and treaties as they or their aforesaid shall form with them; provided those treaties are, on the other side, kept faithfully by these barbarians; and, unless this be done, of taking up arms against them, whereby they may be reduced to order, as

shall seem fitting to the said Sir William and his aforesaid and deputies, for the honour, obedience, and service of God, and the stability, defence, and preservation of our authority among them.

The clause follows the wording of the de Monts commission of 1603 so closely that it seems to have been modelled on it. The Crown recognizes that the Natives possess an autonomous status under their own rulers and the capacity to conclude treaties. At the same time, it asserts the right to reduce them to order if they violate the treaties. The principal objective, however, is to live in peace with the Indians, not to drive them away or seize their lands.

It is interesting to note that Alexander's potential domains in America were enlarged by a royal charter issued on 2 February 1628. Perhaps the most extraordinary instrument of its type, this confers rights and powers identical to those of the 1621 charter over a territory dubbed Canada, encompassing all lands within fifty leagues of the area drained by the St. Lawrence River and its tributaries, as well as within fifty leagues of a passage leading from the river's source westward to the Gulf of California and all lands adjacent to the gulf on the west and south. As if this were not enough, Alexander is also granted all other lands "that shall be found, conquered or discovered, at any future time by him or his successors" on both sides of the territories described above that are not yet "really and actually possessed" by other subjects of His Majesty or by those of any allied Christian sovereign or state.

This charter is a hybrid of the newer type of colonial grant, which assigns definite boundaries to the lands allocated, and the older type, which confers a general faculty to conquer or appropriate overseas territories except those actually possessed by allied princes. The blending of types testifies to their fundamental similarity: both relate to territories as yet to be won for the King. The salient difference is that the newer type of grant claims in advance exclusive rights of trade and colonization as against other European powers.

In sum, the early English charters did not treat territories occupied by indigenous peoples as legally vacant or purport to deprive these peoples of their rights. The charters were speculative grants that authorized the grantees to acquire indigenous lands by peaceful cession and purchase or, in some instances, by conquest. Only where the lands were uninhabited could they be acquired by simple occupation and settlement. Prior to an actual acquisition, the charter holders could claim no greater rights against the indigenous peoples than those held by the Crown itself.

Conclusion
French and English perspectives on the indigenous peoples of North America
were complex and sometimes contradictory, and they evolved over time as European concerns and ambitions changed. Despite this fact, there was also strong thematic continuity throughout the initial period of contact and colonization. These themes can be summed up in several basic propositions.

From the evidence considered here, the French and English Crowns recognized that most of North America was in the possession of Indigenous peoples and that this possession had juridical dimensions. Indigenous territories were not terra nullius; they could be acquired only by methods applicable to occupied territories — by conquering them or securing cessions from their indigenous inhabitants. Modes of acquisition that governed vacant territories — such as occupation, settlement, and perhaps discovery — did not apply to lands held by indigenous peoples. Moreover, the two Crowns clearly considered that indigenous American peoples could conclude treaties of peace and friendship, as well as military alliances. So the evidence provides little comfort for the doctrine of a legal vacuum.

There is also scant support for the version of the discovery theory espoused by Chief Justice Marshall, which holds that the European powers agreed among themselves that the first state to discover an American territory held exclusive rights of access there. Both France and Britain took the view that they were free to travel, trade, and pursue colonial ventures in any American territories not actually settled or controlled by other European states. Mere acts of discovery, exploration, and token occupation did not confer exclusive rights, even as among European powers.

The papal bulls did not fare much better. The French and English Crowns denied the efficacy of the papal instruments, whether viewed as outright grants of territorial title or, more plausibly, as grants of exclusive rights of access for purposes of trade, missionary activity, colonization, and conquest. Nevertheless, both Crowns also availed themselves of the view, set forth in the papal bulls, that Christian powers were entitled on religious grounds to secure the submission of indigenous peoples, either by peaceful means or, if need be, by making war on them and conquering their lands — the aim being, in the words of the bull Inter caetera, 4 May 1493, “to bring under your sway the said mainland and islands with their residents and inhabitants and to bring them to the Catholic faith.”

