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In 1947, Professor Felix Cohen, then Associate Solicitor for the United States Department of the Interior and a recognized scholar in American Indian law, wrote that despite what "[e]very American schoolboy is taught . . . the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners."[1] Only eight years later, Justice Reed, writing for the majority of the United States Supreme Court in *Tee-Hit-Ton Indians v. United States*,[2] asserted a contrary view: "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 . . . it was not a sale but the conquerors' will that deprived them of their land."[3]

Professor Cohen's and Justice Reed's statements do not represent merely an insignificant difference of opinion on an historic fact. To the contrary, Justice Reed's historical observation was a predicate to the Supreme Court's holding in *Tee-Hit-Ton*, one of the most significant statements by the Court on the constitutional rights of Native Americans to their aboriginal land, often defined as land upon which a tribe has lived since "time immemorial."[4] Relying on his own historical ob-

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1. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34-35 (1947) [hereinafter cited as Cohen].

2. 348 U.S. 272 (1955).

3. *Id.* at 289-90.

4. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 664 (1974); Holden v. Joy, 84 U.S. (17 Wall.) 211, 244 (1872); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *Cf.* United States *ex rel.* Hualpai Indians v. Santa Fe Pac. Ry., 314 U.S. 339, 345 (1941) ("definable territory occupied exclusively" by the tribe); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835) ("perpetual right of possession . . . as their common property, from generation to generation").

servation and on questionable legal precedent, Justice Reed held in *Tee-Hit-Ton* that the Indians' title rights,[5] while permitting them to occupy their aboriginal land, did not represent a property right whose extinguishment required compensation under the fifth amendment taking clause.[6]

The *Tee-Hit-Ton* opinion has stood for twenty-five years without serious scrutiny. Several reasons, however, compel its reexamination. First, because *Tee-Hit-Ton* implicitly authorizes congressional confiscation of Indian land, including reservation land created by executive order[7] or reserved by treaty,[8] the decision continues to threaten many Native Americans. Second, because the case acknowledges a congressional power to extinguish Indian rights to tribal land, fear of congressional reprisals prevents many tribes from fully litigating existing claims against the government.[9] Finally, and most significantly, *Tee-*

5. This Article uses the terms "aboriginal title" and "recognized title" when describing post-*Tee-Hit-Ton* cases. Because the term "recognized title" did not exist before *Tee-Hit-Ton*, see text accompanying notes 110-83 *infra*, these terms are used in regard to pre-*Tee-Hit-Ton* cases only when it can be determined that a modern court, applying *Tee-Hit-Ton*, would conclude that the tribe held either aboriginal or recognized title. Generally, this determination can not be made, especially when the tribe had a treaty. In such cases, the generic term "Indian title" is used to denote that, under the *Tee-Hit-Ton* test, the land tenure may be either aboriginal or recognized.

6. 348 U.S. at 288-89.

7. See text accompanying notes 236-250 *infra*.

8. See text accompanying notes 251-75 *infra*.

9. Admittedly, Indian tribes have made some major gains in the federal courts. For example, they have forced the government to invest their trust funds instead of letting the money sit in the Treasury as an interest free loan to the federal government. Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390 (Ct. Cl. 1975); Mancester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973). Additionally, some Northwest Coast tribes have been allotted 50% of the entire salmon catch of Puget Sound, based on treaties signed in the 1850's. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). Nevertheless, because of recent Eastern land claims, *see, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); and the fishing claims in Washington, *see, e.g.*, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979), several members of Congress introduced bills to overturn the recent decisions by authorizing extinguishment of all tribal ownership rights in the disputed areas. *See, e.g.*, H.R. 9951, 95th Cong., 1st Sess., 123 CONG. REC. 12242 (1977) (to extinguish all aboriginal water rights and limit tribal water rights for Indian reservations to present use); H.R. 9950, 95th Cong., 1st Sess., 123 CONG. REC. 12242 (1977) (to waive tribal government immunity and limit tribal jurisdiction); H.R. 9906, 95th Cong., 1st Sess., 123 CONG. REC. 12099 (1977) (to extinguish tribal title and interests to lands or water in New York); H.R. 9054, 95th Cong., 1st Sess., 123 CONG. REC. 9304 (1977) (to abrogate all treaties between Indian tribes and United States); S.J. Res. 86, 95th Cong., 1st Sess., 123 CONG. REC. 16232 (1977) (to extinguish any right, title, or other interest of the Mashpee tribe to certain lands in Massachusetts). None of the "backlash" bills were passed. The relationship between the assertion of Indian rights and congressional attempts to extinguish

Hit-Ton provides a rule of law that, if unchecked, may be used to justify other arbitrary congressional action in derogation of Indian tribal rights.

This Article argues that the *Tee-Hit-Ton* case represents unsound legal reasoning. More important, the Article proposes that because the case presents significant dangers to Indian rights and to future Indian claims, the decision must be reevaluated. The first section of the Article explores the history and foundation of the *Tee-Hit-Ton* decision, critically analyzes the rationale employed by the Court, and concludes with speculations on the motivation behind the Court's holding. The second section of the Article discusses *Tee-Hit-Ton*'s effect on current litigation involving Indian claims. By addressing the substantive fallacies of the Court's rationale and the potential dangers of future applications of the case, the Article hopes to supply a sufficient basis for future restriction of *Tee-Hit-Ton*'s impact.

The Tee-Hit-Ton Rule

When the United States acquired Alaska from Russia in 1867,[10] the new territory had few White settlers. Indigenous Alaskan Indian tribes, such as the Esquimos, Aleuts, and Tlingits, were the sole occupants of most of the territory. Because the Alaskan climate is so inhospitable, many years passed without the clashes between Indians and White settlers that had typified western expansion. Two factors, however, made conflict unavoidable. First, although Alaska comprises 365,000,000 acres, only a small percentage of that land is habitable.[11] Second, Alaska is rich in natural resources, particularly oil.[12] As the potential value of Alaska's resources became known, and as Alaskans began lobbying intensely for statehood, the Alaska natives' rights to their aboriginal lands inevitably became an issue.

In 1947 Congress passed a joint resolution directing the Secretary of the Interior to sell the right to cut timber from a forest located in territory inhabited by Alaska tribes.[13] The joint resolution directed

these rights is obvious, especially to Indian leaders. Fear of this type of backlash may prevent tribes from fully pressing or litigating their claims. Certainly, the knowledge that Congress has the power to extinguish Indian rights has weakened the bargaining position of the tribes who wish to settle their claims.

10. Treaty with Russia, March 30, 1867, United States-Russia, 15 Stat. 539, T.S. No. 301.

11. *See The Alaska Lands Issue: Our Last Frontier*, 33 CONG. Q. ALMANAC 671 (1977).

12. *See generally* FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND 285-426 (1968).

13. H.R.J. Res. 205, 61 Stat. 920 (1947).

that proceeds of the sale be put in a trust fund until the nature of the Indians' "possessory rights" in the timber could be determined.[14] In addition, section 3(b) of the resolution stated: "Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest."[15] Once the merchantable timber in the 350,000 acre forest had been cut down, the Tee-Hit-Ton band of Tlingit Indians sued for a partial taking, basing their claim on an earlier case that had held that aboriginal title included ownership of standing timber.[16] If the tribe held aboriginal title to the 350,000 acres within the forest, and if that interest were protected by the fifth amendment, the government could be compelled to compensate the tribe for cutting down the timber.

Although the Supreme Court had decided many cases concerning the rights flowing from aboriginal title,[17] the Court had rarely considered whether a tribe's aboriginal interest in land was protected from confiscation by the government under the fifth amendment taking clause. Congress had only recently waived sovereign immunity for claims against the government occurring after 1946, by passing the Indian Claims Commission Act.[18] That statute, which also created the Indian Claims Commission and empowered it to adjudicate claims arising before 1946,[19] conferred jurisdiction on the Court of Claims to adjudicate legal and equitable claims of the Indians. Accordingly, the primary issue in *Tee-Hit-Ton* was whether aboriginal ownership conferred any legal or equitable rights against the government cognizable under this jurisdictional statute.

Justice Reed, writing for the majority in *Tee-Hit-Ton*, held that aboriginal title was not a compensable property right unless Congress had "recognized," by treaty or other unambiguous legislation, the tribe's right to live on the land permanently.[20] Justice Reed reached this conclusion by referring to a series of cases on sovereign rights to Indian land, beginning with *Johnson v. M'Intosh*.[21] According to the

14. *Id.* § 3(a).
15. *Id.* § 3(b).
16. *See* Shoshone Tribe v. United States, 299 U.S. 476 (1937).
17. See notes 32-106 & accompanying text *infra*.
18. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. II 1978) (pre-1946 claims); 28 U.S.C. § 1505 (1976) (post-1946 claims)).
19. *Id.*
20. 348 U.S. at 288-91.
21. 21 U.S. (8 Wheat.) 543 (1823).

Court, *Johnson* stood for the proposition that by discovery of territory, a sovereign gained the exclusive right to extinguish the native tribes' title by purchase or conquest.[22] Apparently viewing the act of discovery by the sovereign as itself extinguishing all Indian title to land, Justice Reed then reasoned that aboriginal title represented a permission by the sovereign to occupy, entailing nothing more than "mere possession not specifically recognized as ownership" of land.[23] Congress, of course, could choose to recognize the Indians' permanent right to occupy a territory, thus entitling the tribe to compensation for the extinguishment of that recognized right, but until such "recognized" title was bestowed on the Indians, any interest they held did not require compensation upon confiscation by the government.[24] Moreover, because the decision whether to recognize the Indians' right to land was exclusively within the authority of Congress, the failure of Congress to recognize Indian title raised only political and not justiciable questions,[25] thereby precluding judicial review.

Applying this theory to the facts in *Tee-Hit-Ton*, Justice Reed first noted that Congress had never explicitly recognized the Tlingits' permanent right to occupy any portion of the forested area.[26] Accordingly, the Tlingits possessed merely aboriginal, and not recognized, title.[27] Because Congress apparently had decided not to recognize the Tlingits' permanent right to occupy the land in question, Justice Reed determined that Congress also apparently had chosen not to compensate the Tlingits for the confiscation of their land.[28] As possessors of nothing more than aboriginal title, the Tlingits had no legal or equitable claim cognizable under the jurisdictional statute, and their claim was dismissed.

Chief Justice Warren and Justices Douglas and Frankfurter dissented. They did not, however, disagree with the rule that unrecognized aboriginal title is not protected by the fifth amendment taking clause. Instead, they argued the tribe held recognized title because the Organic Act for Alaska of 1884[29] had recognized the Alaska natives'

22. 348 U.S. at 279-80.
23. *Id.* at 279.
24. *Id.* at 288-89.
25. *Id.* at 281 (citing United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941)).
26. 348 U.S. at 278.
27. *See id.* at 278-79.
28. *Id.* at 278-79, 288-89.
29. Ch. 53, 23 Stat. 24 (1884).

right permanently to live on their land, thus entitling them to fifth amendment protection.[30]

Tee-Hit-Ton in Context: Genesis and Development of the Doctrine of Discovery

Underlying Justice Reed's conclusion in *Tee-Hit-Ton* that a taking of aboriginal title is not compensable under the fifth amendment was the premise that aboriginal title is not a property right but a "mere possessory right" subject to the whim of the sovereign. Justice Reed purported to derive this principle from those cases dealing with the doctrine of discovery, a doctrine first applied to Indian title questions by Chief Justice Marshall in "[t]he great case of *Johnson v. M'Intosh*."[31] Justice Reed's reliance on the doctrine of discovery was misplaced because an analysis of the development of that doctrine, as begun in the Marshall Court and as refined by subsequent cases leading up to *Tee-Hit-Ton*, supports the conclusion that aboriginal title *is* indeed a compensable property right.

