WELL SETTLED?: THE INCREASING WEIGHT OF HISTORY IN AMERICAN INDIAN LAND CLAIMS

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> *[It is] a settled principle, that [the Indians'] right of occupancy is considered as sacred as the fee simple of the whites.*[1]
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> *Justice Henry Baldwin*
> *Mitchel v. United States (1835)*

> *It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.*[2]
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> *Justice Stanley Forman Reed*
> *Tee-Hit-Ton Indians v. United States (1955)*

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[1] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835) (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831)).

[2] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

On October 18, 1987, thirty-six members of the Missisquoi Abenaki Tribe were arrested by officials of the State of Vermont for fishing without a state license.[3] In an amazing turn of events, Judge Joseph J. Wolchik found that the federal government—the only entity with the lawful power to extinguish Indian title—had never extinguished Abenaki title to the tribe's traditional lands in the State of Vermont, including the land on which the defendants were fishing.[4] Since the defendants were fishing on tribally owned land, the State of Vermont had no jurisdiction over them and Judge Wolchik dismissed the charges against them.[5] Unsurprisingly, in *State v. Elliott*,[6] the Vermont Supreme Court reversed in a unanimous decision on June 12, 1992.[7]

It is unfortunate that it was the trial court's ruling, rather than the Vermont Supreme Court's ruling, that was surprising. It is a great deal more than merely unfortunate that the Vermont Supreme Court failed to accord its American Indian citizens the same level of protection for their property rights as it accords its non-Indian citizens. It is tragic that this disparity of treatment existed not only in the distant past but persists to this day.

The ruling in *State v. Elliott* is premised on two assumptions. First, the court assumed that Indian title can be extinguished by the "increasing weight of history."[8] In effect, the court assumed that the longer tribal rights are ignored, the greater the reason for construing the federal government's failure to protect Indian interests as an affirmative intent to extinguish Indian title.[9] This view incorrectly interprets existing federal law on what acts are sufficient to extinguish Indian title; state adverse possession doctrine is inapplicable to Indian title and existing federal law

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[3] State v. St. Francis, No. 1170-10-86Fcr, slip op. at 1 (Vt. Dist. Ct. Aug. 11, 1989), *rev'd*, State v. Elliott, 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[4] *Id.* at 91-92.

Whether recognition of original Indian title would give the Abenaki Nation the right to evict non-Indian residents from Abenaki land or to collect rent from them is a separate question not addressed by the court.

[5] *Id.* at 96.

[6] 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[7] *Id.* at 221.

[8] *Id.* at 218; *see also id.* at 213-18 (describing way in which Indian title was extinguished by historical events).

[9] *Id.* at 213, 218.

requires clear and convincing evidence that Congress intended to extinguish Indian title.[10] The Vermont Supreme Court ignored this principle, interpreting extinguishment doctrine in a way which would allow tribal property rights to be lost in a casual manner, rather than through clear expression of congressional intent. This approach not only fails to accord American Indian nations adequate protection for their property rights, but also denies Indian nations equality under the law by treating non-Indian property rights as more sacred and inviolable than tribal rights.

The second assumption underlying the ruling in *State v. Elliott* is the continued viability of the principle that Indian lands can be taken by the federal government without compensation unless the government has explicitly promised otherwise.[11] This principle, established by *Tee-Hit-Ton Indians v. United States*,[12] holds that tribal lands do not always constitute "property" for purposes of the Fifth Amendment.[13] Tribal property is granted protection against seizure only if Congress has "recognized" tribal title by treaty or statute,[14] and even in that case, Indian nations have far less than full constitutional protection.[15]

Tee-Hit-Ton was decided in 1955[16]—ironically, one year after *Brown v. Board of Education*,[17] a landmark in the struggle for racial equality. The ruling in *Tee-Hit-Ton* amounts to a formal declaration that American Indian citizens remain, to a significant

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[10] *See infra* notes 128-134 and accompanying text.

[11] State v. Elliott, 616 A.2d 210, 213 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955)).

[12] 348 U.S. 272, 279 (1955).

[13] *Elliott*, 616 A.2d at 213.

[14] *Tee-Hit-Ton Indians*, 348 U.S. at 277-78 (noting that congressional declaration that Indians are to hold lands permanently requires compensation for subsequent taking of that land).

[15] They do not have full constitutional protection. The federal government has far greater latitude in abrogating treaties and interfering with tribal property rights than it does with non-Indian property rights. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (holding that the federal government may abrogate tribal property rights if it is acting within the scope of its trust power and acts in good faith to ensure that the tribe is provided with "equivalent value" for the property rights taken); *see also* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 OR. L. REV. 245 (1982) [hereinafter Newton, *The Judicial Role*] (criticizing *Sioux Nation*).

[16] *Tee-Hit-Ton Indians*, 348 U.S. at 272.

[17] 347 U.S. 483 (1954).

extent, outside the normal protection of the Federal Constitution and can therefore be subjected to formally unequal treatment under the law.[18] The reasoning in *Tee-Hit-Ton* is reminiscent of the reasoning in *Lone Wolf v. Hitchcock*,[19] a case which has aptly been characterized as the *Dred Scott*[20] of American Indian law because it held that all questions relating to Indian affairs were political questions beyond the reach of the courts and that Congress and the President therefore possessed absolute, unreviewable power over Indian nations.[21] The holding that all cases of treaty abrogation represent unreviewable political questions has been subsequently rejected; some abrogations constitute compensable takings of property enforceable in court.[22] However, the reasoning of *Lone Wolf* retains force in the guise of the plenary power doctrine,[23] as *Tee-Hit-Ton* shows. Further, *Tee-Hit-Ton* itself has never been repudiated. It continues to be cited in modern treatises and articles as a cornerstone of American Indian law and, as the decision of the Vermont Supreme Court in *State v. Elliott* shows,[24] it continues to affect American Indian policy and law, not only theoretically, but in outcomes in the real world.

When the Vermont Supreme Court relied on *Tee-Hit-Ton* to support its holding in *State v. Elliott*, it was as if a current court

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[18] Formally *different* treatment does not necessarily amount to formally *unequal* treatment; the protection of tribal sovereignty and the continued respect for treaties does not deny equal protection of the laws either to non-Indians or to Indians. Indeed, the failure to respect treaty rights would effectively accord Indian nations less protection for property than is accorded to non-Indians, and thus constitute unequal treatment. The rules regarding original Indian title, based on *Tee-Hit-Ton*, do constitute such formally unequal treatment to the distinct disadvantage of Indian nations.

[19] 187 U.S. 553 (1903).

[20] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, Chief Justice Taney declared that Dred Scott, a slave, was not a United States citizen and held that slaves were "like an ordinary article of merchandise and property." *Id.* at 451.

[21] *Lone Wolf*, 187 U.S. at 563.

[22] *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (providing compensation for abrogation of a treaty that resulted in a taking of property rights); United States v. Creek Nation, 295 U.S. 103 (1935) (holding that appropriating land for its own purposes "would not be an exercise of guardianship, but an act of confiscation").

[23] *See* Robert A. Williams, Jr., *Learning Not to Live with the Eurocentric Myopia: A Reply to Professor Laurence's "Learning to Live With the Plenary Power of Congress Over the Indian Nations,"* 30 ARIZ. L. REV. 439 (1988) (criticizing the plenary power doctrine).

[24] *See* State v. Elliott, 616 A.2d 210, 210 (Vt. 1992) (relying on Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)), *cert. denied*, 113 S. Ct. 1258 (1993).

had cited *Dred Scott* with approval. Given the formal expressions of concern for Indian rights in case law,[25] and given the current Supreme Court's tendency to promote formal over substantive equality,[26] the question rises: how could this happen? How could the courts continue, in the 1990s, to deny protection for property held by American Indian nations? What thinking processes allow this to happen?

In Part I below, I will address the question of whether the Vermont Supreme Court correctly applied existing federal precedent in determining whether Abenaki title was lawfully extinguished. Part II will criticize the reasoning in *Tee-Hit-Ton*. In Part III, I will argue that the failure of United States courts to protect tribal property rights adequately is based partly on a perceived need to legitimate the current distribution of wealth and power by reference to a mythological picture of the origins and current shape of property rights. American Indian nations will be treated with respect, equality, and justice only if this inadequate view of property is rejected and replaced by a paradigm that perceives rights as ways to shape the contours of relationships.

In analyzing the reasoning of Justice Morse in *State v. Elliott*, I will have harsh words to say about the opinion. I want to note that this court is no worse than many others (including the United States Supreme Court) that have failed to act to protect tribal property rights as they should have done.[27] Nor is federal Indian law a model of clarity; it is easy to find conflicting precedents and to apply prevailing standards incorrectly because of the complexity of the law in this area and of the moral dilemmas inherent in adjudicating the legal consequences of conquest. Why, then, the harsh words? It is because the courts often have adopted an approach to Indian property rights that has the intended or

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[25] *See, e.g., Sioux Nation of Indians*, 448 U.S. at 371 (providing compensation for taking of property rights of American Indian nations).

[26] Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579; Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

[27] *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that all questions relating to Indian affairs are political questions beyond the reach of the courts).

unintended consequence of treating American Indians as second class citizens, and even as not fully human. The courts have sometimes treated the land as unpossessed.[28] This effectively analogizes the Indian inhabitants to the animals who wandered over the land. The courts have engaged in this unjust approach on the assumption that such treatment was—and continues to be—a necessary part of the way the United States was founded and essential to protecting current non-Indian property rights. It is my purpose to argue that this assumption is unfounded. Respecting tribal property does not mean that non-Indian rights are null and void. Room for compromise exists. But as recent events in the Middle East remind us, a just resolution of an intractable conflict is not possible unless the justice of each side's claim is recognized. The Vermont Supreme Court took a giant step backward in failing to recognize and protect the rights of all its inhabitants—both Indian and non-Indian.

I. WAS THE ABENAKI TITLE LAWFULLY EXTINGUISHED?

Did the Vermont Supreme Court correctly apply existing precedent to answer the question of whether the Abenaki title was lawfully extinguished? To address this question, we first need to ask whether Congress has the constitutional power to extinguish original Indian title without the consent, and over the objections, of the affected Indian nation. Second, what is the test under federal common law governing property rights of American Indian nations for determining whether original Indian title has been extinguished? Third, is that test satisfied in the case of the Abenaki Nation?

A. MAY CONGRESS CONSTITUTIONALLY EXTINGUISH ORIGINAL INDIAN TITLE WITHOUT THE CONSENT OF THE AFFECTED INDIAN NATION?

The Vermont Supreme Court answered the question of whether there are any limits on Congress's ability to extinguish original Indian title by quoting the now classic statement of the law in the

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[28] *See, e.g., Tee-Hit-Ton Indians*, 348 U.S. at 272 (holding that native land use was not sufficiently intensive to implicate property interests protected by the Fifth Amendment).

relatively recent 1941 case of *United States ex rel Hualpai (Walapai) Indians v. Santa Fe Pacific Railroad*,[29] *(Walapai Tribe)* to the effect that aboriginal title may be extinguished " 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.' "[30] This statement of the law assumes that, aside from the duty to pay compensation, there are no constitutional limits on Congress's power to extinguish Indian title. The court further supported this conclusion by citing the 1886 case of *Buttz v. Northern Pacific Railroad*,[31] to the effect that the manner, time, and conditions of extinguishment of Indian title are unreviewable political questions for the sole discretion of Congress.[32]

The Vermont Supreme Court thus answered the question of whether there are any constitutional limits on seizure of Indian property in the negative.[33] It cited both *Walapai Tribe* and *Buttz* to support the proposition that the federal government has absolute, unreviewable power to continue the conquest of Indian nations that have not yet been forced to sign a treaty with the United States.[34] The United States may take land held under original Indian title as it pleases, without any constitutional limits, without any duty to negotiate a contract of sale or a treaty ceding sovereignty, without any constitutionally mandated obligation to pay compensation for the taking of land possessed by Indian nations for thousands of years, and despite the fact that the members of such tribes are United States citizens otherwise protected by the Constitution.

