Today, we begin our third broad substantive area of property law. That is the law of estates. We have covered leasehold, or landlord-tenant law. We have also covered the law of personal property or chattels. This third area is the law of real property or land law. We start with the principles of sovereignty, discovery, and conquest. Perhaps, today of all days is an appropriate one for this lecture. Why, you might ask? Because today, the nation celebration the Christian discovery of America, for today is Columbus day! (Do we have a holiday to celebrate the contributions of native Americans, and should we? Thanksgiving?)

1. Please provide an Overview of the Topic. What is the relevance of this case? What principles?

1. The history of discovery, settlement, and conquest.
2. The importance of sovereignty, that all title to land derives from and is under the ultimate control of the sovereign.
3. The significance of power of the sovereign to maintain and protect property rights.
4. The significance of the chain of title, p. 10, fn. 2.
5. The importance of the right to exclude.
6. The concept of first possessor in time being the basis of ownership, both honored and dishonored in this case.
7. The significance of legal principles and moral or immoral philosophy to mold legal and political debates, such as Locke’s theory of labor.
8. The basic underpinning of our common, shared belief system of one’s entitlement property rights.
9. The great debt that we owe to native Americans and their descendants.
10. As to the quality of the judicial opinion, I would give Marshall a C grade because he fails to adequately document legal authority for his rules of law, he misapplied the general principle to the particular case, failed to recognize possible exceptions to the general rule, and failed in his application to this case by not asking for specifics as to the chain of this particular title.

2. What context? How does one prove ownership today? And how does one protect that ownership procedurally against wrongful claims?

Show chain of title to the US government, and seek ejectment against trespassers. The basis underpinning of our common, shared belief system

3. What did Locke mean when he said (p. 3) that in the beginning all the world was America?

Undiscovered or unclaimed or frontier.

Plaintiff claimed under a purchase and conveyance from the Piankeshaw Indians and sought ejectment for lands in the State and District of Illinois against the defendant who claimed under a later grant from the United States. Judgment below for the defendant. Appeal to the Supreme Court.

5. What is the legal issue? Why was this issue an important one at that time?

Whether plaintiff’s claim to land derived in 1773 and 1775 from the chiefs of the Illinois and Piankeshaw Indians, can be recognized in the courts of the United States? Arguably pre-US and outside the original 13 colonies: land grab.

6. Was there any doubt as to the chiefs’ representation of the tribes or of their rightful possession of the land at issue?

No, p. 4.

7. What is the Chief Justice Marshall’s legal authority in this case? What is the difference between natural (original, first created) law and positive (descriptive or explanatory) law?

He references natural law, and the Creator. But settles on the principle that the right of society to prescribe rules of property cannot be called into question and that he uses government adopted principles in the case as the source of law for the decision.

8. What is the court’s statement of the rationale for the European discovery rule?

The vastness of the land to accommodate ambition and enterprise, and the character and religion of its inhabitants “offered an apology (excuse) for considering them as a people over whom the superior genius of Europe might claim an ascendancy (domination).”

9. What was the exchange for European unlimited independence over the land?

Civilization and religion.

10. What is the rule of discovery and what is its role or its rationale? How were conflicts over title by discovery resolved?

Rule is that discovery gave title to the government by whose subjects or by whose authority, it was made, against all other European governments, which title might
be consummated by possession. (Discovery and Possession). Its purpose was to regulate European acquisition of land between themselves. And conflicts were resolved by the sword.

11. What about the natives’ rights to the land?

Discovery gave the discoverers the exclusive right of acquiring the soil from the natives, and establishing settlements upon it. The relationship between the discoverers and the natives were to be regulated by themselves. “In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion, but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”

12. What rule of title did the Europeans establish?

While they respected the right of the natives, as occupants, the Europeans asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantee, subject only to the Indian right of occupancy.

13. What is the court’s authority for these rules?

The history of America from its discovery to the present. Spain, Portugal did, as did France (even though more conciliatory her conduct to the natives) and Holland. England assented to the discovery rule, of lands unknown to Christian people, and giving prior title to the Christian rule.

14. What value did Christian religion play in the rule of discovery?

It provided a rationale for taking the land, in consideration of the gift of religion, and for first title to a Christian discoverer.

15. How does the discovery principle apply to the issue in this case?

Our whole country has been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. Royal governments remained in the crown and the king claimed and exercised the right of granting land, with limited exceptions.

16. How has the United States acted relative to the principle of discovery?
In the treaty ending the Revolution, Great Britain relinquished all claims of its title in the United States to States. And the US has accepted.

17. What did Virginia say on to title in its territory?

1779, declaring Virginia has the exclusive right of pre-emption from the Indians, and no person or persons have or ever had a right to purchase any lands within form any Indian nation, except only persons duly authorized, for the benefit of the colony and for the Commonwealth. The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

18. Should Virginia’s statute apply or not apply to this case?

Land in question is within its territory and the statute is retroactive, prior to 1779. And yet the court cites the statute as a statement of Virginia’s affirmation of the broad principle that the exclusive right to purchase from the Indians resided in the government. (The court reserves the question of the power of annulling vested rights.) p.7.

19. What reference to Kentucky?

Virginia set up a land sale office and made money selling the land that now is Kentucky, despite the fact that Indians claimed and possessed the land with much persevering courage.

20. How did the United States get ownership of the land?

The states conceded their territories to the United States. The land in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the Ohio River. The grant contained reservations and stipulations which could only be made by the owners of the soil, and gave all the lands, not reserved, to the US.

21. What relationship between discovery and conquest?

That the discovery rule gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest, and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

22. Why can’t the Indians grant titles as well?

The exercise of the US right to grant title must negate the existence of any right which may conflict with, and control it. And absolute right to lands cannot exist, at the same time, in different persons, or in different governments. And absolute
must be an exclusive title, or at least as title which excludes all others not compatible with it. (The right to exclude).

23. What about the fruits of the land? Does it belong to the government or to the owners of the land?

The court reserved its opinion on that issue and said that it will not enter into the controversy whether owners have the right to expel hunters from the territories they possess.

24. What other principle does the court add to its analysis of the rationale for exclusive sovereignty of title?

Conquest.

25. What does the court think should happen to the conquered? Why does that not work with the Indians (according to Marshall)?

They should be allowed to assimilate into the general society and be given the right of property. The Indians were independent, lived off the land, were fierce savages, and were occupied by war. (Is this true of all Indians?)

26. Was it really incompatible to the Europeans and natives to live in harmony?

What about the first Thanksgiving?

27. Were white settlers the other group who received grants from the European governments?

28. What would natural law say about the issue of Indian ownership?

That first in time is first in right.

29. What rights do the Indians have?

Occupation, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. Does that mean they can sublease or assign their occupancy rights?

30. What is the answer to the question? Who wins and why?

The defendant wins as the plaintiff did not receive title from an Indian chief.

31. Could the plaintiff have received good title from an Indian chief and if so how? What would have been the plaintiff’s strongest argument?
32. Could native Americans claim compensation under the Fifth Amendment? Why not? Should they be able to claim today for past wrongs? Why? Or Why not?

32. Why, according to Grotius do we have private property?

To preserve peace. The riches of the earth once belonged to everyone in common, but avarice led to scarcity. What you possessed, you owned. What role of the government.

33. Does the Native American Graves Protection and Reparation Act of 1990 follow or deviate from the principles in Johnson?

Deviate in that personal property of the tribes belong to them, and their transfer of ownership to another passes title.