Genesis: The Marshall Court

The major doctrines of federal Indian law were established in a series of opinions by the Marshall Court.[32] Four of these cases played a prominent role in the Court's development of the doctrine of discovery.[33]

The earliest Marshall Court case involving Indian land claims was the Yazoo land case, *Fletcher v. Peck*.[34] A purchaser who traced his

30. 348 U.S. at 294.

31. *Id.* at 279.

32. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (tribal sovereignty); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (trust relationship); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (doctrine of discovery).

Because they view themselves as sovereigns, some Indian tribes assert that Indian law properly is the study of tribal law only. Thus, some Indians, especially traditional tribal members, to this day do not acknowledge the sovereignty of the United States over them. *See, e.g.*, Letter from Representatives of the Iroquois Confederacy to Raporteur Martinez Cobo of the Subcommission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights of the United Nations Economic and Social Council, (July 26, 1976), *reprinted in* AM. INDIAN J., Sept. 1976, at 5; Letter from the Lakota Treaty Council, AM. INDIAN J., Sept. 1976, at 8; *Internation NGO Conference on Discrimination Against Indigenous Populations in the Americas—1977*, AM. INDIAN J., Nov. 1977, at 12-13, 23. This Article concedes that Indian nations are subject to the laws of the United States, however, and hence is limited to an analysis of federal Indian law.

33. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

34. 10 U.S. (6 Cranch) 87 (1810). *Fletcher* is best known as the first Supreme Court interpretation of the contract clause. The case grew out of a land fraud scheme involving the

title back to a grant of aboriginal lands by Georgia sued for a breach of covenants in his deed. Indian title was in issue only tangentially because one of the covenants represented that Georgia was seised in fee at the time of the grant.[35] Thus, the Court had to resolve whether Georgia had the power to grant land occupied by the Indians. The Court held that, as one of the original thirteen states, Georgia could grant the land: "The majority of the court is of opinion that the nature of Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[36] *Fletcher* thus established the proposition that the sovereign has the authority to grant land held in Indian title.[37] The opinion failed to delineate, however, the rights, if any, attaching to Indian title, including the effect of the grant on Indian title. The Court merely indicated that Indian title was to be respected until it was extinguished and that the Indians living on granted land could not be ejected by a grantee of the state.[38]

Justice Johnson dissented, criticizing the majority's failure to explain or characterize the nature of the Indians' property interest. In Justice Johnson's view, the state could not have a fee simple estate because its interest was "a mere possibility,"[39] while the Indians had the "absolute proprietorship of their soil."[40] This approach, although perhaps legally sound, presented an obstacle the Court neither needed, nor desired, to confront in *Fletcher*: if the Indians' interest in their aboriginal land was that of an absolute proprietor, all the grants of aboriginal lands to private persons solely by the United States government would be void. Such a decision would have had far-reaching effects, since these grants formed the basis of most claims to real property in the United States.

Thirteen years later *Johnson v. M'Intosh*[41] forced the Court to answer the difficult questions it had avoided in *Fletcher*. As with many Indian land questions, *Johnson* arose from a dispute between non-In-

bribery of all but one member of the Georgia legislature. The validity of titles to a large area of land in present-day Alabama and Mississippi turned on its outcome. For a history of this case, see C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 309-23 (1944) [hereinafter cited as HAINES].

35. 10 U.S. (6 Cranch) at 139-40.

36. *Id.* at 142-43.

37. *Id.* at 142. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974).

38. 10 U.S. (6 Cranch) at 142-43.

39. *Id.* at 146.

40. *Id.*

41. 21 U.S. (8 Wheat.) 543 (1823).

dian successors to the original grantees of Indian land. The case turned on the narrow issue of whether grants of land in 1773 and 1775 by the Illinois and Piankeshaw nations to a private individual superseded a later sale by the same tribes to the United States government. Consequently, the Court squarely faced the task of reconciling the rights of the government and the Indians to alienate land.

In reconciling the competing rights of the United States government and the Native Americans, Chief Justice Marshall based his decision in *Johnson* on the principle that a nation discovering and taking possession of new territory acquires certain rights in the territory, stating "[D]iscovery 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."[42]

Chief Justice Marshall then proceeded to delineate the rights of each party. Discovery of a new territory gave the discoverer the exclusive right as sovereign to acquire Indian land and thereby to extinguish Indian title.[43] The discoverer's mere acquisition of this right upon discovery did not, however, extinguish all Indian rights to the territory. To the contrary, until the discoverer exercised its right, either "by purchase or by conquest"[44] the Indians were recognized as "the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it."[45] Consequently, until the discoverer exercised its exclusive right, both the sovereign and the Indians had simultaneous interests in the territory. After Indian title was extinguished, however, the sovereign gained an "absolute title,"[46] unrestricted by Indian rights.

Applying this doctrine to the facts in *Johnson*, the Chief Justice concluded that the original sale by the Indians conveyed at most only the same right to occupy that the tribe possessed.[47] Since the doctrine

42. *Id.* at 573. As Chief Justice Marshall pointed out, possession was necessary because discovery alone could not support the original extravagant claims of the discovering nations; the discoverer had to exercise physical control over the claimed land. For example, England's charter to its first colony granted 400 miles north and south along the eastern seacoast, extending from sea to sea. *Id.* at 577-78. Actual possession, however, often accomplished only at the expense of a war, was necessary to perfect these claims. *Id.* at 579-84. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).

43. 21 U.S. (8 Wheat.) at 587.

44. *Id.* It was necessary to establish that only the discoverer had the right to purchase; otherwise a competing nation could buy the land out from under the discoverer, thereby destroying the discoverer's land base and its claim to sovereignty.

45. *Id.* at 574 (emphasis added).

46. *See id.* at 588.

47. *Id.* at 593.

of discovery permitted the sovereign alone to extinguish Indian title,[48] this earlier sale was without legal significance, thereby rendering the subsequent sale to the United States valid.[49] As a consequence, the holder of the United States patent prevailed.[50]

Notably, there were two alternative, although unacceptable, methods Chief Justice Marshall could have used to resolve *Johnson* without resort to the doctrine of discovery. On one hand, he could have relied on the traditional legal maxim, *nemo dat quod non habet* (no one gives what he does not have), to conclude that because the Indian tribes had no cognizable right to their lands, the original sale was void. On the other hand, if he concluded the Indians' rights to their land were absolute, as Justice Johnson had suggested in *Fletcher*, he would invalidate the government grants of land occupied by Indian tribes, which formed the basis of most claims to real property in this country.[51] As Professor Cohen has pointed out, the doctrine protected Indian rights to their aboriginal land without invalidating the government grants to which so many Americans traced their title.[52] As such, it represents a brilliant compromise, providing the analytical framework to uphold the validity of sovereign grants of aboriginal land while giving substance to Indian or aboriginal title.[53]

The third major Marshall Court case to develop the doctrine of discovery, *Worcester v. Georgia*,[54] also discussed the validity of sovereign grants of aboriginal land, while further defining the scope of In-

48. Notably, the court recognized the coexistence of two land tenure systems: that of the United States government and that of the Indians. Although under the doctrine of discovery the private settler acquired no rights enforceable under the United States law by purchasing land from the Indians, the Court stated that, were the tribe to annul the original grant, the individual purchaser might be able to seek redress under tribal laws. *Id.* at 593.

49. *Id.* at 593-94.

50. Another view of Marshall's reason for not recognizing the claims of the private grantee is that titles to land based on Indian grants could not be recognized in the courts of the United States. *See* HAINES, *supra* note 34, at 524. See note 48 *supra*.

In dicta, Chief Justice Marshall discussed the effect of the discoverer's grants of aboriginal lands on the Indian occupants, an issue Justice Johnson had criticized the court for dodging in his dissent in *Fletcher*. As in *Fletcher*, Chief Justice Marshall again concluded that the sovereign had the power to grant aboriginal land, although in *Johnson* the conclusion was supported by a thorough examination of the practices of France, Spain, and Great Britain. 21 U.S. (8 Wheat.) at 574-77. This examination revealed that "our whole country [has] been granted by the Crown while in the occupation of the Indians." *Id.* at 579. Thus, contrary to Justice Johnson's views, Chief Justice Marshall concluded that the doctrine of discovery was "incompatible with an absolute and complete title in the Indians." *Id.* at 588.

51. *See* Cohen, *supra* note 1, at 48-49.

52. *Id.*

53. *See id.*

54. 31 U.S. (6 Pet.) 515 (1832). *See generally* HAINES, *supra* note 34, at 600-04 (1944);

dian land rights. The major issue in *Worcester* was whether Georgia could exercise sovereignty over the Cherokee Nation. The discussion of the discovery doctrine ostensibly was necessary to determine what interest, if any, the Cherokee Nation had in its homeland in Georgia. If the Cherokee Nation had no property interest, Georgia would have exclusive sovereignty over the area in question. Georgia argued that the Indians lost all property rights by virtue of discovery. Chief Justice Marshall rejected this argument on several grounds. First, he noted that the tribe still inhabited its aboriginal territory, thereby evidencing the establishment of a land base over which it exercised sovereignty.[55] Second, the United States had dealt with the Cherokee Nation as a limited sovereign nation, agreeing by treaty on the boundaries of the tribe's land.[56] Finally, the Court discussed for the first time the Indian commerce clause,[57] which entrusts to Congress the right to regulate affairs with the Indian tribes.[58] Because Congress had entered into a treaty with the Cherokees, the Court concluded that Georgia was preempted from interfering with the Cherokees' land tenure or rights to self-government.[59]

Worcester's prime importance derives not from its finding that the Indians retained aboriginal rights, but from its qualification of the sovereign's right to extinguish Indian title. Referring to the doctrine of discovery, Chief Justice Marshall stated that a sovereign grant of Indian land, in and of itself, was not sufficient to extinguish Indian title. To the contrary, until the sovereign extinguished Indian title, a grant "asserted a title against Europeans only and [was] considered as blank paper so far as the rights of the natives were concerned."[60] Second, the opinion clarified the statement in *Johnson* authorizing the sovereign's extinguishment of Indian title by "conquest."[61] According to Chief

Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

55. 31 U.S. (6 Pet.) at 559-60.

56. *Id.* at 555-56.

57. U.S. CONST. art. 1, § 8, cl. 3.

58. *See* 31 U.S. (6 Pet.) at 558-59.

59. *Id.* at 560-63. *Worcester* thus traditionally is cited as holding that Indian tribes possess inherent sovereignty subordinate in certain limited areas only to the sovereignty of the United States. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 326, 331 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206-07. Accordingly, states may not exercise jurisdiction over Indian tribes within their borders in the absence of a congressional grant giving them the power to do so. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 219-20 (1959).

60. 31 U.S. (6 Pet.) at 546.

61. 21 U.S. (8 Wheat.) at 587.