While rejecting the monopolistic claims of the Iberian powers, the French and English Crowns eventually began playing a similar game, claiming exclusive spheres of operation in the New World as against other European powers. We witness this development in the de Monts commission of 1603 and the Virginia charters of 1606 and 1609, with their designation of definite geographical limits. The vast territories France and Britain now claimed as their exclusive spheres extended inland from coastal areas with which they had some historical connections in the form of early voyages of discovery, exploration, trade, and colonization. This fact is the germ of truth in Marshall’s version of the discovery theory, but the location of these asserted spheres was a matter of continual dispute among the imperial powers. In the end, the matter could only be settled by treaty inter se, and even this proved remarkably difficult to achieve. But that is another chapter in a long tale.

Neither the doctrine of a legal vacuum nor Marshall’s doctrine of legal symbiosis is a completely satisfactory account of official French and English attitudes to indigenous territories in North America. However, Marshall’s theory comes closer to the mark than its rival. Once the ghost of discovery is exorcised, the idea of legal symbiosis stands up reasonably well as a schematic representation of a complex sequence of events.

Notes

2 21 U.S. (8 Wheat.) 543 (1823) [Johnson].
3 31 U.S. (6 Pet.) 315 (1832) [Worcester]. See also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) [Cherokee Nation].
5 For a fuller analysis, see Slattery, Ancestral Lands, supra note 1 at 17-48.
6 Worcester, supra note 3 at 542-43.
7 Johnson, supra note 2 at 573.
8 Worcester, supra note 3 at 544.
9 Ibid., at 545.
10 Johnson, supra note 2 at 573.
11 Ibid., at 574-89.
12 Worcester, supra note 3 at 546.
13 Ibid., at 544-45.
14 Ibid., at 546-47.
15 Thus, Marshall characterizes a treaty of 1778 between the United Colonies and the Delaware as employing “language of equality” and formed “as near as may be, on the model of treaties between the crown heads of Europe” (Worcester, supra note 3 at 549-50).
16 Johnson, supra note 2 at 591.
17 Worcester, supra note 3 at 544.
18 Cherokee Nation, supra note 3 at 17.
19 Worcester, supra note 3 at 559.
20 Cherokee Nation, supra note 3 at 17-18.
21 Johnson, supra note 2 at 603.
22 Ibid., at 574.
23 The following analysis draws on Brian Slattery, The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown’s Acquisition of Their Territories (D. Phil. thesis, Oxford University, 1979); reprinted, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 66-69. See also E.A. von der Heyde, “Discovery, Symbolic Annexion and Virtual Effectiveness in International Law” (1935) 29 AJIL 448 at 451-52; M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (London: Longmans, Green, 1926) at 26; Ludwig F. Von Pastor, The History of the Popes from the Close of the Middle Ages, vol. 6 (London: Kegan Paul, 1894-1953) at 139-43.


25 Ibid., 20 at 23-25.

26 See also the references in the bull Inter caetera of 1456, ibid. at 31; Arabi regis of 1481, ibid. at 53.

27 See discussion in ibid. at 9, 56.

28 Ibid. at 75. See also the two related bulls, Inter caetera and Eximiae devotionis, both issued the previous day, on 3 May.

29 Ibid. at 62.

30 It is interesting that Columbus himself described the bull Inter caetera of 1493 as granted to the Spanish monarchs “to conquer new countries.” See Lewis Hanke, The Spanish Struggle for Justice in the Conquest of America (Philadelphia: University of Pennsylvania Press, 1949) at 25.

31 In Davenport, supra note 24 at 93.


33 The following review is based on Slattery, Land Rights of Indigenous Canadian Peoples, supra note 23 at 70-85, and the same author’s “French Claims in North America, 1500-59” (1978) 59 Canadian Historical Review 139. For discussion of French practice after 1625, see Land Rights of Indigenous Canadian Peoples at 85-94.