Is this an accurate statement of existing law? As often happens in American Indian law, the answer is "yes and no." On one hand, both *Walapai Tribe* and *Buttz* strongly suggest that there are no constitutional limits on federal authority over Indian lands beyond

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[29] 314 U.S. 339 (1941) [hereinafter *Walapai Tribe Case*].

[30] State v. Elliott, 616 A.2d 210, 213 (Vt. 1992) (quoting *Walapai Tribe Case*, 314 U.S. at 347), *cert. denied*, 113 S. Ct. 1258 (1993).

[31] 119 U.S. 55 (1886).

[32] *Elliott*, 616 A.2d at 213 (citing *Buttz*, 119 U.S. at 66).

[33] *Id.*

[34] The court's use of these cases is therefore strongly reminiscent of Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). It is as if the court had cited two cases which developed the implications of *Dred Scott* without citing *Dred Scott* itself.

the duty to pay compensation for taking lands held under recognized title. On the other hand, *Walapai Tribe* and *Buttz* are inconsistent with the Marshall Court Indian law cases decided in the 1820s and 1830s: *Johnson v. M'Intosh*[35] and *Mitchel v. United States*.[36] Those cases have never been overruled; indeed, they continue to be cited by the United States Supreme Court.[37] Further, the Vermont Supreme Court purported to rest its decision in *Elliott* on these foundational Marshall Court cases.[38] The court therefore presented the later cases as consistent with the earlier ones and American Indian law as continuous and coherent over time. The truth is far different. The later cases misstate the holdings of the earlier cases.[39] This is not surprising in view of the fact that the Marshall Court cases were decided during the treaty period, while *Buttz* was decided at the beginning and *Walapai Tribe* at the tail end of the allotment period and the beginning of the current self-determination period. There was a one hundred and eighty degree shift in policy between the treaty period and the allotment period.[40]

It is not unusual for courts to overrule old cases by distinguishing them to death; however, it is unusual to continue to cite those old cases when their holdings are embarrassingly at odds with later interpretations. At some point, the courts tend to acknowledge that the old case has been effectively overruled.[41]

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[35] 21 U.S. (8 Wheat.) 543 (1823).

[36] 34 U.S. (9 Pet.) 711 (1835).

[37] *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 326 (1978) (citing *Johnson*); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 668 (1974) (citing *Mitchel*).

[38] State v. Elliott, 616 A.2d 210, 212 (Vt. 1992) (citing *Johnson* and *Mitchel*), *cert. denied*, 113 S. Ct. 1258 (1993).

[39] *See* notes 85-127 and accompanying text.

[40] *See* ROBERT N. CLINTON, NELL JESSUP NEWTON, MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 137-64 (3d ed. 1991) (explaining shifts in federal policy).

[41] *See, e.g.*, South Dakota v. Bourland, 113 S. Ct. 2309 (1993). In *Bourland*, Justice Thomas acknowledges what the opinion of Justice Stewart denied in the earlier case of Montana v. United States, 450 U.S. 544 (1981), i.e., that *Montana* substantially changed the law of tribal sovereignty. Justice Thomas notes:

> The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument, is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

Bourland, 113 S. Ct. at 2320 n.15 (quoting *Montana*, 450 U.S. at 565).

Since the earlier cases were never explicitly overruled and continue to be relied upon to support current Indian law policy, it is appropriate to criticize the Vermont Supreme Court for failing to recognize the actual holdings of the earlier cases and to explain or justify the ways in which the later cases narrow tribal rights in a manner inconsistent with prevailing policy in the period before or after the allotment period.

To examine the relevant case law on the means by which Indian title may be lawfully extinguished, we can start by asking what the Marshall Court cases actually said. It has long been presumed that the federal government has the raw power to extinguish Indian title at the time and manner of its choosing.[42] One of Chief Justice John Marshall's most famous statements in *Johnson v. M'Intosh* is that "[c]onquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[43] However, the assumption that the *raw power* exists does not settle the question of its *legality*. It is true that Chief Justice Marshall bemoaned the unfortunate fact that courts of the conqueror cannot comfortably question the legitimacy of the sovereign that constitutes their own source of authority.[44] At the same time, even though Marshall acknowledged both the impossibility of undoing past events and the fact that the sovereign he represented was born in sin, he also imposed legal limits on the *future* conduct of the "conqueror."[45] In so doing, he delimited the circumstances in which the conqueror would be able *prospectively* to extinguish Indian title—and therefore continue its conquest.[46]

Johnson v. M'Intosh is often cited for the propositions that "discovery gave exclusive title to those who made it"[47] and that, however "extravagant" and "unjust" it may be to claim that mere "discovery" of the Americas constituted "conquest" of its inhabitants, this principle was "indispensable to [the] system under which

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[42] Buttz v. Northern Pac. R.R., 119 U.S. 55, 66 (1886).
[43] 21 U.S. (8 Wheat.) at 588.
[44] *Id.* at 590.
[45] *Id.* at 594-95.
[46] *Id.* at 595-96.
[47] *Id.* at 574.

the country has been settled"[48] and therefore "cannot be rejected by Courts of justice."[49] So stated, and ripped out of context, *Johnson* appears to hold that American Indians were conquered as soon as John Cabot set foot on American soil, and that it only required the inevitable march of history to carry out this preordained outcome.[50] Under this view, tribal property rights are not properly understood as rights at all, but merely as revocable licenses, or, in the words of Justice Reed in his *Tee-Hit-Ton* opinion, mere "permission by the whites to occupy."[51]

This is not what *Johnson* or later Marshall Court cases held at all.[52] The discovery principle was never meant to apply to relations between Indian nations and the colonizing nations.[53] Rather, it was intended to regulate the relations of European nations *among themselves*;[54] it purported to affect Indian title only to the extent necessary to allocate spheres of influence among contending European powers and thus to prevent bloody wars among them.[55] As Marshall explained in *Johnson*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . But, as they were all in pursuit of nearly the same object, it was necessary, *in order to*

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[48] *Id.* at 591.

[49] *Id.* at 592.

[50] *See* BRIAN W. DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY (1982) (describing the history of the idea that American Indians constitute a "vanishing race").

[51] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[52] *See* Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 24 (reinterpreting the Marshall Court cases); John Lowndes, *Aboriginal Title: Extinguishment by the Increasing Weight of History*, 44 BUFF. L. REV. (forthcoming 1994).

[53] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-73 (1823) (stating that discovery principle gives ultimate title to discovering government against all other claims by European governments); Ball, *supra* note 52, at 24 (explaining nature of discovery principle).

[54] *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832) (explaining that discovery principle regulates rights among European discoverers); *Johnson*, 21 U.S. (8 Wheat.) at 572-73 (stating that discovery principle gives ultimate title to discovering government against all other claims by European governments); Ball, *supra* note 52, at 24 (explaining nature of discovery principle).

[55] *See Johnson*, 21 U.S. (8 Wheat.) at 572-73 (explaining that purpose of discovery principle is to avoid conflicting settlements and consequent war among Europeans).

> *avoid conflicting settlements, and consequent war with each other*, to establish a principle, which all should acknowledge as the law by which the *right of acquisition*, which they all asserted, should be regulated *as between themselves*. This principle was, 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. . . .
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> *Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves*. The rights thus acquired being exclusive, no other power could interpose between them.[56]

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[56] *Id.* (emphasis added). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832) (stating that discovery principle was designed to regulate conflicts among Europeans). In *Worcester*, the Court stated:

> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? . . .
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> . . . To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was '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.'
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> This principle . . . gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on 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. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.
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> *The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place.*

Id. at 543-44 (emphasis added) (citation omitted) (quoting *Johnson*, 21 U.S. (8 Wheat.) at 573).

The discovery doctrine allocated spheres of influence among European nations and in no way determined the rights of Indian nations vis-à-vis those nations themselves.[57] As Marshall explained nine years after the decision in *Johnson v. M'Intosh*, "The truth [is that] these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[58]

In defining tribal rights against the United States, the Marshall Court's opinion in *Johnson v. M'Intosh* set up an elaborate compromise between the policies of protecting tribal occupancy rights and acknowledging the limits on those rights necessary to allocate spheres of influence among European nations and to avoid wars among the colonizing powers.[59] *Johnson* divided property rights in Indian lands between the "ultimate title" or "naked fee" of the colonizing sovereign and the "right" or "title of occupancy" of the Indian nations.[60] This compromise did not suggest that Indian title was merely "permission from the whites to occupy," as later stated by Justice Reed in *Tee-Hit-Ton*,[61] but, as Justice Baldwin's concurring opinion in *Cherokee Nation v. Georgia*[62] stated, was "as sacred as the fee simple, absolute title of the whites,"[63] a conclusion that was adopted by the full court four years later in *Mitchel v. United States*.[64]

If tribal property rights had been abolished at the moment of discovery, there would have been no need for this elaborate conceptual structure. Moreover, contrary to the idea that discovery gave the colonizing nations, and the United States as their successor in interest, absolute power over Indian nations and their lands, and contrary to the statement in *Walapai Tribe* that Indian title can be extinguished by force, consent, complete dominion "or otherwise,"[65] the Marshall Court opinions clearly limited the

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[57] *See Worcester*, 31 U.S. (6 Pet.) at 546 (stating that soil grants asserted title against Europeans only and not against native inhabitants).

[58] *Id.*

[59] *Johnson*, 21 U.S. (8 Wheat.) at 543.

[60] *Id.* at 593.

[61] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[62] 30 U.S. (5 Pet.) 1 (1831).

[63] *Id.* at 48 (Baldwin, J., concurring).

[64] 34 U.S. (9 Pet.) 711, 746 (1835).

[65] *Walapai Tribe Case*, 314 U.S. 339, 347 (1941).

circumstances under which Indian title could be lawfully extinguished in the future to (1) *consensual*, voluntary purchase and (2) military conquest.[66] Marshall noted that "The United States . . . maintain . . . that discovery gave an exclusive right to extinguish the Indian title of occupancy, *either by purchase or by conquest.*"[67]

Chief Justice Marshall says several times in *Johnson* that, in the absence of conquest, Indian title can be lawfully acquired by the United States only through a voluntary, consensual transfer.[68] He first notes that in the establishment of the relations between colonizing powers and native nations, "the rights of the original inhabitants were, in no instance, entirely disregarded."[69] Indeed, "[t]hey 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."[70] He further argues: "It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."[71]

Marshall noted that Indian rights were considerably diminished in both sovereignty and property because the discovery principle denied Indian nations the power to choose whether to come within the sphere of influence (or sovereignty broadly conceived) of the European power which claimed such a colonial relationship and also denied Indian nations the power to choose which European nation with whom to affiliate.[72] This did not, however, grant the colonizing nation carte blanche; rather, the "ultimate title" gave that nation "the sole right of *acquiring* the soil from the natives."[73] The verb "acquiring" is used several times in the opinion.[74] It is

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[66] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823).
[67] *Id.* (emphasis added).
[68] *Id.* at 545, 546, 602.
[69] *Id.* at 574.
[70] *Id.*
[71] *Id.* at 603.
[72] *Id.* at 574.
[73] *Id.* at 573 (emphasis added).
[74] *E.g., id.* at 592 ("The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.").

not used casually. Elsewhere Marshall refers to the "ultimate title" as a "right of pre-emption,"[75] a technical property term referring to the right to purchase property when the current owner decides voluntarily to sell. The issue in *Johnson* itself concerned the relative rights of claimants who had purchased lands from the Piankeshaw and Illinois Indians and those who had been later granted those lands by the federal government after the United States had acquired those lands by treaty.[76]

Whatever ambiguity remained in *Johnson* was settled by the later Marshall Court cases. In 1831, in *Cherokee Nation v. Georgia*,[77] Marshall explained that "the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished *by a voluntary cession to our government*."[78] Similarly, in *Worcester v. Georgia*,[79] decided in 1832, Marshall noted that the doctrine of discovery

> 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. It gave the exclusive *right to purchase*, but did not found that right on a denial of the right of the possessor to sell.[80]

Finally, Justice Baldwin explained, in the 1835 case of *Mitchel v. United States*[81] that "[s]ubject to this right of possession [in the Indians], the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians, *though possession*

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[75] *Id.* at 585.