Justice Marshall, the power to extinguish Indian title by conquest was justifiable only after a confrontation in which the Indians had been the aggressors.[62]

The final major decision by the Marshall Court on Indian land rights, *Mitchel v. United States*,[63] presented the Court with an opportunity to determine the rights of a tribe to alienate its interest in land. Like *Johnson, Mitchel* concerned adverse claims by the holder of a United States land patent and a party tracing title to a tribal grant. Justice Baldwin first determined that the tribe's aboriginal title had not been extinguished by Spain, the nation claiming discovery rights to Florida during the pertinent period before the tribal grant.[64] He then noted that Spain acknowledged the Indians' interest in their aboriginal land as one which they could convey to a third party.[65] When the tribal grant was confirmed by Spain, the grantee thus obtained a fee simple title to the land.[66] Since Spain's cession of the land to the United States explicitly ratified all grants made by Spain prior to the cession,[67] the holder of the ratified tribal grant had a title superior to that of the later United States patent holder.[68]

Mitchel made clear that aboriginal title was alienable to third parties if the sale were ratified by the sovereign. In establishing this feature of aboriginal title, the Court emphasized the significance to be attached to the rights associated with aboriginal title[69] and the deference the sovereign must afford such title.[70] Reiterating language of *Cherokee Nation v. Georgia*[71] Justice Baldwin termed the right of occupancy "as sacred as the fee simple of the Whites."[72] Furthermore, under Justice Baldwin's analysis, discovery gave the sovereign only an "ultimate reversion in fee,"[73] subject to the tribe's "perpetual right of occupancy."[74] Consequently, a successor to the land could acquire a

62. 31 U.S. (6 Pet.) at 545-47.
63. 34 U.S. (9 Pet.) 711 (1835).
64. *Id.* at 751-56.
65. *Id.* at 758.
66. *Id.* at 758-59.
67. *See id.* at 734-35.
68. *Id.* at 759-60.
69. *Id.* at 752, 754, 756.
70. *Id.* at 758-59.
71. 30 U.S. (5 Pet.) 1 (1831).
72. 34 U.S. (6 Pet.) at 746 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831) (Baldwin, J., concurring)).
73. 34 U.S. (9 Pet.) at 756.
74. *Id.* at 746.

fee simple absolute title only upon obtaining both the fee and the possessory right.

Evolution of the Doctrine of Discovery

Following the Marshall Court era, every court considering the doctrine of discovery reaffirmed its basic tenets. Only a few of these cases, those which rely on the Marshall Court's decisions and which address unresolved issues related to the nature of Indian title, are sufficiently significant for the present purpose to warrant comment. These decisions address four major aspects of Indian land title: first, the sovereign's power to extinguish Indian title; second, the concept of split title; third, the methods available for extinguishing Indian title; and fourth, rights for compensation under the fifth amendment taking clause. Neither the Marshall Court decisions nor the refinements of the doctrine of discovery in subsequent decisions support Justice Reed's analysis in the 1955 *Tee-Hit-Ton* decision.

The doctrine of discovery did not change drastically after its original promulgation by the Marshall court; however, several decisions did refine aspects of the doctrine. The first area of refinement involved the sovereign's preemptive power to extinguish Indian title. Although this power had never been doubted, there was considerable uncertainty as to whether *Fletcher* stood for the proposition that the original thirteen states also had the right to extinguish Indian title. In 1974 the Supreme Court answered this question, holding that the statement in *Fletcher* that the original thirteen states were seised of the fee meant only that they had the preemptive right to purchase.[75]

The second area of refinement clarified the meaning of the *Mitchel* decision. Since *Mitchel*, the Court has consistently described Indian title as a split title, characterizing the sovereign's interest as ownership of the fee and the tribe's interest as a right of occupancy.[76] Accord-

75. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974) (original 13 states owned the fee and thus the preemptive right to purchase, but could not extinguish Indian title without federal consent).

76. *See, e.g.*, Francis v. Francis, 203 U.S. 233, 238 (1906); Doe v. Wilson, 64 U.S. (23 How.) 457, 463 (1859) (tenancy in common); Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839). *But cf.* United States v. Cook, 86 U.S. (19 Wall.) 591, 593 (1873) (tribe as life tenant, United States as remainderman). The necessity for tribal consent to convey absolute fee title was reaffirmed in an 1853 decision. *See* Chouteau v. Molony, 57 U.S. (16 How.) 203 (1853). In *Chouteau* the Court stated that a Spanish grant of aboriginal land of the Sac and Fox tribes in what became the Louisiana purchase would have been invalid without tribal consent. *Id.* at 239. Because the tribe had only given the claimant's predecessor a mining easement, the Court interpreted the sovereign grant as confirming only the rights given by the tribe despite broad language in the grant which could be read as granting the fee. *Id.* at

ingly, a grant by the government would be encumbered by aboriginal title until the title was extinguished, a conclusion reached by the Marshall era cases, although arguably only in dicta.[77]

The validity of a sovereign grant of aboriginal land has rarely been raised since the Marshall era because many United States grants on their faces protected Indian title, providing that the grantee could not occupy the land until Indian title had been extinguished by Congress.[78] There are, however, a few cases raising the issue directly. In *Clark v. Smith*,[79] for example, a patent to unextinguished aboriginal land issued in 1795 was upheld over the objections of a rival claimant. The Court held the patent valid, but only to convey the fee; the patentee gained full title only when the aboriginal title of the Chickasaw Indians was extinguished by a treaty.[80] In the subsequent case of *Beecher v. Wetherby*,[81] involving a school land grant by the United States to Wisconsin, the Court also held the grant valid only to convey

228-29. *See* Cohen, *supra* note 1, at 51. The necessity for sovereign consent to convey a fee simple absolute title was embodied in the Nonintercourse Act, first enacted in 1834, Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 (1834), and still in effect today. *See* 25 U.S.C. § 177 (1976). This law provides that all sales made without such consent are void. The current version of the law is the basis of the claims by eastern tribes that sales of their aboriginal land to the states made without federal consent were void. See notes 294-309 and accompanying text *infra*.

77. This description of Indian title should be considered dicta because the validity of a grant of aboriginal title was not directly at issue in many of these cases. In *Fletcher* and *Johnson*, the sovereign grant was made after Indian title had been extinguished. In *Worcester* no grants had been made of Cherokee land, although Georgia asserted the power to extinguish Cherokee title. In *Mitchel*, the tribe's grant of its land had been confirmed later by the sovereign and thus was valid to convey the fee simple absolute. Descriptions of title as split in these cases therefore must be read as dicta. Nonetheless, the Court has stated that dicta in early cases, especially early land cases, is extremely persuasive. United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 346 (1941).

78. *See, e.g.*, United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 344-45 (1941); Atlantic & Pac. R.R. v. Mingus, 165 U.S. 413, 437-38 (1897); Buttz v. Northern Pac. R.R., 119 U.S. 55, 58 (1886). *Cf.* Spalding v. Chandler, 160 U.S. 394, 402 (1896) (Preemption Act of 1841 explicitly excepted Indian reservations from settlement).

In some instances the grants did not explicitly protect Indian title, but a sympathetic Supreme Court, reading the language of the grant in light of the doctrine of discovery, interpreted the grant as manifesting a congressional intent that the grantee await extinguishment before acquiring a right to the land. *See, e.g.*, Cramer v. United States, 261 U.S. 219, 225 (1923) (railroad grant exception for land "granted, sold, reserved . . . or otherwise disposed of" excepted aboriginal land inhabited by individual Indians); Minnesota v. Hitchcock, 185 U.S. 373, 391 (1902) (school land grant excepting lands "sold or otherwise disposed of" excepted reservation lands of the Chippewa tribe); Leavenworth, Lawrence & Galveston R.R. v. United States, 92 U.S. 733, 746 (1875) (railroad grant excepting land "reserved to the United States . . . for any other purpose whatsoever" excepted reservation of Osage tribe).

79. 38 U.S. (13 Pet.) 195 (1839).

80. *Id.* at 201.

81. 95 U.S. 517 (1877).

irrevocably the "naked fee" to the grantee, so that the state received full title only when Indian title was extinguished two years later.[82]

The third major area addressed by the post-Marshall era courts was the methods available to extinguish Indian title. Although *Johnson* formally established that the government could extinguish Indian title "either by purchase or by conquest,"[83] never before *Tee-Hit-Ton* did the Court hold that aboriginal land had been extinguished by conquest. In part this is a result of the congressional practice of waiving sovereign immunity only rarely, thereby precluding judicial determinations of Indians' rights against the sovereign. To a large extent, however, the lack of any findings of a conquest is attributable to the practice employed by the federal government of negotiating treaties even with defeated tribes, wherein the Indians ceded portions of their land.[84] Indeed, extinguishment by voluntary cession for consideration had been the rule in acquisition of Indian title.[85] Before *Tee-Hit-Ton* virtually all cases finding Indian title extinguished involved voluntary cession.[86] The only exceptional cases were those in which the court held that extinguishment had occurred by tribes voluntarily abandoning their occupancy rights,[87] a method of extinguishment alluded to in *Johnson*.[88]

Perhaps the most important area of judicial development in Indian land claim disputes, however, focused on compensating Indians under

82. *Id.* at 525-26. In only one case involving the construction of a grant did the Court hold that a sovereign grantee had obtained a fee simple title despite the fact that aboriginal title had not been expressly extinguished by Congress. That case, Marsh v. Brooks, 55 U.S. (14 How.) 513 (1852), is not inconsistent with the tenets of the doctrine of discovery, however. The grantee in *Marsh* had lived and made improvements on a plot of land for 50 years without the tribe's objection. Although the grantee was never a formal purchaser of the land, principles of fairness in all likelihood dictated the Court's holding. As the Court itself noted, the tribe "must be held to knowledge [of] and to consent" to the grantee's claim, particularly in view of "his open and notorious actual occupancy." *Id.* at 524. At most, *Marsh* supports the proposition that aboriginal title is subject to the doctrine of adverse possession.

83. 21 U.S. (8 Wheat.) at 587.

84. *See generally* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 46-66 (1971) (facsimile of 1942 edition) [hereinafter cited as 1942 HANDBOOK].

85. Cohen, *supra* note 1, at 34-43.

86. *See, e.g.*, Minnesota v. Hitchcock, 185 U.S. 373, 388-89 (1902); Spalding v. Chandler, 160 U.S. 394, 405-06 (1896); Buttz v. Northern Pac. R.R., 119 U.S. 55, 69-70 (1886); Beecher v. Wetherby, 95 U.S. 517, 526 (1877); Holden v. Joy, 84 U.S. (17 Wall.) 211, 245 (1872); Clark v. Smith, 38 U.S. (13 Pet.) 195, 200-01 (1839).

87. *E.g.*, Williams v. City of Chicago, 242 U.S. 434, 437 (1917); United States v. Fernandez, 35 U.S. (10 Pet.) 303, 304 (1836); United States v. Arrendondo, 31 U.S. (6 Pet.) 691, 747-48 (1832).

88. *See* 21 U.S. (8 Wheat.) at 590-91.

the fifth amendment for takings by the sovereign. Before the passage of the Indian Claims Commission Act,[89] a tribal claim for compensation under the fifth amendment could be brought against the government only if the tribe had been able to secure the passage of a statute waiving sovereign immunity and granting jurisdiction to the Court of Claims to hear the grievance.[90] Consequently, in only a handful of cases decided before *Tee-Hit-Ton* was there direct controversy between an Indian tribe and the federal government concerning the fifth amendment. Nevertheless, in at least three of these cases, the Court held that the government's confiscation of Indian land constituted a fifth amendment taking.[91]

A fourth decision, the only pre-*Tee-Hit-Ton* case in which the Court awarded compensation for what was unquestionably unrecognized aboriginal title was *United States v. Alcea Band of Tillamooks*[92] *(Tillamooks I)*. In *Tillamooks I*, the Tillamooks tribe claimed a right to compensation for land taken by the federal government pursuant to executive order. Although the Court in *Tillamooks I* held that the tribe was entitled to compensation,[93] only four members of the Court based their decision on the fifth amendment.