37 In Biggar, supra note 35 at 178.

38 See provision in ibid. at 183.


40 See especially Biggar, supra note 35 at 178, 180.

41 Ibid. at 180. There are precedents for this formula. The bull Inter caetera of 4 May 1493 grants to Spain all lands beyond a certain line, with the proviso that none of them “be in the actual possession of any Christian king or prince” as of Christmas 1492. See Davenport, supra note 24 at 77. See also the English letters patent of 9 December 1502 to Hugh Eliot and others, in H.P. Biggar, ed., The Precursors of Jacques Cartier, 1497-1534 (Ottawa: Government Printing Bureau, 1911) at 82.

42 The wording of the clause is broad enough to cover indigenous allies as well as Christian ones. However, the preamble speaks of sending the expedition to Canada, Ochelaga, and other neighbouring regions, which are “uninhabited or not possessed and ruled by any Christian princes,” referring to Christian princes rather than allied ones. See Biggar, A Collection of Documents, supra note 35 at 178.

43 This is implied, for example, in Henri Brun, “Les droits des Indiens sur le territoire du Québec” (1969) 10 C. de D. 415 at 426, 428-29.

44 Among the various motives that Spanish officials thought might explain the French expedition, the religious one was apparently not even considered. The Cardinal of Seville said, “Their motive is that they think, from what they learn, that these provinces are rich in gold and silver, and they hope to do as we have done, but, in my judgment, they are making a mistake.” (Letter of 10 June 1541 in Biggar, A Collection of Documents, supra note 35 at 325). For discussion, see Trudel, supra note 36 at 129-31; Julien, supra note 36 at 138-41, 147, 149; Lancròt, supra note 36 at 67-68.

45 Inter caetera, 4 May 1493, in Davenport, supra note 24 at 76.

46 Biggar, A Collection of Documents, supra note 35 at 181 [emphasis added].

47 Ibid. at 179 [emphasis added].

48 Relation of Cartier’s third voyage in H.P. Biggar, ed., The Voyages of Jacques Cartier (Ottawa: King’s Printer, 1924) at 251, n. 2.

49 Relation of Roberval’s voyage, ibid. at 263-64.

50 Cartier’s third voyage, ibid. at 255; Roberval’s voyage, ibid. at 264.

51 Roberval’s voyage, ibid. at 265.

52 Spanish ambassador in France to Emperor (8-10 November 1540[?]) in Biggar, A Collection of Documents, supra note 35 at 135-36; Emperor to Cardinal of Toledo (11-13 November 1540[?]), ibid. at 140-41.

53 Letter of (11-13 November 1540[?]), ibid. at 141.

54 Spanish ambassador in France to Emperor (27 December 1540), ibid. at 167-71. See also Cardinal of Toledo to Emperor (27 January 1541), ibid. at 190.

55 Emperor to Cardinal of Toledo (5 February 1541), ibid. at 197. See also Comendador Mayor (Los Cobos) to Luis Sarmiento (16 March 1541), ibid. at 235.

56 Letter of 24 March 1541, ibid. at 242-43. See also Cardinal of Toledo to Emperor (26 June 1541), ibid. at 318.

57 Letter of 7 May 1541, ibid. at 283-84.

58 Spanish ambassador in Rome to Comendador de Leon (Los Cobos) (14 April 1541), ibid. at 268-69. See also letter to the same emperor (17 April 1541), ibid. at 270-71.

59 Los Cobos to Aguilar (6 July 1541), ibid. at 329-30.

60 Letter of 7 May 1541, ibid. at 284.

61 Spanish ambassador in France to Emperor (3 November 1541), ibid. at 404. The word translated as “princes” in English is “princes” in the original text, which is the same word used there for Christian monarchs.

62 The King perhaps refers to early voyages by fishing vessels, but none are known prior to 1504. See ibid. at 170, n. 1; Lancròt, A History of Canada, supra note 36 at 45-46; C.-A. Julien, R. Herval, and T. Beauchesne, eds., Les Français en Amérique pendant la première moitié du XVIe siècle (Paris: Presses Universitaires de France, 1946) at 1-3; Trudel, supra note 36 at 34.