[76] *Id.* at 543; *see also id.* at 604 (referring to the consequences of an "unauthorized purchase" as a title purportedly "acquired from the Indians" which would not be valid against title "acquired from the crown").

[77] 30 U.S. (5 Pet.) 1 (1831).

[78] *Id.* at 17 (emphasis added).

[79] 31 U.S. 515 (1832).

[80] *Id.* at 544 (emphasis added).

[81] 34 U.S. (8 Wheat.) 711 (1835).

could not be taken without their consent."[82]

It might be argued that *Johnson* held that Indian title could be extinguished without prior consent because it acknowledged that title could be extinguished by conquest. However, *Johnson* cannot be read to suggest that any future assertion of power over Indian land was compatible with law because it would constitute a form of conquest. Conquest referred to armed conflict and submission of the enemy by military force. As Marshall wrote, "The title by conquest is acquired and maintained by force."[83] Conquest did not mean that, any time a state asserted the right to take over property or lands of another that, by that very announcement, conquest had occurred. Nor did it refer to gradual encroachment by non-Indians on Indian lands.[84]

Somehow, the limitation on means of extinguishing Indian title to consensual transfer and military conquest established by the Marshall Court was ignored in the later cases like *Walapai Tribe*, which held that the decision to abrogate Indian title was a nonjusticiable political question. How did this happen?

Although the opinions in both *Buttz*[85] and *Walapai Tribe*[86] purported to apply prior law, they actually misstated it. In so

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[82] *Id.* at 745-46.

[83] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589 (1823).

[84] The Indian Claims Commission held, in Seminole Indians v. United States, 13 Ind. Cl. Comm. 326, 362-63 (1964), that a tribe "does not relinquish aboriginal title by failing to resist white encroachment." Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 71 (1979). The Court of Claims, however, later held that extinguishment could be shown if the tribe "voluntarily" abandoned their lands. The standard for showing abandonment, however, is a high one and does not ordinarily apply to forced dispossession, which amounts to a common-law trespass. *See, e.g.*, Wichita Indian Tribe v. United States, 696 F.2d 1378 (Fed. Cir. 1983) (holding that record did not support conclusion that Indians had abandoned claimed land due to migration). In Williams v. City of Chicago, 242 U.S. 434 (1917), the Supreme Court found that the Pottawatomies' title to lands around Lake Michigan had been lost when the tribe ceased to occupy those lands. It noted that the property "was abandoned long ago." *Id.* at 436. The Court did not address the question of whether or not the abandonment had been voluntary. Moreover, the term "abandon" has a technical meaning in property law. Property is "abandoned" rather than "lost" or "mislaid" only when the owner intends to relinquish ownership rights. Involuntary separation of the owner from the property does not constitute abandonment. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 128 (1993).

[85] Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886).

[86] *Walapai Tribe Case*, 314 U.S. 339 (1941).

doing, they effectively, but silently, overruled part of the doctrinal structure of the Marshall Court cases. The 1886 case of *Buttz* involved a conflict between a railroad, which had been granted title to lands occupied by the Sisseton and Wahpeton bands of the Dakota (Sioux) Nation, and a settler who claimed to have perfected ownership rights pursuant to a later congressional statute granting preemption rights to actual settlers.[87] Justice Field acknowledged that, at the time of the conveyance to the railroad in 1864, "the title of the Indian tribes was not extinguished."[88] The grantee railroad received the "fee" subject to the Sioux "right of occupancy."[89] This ruling is perfectly consistent with the division of property rights contemplated by *Johnson v. M'Intosh* and its progeny. Justice Field then explained:

> The grant conveyed the fee subject to this right of occupancy. . . . The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it, and the manner, time and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.[90]

To support the proposition that the "manner, time and conditions of . . . extinguishment [of original Indian title] were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals,"[91] Justice Field cited *Beecher v. Wetherby*[92] and quoted the following language:

> It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be

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[87] *Buttz*, 119 U.S. at 55.
[88] *Id.* at 66.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] 95 U.S. 517, 525 (1877).

> that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government.[93]

Although the first two sentences quoted above might suggest that extinguishment of Indian title constituted a political question, Justice Field failed to note that the third sentence clearly states that the issue being discussed is not the right of the government to extinguish Indian title, but the right of the government to grant the fee to Indian land, a grant that is *subject to the Indian title of occupancy* and in no way extinguishes it.[94] Moreover, the sentences *preceding* the above quotation from *Beecher* read as follows:

> But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States.[95]

The quotation from *Beecher*, wrongly relied upon by the Court in *Buttz* for the proposition that the manner and time of extinguishment are nonjusticiable questions, held that the decision by the United States to *convey the fee* was not subject to judicial review.[96]

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[93] Buttz v. Northern Pac. R.R., 119 U.S. 55, 66-67 (1886) (quoting *Beecher*, 95 U.S. at 525).

[94] *Beecher*, 95 U.S. at 525.

[95] *Id.*

[96] *Id.*; *see also Buttz*, 119 U.S. at 66 (holding that interest of Indians could only be extinguished by United States government and that manner, time, and conditions of extinguishment were matters solely for consideration of the government).

Beecher does not, in any way, stand for the proposition that *extinguishment of the Indian title* was not justiciable. To the contrary, *Beecher* clearly states that it is the decision by the United States to convey the fee that is subject to deference by the courts;[97] the conveyance of that fee interest is subject to the Indian title of occupancy and ripens into a fee simple absolute interest only after Indian title is extinguished by some later action.[98]

Beecher involved a land grant by the United States to the State of Wisconsin while the land was still occupied by the Menominee Nation.[99] The Supreme Court held that this conveyance of the fee was sufficient to vest title in the State of Wisconsin, but that conveyance of the fee did not extinguish the Menominee title.[100] Less than eight months after admission of Wisconsin to the Union, the Menominees ceded to the United States all their lands in Wisconsin, though they were permitted to remain on them for two more years or "until the President should give notice that they were wanted."[101] Subsequently, the Menominees indicated their unwillingness to leave Wisconsin, and they were allowed to occupy temporarily certain lands in Wisconsin and, in 1854, were granted specific lands in Wisconsin for a permanent home.[102] The Supreme Court held that the initial grant was sufficient to convey the fee to the State of Wisconsin, but that conveyance of the fee did not, by itself, extinguish Indian title.[103] On the contrary, the State received full title only when the Indian title was later extinguished by the federal government.[104]

Beecher thus held that the time and manner of the granting of the fee interest constitute a political question.[105] However, the time and manner of extinguishment of *Indian title* are another question entirely. To the extent *Beecher* says anything at all about

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[97] *Beecher*, 95 U.S. at 526.
[98] *Id.*
[99] *Id.* at 517.
[100] *Id.* at 527.
[101] *Id.* at 518.
[102] *Id.*
[103] *Id.* at 527.
[104] *Id.* at 526.
[105] *Id.* at 525.

this issue, it relates the fact that the Menominee title was not in fact extinguished until the Menominee Nation voluntarily sold the land to the United States.[106]

Both *Beecher* and *Buttz* hold that the mere conveyance of the fee to a non-Indian did not extinguish the tribal title of occupancy; rather, the fee is conveyed subject to the tribal right of occupancy.[107] Moreover, in both *Beecher* and *Buttz*, tribal occupancy rights were extinguished by treaties negotiated with the relevant tribes which provided for compensation in cash or alternative lands.[108]

Buttz misstates the holding in *Beecher* by proclaiming that there are no limits on the Congress's ability to extinguish Indian title; neither *Beecher* nor the earlier Marshall Court cases hold anything of the kind.[109] Rather, those cases hold that the federal government can grant the fee while land is still occupied by an Indian nation or by tribal members and that the decision to do so cannot be challenged in the courts.[110] In fact, the tribes would have little reason to object to such a grant because it in no way affects tribal title. *Buttz* altered the holding of *Beecher* to deprive Indian nations of the right to maintain tribal property until a voluntary cession is made to the federal government or they are conquered militarily.[111]

In addition to citing *Buttz*, the Vermont Supreme Court cited *Walapai Tribe* for the proposition that the "power of Congress in [regard to extinguishment of Indian title] is supreme. The manner, method and time of such extinguishment raise political not justiciable issues."[112] The only authority presented in Justice Douglas's opinion in *Walapai Tribe* for this proposition is *Buttz*.[113] As shown above, *Buttz* misstated the holding of *Beecher*. Douglas further appeals to *Johnson v. M'Intosh* to support the proposition

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[106] *Id.* at 526.

[107] Buttz v. Northern Pac. R.R., 119 U.S. 55, 69 (1886); Beecher v. Wetherby, 95 U.S. 517, 526 (1877).

[108] *Buttz*, 119 U.S. at 58; *Beecher*, 95 U.S. at 518.

[109] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 545 (1823) (holding that Indians' right to occupancy was as valid as the United States' right in the fee).

[110] *Beecher*, 95 U.S. at 526.

[111] *Buttz*, 119 U.S. at 68.

[112] *Walapai Tribe Case*, 314 U.S. 339, 347 (1941).

[113] *Id.* (citing *Buttz*, 119 U.S. at 68).

that extinguishment constitutes a nonjusticiable question.[114] Yet the only language he cites in *Johnson* is the statement that " 'the exclusive right of the United States to extinguish Indian title has never been doubted.' "[115] This statement supports the notion that no one other than the United States government can extinguish Indian title. That means that neither the states nor private individuals can extinguish Indian title by conveyances not ratified by the United States. It does not mean that there are no lawful limits on the means of extinguishment.

As to the infamous sentence in *Walapai Tribe* to the effect that "whether it be done by treaty, by the sword, the purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts,"[116] the only authority cited is *Beecher* itself, a case which, as we have seen, did *not* hold that extinguishment of Indian title was nonjusticiable, but rather, that it was the conveyance of the fee by the United States which was nonjusticiable.[117] Moreover, this sentence was superfluous in *Walapai Tribe*. The Court held that the conveyance of the fee to the railroad in that case was sufficient to convey the ultimate fee title, but that the Sioux right of occupancy was not extinguished until several years later in a voluntary cession and treaty agreement between the United States and the Sioux Nation, ratified by Congress in 1874.[118]

Despite the fact that both *Buttz* and *Walapai Tribe* are said to grant Congress absolute power to extinguish original Indian title without obtaining the voluntary consent of the affected Indian nation, in both cases the Supreme Court held that the initial grant of the fee was made subject to the tribal right of occupancy, and that the tribal title was not extinguished until Congress took additional steps to extinguish tribal title beyond merely granting the fee interest to a non-Indian owner.[119] In *Buttz*, those additional steps included negotiating a treaty and compensating the

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[114] *Id.* (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823)).
[115] *Id.* (quoting *Johnson*, 21 U.S. (8 Wheat.) at 586).
[116] *Id.* at 347.
[117] Beecher v. Wetherby, 95 U.S. 517, 525 (1877).
[118] *Walapai Tribe Case*, 314 U.S. 339 (1941).
[119] *Id.* at 345; Buttz v. Northern Pac. R.R., 119 U.S. 55, 68 (1866).