In the plurality opinion, Justice Vinson reviewed the doctrine of discovery cases, in which the Indians' aboriginal title had been characterized as "sacred as the fee simple."[94] He concluded that the taking in *Tillamooks I* was compensable even though the tribe's title had never been recognized by a treaty, stating: "The Indians' right of occupancy has always been held to be sacred; something not to be taken from him

89. 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. II 1978) (pre-1946 claims); 28 U.S.C. § 1505 (1976) (post-1946 claims).

90. *See generally*, 1942 HANDBOOK, *supra* note 84, at 373-78; Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 512 (1966) [hereinafter cited as Wilkinson]. In one case, Spalding v. Chandler, 160 U.S. 394 (1896), the Court had acknowledged Congress's power to take aboriginal land for public use. Congress had appropriated money and paid the tribe, however; thus, the fifth amendment was not in issue. *Id.* at 406.

91. United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103 (1935). These cases were distinguished in *Tee-Hit-Ton* as involving recognized and not merely aboriginal title. See text accompanying notes 139-53 *infra*.

92. 329 U.S. 40 (1946).

93. *Id.* at 54.

94. *See, e.g.*, Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835). *See also* United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 345 (1941); United States v. Shoshone Tribe, 304 U.S. 111, 115 (1938); Minnesota v. Hitchcock, 185 U.S. 373, 389 (1902); Beecher v. Wetherby, 95 U.S. 517, 526 (1877); Leavenworth, Lawrence & Galveston R.R. v. United States, 92 U.S. 733, 742 (1875); United States v. Cook, 86 U.S. (19 Wall.) 591, 593 (1873); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831) (Baldwin, J., concurring).

except by his consent, and then upon such consideration as should be agreed upon."[95]

Concededly, the Court did not explicitly base its holding on the fifth amendment. Nevertheless, as Justice Vinson pointed out, the relevant jurisdictional act, permitting suit on "any and all legal and equitable claims arising under or growing out of the original Indian title,"[96] could not itself create any new claims, but instead only authorized suit for existing cognizable claims.[97] Given the absence of statutory authority for the award, the only legal or equitable basis for the plurality decision was the fifth amendment, a conclusion reached by Professor Cohen as well.[98] To Cohen, the decision in *Tillamooks I* followed inexorably as the next logical step from *Johnson* and its progeny, validating his thesis that the Court's cases on Indian title had created "a body of law that has never rejected its first principles."[99]

95. 329 U.S. at 52 (quoting Minnesota v. Hitchcock, 185 U.S. 373, 388-89 (1902)).

96. 329 U.S. at 41 (quoting Act of August 26, 1935, ch. 686, § 1, 49 Stat. 801 (1935)).

97. 329 U.S. at 45-46.

98. Cohen, *supra* note 1, at 47-59. Justice Black, in a concurring opinion, also argued that the tribe was entitled to compensation, but only because the jurisdictional act itself had created the claim. 329 U.S. at 54-55. Although cautioning against reliance on the plurality opinion, Professor Cohen argued that substantively Justice Black differed from the plurality only on the "metaphysical issue" of "rights depend[ing] on remedies." Cohen, *supra* note 1, at 56. To the average Indian, Cohen noted, it would make no difference why the taking was compensable, as long as it was compensable. Hence, at least to Professor Cohen, *Tillamooks I* signaled that a majority of the Court found purely aboriginal title compensable. *Id.* at 56 & n.70. A similarly expansive reading of the case was given by the Ninth Circuit Court of Appeals in Miller v. United States, 159 F.2d 997 (9th Cir. 1947). There the court held that a tribe whose tidelands had been condemned was entitled to compensation. Although conceding that the title to the land in issue was recognized, the court in *Miller*, citing *Tillamooks I*, stated that the result of the case would have been no different had the Indians held aboriginal title. *Id.* at 1005-06.

99. Cohen, *supra* note 1, at 47. Of the cases discussing Indian rights, only a few contain derogatory language as to the nature of aboriginal title. *See, e.g.*, Spalding v. Chandler, 160 U.S. 394 (1896); Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886); Marsh v. Brooks, 55 U.S. (14 How.) 513 (1852). In *Marsh*, the Court used the strongest negative language, speaking contemptuously of "these loose Indian pretensions." 55 U.S. (14 How.) at 523. In *Spalding* and *Buttz* the Court seemed to downplay the importance of aboriginal title, terming the right "merely" one of occupancy, the *Spalding* court somewhat schizophrenically calling it "merely a title and right to the perpetual occupancy," 160 U.S. at 403, and the *Buttz* Court considering it "merely a right of occupancy, a right to use the land subject to the dominion and control of the government," 119 U.S. at 66.

The tenor of the language in each of these cases can be explained. In each case, two non-Indians asserted adverse claims, long after the original Indian inhabitants had left the land, one tracing title back to a tribal grant. In these cases, the Court's choice of language reflected more its view of the bad case made by one of the parties than its view of the nature of the original Indians' right to their lands. For example, it surely is not coincidence that the Court used the strongest negative language in *Marsh*, where one claimant paid an Indian tribe a few dollars in an attempt to acquire land peacefully settled and inhabited by another

As a consequence of *Tillamooks I*, the Court of Claims awarded the Tillamooks more than $3,000,000, with interest from the date of taking. The government appealed the award on the ground that interest should not have been part of the compensation. In its petition for certiorari, the government argued that the compensation owed the tribe was only the value of the land at the time of taking, because *Tillamooks I* was based on a congressional directive to compensate the Indians for the taking and not on the fifth amendment.[100] The distinction was critical; a fifth amendment taking requires payment not only of the value of the land at the time of the taking, but also of the interest or its equivalent to make the aggrieved party whole.[101] The interest on this $3,000,000 judgment, for example, brought the final judgment to more than $17,000,000.

The Supreme Court granted the petition, limiting review to the question of whether the earlier case had been based on the Constitution or the jurisdictional act.[102] In *United States v. Alcea Band of Tillamooks*[103] *(Tillamooks II)*, a unanimous per curiam decision, the Court reversed the Court of Claims, stating: "Looking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment."[104]

This statement must have astonished Indian lawyers, and Professor Cohen as well, for Justice Vinson had stated in his plurality opinion in *Tillamooks I* that the jurisdictional act in that case did not create any claims.[105] If a taking of aboriginal title was compensable at all, it would have to be as a fifth amendment taking claim. Nevertheless, the

non-Indian for many years. The use of the phrase "loose Indian pretensions" would seem to demonstrate more the Court's distaste for the attempted land grab than its real view of the nature of aboriginal title.

100. Petition for Certiorari at 9-11, United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951). *See also* Brief for Petitioner at 17-20, United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951).

101. *See, e.g.*, Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937); United States v. Creek Nation, 295 U.S. 103, 111 (1935) (based on implied promise to pay).

102. 340 U.S. 873 (1950).

103. 341 U.S. 48 (1951) (per curiam).

104. *Id.* at 49.

105. 329 U.S. at 45. *See also* Shoshone Tribe v. United States, 299 U.S. 476, 492-93 (1937); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 500 (1913) (statute conferring jurisdiction "on account of losses sustained" when a reservation was opened for public settlement did not permit a court to give a remedy for "moral obligations," but only to apply existing legal principles); The Sac & Fox Indians of Iowa v. The Sac & Fox Indians of Oklahoma, 220 U.S. 481, 489 (1911) (statute giving jurisdiction to court to adjudicate legal and equitable claims did not create new rights). *See generally* 1942 HANDBOOK, *supra* note 84, at 377 & nn.155 & 157.

only possible interpretation of the Court's opinion in *Tillamooks II* was that a taking of aboriginal title was compensable as a claim created by the jurisdictional act. This interpretation implies that a taking of aboriginal land is not compensable in the absence of the creation of such a claim by Congress. Since the Indian Claims Commission Act gave the Court of Claims jurisdiction only over existing legal and equitable claims against the government,[106] *Tillamooks II* gave a strong warning that post-1946 takings of aboriginal title would not be compensable, thereby paving the way for *Tee-Hit-Ton*.

Tee-Hit-Ton: An Analysis of Precedent

The Concept of Recognized Title

As the previous analysis demonstrates, aboriginal title, as defined in *Johnson* and developed by later cases, was never a meaningless concept. Decisional law defining its features often referred to it as being "sacred as the fee simple."[107] Both the Indians' aboriginal title and the government's title had to be conveyed to give a successor a fee simple absolute title. Although not alienable to a party other than the United States Government, aboriginal title continued when the United States Government granted Indian-held land without the natives' consent. Only the sovereign legitimately could extinguish the Indians' aboriginal title, and the acceptable methods of extinguishment were clearly defined: the sovereign had general authority to acquire aboriginal title through voluntary and consensual agreements with the Indians and had an extremely limited power to acquire aboriginal title through conquest.

In view of the historical deference with which the courts had addressed the Indians' aboriginal title, evisceration of the concept in *Tee-Hit-Ton* was both unexpected and damaging. Nevertheless, hindsight reveals that some prior decisions did contain signals of the advent of *Tee-Hit-Ton* and the concept of recognized title. Each of these cases, usually in opinions written by Justice Reed, contained traces of the incipient distinction between aboriginal and recognized title later to become determinative in *Tee-Hit-Ton*.

The term "recognized title" was first used in a sense approximating its use in *Tee-Hit-Ton* by Justice Reed in the majority opinion in

106. 25 U.S.C. §§ 70a, 70v (1976).

107. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835). *See also* cases cited note 94 *supra*.

Northwestern Bands of Shoshone Indians v. United States.[108] The Court in *Northwestern Bands* upheld the district court's dismissal of a claim for a taking of 15,000,000 acres of tribal land on the ground that the claim had not arisen from the treaty of Box Elder in 1863, as required by the jurisdictional statute. Although the Box Elder treaty was similar in wording to the Fort Laramie treaty, which had been held to delineate the boundaries of tribal rights to land for the purpose of interpreting another jurisdictional act,[109] the Court held that the less specific language of the Box Elder treaty did not recognize the tribe's aboriginal title.[110] Consequently, the claim was not within the scope of the jurisdictional act.[111]

In one sense, the opinion broke no new ground. The Court used the term "recognized" merely to determine whether the claim was subject to the jurisdictional statute. Justice Reed pointed out that "[u]nder the words of the jurisdictional act, 'arising under or growing out of the treaty,' suit is authorized only for rights acknowledged by the treaty."[112] Therefore, "[i]f the treaty recognized the aboriginal or In-

108. 324 U.S. 335 (1945). According to Professor Cohen, this 5-4 decision "shocked the national conscience." The case sparked many unsuccessful calls for rehearing, by, among others, the Department of Interior, Judge Hudson of the Permanent Court of International Justice, and the American Civil Liberties Union. F. Cohen, *Indian Claims*, in THE LEGAL CONSCIENCE 264 (L. Cohen ed. 1960) [hereinafter cited as THE LEGAL CONSCIENCE].

109. *See* Fort Berthold Indians v. United States, 71 Ct. Cl. 308, 331-34 (1930).