63 Davenport, supra note 24 at 208 [emphasis added].

64 Ibid. at 207. For Portugal’s views on these negotiations, see Eugène Guérin, Anges et ses pilotes (Paris: Maurice Prudhomme, 1901) at 232-33.

65 Charles de la Roncière, Histoire de la marine française, vol. 3 (Paris: Librairie Plon, 1899-1934) at 302-3. A similar ban on navigation to lands discovered by Portugal was issued in October 1547. See ibid. at 303-4.

66 Davenport, supra note 24 at 217-18.

67 Ibid. at 220, n. 9.


69 Ibid.

70 Ibid. at 6 [emphasis added].

71 Ibid. at 9 [emphasis added].

72 Lancròt, supra note 36 at 80; Trudel, supra note 36 at 218.


74 Ibid. at 42 [emphasis added].
Ibid. at 48.

Lantot, supra note 36 at 82; Trudel, supra note 36 at 228-31.

Edits, ordonnances royaux, déclarations et arrêts du conseil d'état du Roi concernant le Canada, vol. 3 (Québec: Presse Fréchette, 1854-56) at 8.

Ibid. at 9.

Ibid. [emphasis added].

Ibid.


In 1580, Philip II of Spain had seized the vacant Portuguese throne.

Tassis to the Council of State (9 July 1601) in L.A. Vigneras, Some Spanish Documents Relating to Early French Expeditions to Canada" (1954) 35 Canadian Historical Review 217 at 221.


Ibid. at 490. Ganong points out that, on maps of the period, the forty-ninth parallel is shown as running north of Cape Cod while the forty-sixth cuts through Cape Breton. See Ganong, supra note 32 at 158-60.

Lescarbot (1618), supra note 86 at 490.

Ibid. at 491.

These ideas are reiterated in the supplementary letters patent issued to de Monts on 18 December 1603. They rectify that he has been empowered to settle the lands specified and establish the King's authority and generally ensure that French subjects may henceforth live there and trade with the savages inhabiting the said places. See Collection de manuscrits contenant lettres, mémoires, et autres documents historiques relatifs à la Nouvelle-France, vol. 1 (Québec: A. Coté et Cie., 1883-85) at 46.

Lescarbot (1618), supra note 86 at 491. This was in accordance with de Monts's petition, which requested power to bestow "graces et privilèges tant à ceux du pays qu'aux gens qui y vont y habiter." See Collection de manuscrits, supra note 90 at 40.

Lescarbot (1618), supra note 86 at 491.

Ibid. at 490.

Commissions issued by the Comte de Soissons on 15 October 1612 and by the Duc de Ventadour on 15 February 1625. See Edits, supra note 78 at 11-14.

The following analysis is based on Slatter, Land Rights of Indigenous Canadian Peoples, supra note 23 at 95-107. For discussion of subsequent English practice up to 1763, see ibid. at 107-361.

In Biggar, A Collection of Documents, supra note 35 at 9. Cabot was a naturalized Venetian but born elsewhere. See, for example, Halpeny and Hamelin, supra note 83 at 146.

The operative words in the Latin original are "subsecari, occupari et possidendi." See Biggar, Precursors of Jacques Cartier, supra note 41 at 7.


The royal letters patent issued on 3 February 1498 for this voyage are of little juridical interest. See Biggar, ibid. at 22-24.

Raimondo di Soncino to the Duke of Milan (18 December 1497), ibid. at 19-20.

Ibid. at 41-59, 70-91. The texts are dated 19 March 1501 and 9 December 1502.

Ibid. at 51, 81-82.

Ibid. at 82.
142 An English translation of the Latin original is given in *ibid.* at 239. The date is incorrectly given there as 2 February 1628/29 rather than 1627/28 (i.e., 1627 old style, 1628 new style).
145 In Davenport, *supra* note 24 at 76.