Sisseton and Wahpeton bands of the Sioux for their lost property.[120] Similarly, in *Walapai Tribe*, the Court found that tribal title was extinguished after the granting of the fee by a treaty with the Walapais.[121] Thus, in both *Buttz* and *Walapai Tribe*, original Indian title was extinguished, not by a unilateral act of the federal government, but by a negotiated treaty.[122]

I said earlier that "somehow" *Buttz* and *Walapai Tribe* misstated the law on extinguishment as previously set down in the Marshall Court cases and in *Beecher*. The reason behind this "somehow" is not difficult to discern. *Buttz* was decided in 1886, the year before the 1887 General Allotment Act was passed, and fifteen years after Congress ended the practice of making treaties with Indian nations.[123] It was also decided one year after the passage of the Major Crimes Act, by which Congress asserted, for the first time, the power to limit tribal sovereignty by interfering in *internal* tribal relations.[124] This aspect of *Buttz* therefore represents the emerging philosophy of the allotment period when the federal government was attempting to break up tribal organization and to assimilate and integrate Indians with the non-Indian population. To do this, the federal government needed to ignore treaty promises to preserve both tribal sovereignty and tribal property rights. The culmination of that policy was the 1903 case of *Lone Wolf*,[125] which authorized forced allotment of land in Indian country and allowed Congress to abrogate tribal property rights without any constitutional limitations.[126]

It is unfortunate that Justice Douglas's opinion in *Walapai Tribe* cited *Buttz* rather than the Marshall Court cases in defining the scope of federal power over Indian property.[127] *Walapai Tribe* gives continuing power to the philosophy underlying *Lone Wolf* and wrongfully deprives Indian nations of the right to determine the circumstances under which they will voluntarily part with their

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[120] *Buttz*, 119 U.S. at 68-70.
[121] *Walapai Tribe Case*, 314 U.S. at 339.
[122] *Id.* at 358; *Buttz*, 119 U.S. at 69.
[123] CLINTON ET AL., *supra* note 40, at 148.
[124] *Id.*
[125] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[126] *Id.* at 553.
[127] *Walapai Tribe Case*, 314 U.S. 339, 345 (1941).

land.

B. HAS THE ABENAKI TITLE BEEN EXTINGUISHED?

1. What is the Test for Determining Whether Original Indian Title Has Been Extinguished? If original Indian title can be extinguished by means other than consensual transfer or military conquest, what are the circumstances under which the courts will find extinguishment to have occurred? The Supreme Court has stated again and again that the sole entity with the power to extinguish Indian title is Congress.[128] The states (even the original thirteen states) cannot extinguish Indian title; nor can private parties do so by encroaching on tribal land.[129] Extinguishment of Indian title requires a sovereign act by Congress.[130] The touchstone is the intent of Congress.[131] Moreover, "an extinguishment cannot be lightly implied in view of the avowed solicitude of the United States for the welfare of its Indian wards."[132] The Supreme Court held in the 1985 case of *County of Oneida v. Oneida Indian Nation* that "congressional intent to extinguish Indian title must be 'plain and unambiguous,' and will not be 'lightly implied.' "[133] It further noted that "[r]elying on the strong policy of the United States 'from the beginning to respect the Indian right of occupancy,' . . . it '[c]ertainly' would require 'plain and unambiguous action to deprive the [Indians] of the benefits of that policy.' "[134]

The Vermont Supreme Court in *State v. Elliott*[135] suggests three different reasons for its conclusion that the Abenaki title was extinguished. First, it suggests, but does not conclude, that

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[128] *Id.*; Buttz v. Northern Pac. R.R., 119 U.S. 55, 66 (1886); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823).

[129] *Walapai Tribe Case*, 314 U.S. at 353.

[130] County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) [hereinafter *Oneida II*].

[131] *Walapai Tribe Case*, 314 U.S. at 353.

[132] *Id.* at 354.

[133] *Oneida II*, 470 U.S. at 247-48 (citation omitted) (quoting *Walapai Tribe Case*, 314 U.S. at 346, 354).

[134] *Id.* at 248 (first alteration added, subsequent alterations in original) (citation omitted) (quoting *Walapai Tribe Case*, 314 U.S. at 345-46).

[135] 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

Abenaki title was extinguished when the Republic of Vermont broke away from New York in a military rebellion.[136] Second, the court argues that Abenaki title was extinguished when Congress admitted Vermont to the Union in 1791.[137] Third, the court concludes that Abenaki title was extinguished by "the increasing weight of history."[138] Let us examine these arguments in turn.

2. Did the State of Vermont Extinguish Indian Title When It Broke Away from New York and Established the Republic of Vermont? As reported by the Vermont Supreme Court in *State v. Elliott*, in the mid-eighteenth century, the British Crown attempted to prevent wars with Indian nations by issuing edicts prohibiting non-Indian settlement on Indian land without the consent of the Crown.[139] In 1761, the Crown issued a "Royal Instruction" to its "colonial governors prohibiting them from making grants of land occupied by Indians without specific authority from the Crown."[140] The 1761 Royal Instruction further required non-Indians who had settled on what were still Indian lands to remove themselves from Indian country immediately.[141] This Royal Instruction was followed by the famous Proclamation of 1763, again forbidding settlement by non-Indians on Indian land and ordering settlers to leave if they were occupying such lands unlawfully.[142] At this time, Vermont did not exist as a separate colony.[143] It was unclear whether it was inside the territory of New York or New Hampshire, although it was probably within the borders of New York.[144]

On August 17, 1763, New Hampshire Royal Governor Benning Wentworth violated British law by making land grants of land occupied by Abenakis in what is now Vermont.[145] Continued ownership was conditioned on actual settlement.[146] These grants

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[136] *Id.* at 215-17, 220.
[137] *Id.* at 217, 220-21.
[138] *Id.* at 218.
[139] *Id.* at 215.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See id.* at 216 (describing Vermont's rise to independence as a "Republic").
[144] *See id.* at 215-16 (detailing Vermont's origination).
[145] *Id.* at 215.
[146] *Id.*

were invalid and unlawful for at least two reasons: first, because they violated the Royal Instruction of 1761[147] and second, because the territories granted by Wentworth were not part of New Hampshire.[148] After the grants by Governor Wentworth, New York Governor Cadwallader Colden attempted to grant the same lands granted by Wentworth on the theory that Wentworth had no authority to grant lands in the State of New York.[149]

The Crown responded to the conflicting actions of its Royal Governors in New York and New Hampshire by issuing a "Privy Council Order" in 1764 that set the boundary between New York and New Hampshire at the Connecticut River, thereby putting the Wentworth Grants (and the land occupied by the current state of Vermont) firmly within the borders of New York.[150] Conflict ensued between the New Hampshire claimants and New York authorities.[151] In 1767, the Crown issued another Privy Council Order prohibiting the New York Governor from issuing any land grants in the disputed area until the Crown could decide the matter.[152] After that, the Crown failed to act.[153] In 1769, New York attempted to eject the New Hampshire claimants by ejectment suits.[154] The New Hampshire settlers' response was to revolt.[155] Between 1770 and 1775, the "Green Mountain Boys," led by Ethan Allen, fought the New Yorkers attempting to claim lands in Vermont.[156] In 1777, Vermont declared its independence from New York and established the Republic of Vermont.[157] Vermont's declaration of independence asserted sovereignty over the lands granted by Governor Wentworth.[158]

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[147] *See supra* text accompanying notes 140-141 (describing background of the Royal Instruction of 1761).

[148] *See* State v. Elliott, 616 A.2d 210, 216 n.7 (citing Vermont v. New Hampshire, 289 U.S. 593, 598 (1933), as support for New York's assertions that the land granted by Wentworth belonged to New York), *cert. denied*, 113 S. Ct. 1258 (1993).

[149] *Id.* at 216.

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

After ratification of the Constitution in 1789, Congress passed the first Trade and Intercourse Acts in 1790.[159] Among other things, those acts reaffirmed the policies established by Great Britain in the Royal Instruction of 1761 and the Proclamation of 1763 that prohibited anyone from settling on Indian land without permission of the federal government.[160] Vermont was admitted to the Union one year later, in 1791.[161]

The central question is whether the establishment of the Republic of Vermont in 1777 extinguished Abenaki title. It might be argued that the Republic of Vermont broke away from New York in order to protect the property claims of the settlers who based their title on the Wentworth Grants. It arguably would be inconsistent with this historical fact to conclude that those claims were invalid because the Abenaki title had never been extinguished by either the Crown or the Republic of Vermont itself in its declaration of independence from Great Britain and the State of New York.

The Vermont Supreme Court did not hold that the Wentworth Grants, by themselves, extinguished Abenaki title.[162] They were illegal under British law, after all. However, the court suggests that the Republic of Vermont itself may have extinguished Abenaki title by its resolute action defending the Wentworth Grants.[163] The court refused to decide whether Vermont legitimately achieved sovereignty as a separate nation in 1777 with the power to extinguish Indian title.[164] Rather, it viewed the period of the Republic of Vermont (1777-1791) as a factor in establishing a long historical process by which Indian title was extinguished within the State of Vermont.[165] According to the Vermont Supreme Court, the crucial point is that the Wentworth Grants were conditional on

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[159] Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (expired 1793) (codified as amended at 25 U.S.C. § 177 (1988)).

[160] *See id.* (requiring consent from U.S. to have a valid sale of Indian land).

[161] State v. Elliott, 616 A.2d 210, 217 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[162] *See id.* at 214-21 (arguing that "cumulative effects leading to statehood" extinguished Abenaki title).

[163] *See id.* at 220 (citing as support for the extinguishment of Abenaki title grantees' "assertion of dominion over the area" as their recognized means to retain ownership under Wentworth Grants).

[164] *Id.*

[165] *Id.*

settlement.[166] Since those rights could vest only if the grantee settled on the land, they were inconsistent with retention of Indian occupancy rights.

There are several problems with the court's reasoning. First, the Wentworth Grants clearly violated British law at the time those grants were made.[167] It is therefore unclear how one can conclude that they provide a lawful root of title unless one concludes that Vermont achieved sovereignty under international law.[168]

Second, the court suggests, but does not conclude, that the Wentworth Grants were not unlawful.[169] For example, the opinion states that "[w]hile the Crown may have declared the grants invalid based on a lack of jurisdictional authority in this particular governor, the sovereign's intent to allow British appropriation of the area was not in question."[170] The court argues that it is appropriate to ignore the Royal Instruction of 1761 and the Proclamation of 1763. Somehow, they were "paper tigers," not meant to be enforced.[171] The court further argues that the Privy Council Orders of 1764 and 1767 were intended to "pacify the two British jurisdictions, not protect Native Americans."[172]

It may be true that the purpose of the Proclamations of 1761 and 1763 was to prevent wars with Indian nations whose territory was being invaded by British subjects rather than any altruistic purpose to protect Indian rights. Yet it is also true that the Royal Proclamations clearly delineated the circumstances under which lawful title to Indian lands could be created.[173] The fact that non-Indians continuously invaded Indian lands in violation of the Proclamation of 1763 does not make that Proclamation invalid. On

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[166] *Id.*

[167] *See supra* notes 140-144 and accompanying text (describing how the Crown's law prohibited grant of lands occupied by Indians without express authority from the Crown).

[168] Alternatively, one could argue that the United States extinguished Abenaki title when Vermont was admitted to the Union in 1791. State v. Elliott, 616 A.2d 210, 217, 221 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993). That argument is addressed below. *See infra* text accompanying notes 175-194.

[169] *Elliott*, 616 A.2d at 218-19.

[170] *Id.* at 218.

[171] *Id.* at 219.

[172] *Id.* at 218-19.