110. Both the treaties of Fort Laramie and Box Elder dealt with the same topics—the needs to establish roads and military posts and to secure freedom from attack for travelers going through Indian land. The only real difference was in the wording used in the sections acknowledging boundaries. In the Fort Laramie Treaty, the Indians "recognize[d] and acknowledge[d] the following tracts of country." Treaty of Fort Laramie, Sept. 7, 1851, 11 Stat. 749. In the Box Elder Treaty the boundaries were delineated as follows: "The country claimed for Pokatello, for himself and his people, is bounded on the west by Raft River and on the east by the Porteneuf mountains." Treaty of Box Elder, July 30, 1863, 13 Stat. 663.

111. 324 U.S. at 347-54. Justices Douglas, Frankfurter, and Murphy dissented. Justice Murphy argued that the Court should have applied the long-standing rule of liberal construction of treaty language which required ambiguities to be resolved in favor of the tribe. In construing the jurisdictional act's requirement that the claim arise from the treaty, he would have held that the very fact the treaty sought and accepted rights of way through Northwestern Band lands was sufficient "recognition and acknowledgment" of the Indians' aboriginal title to the land. *Id.* at 366. In a separate opinion, Mr. Justice Douglas made a similar argument, stating: "He who comes to my abode and bargains for free transit or a right of way across the land on which I live and which I proclaim to be my own certainly recognizes that I have a claim to it." *Id.* at 359. Mr. Justice Roberts voted to reverse the Court of Claims but did not align himself with a dissenting opinion. Justices Black and Jackson concurred with the majority, basing their opinion on the futility of redressing ancient wrongs committed against a small group of natives inhabiting a large area of land when the original victims had "gone to the Happy Hunting Ground." *Id.* at 355. Justices Black and Jackson's concurrence is discussed at text accompanying notes 208-14 *infra*.

112. 324 U.S. at 337.

dian title, the authority to sue for the taking under the jurisdictional act" existed.[113] The desire of Congress to limit its waiver of sovereign immunity to claims acknowledged by the treaty was understandable to the Court, because Congress may not have desired to submit itself to the "uncertainties of definition of boundaries and difficulties of proof to establish aboriginal title for tribes with a shifting habitat."[114]

What was new in the case, however, was the designation of aboriginal title as merely "the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians."[115] This kind of title was distinguishable, according to the Court, from "a recognized right of occupancy."[116] Although this passage was in the context of the majority's discussion of the jurisdictional act, the Court for the first time intimated that, absent the question of waiver of sovereign immunity, different rights might flow from recognized, as opposed to aboriginal, title.

The second most influential opinion by Justice Reed was his dissent in *Tillamooks I*.[117] In holding that a taking of aboriginal title was compensable, Justice Vinson's plurality opinion in *Tillamooks I* had explicitly rejected the government's defense that compensation was required only for a taking of recognized title. The government, he noted, had "seized upon language of the Court of Claims . . . and from it had fashioned a full-blown concept of 'recognized Indian title.' "[118] To Justice Vinson, the recognition issue was only one of evidence: documents showing the United States had recognized the boundaries of aboriginal land obviated the time and expense necessary for a tribe to prove it exclusively used and occupied the land at issue at the time it had been lost by the tribe, often a hundred years before trial.[119]

Justice Reed's dissent took issue with the plurality opinion's refusal to adopt the recognized title distinction, asserting that since the days of the Marshall Court there had been at least two types of Indian title: "[F]irst, occupancy as aborigines until that occupancy is interrupted by governmental order; and second, occupancy when by an act of Congress they are given a definite area as a place upon which to

113. *Id.* at 337-38.
114. *Id.* at 340.
115. *Id.* at 338.
116. *Id.* at 339.
117. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 55 (1946) (Reed, J., dissenting).
118. *Id.* at 49 (quoting Duwamish Indians v. United States, 79 Ct. Cl. 530 (1934)).
119. 329 U.S. at 50.

live."[120] Justice Reed cited two sources of authority for this proposition: a number of special act opinions using the word "recognition" in various contexts and a passage from *Johnson v. M'Intosh*[121] which subsequently proved pivotal in the *Tee-Hit-Ton* opinion.[122]

Before that controversy returned to the Supreme Court as *Tillamooks II*, however, a footnote in the 1949 case of *Hynes v. Grimes Packing Company*[123] put an end to the optimism sparked by the *Tillamooks I* opinion. Ironically, *Hynes* did not raise a fifth amendment question because it was concerned with regulation of fishing rights.[124] Nevertheless, in dicta, Justice Reed once again stressed that only a reservation created by a treaty can create any type of compensable interest in the land, because "the quality of rights thereby secured to the occupants of the reservation depends on the language or purpose of the congressional action."[125] Since there had been no treaty with the Karluk Indians, their executive order reservations were "subject to the unfettered will of Congress."[126] The footnote appended to this statement signaled the end of Indian advocates' dreams that aboriginal takings were compensable, by stating that *Tillamooks I* did "not hold the Indian right of occupancy compensable without a specific legislative direction to make payment."[127] The summary reversal of the lower court's fifth amendment award in *Tillamooks II*, therefore, was not wholly unexpected.

120. *Id.* at 57.

121. 21 U.S. (8 Wheat.) 543 (1823).

122. For a discussion of Justice Reed's authority for the recognized title distinction, see text accompanying notes 128-64 *infra*.

123. 337 U.S. 86 (1949).

124. Whether a tribe's fishing rights are aboriginal or treaty recognized, they may be subject to reasonable and necessary regulations by the state or federal government to conserve the fishery, as long as the regulations are non-discriminatory against Indians. *See* Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968) (if treaty is silent on manner of fishing, state may regulate the manner of exercising treaty fishing rights so long as the regulation meets appropriate standards and does not discriminate). Such regulations are deemed a permissible exercise of the sovereign's police power. Regulations reasonably necessary to promote health, safety, morals, or welfare require no just compensation even though they may deprive an owner of his beneficial use. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962). *See generally* 1 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN §§ 1.42[1]-[8] (3d ed. rev. 1979) [hereinafter cited as NICHOLS].

125. 337 U.S. at 103.

126. *Id.* at 106.

127. *Id.* at 106 n.28. The Justice Department, reading this language as a signal of the Court's willingness to narrow considerably the broad language of *Tillamooks I*, based its argument in *Tillamooks II* on the interpretation of *Tillamooks I* in footnote 28. Brief for the United States at 17-19, United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951).

Despite the signposts in these opinions, and despite the language in Justice Reed's opinion in *Tee-Hit-Ton* that reads as if the distinction between recognized and aboriginal title had been long followed, most cases before *Tee-Hit-Ton* completely ignored the character of Indian title held by a tribe.[128] In fact, as the following passage from a 1902 opinion by the Court indicates, whether the land was aboriginal or reservation land was often of no concern: "Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians."[129] Moreover, the Court had twice rejected the argument that government recognition of aboriginal title was necessary to accord rights in tribal land, the contention that became the cornerstone of *Tee-Hit-Ton*. In *Cramer v. United States*[130] the Court said: "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy."[131] The Court quoted this passage from *Cramer* in *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*[132] (*Walapai Tribe*) in which it had stated: "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action."[133]

Although *Cramer* and *Walapai Tribe* are evidence of the Court's disregard of the concept of recognized title, the Court admittedly had employed the term "recognition" in Indian claims cases prior to *Tee-Hit-Ton*. Indeed, in *Tee-Hit-Ton* Justice Reed selected some of these very cases[134] as authority for the proposition that "[w]here the Congress

128. *See, e.g.*, Spalding v. Chandler, 160 U.S. 394 (1896). "The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land. . . . When Indian reservations were created . . . the Indians held the land by the same character of title . . . ." *Id.* at 403. *See also* Nadeau v. Union Pac. R.R., 253 U.S. 442, 444, 446 (1920) (land reserved from a treaty guaranteeing "full and complete possession thereof 'as their home forever' " was "but part of the domain held by the Tribe under the ordinary Indian claim—the right of possession and occupancy—with the fee in the United States"); United States v. Mille Lac Band of Chippewa Indians, 229 U.S. 498, 500 (1913) (describing reservation land as "reserved for the occupancy and use" of the tribe).

129. Minnesota v. Hitchcock, 185 U.S. 373, 388-89 (1902).

130. 261 U.S. 219 (1923).

131. *Id.* at 229.

132. 314 U.S. 339 (1941).

133. *Id.* at 347.

134. Sioux Tribe v. United States, 316 U.S. 317 (1942) (Treaty of 1868, jurisdictional act was Act of June 3, 1920, ch. 222, 41 Stat. 738 (1920)); United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938) (Treaty of 1866; jurisdictional acts were Act of May 26, 1920, ch.

by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking."[135] The five cited cases were connected by only two common features: first, in each case the tribe had made a treaty with the United States, whereby the tribe received certain territory on which to reside; and second, in each case the claim was brought under the authority of a special jurisdictional act.[136]

Justice Reed's reliance on these cases is questionable for several reasons, the most significant being that the word "recognition" had no unitary meaning. Some of the cases used the term with no apparent fixed meaning;[137] one case did not use it at all.[138] Far from acknowledging a distinction between recognized and aboriginal title, the Court in each case did not distinguish between two types of Indian title but considered the concept of Indian title sufficient to encompass both. As the following analysis indicates, none of these cases supports the distinction created in *Tee-Hit-Ton*.

United States v. Creek Nation,[139] the oldest of the five cases cited by the Court, illustrates the weakness of the Court's assertion. In *Creek*

203, 41 Stat. 623, and Act of May 15, 1936, ch. 398, 49 Stat. 1276). Chippewa Indians v. United States, 301 U.S. 358 (1937) (series of treaties cited *id.* 361 nn.3 & 4; jurisdictional acts cited *id.* at 360 nn.1 & 2)); Shoshone Tribe v. United States, 299 U.S. 476 (1937) (treaty of 1868; jurisdictional act was Act of Mar. 3, 1927, ch. 302, 44 Stat. 1349); United States v. Creek Nation, 295 U.S. 103 (1935) (series of treaties beginning in 1833; jurisdictional act was Act of May 24, 1924, ch. 181, 43 Stat. 139).

135. 348 U.S. at 278-79.

136. See note 134 *supra*. Perhaps because he believed the *Tillamooks II* unanimous opinion sounded the death knell for any theory of compensability for a taking of aboriginal title, the attorney for the tribe in *Tee-Hit-Ton* did not even attempt to argue that a taking of aboriginal title under the doctrine of discovery was protected by the fifth amendment. Instead, he based his argument on two theories: first, that the land tenure of the Alaska natives was so completely different from that of Indians in the forty-eight contiguous states that the doctrine of discovery cases did not apply to them. Their ownership, through aboriginal title, was a "full proprietary ownership," more like fee simple ownership than mere original Indian title. *See* 348 U.S. at 277. Therefore, the fifth amendment required compensation for takings of this type of title. In the alternative, he argued that the Organic Act of 1884 and the Act of June 6, 1900, for a civil government for Alaska, had recognized their title, as that term had been used in the recent Court opinions. *See id.* at 378. Indeed, even though there were amici briefs submitted by the Attorneys General of Idaho, Utah, and New Mexico, only Utah's brief contested the origin or logic of the theory that only recognized title was compensable. Brief of the State of Utah, Amicus Curiae, at 4-7, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (arguing that the distinction in favor of a "recognized title" arose from "boilerplate language of the traditional jurisdictional act").

137. *See, e.g.*, Chippewa Indians v. United States, 301 U.S. 358, 373 (1937); United States v. Creek Nation, 295 U.S. 103, 106 (1935).

138. *See* Shoshone Tribe v. United States, 299 U.S. 476 (1937).

139. 295 U.S. 103 (1935).

