position.[108] One position advocated the forceful dispossession of Indians, in part because of their "savage" or "primitive" nature; the other advocated the "civilizing" of tribes so that they could become assimilated into white culture and become useful republican citizens. The positions were, of course, two sides of the same coin: they both started with the assumption that Indians were different (primitive, childlike, savage) and that their differentness could not be tolerated. While the positions provoked sharp differences of policy and, as we shall see, precipitated conflict in the Court's Indian cases, they functioned to exclude from discourse a third ideological point of view, that of cultural relativism. The idea that Indians in America should be allowed to perpetuate a radically different cultural heritage from that of white settlers, and at the same time be treated as human beings having natural rights to autonomy and respect, was not seriously entertained at the time of the Marshall Court. Only a diluted version of that idea was entertained, manifested in the theory that Indian tribes were wards of the federal government and should, because of their cultural differentness, be forcibly separated from white society. That theory was subsequently to provide the principal justification for the establishment of federal Indian reservations, which began in earnest in the 1860s.[109]

The first Marshall Court cases in which the rights of Indian tribes were considered reflected the early patterns of Indian-white interchange in America. They involved land disputes between whites in which one of the disputing parties had acquired title to the land from an Indian tribe.[110] In *Fletcher* v. *Peck*, for example, the state of Georgia had granted a portion of its land to nonresident land companies even though Indians remained in possession of, and theoretically in ownership of, the land. Luther Martin, in arguing *Fletcher* for a member of one of the land companies, confronted the question of the Indian title. "What is the Indian title?" he asked. "It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession." The Indian title, Martin claimed, was "a mere privi-

[108] These two positions did not, of course, exhaust the responses of nineteenth-century white Americans to the "Indian question." Within the community of persons who adhered to the "civilize" position there was debate about whether "civilization" could take place without removal, or whether the two responses were linked. And within the white missionary community there were those who believed that the Indian tribes could become "civilized" and Christianized and at the same time retain their cultural identity as a nation. See McLoughlin, *Cherokees*, 335–352.

[109] See generally G. Harmon, *Sixty Years of Indian Affairs* (2d ed., 1969); F. Prucha, ed., *The Indians in American History* (1971).

[110] See, e.g., Fletcher v. Peck, 6 Cranch 87 (1810); Preston v. Browner, 1 Wheat. 115 (1816); Danforth's Lessee v. Thomas, 1 Wheat. 155 (1816).

lege which does not affect the allodial right."[111] Marshall, for the Court, appeared to accept this argument. "It was doubted," he said, "whether a state can be seised in fee of lands, subject to the Indian title." But a "majority of the court" had concluded "that the nature of the Indian title . . . is not such as to be absolutely repugnant to seisin in fee on the part of the state."[112] Johnson, in his concurrence, disagreed. The Indians in Georgia, he maintained, were "an independent people" with "an absolute right of soil." No "other nation can be said to have an interest in [their land]."[113] He was later to abandon that position.

New Jersey v. *Wilson*,[114] discussed in Chapter IX, did little to clarify the status of Indian titles to land, although an Indian title was at the heart of the case. As we have seen, in *Wilson* the colony of New Jersey, in a 1758 statute ratifying an agreement between colonial commissioners and the Delaware tribe, had granted the Delawares a tract of land and perpetual immunity from taxation of that land in exchange for cession of Delaware claims to large portions of the southern half of the colony. The Delawares, as Marshall put it for the Court, "continued in peaceable possession of the lands thus conveyed to them" until 1801, when they decided to move to Stockbridge, New York, and "obtained an act of the legislature of New Jersey authorizing a sale of their land."[115] The land was sold two years later by state commissioners to a group of whites, and in 1804 the New Jersey legislature repealed the 1758 statute and assessed the land for taxation. The white buyers challenged the constitutionality of the 1804 repeal on the ground that it violated the Contract Clause, and Marshall held that the 1804 statute was invalid. The principal significance of the *Wilson* case was, as previously noted, Marshall's finding that a perpetual tax exemption granted before the United States finally came into being, and well before the framing of the Contract Clause, was nonetheless a "contract" for constitutional purposes.

There was, however, another issue implicitly posed by *New Jersey* v. *Wilson:* what was the status of the Indian title? The Delawares' original claims to New Jersey land would have been regarded, *Fletcher* suggested, as mere rights of possession, subject to being obliterated by the colony in which the land existed. But the New Jersey colonial legislature had, in 1758, formally granted the Delawares land. Was the title created by that grant more than a "mere occupancy"? Marshall's language in *Wilson* suggested that it was. The land had "been sold," he said, "with the assent of the state, with all its privileges and immunities." The white purchasers "succeed[ed] with the assent of the state, to all the rights of the Indians." And the privilege of exemption from taxation, while "an-

[111] 6 Cranch at 121, 123.
[112] Ibid., 142–43.
[113] Ibid., 147.
[114] 7 Cranch 164 (1812).
[115] Ibid., 166.