[173] *Id.* at 215 (providing, in relevant part, the Royal Proclamation of 1763 and noting that both proclamations required authority from the Crown to transfer fee title to Indian lands).

the contrary, it was the consistent practice of both Great Britain and the United States to validate claims of non-Indians who unlawfully invaded and settled on Indian lands *only* after a treaty was negotiated with the relevant Indian nation or after that nation was militarily conquered.[174] Neither happened in the case of the Abenakis. Moreover, even if it is true that the Proclamation of 1763 was not vigorously enforced, that does not make it a "paper tiger" in any recognizable legal sense. It was the law of the land and defined the circumstances under which valid titles could be created.[175]

Third, if the Vermont Supreme Court is correct in asserting that the Republic of Vermont was established not only to protect New Hampshire land claimants against New York land claimants, but also to vest title in the New Hampshire grants without any regard whatsoever for the rights of the native Abenakis, this concept would make Vermont unique in the history of the United States. The consistent policy of both Great Britain and the United States was to prevent non-Indian settlement on Indian land without a prior treaty between the relevant Indian nation and the colonizing power. This policy characterizes both the British Proclamation of 1763 and the federal Trade and Intercourse Act of 1790.[176] When non-Indians illegally settled on Indian land, the United States sometimes responded by ejecting the squatters; at other times, the squatters were given full property rights—but only after the land was first obtained from the relevant Indian nation by treaty. The Supreme Court of Vermont was unwilling to take the drastic step of interpreting its own declaration of independence as less respectful of Indian rights than was Great Britain or the United States. It therefore described the declaration of independence of the Republic of Vermont and the subsequent period before admission

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[174] *See also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273, 279 (1955) (recognizing conquest and agreement by treaty as the means which the Court used to acknowledge claims of non-Indians to Indian land).

[175] For an explanation of the importance of the Proclamation of 1763, see Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989).

[176] *See* Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (expired 1793) (codified as amended at 25 U.S.C. § 177 (1988)) (making transfers of land from Indian nations to non-Indians invalid unless made through agreement with the United States).

to the Union in 1791 as merely a factor to consider in determining whether Indian title was extinguished by the combination of events that included the Wentworth Grants in 1763, the declaration of independence of the Republic of Vermont in 1777, the admission of Vermont to the Union in 1791, and the subsequent relations among the Abenakis, the United States, and the State of Vermont.[177]

Finally, if the Vermont Supreme Court is correct that the Republic of Vermont was established in 1777 on the basis of a policy of protecting the rights of non-Indian land claimants over the interests of its resident Indian population, then it sends a peculiar message to its Abenaki citizens. Members of the Abenaki Nation are currently citizens of the United States and the State of Vermont. Holding that validation of the Wentworth Grants requires not only invalidating the subsequent New York Grants, but also extinguishment of the Abenaki title would tell Abenaki citizens of the State of Vermont that the State of Vermont was established to protect the property rights of all Vermonters except themselves.

By failing to hold cleanly that the establishment of the Republic of Vermont extinguished Abenaki title, the Vermont Supreme Court attempted to displace blame onto the United States for the injustice of denying Abenaki claims when it admitted Vermont to the Union in 1791,[178] thereby suggesting that Vermont was no different from the rest of the Union and that any injustice present at its creation was no different than the injustices committed by Great Britain or the United States or other states. Yet in doing so, as the next section shows, the Vermont Supreme Court misapplied federal Indian law. Its attempt to shift the blame therefore cannot succeed. The responsibility for extinguishing Abenaki title rests with the Vermont Supreme Court itself and occurred, not in 1777 and not in 1791, but in 1992 with its decision in *State v. Elliott*.

3. Did Congress Extinguish the Abenaki Title When Vermont was Admitted to the Union? The Vermont Supreme Court suggests that Abenaki title was extinguished when Vermont was admitted to the

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[177] State v. Elliott, 616 A.2d 210, 215-20 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[178] *See id.* at 220 (concluding that "Vermont's admission to the Union . . . eliminat[ed] any remaining ambiguity about who had dominion over lands once controlled by the Abenakis").

Union in 1791.[179] The court notes that the Wentworth Grants were contingent on actual settlement, that Congress was aware of this, and that Congress questioned Vermont about whether the conditions had been met.[180] Justice Morse's opinion states that "Vermont was called upon to clarify in writing the status of the Wentworth Grants in order to confirm fulfillment of the settlement conditions."[181] Justice Morse argues that when Vermont was admitted to the Union in 1791, Congress understood that the Wentworth Grants were contingent on settlement and that Congress not only approved those grants but impliedly agreed that tribal title was to be immediately extinguished upon Vermont's admission to the Union.[182]

This reasoning is incompatible with established canons of construction in federal Indian law, prevailing standards for finding extinguishment, established precedent, and the consistent policy of the United States. Established canons of construction require a clear and unambiguous statement that Congress intended to extinguish original Indian title.[183] While holding in *Walapai*

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[179] *Id.* at 218.

[180] *Id.* at 217.

[181] *Id.*

[182] *Id.*

[183] The most important canons of statutory construction are described by Clinton, Newton and Price as follows:

> *Canons of Statutory Construction:* Once a determination has been made that a particular statute affects Indian tribes or individuals, courts have invoked canons of construction favoring creation and preservation of tribal rights. One rationale for such canons in the area of interpreting treaties and agreements is to redress unequal bargaining power. By parity of reasoning, the Court applied the canon requiring interpretation of doubtful expressions in favor of the Indians to cases involving interpretation of statutes ratifying agreements between the government and Indian tribes. *See, e.g., Choate v. Trapp*, 224 U.S. 665, 675-76, 678 (1912), *citing Jones v. Meehan*, 175 U.S. 1 (1899); *see also Antoine v. Washington*, 420 U.S. 194, 199-200 (1975) (statute ratifying agreement) (collecting cases). The Court began to recognize that other policies justify special care in interpreting statutes as well. As the Court stated in a recent case: "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Thus, the Court began to extend the rule requiring resolution of ambiguities in favor of Indian interest to statutes dealing with Indian matters. *See Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (clear

Tribe that extinguishment constitutes a political question, the Supreme Court balanced this arrogation of absolute power by noting that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."[184] Similarly, the Supreme Court held in the 1985 case of *County of Oneida v. Oneida Indian Nation*[185] that "congressional intent to extinguish Indian title must be plain and unambiguous, . . . and will not be lightly implied."[186] It further noted that "Relying on the strong policy of the United States from the beginning to respect the Indian right of occupancy, . . . it certainly would require plain and unambiguous action to deprive the [Indians] of the benefits of that policy."[187]

The mere fact that Congress was aware of the Wentworth Grants and the fact that they would vest only upon settlement does not in any way constitute a clear intent to extinguish Indian title. Throughout the period under question—and to the present day—the law was that the conveyance of the fee did not, by itself, extinguish Indian title. All the cases cited by the Vermont Supreme Court affirm this principle, including *Johnson v. M'Intosh*,[188] *Buttz*,[189] and *Walapai Tribe*.[190]

Conditioning title on settlement was a practice often used later by the United States to ensure that land grants were given to

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statutory language needed to terminate reservation status); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956) (tax exemption). In addition, the Court has interpreted federal laws so as to minimize infringement on inherent tribal sovereignty by "tread[ing] lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Finally, the presence of the same factors may call for construction of federal regulations as well as statutes to protect tribal interests. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982) (Secretary violated BIA regulations in notice procedures for oil and gas leases; any doubt in interpretation of regulations should be resolved in favor of the tribe).

CLINTON ET AL., *supra* note 40, at 230-31.

[184] *Walapai Tribe Case*, 314 U.S. 339, 354 (1941).

[185] 470 U.S. 226 (1985).

[186] *Id.* at 247-48.

[187] *Id.* at 248.

[188] 21 U.S. (8 Wheat.) 543 (1828).

[189] 119 U.S. 55 (1886).

[190] 314 U.S. 339 (1941).

owner-occupiers and not to land speculators.[191] Conditioning title on settlement thus may have represented a policy choice about which non-Indian claimants would be given priority rights in land. However, a policy choice that identifies which competing non-Indian claimant has priority does not tell us anything at all about the conditions under which Indian title of occupancy has been extinguished. Validation of the Wentworth Grants, even if they were contingent on settlement, therefore does not provide clear evidence of congressional intent to authorize settlement of Abenaki land.

Consider also that Vermont was admitted to the Union in 1791, one year after passage of the first Trade and Intercourse Act in 1790. The United States at this time was militarily weak relative to the Indian nations on its borders, and passage of the 1790 Non-Intercourse Act was intended to prevent Indian wars by controlling unauthorized settlement on Indian lands by prohibiting all settlement before the federal government arranged a treaty with the affected tribe.[192] Moreover, the Constitution, adopted in 1789, was intended to centralize power over Indian affairs in the federal government, thereby depriving the states of the ability to take tribal property without consent of the federal government.[193] Since the Abenakis never abandoned their lands in Vermont and had previously waged five separate wars against the British,[194] it would be extremely odd to find the United States so indifferent to Abenaki claims. Given this historical context, and given the requirement that Congress clearly express its intent to extinguish Indian title, the mere knowledge of the Wentworth Grants cannot be sufficient evidence of an intent by Congress not only to invalidate the later New York Grants and to validate the claims of the New Hampshire grantees, but also to extinguish Indian title.

Finally, even if it is *arguable* that Congress intended to extinguish Abenaki title by affirming land grants that were conditional

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[191] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 416 (2d ed. 1985) (discussing the Homestead Act of 1862).

[192] DIPPIE, *supra* note 50, at 48-50; REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY 1783-1812, at 62 (1967).

[193] HORSMAN, *supra* note 192, at 53-65.

[194] WILLIAM A. HAVILAND & MARJORY W. POWER, THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST & PRESENT 225-39 (1981).

on settlement, this intent is far from "plain and unambiguous."[195] By considering the circumstances of Vermont's admission to be strong evidence of congressional intent to extinguish Abenaki title,[196] the Vermont Supreme Court fails to respect established burdens of proof.[197] Those burdens of proof are not merely technical details; they implement fundamental *federal* policies that limit the power of *state* governments to take over Indian lands. The Supremacy Clause of the United States Constitution, as well as the policy of protecting Indian rights, requires that they be taken seriously.

4. Was the Abenaki Title Extinguished by the "Increasing Weight of History"?

> *In the instant case, the United States relies entirely on the phrase "the exercise of complete dominion" to support its position. Courts have emphatically ruled, however, that no matter the method employed to abrogate treaty rights, Indian title cannot be extinguished absent plain and unambiguous expression by Congress of its intent to do so.*[198]
>
> *—Yankton Sioux Tribe of Indians v. Nelson*

The Vermont Supreme Court was well aware that neither the 1777 declaration of independence of the Republic of Vermont nor the admission of Vermont to the Union in 1791, either alone or together, clearly demonstrated an intent to extinguish Abenaki title.[199] The court therefore viewed these events as cumulative "evidence" that demonstrates congressional intent to extinguish Abenaki title over time. That evidence is established, in the court's view, by the "increasing weight of history."[200] This is the heart

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[195] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247-48 (1985) (requiring congressional intent to be "plain and unambiguous").

[196] State v. Elliott, 616 A.2d 210, 220-21 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[197] *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) (explaining that 25 U.S.C. § 196 places the burden of proof on the non-Indian in title disputes with Indian claimants).

[198] Yankton Sioux Tribe of Indians v. Nelson, 604 F. Supp. 1146, 1153 (D.S.D. 1985), *rev'd*, 796 F.2d 241 (1986), *cert. denied*, 483 U.S. 1005 (1987).

[199] *Elliott*, 616 A.2d at 218.

[200] *Id.*

of the decision in *State v. Elliott*, and the result stands or falls with it.