Nation, the claimant tribe owned Oklahoma land in fee simple. The land was granted to the tribe by the United States in an 1833 treaty in return for the Creek's ceding their aboriginal land in the East.[140] After a later treaty ceding a portion of this fee simple land to the United States, the government commissioned a survey to delineate the boundaries of a portion of the ceded land which had been granted to another tribe. Unfortunately, the survey was incorrect, resulting in the loss of some of the Creek reserved lands.[141] Consequently, the tribe claimed that the error resulted in a taking under the fifth amendment, requiring the government to compensate the tribe for the loss.

The term "recognized" was used only once in the *Creek Nation* opinion. In discussing an earlier disputed survey, the Court pointed out that the tribe and the government settled their differences in that dispute in an agreement in which the "tribe's ownership of the lands east of [the] line was expressly recognized."[142] In sustaining the fifth amendment claim, however, the Court noted that the ownership interest recognized was fee simple, "not the usual right of occupancy with the fee in the United States."[143] *Creek Nation* thus provided limited support for Justice Reed's premise, intimating that types of Indian title other than fee simple might be treated differently. Nevertheless, at most the opinion raised the possibility that fee simple title might be regarded more favorably than other Indian title. Even this interpretation fails, however, in light of the result achieved in the second opinion relied upon by Justice Reed: *Shoshone Tribe v. United States*,[144] a decision of even more questionable precedent than *Creek Nation*.

In *Shoshone Tribe*, the Court held that the forced settling of a band of Arapahoes on the Shoshone reservation was a fifth amendment taking of an undivided one-half interest in the Shoshone land.[145] Like *Creek Nation, Shoshone Tribe* was brought under a special jurisdictional act, covering "all legal and equitable claims . . . arising under or growing out of the treaty of July 3, 1868."[146] Although Justice Cardozo, the author of the opinion, did note that the Indians had the "treaty right of occupancy with all its beneficial incidents,"[147] the term "recognition" was not mentioned; at no point did the Court distinguish

140. *See* Treaty of Feb. 14, 1833, 7 Stat. 417.
141. 295 U.S. at 105-07.
142. *Id.* at 106.
143. *Id.* at 109.
144. 299 U.S. 476 (1937).
145. *Id.* at 497.
146. *Id.* at 484-85 n.1 (quoting Act of Mar. 3, 1927, 44 Stat. 1349 (pt. II)).
147. 299 U.S. at 496.

between the treaty rights of occupancy and the rights of occupancy incidental to aboriginal title as discussed in the discovery cases. Furthermore, the government had argued in *Shoshone Tribe* that irrespective of whether the tribe claimed to have lost aboriginal or reservation land, no type of Indian title ought be treated as a property right.[148] By affirming the award, the Court rejected the government's claim, although it failed to articulate the precise basis for the decision. Hence, although the result in *Shoshone Tribe* may be consonant with the theory espoused in *Tee-Hit-Ton*, neither the language nor rationale supports a judicially recognized distinction between aboriginal and recognized title.

United States v. Klamath & Moadoc Tribes[149] provides even less persuasive authority for the *Tee-Hit-Ton* rule than does *Shoshone Tribe*. The Court in *Klamath & Moadoc* held that the patenting of reservation land to a road company without the tribes' consent was a taking.[150] Although noting that the tribes' reservation derived from a congressional treaty, the Court seemed concerned with the treaty only to the extent of ascertaining whether the treaty *took away* any of the tribes' aboriginal rights rather than determining if it gave the tribes any new rights.[151] More significantly, the result in *Klamath & Moadac* does not support the *Tee-Hit-Ton* rule. For a treaty to have recognized aboriginal title under *Tee-Hit-Ton*, the treaty must show a "definite intention . . . to accord legal rights, not merely permissive occupation."[152] Since *Tee-Hit-Ton*, treaty clauses, similar to those in *Klamath & Moadoc*, giving the President ultimate authority over the disposition of treaty land have been interpreted as language of divestment, depriving the land of recognized title status.[153] Consequently, the language of the

148. The Justice Department had stated in its brief that the United States could not take reservation land except by eminent domain, but argued that there had been a breach of treaty although no taking in this case. Brief for United States at 29-30, Shoshone Tribe v. United States, 299 U.S. 476 (1937). Justice Reed was the Solicitor General during this period.

149. 304 U.S. 119 (1938).

150. *Id.* at 124-25.

151. For example, the Court concluded that language in the treaty declaring that the reservation should be set aside for the Indians until otherwise directed by the President did not defeat the tribe's claim because it "clearly did not detract from the tribes' right of occupancy." *Id.* at 123.

152. 348 U.S. at 279.

153. *See, e.g.*, United States v. Kiowa, Comanche & Apache Tribes, 479 F.2d 1369, 1373-74 (Ct. Cl. 1973), *cert. denied sub nom.* Wichita Indian Tribe v. United States, 416 U.S. 936 (1974). With the typical post-hoc reasoning of the Court of Claims cases after *Tee-Hit-Ton*, the court in *Kiowa* distinguished *Klamath & Moadoc* as a case in which the treaty language of divestment was undermined by subsequent actions, including Congress's pass-

treaty in *Klamath & Moadoc* failed *Tee-Hit-Ton's* test of treaty language sufficient to give a tribe recognized title. Hence, all three cases granting fifth amendment compensation relied on in *Tee-Hit-Ton* fail to support Justice Reed's opinion in that case.

The two cases relied on in *Tee-Hit-Ton* in which compensation was denied also fail to provide support for a distinction between aboriginal and recognized title. In both cases, the denial was based on reasons having nothing to do with recognition as defined in *Tee-Hit-Ton*. In *Chippewa Indians v. United States*,[154] several bands of Chippewa Indians claimed a share of proceeds from the sale of aboriginal lands of the Red Lake bands of Chippewas. The jurisdictional act gave the Court of Claims jurisdiction over legal and equitable claims arising out of an 1889 allotment act under which cessions by all the Chippewa bands had been obtained.[155] The other bands of Chippewa argued that they had a right to share in the trust funds created with the profits from sales of Red Lake ceded land and that they had an interest in the then-existing Red Lake reservation land. The Supreme Court disagreed, pointing out that the Red Lake bands had occupied the land in question exclusively at the time of the negotiations and treaties.[156] Additionally, the Court stressed that United States officers had "recognized, repeatedly and consistently, the occupancy and title of the Red Lake bands."[157] Hence, the claimants in *Chippewa Indians* were unsuccessful, not because they did not hold recognized title but because they failed to prove that they possessed aboriginal title.

The Court used the term "recognition" in *Chippewa Indians* only in the sense that the government had acknowledged the existence of certain boundaries to a reservation. Moreover, the Court's discussion of the Red Lake bands' interest in the land demonstrates that the Court found the treaty relevant or significant only in determining whether the treaty had destroyed aboriginal land rights, not whether the treaty had granted any. The Court decided the treaty had not destroyed aboriginal rights, concluding that the Red Lake bands had retained their "full

ing of the jurisdictional act allowing the tribe to sue, which showed intent to recognize. 479 F.2d at 1375. In addition, the court pointed out that the language of divestment in *Klamath & Moadoc* ("until otherwise directed by the President," 304 U.S. at 123) did not express a territorial limitation as did the language in *Kiowa* ("or such portion of the same as may hereafter from time to time be designated by the President," 479 F.2d at 1374). For other decisions on what acts suffice for recognition, see text accompanying notes 251-75 *infra*.

154. 301 U.S. 358 (1937).

155. Act of May 14, 1926, ch. 300, § 1, 44 Stat. 555.

156. 301 U.S. at 372.

157. *Id.* at 372-73.

Indian title" when they reserved some of their aboriginal land from the cession.[158] Certainly if the Court had regarded only recognized title, and not aboriginal title, as a property right, the Court would not have emphasized this point.

The remaining case, *Sioux Tribe v. United States*,[159] did not involve aboriginal land at all. The tribe claimed that when the President abolished a temporary reservation created by an executive order on previously ceded land, the tribe had a right to compensation. Aboriginal title was not in issue, because the tribe had relinquished any aboriginal rights by an earlier voluntary cession of their land.[160] In denying compensation, the Court distinguished between reservations reserved from a treaty of cession and those created by the President out of the public domain.[161] When the land in *Sioux Tribe* was ceded by the tribe, the aboriginal title was extinguished and the land became public domain. The case merely held that, although the President has the authority to create reservations on public domain lands,[162] such reservations, being temporary, do not give a tribe compensable property rights.[163]

As this analysis reveals, the Court's reliance on these five cases was misplaced. By treating the concept of recognition as an historical underpinning of case law, the Court has forced lower courts to ascertain whether one hundred year old treaties and statutes were intended by Congress to "recognize" title within the meaning of *Tee-Hit-Ton*. Accomplishing this feat of judicial legerdemain is particularly difficult because, before *Tee-Hit-Ton*, Congress was not cognizant of a distinction between recognized and aboriginal title. The results of subsequent judicial attempts to find congressional intent, consequently, are less than consistent.[164]

Extinguishment by Conquest

In holding in *Tee-Hit-Ton* that aboriginal title was not a compensable property interest under the fifth amendment, Justice Reed relied heavily on the doctrine of discovery cases, and in particular on *Johnson*

158. *Id.* at 371.
159. 316 U.S. 317 (1942).
160. *See id.* at 318.
161. *Id.* at 326.
162. See note 237 *infra*.
163. 316 U.S. at 330. For a discussion of the implications of *Sioux Tribe* in conjunction with *Tee-Hit-Ton*, see notes 241-50 & accompanying text *infra*.
164. For an example of the confusion caused by the pretense that the term "recognition" has a unitary meaning, see Annot., 41 A.L.R. FED. 425, 450-52 (1979).

v. M'Intosh.[165] Unfortunately, the portion of the *Tee-Hit-Ton* opinion discussing these cases is poorly structured. The Court first quoted several lengthy passages from *Johnson*, followed with several assertions of fact regarding the case in controversy, and finished by purporting to state the obvious conclusion.[166] Despite the Court's poor drafting, one can nevertheless discern a semblance of logic in the opinion. Initially, the Court noted that conquest was a legitimate means of extinguishing aboriginal title.[167] Recognizing this, the Court went on to suggest that the government and its predecessors, as a matter of historical fact, had conquered the Indians, either through actual warfare or by forcing treaties on the Indians.[168] Consequently, all aboriginal title had been extinguished before *Tee-Hit-Ton*, with the exception of the title Congress had chosen to grant back to the Indians.[169]

The Court in *Tee-Hit-Ton* relied on *Johnson* to provide the cornerstone for converting the doctrine of discovery to this doctrine of conquest.[170] Two passages from *Johnson* regarding extinguishment of Indian title by conquest were cited, including the statement 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."[171] The Court's reliance on these passages from *Johnson* was misplaced for several reasons. The only war relevant to the decision in *Johnson* was the war between France and England to settle England's claim to the land east of the Mississippi, including the land in

165. 21 U.S. (8 Wheat.) 543 (1923).

166. *See* 348 U.S. at 279-85.

167. *Id.* at 279-82.

168. *Id.* Justice Reed first advanced this thesis in the majority opinion in Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945). He stated that "the white sovereign" had the power to extinguish Indian title by purchase or conquest and implied that conquest had taken place. "The whites enforced their claims by the sword and occupied the lands as the Indians abandoned them." *Id.* at 339.

169. 348 U.S. at 281-82.

170. To Justice Reed, *Johnson* "denied the power of an Indian tribe to pass their right of occupancy to another." 348 U.S. at 279-80. In fact, *Johnson* held only that the sale to the first buyers could only convey the tribes' occupancy rights since the fee was in the United States. A later sale of the same occupancy rights by the tribe to the United States gave the government the full title. The wronged prior purchasers could seek redress only under tribal law. 21 U.S. (8 Wheat.) at 591-93. As stated above, the later decision in *Mitchel* made it clear that Indian tribes may alienate their occupancy right, though the sovereign's consent is necessary for the buyer to take a fee simple title. See text accompanying notes 63-74 *supra*.

171. 348 U.S. at 280 (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) at 588). The second passage stated that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." 348 U.S. at 280 (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) at 587).

controversy in the case.[172] This war in no way affected the Indian tribes' interest in their land, as the opinion pointed out.[173] Hence, the language was merely dicta.

The dicta in *Johnson* regarding extinguishment of Indian title by conquest[174] does not support Justice Reed's conclusion that all Indian land had been conquered. Authorities differ on whether Justice Marshall actually recognized conquest as a valid method of extinguishment of Indian title under American law.[175] Regardless of how the passages in *Johnson* are interpreted, however, it is evident that *Johnson* did *not* establish that all Indian title had been extinguished by conquest, for *Johnson* itself,[176] as well as its progeny,[177] recognized that purchase was the primary method of extinguishment of Indian title. Had discovery itself extinguished Indian title to land, most of the decisions in those cases would have been unnecessary.

In addition, Justice Reed's use of the term "conquest" is itself questionable. Both at the time of *Johnson* and today, conquest has been a narrow concept with clearly defined effects on the conquered people.[178] For example, conquest generally requires some sort of physical possession by force of arms.[179] Thus, the conclusion that all Indian land has been conquered was as illogical as it was unprecedented. Even if Justice Reed meant only that the congressional resolution at issue in *Tee-Hit-Ton* was the functional equivalent of a declaration of war followed by conquest, such a conclusion was not warranted by either the language of the resolution[180] or the rules of international law regarding conquest.[181] Finally, even if the federal government's actions

172. *See* 21 U.S. (8 Wheat.) at 581-85.

173. *Id.* at 583.

174. *Id.* at 590-91, *quoted in* Tee-Hit-Ton Indians v. United States, 348 U.S. at 280.

175. *Compare* Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 77, 92-93 (1977) (Marshall recognized conquest as a potential method of extinguishment in international law, but rejected conquest in American law) *with* Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637, 647, 656, 660-64 (1978) (Marshall recognized conquest as legal in American law in *Johnson*, but narrowed the concept to permit extinguishment only by defensive wars in *Worcester*).

176. 21 U.S. (8 Wheat.) at 585, 587, 593, 603.

177. See text accompanying notes 31-127 *supra*.

178. *Compare* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589-90 (1923), *with* L. OPPENHEIM, INTERNATIONAL LAW 566-74 (8th ed., H. Lauterpacht ed. 1955).

179. *See* L. OPPENHEIM, INTERNATIONAL LAW 566 (8th ed., H. Lauterpacht ed. 1955). Modern international law has disapproved conquest as a valid method of acquiring territory. *See, e.g.*, R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 53-68 (1963); C. RHYNE, INTERNATIONAL LAW 103 (1971); G. VON GLAHN, LAW AMONG NATIONS 280-88 (2d ed. 1971).

180. See text accompanying notes 13-15 *supra*.

181. See note 179 *supra*.

in the forty-eight contiguous states could have been interpreted as examples of the "conqueror's will," the Alaska natives had never fought a skirmish with either Russia or the United States, but instead welcomed newcomers to Alaska with open arms. To say that the Alaska natives were subjugated by conquest stretches the imagination too far. The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself.

Extinguishment as a Political Question

In constructing the rule of *Tee-Hit-Ton*, Justice Reed asserted that the decision of Congress to recognize aboriginal title was not subject to judicial review.[182] This conclusion logically followed from two unexpressed premises: first, that political questions, such as the decision to declare war, are not justiciable; and second, that extinguishment of Indian title is a purely political question. In support of the latter premise, the court placed critical reliance on language from two cases, *Beecher v. Wetherby*[183] and *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*[184] *(Walapai Tribe)*.

Beecher involved a dispute over tribal land the United States granted to Wisconsin in 1848, before the tribe's aboriginal title had been extinguished. The United States Government subsequently attempted to cede the land back to the tribe, despite its prior grant of the land to Wisconsin. Both the plaintiff and defendant claimed title to lumber taken from the land, the plaintiff's claim based on a United States patent issued in 1872 and the defendant's claim based on the State's issuance of patents in 1865 and 1870. In holding only the grant by Wisconsin valid, the Court stated that "the propriety or justice of . . . [the government's] 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."[185]

The Court's position in *Beecher* was sound. Because many land titles can be traced to a period of Indian occupancy, judicial time and individual resources would be wasted if third parties were permitted to contest the sovereign's decision to extinguish the tribal right of occupancy. Additionally, there seems little justification in allowing a third party to contest the sovereign's decision with respect to a tribe if the

182. 348 U.S. at 280-81.
183. 95 U.S. 517 (1877).
184. 314 U.S. 339 (1941).
185. 95 U.S. at 525, *quoted in* Tee-Hit-Ton Indians v. United States, 348 U.S. at 281.

tribe itself is an uninterested party. *Tee-Hit-Ton* was *not* a controversy between third parties, but a direct controversy between a native Alaska tribe and the government. Hence, what proved to be a compelling justification in *Beecher* was wholly lacking under the facts of *Tee-Hit-Ton*. Indeed, a contest between a tribe and the government regarding the consequences of congressional extinguishment or the government's liability seems to be precisely the sort of matter subject to judicial review.

Walapai Tribe is equally unsupportive of *Tee-Hit-Ton*'s conclusion that all aspects of congressional authority to extinguish aboriginal title are nonreviewable. In *Walapai Tribe*, the United States brought suit as guardian of the tribe to enjoin the railroad's interference with the tribe's rightful enjoyment and possession of its territory. The railroad defended on the grounds that the tribe's aboriginal title had been extinguished. In holding that the tribe's aboriginal title had not been extinguished, the Court first carefully pointed out, in language directly conflicting with the later *Tee-Hit-Ton* holding, that a tribal claim to particular land did not have to be based on "a treaty, statute or other formal government action"[186] to be actionable. Justice Reed did not emphasize this statement, however, relying instead on language in *Walapai Tribe* stating "the power of Congress . . . [with respect to extinguishment] is supreme. The manner, method and time of such extinguishment raise political, not justiciable, questions."[187]

Despite this language recognizing the extinguishment power of Congress, *Walapai Tribe* does not support the conclusion that all aspects of congressional authority to extinguish aboriginal title are immune from judicial review. First, *Walapai Tribe*, like *Beecher*, involved adverse claims by third parties. Hence, the nonreviewability of congressional determinations to extinguish was again justifiable as a means of sparing the unnecessary time and expense associated with a contest of congressional activities by third parties. Second, the restriction of the Court's power of review was not directed at the consequences of congressional extinguishment, but only at the fact and method of extinguishment. Concededly, in the presence of a clear manifestation of congressional intent, the Court may not hold that Congress has no power to extinguish, for clearly it does. The consequences of congressional extinguishment, however, are precisely the incidents of congressional authority subject to judicial review.[188] Hence, although the language in *Walapai Tribe* may support the assertion that

186. 341 U.S. at 347.

187. *Id.*, *quoted in* Tee-Hit-Ton Indians v. United States, 348 U.S. at 281.

188. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977) (power of

only Congress has the power to extinguish Indian title, it does not support the assertion that the Court may not review the consequences of Congress asserting its power.[189]

Speculation on Tee-Hit-Ton: The Court's Motivation

The break from precedent in *Tee-Hit-Ton*[190] cannot but help raise questions about the dramatic shift in the Court's attitude toward Indian rights. Justice Reed's characterization in *Tee-Hit-Ton* of the Indians as "savage tribes," having only "permission from the [W]hites to occupy," and thus entitled only to "gratuities" from the sovereign[191] reflects a remarkably different view than Chief Justice Marshall's characterization in *Johnson* of the Indian tribes as sovereign nations made up of persons possessed of the same human rights as citizens of the discovering nations.[192] There are several possible explanations for this shift of tone.

Realism

One possible explanation for the Court's departure from precedent in *Tee-Hit-Ton* is that earlier opinions deliberately misrepresented relations between the government and Indian tribes as generally amicable, at a time when the government's activities involved confrontations with

Congress over Indian affairs does not bar judicial determination of fifth amendment and equal protection claims).

189. *Id.* Even if Congress does have the unreviewable power to extinguish without compensation when it chooses to do so explicitly, the relevant statute in *Tee-Hit-Ton* suggests that Congress intended the courts to decide its liability for the taking of the timber because § 3(b) of the resolution stated: "Nothing in this resolution shall be construed as recognizing *or denying* the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest." H.R.J. Res. 205, 61 Stat. 920, 921 (1947) (emphasis added).

190. In addition to the cases discussed above, the Court distinguished two other major cases, Minnesota v. Hitchcock, 185 U.S. 373 (1902), and United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1930), as inapposite because they involved recognized title. 348 U.S. at 282 n.15. The Court also cited without comment three other cases in support of the conquest theory, only one containing language supporting the rationale in *Tee-Hit-Ton*: Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886); Martin v. Waddell, 41 U.S. (6 Pet.) 367 (1842); and Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839). Both *Buttz* and *Clark* support the basic tenets of the doctrine of discovery as it existed before *Tee-Hit-Ton*. *Martin* involved a controversy between third parties concerning rights to oyster beds. The plaintiff claimed through the original proprietors of the colony; the defendant claimed through the state of New Jersey. Neither party claimed through an Indian tribe. In the one line referring to Indians in the thirty-two page opinion, the Court stated that Indians were regarded as "mere temporary occupants of the soil." 41 U.S. (6 Pet.) at 409. That passage certainly is insufficient to support the view that Indian title is not a property right.

191. 348 U.S. at 289, 279, 291 (respectively).

192. 21 U.S. (8 Wheat.) at 591-92.

Indians and confiscation of aboriginal land.[193] Despite Chief Justice Marshall's direct exposure to such a confrontation in *Worcester*, one might claim he chose to romanticize the Indian tribes to create the appearance of fair dealings between the United States Government and the tribes. Justice Reed's view of history in *Tee-Hit-Ton* on the other hand, may be more accurate, representing a trend toward honesty on the part of the Court.

Even if true, this argument is unconvincing as either an explanation of or justification for the rule in *Tee-Hit-Ton*. As an explanation of the decision, it fails to account for Chief Justice Marshall's candid recognition that many people believed Indians had no right to their land because of their inferior culture,[194] an argument made to the Court in the earlier case of *Fletcher v. Peck*,[195] as well as by the defendant's attorney in *Johnson*.[196] This belief may have explained to the Chief Justice why the European nations applied the doctrine of discovery, once confined to unoccupied land, to an inhabited country. It cannot justify, however, a rule of law that would deny any rights to the indigenous people.