Besides being intolerably vague, the argument that Indian title can be extinguished by the "increasing weight of history" misrepresents precedent. Justice Morse argues that an "historical event, although insufficient by itself to establish an extinguishment, may contribute to a finding of extinguishment when analyzed together with other events."[201] He further notes that "a century-long course of conduct may demonstrate extinguishment, even though the exact date on which Indian title is extinguished is difficult to determine."[202] To support these propositions, Justice Morse cites two cases, *United States v. Gemmill*[203] and *United States v. Pueblo of San Ildefonso*.[204] Although these ideas are unassailable as a general proposition, both cases are distinguishable; both contain far greater evidence of congressional intent to extinguish Indian title than was present in the case of the Abenakis.

In *Gemmill*, several members of the Pit River Indian Tribe were arrested for trespass and theft of government property when they entered federal lands and removed some Christmas trees.[205] Others were arrested when they sought to stop logging on sacred tribal lands.[206] The court upheld the convictions, finding evidence that the tribe's aboriginal title had been extinguished by Congress.[207] The Ninth Circuit cited four events that, it concluded, together demonstrated clear congressional intent to extinguish aboriginal title. The first event was a federal statute passed in 1851 that required all persons claiming lands by virtue of titles granted by Spain or Mexico to present their claims to a special commission or lose their rights.[208] Although tribal claims were based on original possession, rather than a grant from Spain or Mexico, the Supreme Court interpreted the statute as requiring the Indians in the area to present their claims to the federal govern-

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[201] *Id.* at 213.
[202] *Id.* at 214.
[203] 535 F.2d 1145 (9th Cir. 1976), *cert. denied*, 492 U.S. 982 (1976).
[204] 513 F.2d 1383 (Ct. Cl. 1975).
[205] *Gemmill*, 535 F.2d at 1149.
[206] *Id.* at 1147.
[207] *Id.* at 1149.
[208] *Id.* at 1148.

ment or forfeit them.[209] Thus, a federal statute, as interpreted by the Supreme Court, constituted an express declaration that tribal occupancy rights would be void if the tribes in question did not comply with the statutory claim procedures. Second, the United States engaged in a protracted military confrontation with the Pit River Indians in the 1850s and 1860s, which culminated in a decisive military defeat in 1867.[210] The United States then removed the Pit River Indians from their lands by force. Third, in another express act, the federal government included the lands in question in the Shasta Trinity and Lassen National Forests.[211] Fourth, the tribe brought a claim against the United States before the Indian Claims Commission for compensation for taking its lands.[212] The Commission found such a claim justified and granted compensation to the tribe.[213] Thus, the tribe previously had acknowledged that its title had been extinguished and had been granted compensation for it.

Each of these four events independently suggests a federal intent to extinguish the Indian title; each is also clearer than any event to which the Vermont Supreme Court referred in the case of the Abenakis. Moreover, nothing like any of these four events occurred in the case of the Abenakis. No federal statute required the Abenakis to present their claims to the United States government or lose them. No war took place between the Abenakis and the United States, and no Abenaki lands were included by the federal government in a federal reserve. Finally, the Abenakis never acknowledged loss of their lands by bringing a claim for compensation before the Indian Claims Commission.

Similarly, in *United States v. Pueblo of San Ildefonso*,[214] the United States created a reservation for thirteen pueblos on their ancient lands, included other tribal lands in a national forest reserve, and slowly granted the pueblos' remaining lands to non-Indian settlers under the public land laws.[215] The court found

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[209] *Id.*
[210] *Id.*
[211] *Id.* at 1149.
[212] *Id.*
[213] *Id.*
[214] 513 F.2d 1383 (Ct. Cl. 1975).
[215] *Id.*

that creation of the reservation by itself was not sufficient to extinguish tribal title to lands not included in the reservation borders.[216] Extinguishment occurred only when non-Indians were granted the right to settle particular lands under the federal land laws.[217] The Government had argued that tribal title was lost by substantial "non-Indian interference with [the Indians'] exclusive use and occupancy of aboriginal land title areas."[218] The court rejected the argument that Indian title could be lost by white encroachment when the affected tribe did not voluntarily abandon the land.[219] The actions of private individuals cannot affect tribal title; indeed, "termination of Indian title is exclusively the province of the United States."[220] The court held that there must be "clear and convincing evidence of an intent to extinguish" aboriginal title and that "the fact that some entries [by non-Indians] were allowed in the plaintiffs' aboriginal areas is evidence of official negligence, or lack of knowledge of the plaintiffs' areas, rather than an intent on the part of the United States to abolish their whole titles."[221] The court found tribal title extinguished only when tribal lands were included in a national forest reserve and when individual non-Indian settlers entered tribal lands under the public land laws and were listed as having been granted title and the right to settle.[222]

Again, the case of the Abenakis is far different from that of the Pueblo of San Ildefonso. No reservation was ever created for the Abenakis that might suggest congressional intent to extinguish title to lands that were not included in the reservation. Indeed, no legislation mentioning Abenaki land was ever passed. As discussed

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[216] *Id.* at 1388.
[217] *Id.* at 1391.
[218] *Id.* at 1386-87.
[219] *Id.* at 1390.
[220] *Id.* at 1387.
[221] *Id.* at 1390.
[222] In *Elliott*, Justice Morse also appeals to Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386 (Ct. Cl.), *cert. denied*, 419 U.S. 1021 (1974), to support the claim that white settlement in an area may constitute termination of Indian title "in an appropriate factual context." State v. Elliott, 616 A.2d 210, 219 (Vt. 1992) (citing *Gila River*, 494 F.2d at 1391), *cert. denied*, 113 S. Ct. 1258 (1993). However, *Gila River* involved a claim before the Indian Claims Commission by which the tribe conceded that its title had been extinguished. The only question was how to fix the date at which extinguishment occurred. Moreover, the court clearly holds that "throwing open" the area to white settlement was not sufficient to extinguish aboriginal title. *Gila River*, 494 F.2d at 1391.

above, the mere admission of Vermont to the Union with knowledge of claims to fee title is insufficient to demonstrate a congressional intent to extinguish Abenaki title. Given the desire of the United States to prevent Indian wars, as expressed in the 1790 Non-Intercourse Act,[223] it is hardly credible that the United States would have intended to extinguish Abenaki title by the simple admission of Vermont to the Union. The rule requiring clear and convincing evidence of a plain and unambiguous congressional intent to extinguish Indian title cannot be jettisoned so easily.

A similar result was obtained in *Walapai Tribe* itself, the landmark 1941 precedent that established the rule that original Indian title could be extinguished "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise."[224] In that case, suit was brought by the United States on behalf of the Walapai Tribe to enjoin the defendant railroad from interfering in possession of land by the Walapai Tribe and to establish that the grant to the defendant's predecessor in interest had been made subject to the tribal right of occupancy both inside and outside the reservation established in 1883 by executive order.[225] The Supreme Court held that even the establishment of a reservation for a tribe does not extinguish the tribe's title to lands not included in the reservation, unless Congress has expressly so provided.[226]

> We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing [any] more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home.[227]

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[223] Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (expired 1793) (codified as amended at 25 U.S.C. § 177 (1988)).

[224] *Walapai Tribe Case*, 314 U.S. 339, 347 (1941).

[225] *Id.* at 343-44.

[226] *Id.* at 353-54.

[227] *Id.* at 353.

The Court found that the Walapai's title was only extinguished years after the reservation was established, when a new reservation was created at the request of the Walapais and many members of the tribe moved there.[228]

Similarly, in *Turtle Mountain Band of Chippewa Indians v. United States*,[229] another case cited by the Vermont Supreme Court,[230] the Court of Claims rejected the Government's argument that Indian title could be extinguished by establishment of an executive order reservation by the President.[231] Rather, the court held that "Indian settlement on a reservation should be seen as abandonment of claims [to other land] only when the specific circumstances warrant that conclusion."[232] Those "specific circumstances" must clearly and unambiguously demonstrate congressional intent, not only to grant the fee, but to extinguish Indian title.[233] Thus, in both *Walapai Tribe* and *Turtle Mountain Band*, it was established that even creation of a reservation does not necessarily extinguish tribal title unless congressional legislation clearly demonstrates such an intent.[234] In the case of the Abenaki Nation, no provision was made by either Congress or the President for an Abenaki reservation. No exchange of lands was proposed; no compensation for lands lost was offered. Under these circumstances, it defies logic to find that the mere admission of Vermont to the Union establishes clear congressional intent to extinguish Abenaki title.

In addition, in accord with prior precedent of the Indian Claims Commission, *Turtle Mountain Band* held that encroachment by non-Indians on Indian land does not extinguish Indian title unless that encroachment is clearly authorized by Congress through legislation extinguishing Indian title and providing for distribution of fee patents under federal land laws. As the Court of Claims noted:

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[228] *Id.* at 354.
[229] 490 F.2d 935 (Ct. Cl. 1974).
[230] State v. Elliott, 616 A.2d 210, 221 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).
[231] *Turtle Mountain Band*, 490 F.2d at 945.
[232] *Id.* at 946.
[233] *Walapai Tribe Case*, 314 U.S. 339, 357-58 (1941).
[234] *Id.* at 353-54; *Turtle Mountain Band*, 490 F.2d at 946.

> But if the Executive Order reservation was ineffective, in these circumstances, to end the aboriginal ownership, it follows *a fortiori* that the acts of private citizens were also insufficient. As we have stated, the power of Congress to eliminate aboriginal title is exclusive. . . . Unauthorized white encroachment would not affect the Chippewas' ownership.[235]

In sum, even the history recounted by the Vermont Supreme Court tells us definitively only that Congress intended to ratify the grants of land by the Governor of New Hampshire and deny the validity of the later grants by the Governor of New York.[236] This fact relates to conflicting non-Indian claims; it tells us nothing about whether Abenaki title was extinguished. The court also tells us that the Wentworth Grants were contingent on settlement and that Congress was aware of this fact.[237] The Vermont Supreme Court concludes from this fact that Congress therefore must have intended to grant these claimants the *right* to settle on Abenaki lands;[238] if this is true, it would grant the claimants the right to settle in the future on lands from which the Abenakis had not yet withdrawn. I submit that this is an implausible interpretation of the facts. Given the fact that (1) the Abenakis had previously gone to war with Great Britain at least five times over encroachments on their lands, (2) the United States in 1791 was strongly interested in avoiding wars with its Indian neighbors, (3) Congress had passed the first Non-Intercourse Act in 1790, prohibiting non-Indian settlement on Indian land before that land was ceded to the

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[235] *Turtle Mountain Band*, 490 F.2d at 947 (footnote omitted). Similarly, in United States v. Turtle Mountain Band of Chippewa Indians, 612 F.2d 517 (Ct. Cl. 1979), the court stated:

> [We have held that] Congress has the exclusive power to terminate aboriginal title, that Executive action could not have that effect unless Congress clearly had manifested its intention that that action do so, that Congress had not authorized termination of plaintiffs' aboriginal title by Executive order, and that "if the Executive Order reservation was ineffective, in these circumstances, to end the aboriginal ownership, it follows *a fortiori* that the acts of private citizens were also insufficient."

Id. at 522 (quoting *Turtle Mountain Band*, 490 F.2d at 947).

[236] State v. Elliott, 616 A.2d 210, 221 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[237] *Id.* at 220.

[238] *Id.*

United States in a public treaty, (4) the Abenakis had withdrawn involuntarily from some of their lands settled by the New Hampshire claimants but that the Abenakis never voluntarily abandoned those lands and never abandoned other lands in Vermont to which they had retreated during the Revolutionary War, and (5) the Supreme Court has held consistently that granting of the fee interest to Indian land does not extinguish the Indian title of occupancy in the absence of clear and unambiguous congressional intent to the contrary, it defies both precedent and the longstanding policy of protecting Indian title to conclude that Congress, by the simple admission of Vermont to the Union, casually obliterated all Abenaki title in the State of Vermont, whether currently settled by non-Indians or inhabited by Abenakis.

II. CONSEQUENCES OF EXTINGUISHMENT OF ABORIGINAL TITLE: THE TAKINGS QUESTION

In holding that the Abenaki title to lands in Vermont had been extinguished at some indeterminate time in the past, the Vermont Supreme Court was aided by the assumption that this result would not subject either the State of Vermont or the federal government to any monetary liability for an unlawful taking of the Abenakis' property.[239] This implicit assumption was based on *Tee-Hit-Ton Indians v. United States*,[240] in which the Supreme Court, for the first time, distinguished between "original Indian title" (or "aboriginal title") and "recognized title."[241] Recognized title property is land held by an American Indian nation which is "recognized" by the federal government in a treaty or statute.[242] Land held under "original Indian title" is land that has been occupied by an Indian nation for a long time—usually before the United States asserted sovereignty over the territory.[243] In *Tee-Hit-Ton*, the Supreme Court, in effect, held that property held under original Indian title does not constitute "property" for purposes of the Fifth Amendment, and therefore could be taken by the United States without compen-

[239] *Id.* at 213.
[240] 348 U.S. 272 (1955).
[241] *Id.* at 277.
[242] *Id.* at 278.
[243] *Id.* at 279.

sation.[244] What reasons did the Court give for this extraordinary, outrageous proposition?

First, the Court concluded that this proposition had been established by precedent.[245] As Professor Nell Jessup Newton ably demonstrates, this assertion is incorrect.[246] Just as the 1886 Supreme Court in *Buttz*[247] misrepresented its prior holding in *Beecher v. Wetherby*,[248] the Court, in *Tee-Hit-Ton*, claimed that its decision was compelled by precedent when, in fact, *Tee-Hit-Ton* was a case of first impression.[249] It may seem odd that such a question was never previously definitively litigated, but, as Professor Newton explains, this oddity results from the fact that, until the Indian Claims Commission Act was passed in 1946, there were numerous jurisdictional barriers that prevented Indian nations from bringing claims against the United States for compensation for unlawful taking of their lands.[250]

Second, Justice Reed emphasized that the Tee-Hit-Tons had become greatly reduced in number and had a total membership of

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[244] *Id.* at 291. Recognized title, in contrast, may not *ordinarily* be taken by the federal government without compensation, including interest, but *may* be taken without "just" compensation if Congress was exercising its trust power and made a "good faith effort" to provide the affected nation with property of "equivalent value." *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980) (holding that federal government may abrogate tribal property rights if it is acting within scope of its trust power and acts in good faith to ensure that tribe is provided with "equivalent value" for property rights taken); *see also* Newton, *The Judicial Role*, *supra* note 15 (criticizing *Sioux Nation*).

Although the 1946 Indian Claims Commission Act authorized compensation for takings by the federal government of property held under original Indian title at its fair market value at the time of taking, the courts, in interpreting that statute, gave great significance to the distinction between recognized and unrecognized title. Only holders of recognized title were entitled to interest from the date of taking. Since the Vermont Supreme Court assumed that the Abenaki title had been extinguished by the federal government no later than 1791, when Vermont was admitted to the Union, the Abenaki claim would be likely to be barred by the statute of limitations contained in the Indian Claims Commission Act. State v. Elliott, 616 A.2d 210, 214 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

[245] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

[246] Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980) [hereinafter Newton, *At the Whim of the Sovereign*].

[247] Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886).

[248] 95 U.S. 517 (1877).

[249] *Tee-Hit-Ton Indians*, 348 U.S. at 281.

[250] Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992).

sixty-five.[251] What is the relevance of these observations? Is there a rule of property law that prevents sixty-five persons from owning 350,000 acres? There is no such rule. Until recently, almost half the privately held land in the State of Hawaii was owned by seventy-two landowners.[252] Moreover, if there were such a rule, it would put in doubt current ownership of land in all the proprietary colonies initially owned by individuals or companies.[253] Justice Reed further noted that membership in the Tee-Hit-Ton Nation descends through the female line and there were no remaining women of childbearing age.[254] Again, what is the relevance of this observation? That the Tee-Hit-Tons are a "vanishing race" and that the land is therefore wilderness land available for possession by others?[255] Again, no rule of United States property law makes this circumstance a reason for depriving a possessor of the capacity to assert recognized property rights.

Third, Justice Reed noted that ownership was wholly "tribal" and not "individual."[256] If collective ownership were barred by the rules of property law in the United States, this would be very surprising to the Catholic Church and to such corporate entities as General Motors or Harvard University. It would also surprise hospitals, foundations, and other charitable trusts. Partnerships had better be on the look-out as well. It is commonplace in our law that noncorporeal entities may be established that have the right to own property and to have that property protected from uncompensated seizure by the state. There is, in fact, no rule barring joint ownership of property; nor is there any rule limiting the number of persons who can own property jointly. The Tee-Hit-Ton Nation is an entity with a corporate identity that is no different, in this context, from General Motors or other, non-Indian mechanisms of collective ownership conceptualized as distinct from ownership

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[251] *Tee-Hit-Ton Indians*, 348 U.S. at 286.

[252] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (reciting this fact).

[253] *See* RICHARD MIDDLETON, COLONIAL AMERICA (1992). New Jersey, for example, was conveyed in 1664 by the Duke of York to two men, Sir George Carteret and John Lord Berkeley. Similarly, initially William Penn was proprietor of Pennsylvania. *Id.* at 131-32. Other proprietary colonies included North and South Carolina. *Id.* at 172.

[254] *Tee-Hit-Ton Indians*, 348 U.S. at 286.

[255] *See generally* DIPPIE, *supra* note 50 (describing history of the idea that American Indians constitute a "vanishing race").

[256] *Tee-Hit-Ton Indians*, 348 U.S. at 286.

by individual members.

Justice Reed also noted that the tribal character of the Tee-Hit-Tons' ownership "was more a claim of sovereignty than of ownership."[257] While it is true that the Tee-Hit-Tons mixed what is commonly conceptualized as public (sovereignty) and private (ownership),[258] this provides no warrant to conclude that the Tee-Hit-Tons had no protectible property rights. Cities own property and use it for public purposes, and if Justice Reed is correct, the federal government can take that land without compensation. Of course, this is not the law, and city governments would be outraged if it were made the law.

Justice Reed suggests that the Tee-Hit-Tons' claim was not a property claim at all, but a claim to sovereignty.[259] If so, he presumes that the United States can cut back on tribal sovereignty at will. It is normatively and legally problematic to conclude that the United States can abrogate tribal sovereignty at will without any prior consultation or treaty negotiations with the affected tribe. Nations do not normally conquer other nations simply by declaring it to be so. Moreover, it normally takes more than an executive decision to authorize the absorption of another country. Consider the reaction of Canada if the Secretary of the Interior authorized federal agents to cut down trees in Newfoundland.

Even if the character of the Tee-Hit-Tons' control over their territory was more closely analogous to sovereignty (as understood in the United States) than to property (again, as understood in the United States), this does not provide a reason for allowing the seizure of property without compensation. For example, it is true that the federal government can pass legislation regulating activity in the State of New Jersey, and New Jersey authorities would be compelled to abide by that federal legislation under the Supremacy Clause, without any right to compensation for the loss of sovereignty. However, this federal power would not authorize the federal government to treat all the corporations and individual citizens of the State of New Jersey as devoid of any property rights in the lands and improvements within New Jersey's territorial bound-

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[257] *Id.* at 287.
[258] *Id.*
[259] *Id.*

aries. It is true that most American Indian tribes mixed sovereignty and property in ways not contemplated by the common law. It would be perverse, however, to conclude that *no property rights at all* are implicated in tribal control over land.

Fourth, Justice Reed suggested that the "character of the Tee-Hit-Tons' use of the land" was not sufficiently intensive.[260] Justice Reed notes that the chief of the Tee-Hit-Ton tribe who testified at the trial pointed to only six places in the entire 350,000 acres to mark their use of the land: "(1) his great uncle was buried here, (2) a town, (3) his uncle's house, (4) a town, (5) his mother's house, (6) smokehouse."[261] He notes that there were villages and hunting and fishing grounds.

> There were scattered shelters and villages moved from place to place as game or fish became scarce. There was recognition of tribal rights to hunt and fish on certain general areas, with claims to that effect carved on totem poles. From all that was presented, the Court of Claims concluded, and we agree, that the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth.[262]

What is the relevance of the fact that the Tee-Hit-Ton chief marked the extent of the tribe's land by pointing to crucial markers such as homes, cemeteries and fishing sites? Or the fact that villages moved? That houses were scattered? That the Tee-Hit-Tons hunted and fished rather than planted crops? Why is all of this not enough to establish property rights? The Court suggests that the Tee-Hit-Ton relation to the land was not sufficiently close or intensive to establish property rights.[263] The land was not enclosed; it was not used permanently, but intermittently; it was

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[260] *Id.* at 285.
[261] *Id.* at 286.
[262] *Id.* at 287.
[263] *Id.*

not individually owned, but controlled by a group of people with collective governance mechanisms.[264] Let us compare these factors to those required under modern property law for adverse possession. Enclosure has never been required to establish possession sufficient to satisfy the requirements of the adverse possession doctrine;[265] property use need only be sufficiently "open and notorious" to put the "true owner" on notice of the possession. Property used seasonally may be acquired by adverse possession if the possession is visible and if land in the area is customarily used in that way. Nor are business corporations disempowered from obtaining land by adverse possession. There is therefore no precedent for concluding that the Tee-Hit-Tons' use of the land was insufficiently possessory to be recognized under United States property law.

Justice Reed further notes that the "various tribes of the Tlingits allowed one another to use their lands."[266] Exclusivity has traditionally been a requirement to establish occupancy rights of American Indian nations.[267] But the purpose of the exclusivity requirement is to exclude ownership claims in lands that were not treated as within the tribe's control.[268] It does not prevent recognition of joint claims by tribes that held land in common with each other.[269] Nor does it require that the claimants never have had any visitors or temporary guests. If this were the case, landlords would lose their property rights as soon as they rented their land to tenants, and family members would lose their property by inviting relatives to stay with them in times of hardship.

Even if one recognizes that, historically, the character of Indian use of land differed from most non-Indian usage in fundamental ways, it is hard to understand why that difference justifies concluding that American Indians had so little connection with the land, or expectations in continued access, that their lands could be

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[264] *Id.*

[265] *See* SINGER, *supra* note 84, at 143-60 (explaining the elements of adverse possession).

[266] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 287 (1955).

[267] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 9, § A2a, at 492 (Rennard Strickland ed., 1982).

[268] *Id.*

[269] *Id.*

considered to be *res nullius*, wasteland unowned by anyone. On the contrary, because of the spiritual meaning of land for most American Indian nations, the traditional connection with the land is stronger, closer, and of far greater cultural significance to personal and group identity than it was for non-Indians.

Finally, and most importantly, the Court argued that the Indians—all of them, including the natives in Alaska—had been conquered by the United States or prior colonial powers at some vague point in the past.[270] Justice Reed explained:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[271]

Even if this statement were historically accurate (which it is not), it does not prove that all Indian nations were conquered at some time in the past. In the absence of a military engagement, it is not at all clear what conquest means here. In the case of the Tee-Hit-Ton Indians, as Professor Newton has noted, the only act that may constitute a conquest of the Tee-Hit-Ton Indians is the Supreme Court decision itself.[272] Similarly, the Abenaki Indians were never conquered militarily by the United States.

Nor does Justice Reed's observation that the United States forced Indian nations to cede their lands[273] prove that Indian lands could be taken *without compensation*. *All* lands taken by eminent domain are taken by force; yet the Fifth Amendment requires that compensation be paid when that force is exercised.[274] Justice Reed was correct to note that Indian nations generally, but not always, were deprived of their lands by force.[275] That force,

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[270] *Tee-Hit-Ton Indians*, 348 U.S. at 289.

[271] *Id.* at 289-90.

[272] Newton, *At the Whim of the Sovereign*, *supra* note 246, at 1244.

[273] *Tee-Hit-Ton Indians*, 348 U.S. at 289-90.

[274] U.S. CONST. amend. V.

[275] HORSMAN, *supra* note 192 (describing the process by which Indian nations were deprived of their lands against their will).

however, was exercised in ways established by law, that is, by purchase through a treaty agreement, by military conquest and forced removal followed by a treaty cession, by abandonment occasioned by illegal white encroachment, or by congressional statute. In the absence of any of these indicia of extinguishment of Indian title, tribal title was held to be "as sacred as the fee simple of the whites."[276] The presence or absence of force is irrelevant to the legal question of whether compensation is owed.[277]

It is true that the United States did not always protect Indian nations from unlawful encroachment by non-Indians. The United States also did not always pay compensation when it took tribal lands, especially when it purported to punish the tribe for engaging in war against the United States. It may be true that the United States did not always pay adequate compensation for the lands it took. None of these observations changes the fact that it was the general practice, and the consistent policy, of the United States, from the beginning, to obtain Indian lands by cession in the context of a negotiated treaty for which compensation was paid.[278] By suggesting that the United States generally took Indian lands without compensation, Justice Reed rewrites history to suit his purposes.[279] He acknowledges the original sin of the United States only in order to authorize continued expropriation.

In the end, Justice Reed appealed to practicalities. He worried about the cost of recognizing native property rights.[280]

> In the light of the history of Indian relations in this Nation, no other course would meet the problem of

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[276] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

[277] The *Mitchel* Court does not mention force, and it considered the Indians' right to occupancy "a settled principle." *Id.*

[278] *See* United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976) (finding federal policy is extinguishment through negotiation rather than force, although force is valid).

[279] Justice Reed mischaracterized previous cases to advance the proposition that "Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1954). *See also* United States v. Alcea Bank of Tillamooks, 341 U.S. 48 (1951) (addressing, but not deciding, the question of whether original Indian title constituted property for purposes of the Fifth Amendment).

[280] *Tee-Hit-Ton Indians*, 348 U.S. at 290.

> the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment.[281]

This observation ignores the fact that, most of the time, the United States *did* pay compensation for land seized from American Indian nations,[282] and that it is constitutionally obligated to pay compensation for lands taken for public use, no matter how expensive or desperately they are needed for those public uses. It further ignores the fact that, at the time Justice Reed wrote his opinion, American Indians were citizens of the United States.[283] The seizure of timber of the Tee-Hit-Tons was recent and would continue in the future; Reed therefore authorized future expropriation of property by inhabitants of a territory that was to become a state in just a few years after the *Tee-Hit-Ton* opinion was written.

The welcome letter the Supreme Court wrote to the natives in Alaska let them know that, alone among American citizens and non-citizens who own land in the United States, they and other native peoples were vulnerable to a rule of law that has authorized dispossession without compensation.[284] In *State v. Elliott*,[285] the Supreme Court of Vermont sent its Abenaki citizens the same message.

III. HISTORY, PROPERTY, AND THE RULE OF LAW

> *Governmental taking of land from white men is called "expropriation"; taking of land from Indians is called "freeing the Indian from the reservation" or*

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[281] *Id.*

[282] *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER (1984) for a detailed history of relations between American Indian nations and the United States. For the early history, see also HORSMAN, *supra* note 192.

[283] All American Indians who had not already been made United States citizens were forcibly granted citizenship by statute in 1924. CLINTON ET AL., *supra* note 40, at 152.

[284] African Americans, by contrast, had their labor expropriated through the institution of slavery.

[285] 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

> *"abolishing the reservation system." If a government repudiates its obligations to a white man we speak of "governmental bankruptcy"; if a government repudiates its obligations to an Indian, this is commonly referred to as "emancipating the Indian."*[286]
>
> *—Felix Cohen*

The Vermont Supreme Court acknowledged that extinguishment of Indian title requires an unequivocal act of Congress.[287] How then could the court conclude that the Abenaki title had been extinguished in the absence of any congressional action that even mentioned the Abenaki claims? How could the court conclude that the property rights of its citizens were casually lost when Vermont was admitted to the Union[288] when the Abenakis had previously waged war against Great Britain five times, and the United States in 1791 was greatly concerned about preventing future wars with its Indian neighbors? How could the court conclude that the Abenaki title was lost when the Abenakis were never conquered and Congress failed to negotiate a treaty or otherwise deal with their property rights in any explicit way? How could the court, in good conscience, tell its Abenaki citizens that the Republic of Vermont was established for the sole purpose of protecting the property rights of all Vermonters except themselves?

I offer two hypotheses to answer these questions. First, just as it was difficult in the Bicentennial Year of 1989 for many public figures to recognize the core injustices built into the original Constitution on the issue of slavery,[289] it is hard for judges to recognize and deal with the consequences of the tragic history of relations between the United States and American Indian nations.

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[286] Felix Cohen, Field Theory and Judicial Logic, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 150 (1950), *quoted in* DIPPIE, *supra* note 50, at 339.

[287] *Elliott*, 616 A.2d at 213. The court found extinguishment of Indian property rights to be the exclusive right of the federal government. *Id. See also* Oneida Nation of New York v. New York, 860 F.2d 1150 (2d Cir. 1988) (finding sovereign's intent does not have to be express but must be "plain and unambiguous").

[288] *Elliott*, 616 A.2d at 218.

[289] Justice Thurgood Marshall was a notable exception. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (noting that the Constitution began with "We the People" while denying slaves and women the right to vote).

The strategy of choice is inoculation. The "original sins" of both slavery and conquest are recognized and deplored; yet they are relegated to the past with the pretense that we have gotten beyond them.

This denial of history[290] has profound consequences. In the case of the law governing the relations between Indian nations and the United States, the distancing of past injustice allows the courts to rewrite both history and legal precedent. The courts rewrite history by pretending that conquest happened long ago in the past rather than recently—or even in 1992 as a consequence of their own actions. The courts rewrite precedent by relying on cases which misstate or distort the meaning of earlier cases and by failing to recognize conflicting lines of precedent and competing and contradictory policies.

At the same time, the courts continue to cite, or rather to miscite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions[291] contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights. To the extent they are read to authorize unjust expropriation of Indian lands, they provide a convenient scapegoat. They shift responsibility from current judges to a Court led by perhaps the most respected of all Chief Justices. If a proposition is compelled by a case decided in 1823, it not only has the backing of Chief Justice John Marshall, but also appears to be so long-standing that current courts have no choice but to submit to the principles upon which the country was established and which form the basis of current expectations of non-Indians. To the extent that process entails injustice, it is safely relegated to the past. Yet the past intrudes on the present; the old Indian law opinions are given current force.[292] To the extent that courts currently define Indian rights by reference to doctrines designed to

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[290] *See* Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381 (1991) (arguing that "history is crucial in identifying groups that warrant particular legal protection," yet finding that the courts often use false historical claims to justify failing to respond to injustice).

[291] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (dividing the title to Indian lands between Indian nations and the United States).

[292] *See Elliott*, 616 A.2d at 210 (citing *Johnson*, 21 U.S. (8 Wheat.) 543; Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); and United States v. Cook, 86 U.S. (19 Wall.) 591 (1873)).

promote the invasion and unjust seizure of Indian lands, they participate in the current deprivation of property of Indian nations.[293]

Second, the denial of injustice in both *Tee-Hit-Ton* and *Elliott* rests on a particular form of "either/or" thinking which fails to recognize that various middle positions or accommodations are possible. The Vermont Supreme Court appeared to assume that, if it recognized the legitimate claims of the Abenakis, the logical corollary would be to deny the property rights of all the non-Indian residents of Vermont.[294] This result would be intolerable to the court. Identifying with the State of Vermont and its non-Indian inhabitants, the court assumed that it would be wrong to dispossess all Vermont's non-Indian residents because they had legitimately relied on grants by the State of Vermont and the public recording system in establishing homes and businesses in the state.[295] If it would be unjust to dispossess non-Indian claimants, it must follow that conquest happened at some point in the past. When is not important; what matters is that it happened. If no date can be identified, then it must be found in the "increasing weight of history."[296]

Even if one concludes that it would be unjust or unlawful to dispossess current non-Indian residents in Vermont, it is a logical error to conclude that the original inhabitants must, therefore, have been lawfully deprived of their property rights. One wrong does not make another wrong right. Two just claims may exist and conflict with each other; it may be unjust to dispossess current residents and also have been unjust to dispossess the Abenakis.

This "either/or" reasoning misunderstands the character of property rights. It presumes that the relevant question is "Who is the owner?" and that, once that owner is identified, others have no

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[293] For explanations of the myriad ideological justifications for seizure of Indian lands, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

[294] *See Elliott*, 616 A.2d at 220.

[295] *Id.*

[296] *Id.* at 218.

legally cognizable claims.[297] Ruling that the Abenakis had never been lawfully divested of their title would not automatically entitle them to oust the current residents of Vermont or even to collect rent from them. Given the conflicting property rights in question, it would have been a matter for further discussion how to resolve the conflicting property rights.

The Vermont Supreme Court failed to recognize that the most likely and most appropriate resolution to the case would have been a negotiated and ultimately legislative one. If the court had recognized that the Abenakis had never been lawfully deprived of their title to the tribe's lands in the State of Vermont, the United States could have negotiated with the tribe to settle the matter by providing some land and compensation, as it did in the case of the Passamaquoddy and Penobscot nations in Maine and the natives in Alaska.[298] In other words, the United States could have negotiated a treaty with the Missisquoi Abenaki Nation.[299] This way of resolving the conflict would have recognized property rights and sovereignty on both sides.

It is "well settled" that Indian title is "as sacred as the fee simple of the whites."[300] Yet it also appears to be "well settled" that Indian nations who did not go to war with the United States, and are therefore not the beneficiaries of a treaty, must have been "conquered" at some time in the past and their land claims extinguished by the "increasing weight of history,"[301] whether or not they were paid compensation. These doctrines do not sit well

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[297] For criticism of this model of property rights, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

[298] *See* CLINTON ET AL., *supra* note 40, at 737-40, 1073-75.

[299] Congress ended formal treaty-making with Indian nations in 1871. Yet, it has often engaged in informal treaty-like negotiations with Indian nations after 1871 by discussing pending legislation with the affected nation. Recent examples of such negotiations include settlement of the Alaska Native claims and the claims of the Passamaquoddy and Penobscot Nations geographically located within the borders of the State of Maine. In addition, Congress is perfectly free to pass legislation authorizing the resumption of treaty-making between the United States and American Indian nations. Such a course of action would represent both the best way to settle ongoing controversies over property rights, as well as constituting the best way to respect and give appropriate deference to tribal sovereignty. Such a process, however, can be effectively accomplished through the legislative process if it is conducted in conjunction with good faith negotiations with affected tribes.

[300] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 716 (1835).

[301] State v. Elliott, 616 A.2d 210, 218 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

together. If the land in the United States is to have been well settled by its inhabitants, Indian and non-Indian alike, then the courts must take more seriously the claim that Indian title is "as sacred as the fee simple of the whites."[302] If they do not, they will have to bear the weight of the increasing judgment of history that they participated in the continuing conquest of American Indian nations.

[302] *Mitchel*, 34 U.S. (9 Pet.) at 746.