Even if Chief Justice Marshall's romantic view did not reflect the Indians' real predicament, there was no need for the Court in *Tee-Hit-Ton* to depart from the legal path established by the Marshall precedents. The doctrine of discovery had, before *Tee-Hit-Ton*, proved an effective means of reconciling conflicting claims to aboriginal lands. The fact that the government had not uniformly complied with its stated legal principles is no reason to reject those principles, particularly when the principles provide the legal basis for a group's claim to property. To reject a rule of law establishing the rights of Indians to their land on the ground that the government frequently aided or encouraged the confiscation of Indian land is no more persuasive than the argument that because the government encouraged the perpetuation of second class status for Blacks, the rule of *Brown v. Board of Educa-*

193. Arguably, Felix Cohen contributed to an idealized view depicting the relations between the tribes and the government as generally honorable with few exceptions. *See* THE LEGAL CONSCIENCE, *supra* note 108, at 273-304.

194. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

195. 10 U.S. (6 Cranch) 87 (1810). The plaintiff had argued that "[the soil] is overrun by them, rather than inhabited. It is not a true and legal possession. . . . It is a right not to be *transferred*, but extinguished." *Id.* at 121 (reporter's summary of argument for plaintiff).

196. 21 U.S. (8 Wheat.) 543 (1823). The defendant had argued that Indians "remained in a state of nature, and have never been admitted into the general society of nations." *Id.* at 567 (reporter's summary of argument for defendant).

tion,[197] establishing the equality of Blacks and Whites, is dishonest and therefore should be rejected.

Fiscal Considerations

A second, more plausible explanation for the Court's shift in tone is that the Court was faced with serious fiscal considerations. The rule in *Tee-Hit-Ton* may represent the Court's attempt to save the public treasury from having to pay out what were perceived as nearly ruinous damage awards on claims pending before the Indian Claims Commission. By promulgating the rule in *Tee-Hit-Ton*, the Court left Congress free to extinguish aboriginal title to Alaska, where the land's wealth in resources was just becoming known,[198] without incurring a duty to compensate the natives.

In *Tee-Hit-Ton*, the Court's concern with fiscal considerations was more obvious than it had been in *Tillamooks II*, where the argument first had been made. In *Tillamooks II*, the Government appended an exhibit to its brief that listed all the claims filed with the newly-created Indian Claims Commission prior to August 11, 1950, the cut-off date for claims arising before 1946. The appendix was designed to demonstrate the potential liability of the United States if all the land claims then pending were held to be takings under the fifth amendment, thereby requiring an interest award. The resulting sum was over $9,000,000,000, of which $8,000,000,000 was interest.[199] Apparently the appendix proved effective in *Tillamooks II*, convincing the three justices remaining on the Court from the *Tillamooks I* majority, including Chief Justice Vinson, to reverse the award of interest.

Justice Reed in *Tee-Hit-Ton* explicitly acknowledged the influence of the *Tillamooks II* appendix by citing its $9,000,000,000 estimate.[200] The Court's willingness to accept the government's estimate is surprising. Perhaps the Justices did not realize that the land claims before the Indian Claims Commission could be based on legal theories not requiring an award of interest, such as breach of trust or contract. The inclusion of all the land claims thus inflated the final figure. Irrespective of whether the Justices should have known that not all the land claims

197. 394 U.S. 294 (1955).

198. *See* FEDERAL FIELD COMMITTEE FOR DEVELOPMENT PLANNING IN ALASKA, ALASKA NATIVES AND THE LAND 406-08 (1968) (Arctic Slope oil discoveries in the 1940's and 1950's). *See generally id.* 285-426 (Alaska natural resources).

199. Brief for Petitioner at 55-56, United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951).

200. 348 U.S. at 283 n.17.

were taking claims, for which an award of interest would be necessary, they surely were aware of two general observations about lawsuits; first, that litigants claim much more in damages than they reasonably expect to recover; and second, that litigants often lose. Indeed, the ultimate disposition of the claims proves that the Court should have more closely scrutinized the government's figures. The total amount of damages awarded by the Commission on all the land claims for which the Justice Department had listed estimates came to slightly less than $150,000,000. Even if all these claims could have been pressed as fifth amendment taking claims, with the judgments entitled to interest, the resulting liability would have been slightly over $1,000,000,000, well below the government's estimate.[201]

Ethnocentrism

Understanding American governmental policy toward Indian tribes during the time of *Tee-Hit-Ton* affords some insight into the Court's willingness to permit concerns of the public purse to enter its constitutional decisionmaking process. The termination era of the 1950's was the second of two major eras[202] in which Congress at-

201. The author's research assistants, Dorothy Mayer and Hildegarde Conte, arrived at this figure by determining the final awards given for each of the claims represented by a docket number in the government's appendix. Of the approximately 124 claims listed by the Justice Department, only 33 were land claims in which the tribe was ultimately successful. The total amount awarded on these claims was $148,065,930.00 (table on file with the author). The subsequent history of each docket was obtained by crosschecking the information on final awards in the annual report of the Indian Claims Commission with the subsequent history tables of the two privately published indexes to the Commission's decisions. Until a rudimentary subject matter index was published in 1973, the lack of any research guides to Commission decisions forced researchers to read all the decisions to determine how the Commission had resolved an issue. Although a subject matter index now exists, its subjects are too broad to be very helpful. *See* NATIVE AMERICAN RIGHTS FUND, INDEX TO INDIAN CLAIMS COMMISSION DECISIONS 4 (1973) (NARF). The NARF Index also contains a subsequent history table. The other private index contains only an index by docket number, with subsequent histories and a case name index. DECISIONS OF THE INDIAN CLAIMS COMMISSION (Clearwater Press 1973). Neither index is up-to-date.

202. The first was the allotment era of the late eighteenth and early nineteenth centuries. During this time, the government negotiated large cessions of Indian land. The ceded land was then broken up into 160-acre allotments for individual Indians. Two ideas pervaded this scheme. First, the large amount of land left over after the allotments were made could be opened up for the great number of white settlers clamoring for public domain land. Second, individual Indians would have every impetus to become members of the dominant culture, as opposed to members of a tribe. Since there would be no more tribal land held in common, the tribe's strength as a culture would weaken. Meanwhile, individual Indians would settle, learn husbandry, and gradually adapt to the dominant culture. The allotment era had a devastating effect on Indian land and population, and finally came to an end with the passage of the Wheeler-Howard Act in 1934. 25 U.S.C. §§ 461-479 (1976). During the

tempted to terminate any special status conferred on Indian tribes as separate sovereigns by steps designed to assimilate Indians into the dominant culture. In 1954, Congress passed a resolution calling for the termination of federal trust responsibility over Indians.[203] This goal was to be accomplished by extinguishing tribal land, paying individual tribal members for their share, and allowing the states to exercise civil and criminal jurisdiction over the Indian reservations within their borders. Congress hoped through legislation to deprive the Indians of separate sovereignty and to subject them, and their land, to the same state sovereignty as non-Indian state citizens.[204]

The termination era, regarded as a low point in United States-Indian relations,[205] did no more than reflect the dominant culture's belief in the superiority of its culture. Americans, many of whom had been assimilated from diverse cultures within one generation, generally were unwilling to accept the American Indian tribes' failure to adapt after several hundred years.[206] Policy makers reasoned that the more Indians were given any kind of special treatment, the less likely they would be to adopt the ways of the dominant culture.[207] Thus, assimilationists were opposed to according Indians any special legal status.

Members of the Supreme Court were not immune from these concerns. Justices Jackson and Black expressed their qualms about Indian land claims litigation in a concurring opinion in *Northwestern Bands of Shoshone Indians v. United States*.[208] They asserted that a moral duty alone was owed the Indian tribes, because the Indians' predicament posed more sociological than legal problems.[209] To the two Justices, interpreting the old treaties was a futile task because the Indians had a different concept of land ownership:

1930's and 1940's, congressional Indian policy became more benign. The Indian land base was stabilized, or in some cases augmented, by the return of some unallotted land to reservation status; tribal organizations grew stronger and the Indian population began to increase. *See generally* S. TYLER, A HISTORY OF INDIAN POLICY 95-124 (1973).

203. H.R. Con. Res. 108, 83d Cong., 1st Sess., 99 CONG. REC. 6283 (1954).

204. *See* Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 148-51 (1977) [hereinafter cited as *Termination Policy*].

205. The era was particularly bleak for Indians in the West, who lost their land and autonomy. *Id.* at 149-58. *See also* 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, 93d CONG., 2d SESS., FINAL REPORT 447-54 (Comm. Print 1978). Not until the late 1950's did public sentiment begin to shift. *See Termination Policy, supra* note 203, at 162-63.

206. *See generally* Washburn, *The Historical Context of American Indian Legal Problems*, 40 LAW & CONTEMP. PROB. 12 (1976).

207. *See Termination Policy, supra* note 203, at 162-63.

208. 324 U.S. 335, 354 (1955). (Jackson, J., concurring).

209. *Id.* at 355.

> Ownership meant no more to them than to roam the land as a great common, and to possess and enjoy it in the same way that they possessed and enjoyed sunlight and the west wind and the feel of spring in the air. Acquisitiveness, which develops a law of real property, is an accomplishment only of the "civilized."[210]

Accordingly, language assented to by the Indians in treaties may have had no meaning or significance to them.

Two aspects of these claims caused the Justices particular concern. First, they rejected the contention that a tribe of only 1,500 at the time of the treaty could have "owned" the 15,000,000 acres that were the subject of the Treaty of Box Elder.[211] Second, they were disturbed that the wronged generation of Shoshones, "hav[ing] gone to the Happy Hunting Ground," would leave their present day descendants, who were already accorded special status, a windfall award.[212] If the Indians had no sense of private property, the Justices concluded, why should the Court require the Government to give the Indians, "who needed 10,000 acres apiece to sustain themselves through hunting and nomadic living,"[213] the value of land measured "in terms of what was gained to our people, who sustain themselves in large numbers on few acres by greater efficiency and utilization?"[214]

This same ethnocentric tone was reflected in *Tee-Hit-Ton*. In the first paragraph of the opinion, Justice Reed pointed out that the case involved the claims of only sixty to seventy Indians to over 350,000 acres of land.[215] Later in the opinion, in concluding that the Alaska natives' aboriginal rights were the same as those of the Indians of the lower forty-eight states, he repeated the figures, apparently in disbelief that such a small number of natives could claim to own so many acres just because they "moved from place to place as game or fish became scarce."[216]

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210. *Id.* at 357.
211. *Id.* at 356.
212. *Id.* at 355.
213. *Id.* at 358.
214. *Id.* Professor Cohen called this view of Indians' relationships to their lands the "menagerie theory" because it views the Indians as being more like animals foraging for food than human beings having a culture worthy of respect. 1942 HANDBOOK, *supra* note 84, at 288. *See generally*, THE LEGAL CONSCIENCE, *supra* note 108, at 266-68; Cohen, *supra* note 1, at 57-58. Professor Cohen also expressed dismay that in *Northwestern Bands* "two of the most progressive judges of the Supreme Court" had adopted the menagerie theory. THE LEGAL CONSCIENCE, *supra* note 108, at 267. He did note, however, that the number of Whites occupying the land at the time of the lawsuit was less than the number of Shoshone occupants at the time of the treaty. *See id.*
215. 348 U.S. at 273.
216. *Id.* at 287.

The two concerns expressed by Justices Black and Jackson in their concurrence in *Northwestern Bands* help explain the Court's reliance on fiscal considerations in *Tee-Hit-Ton*. The native Alaskans' claim of ownership to most of Alaska was based on the same nomadic land use pattern as the Tlingits' in *Tee-Hit-Ton*. Hence, it was obvious that the case would have a far greater impact than merely determining the value of the timber cut in the Tongass Forest. In addition, the Indian Claims Commission cases, often based on the same nomadic land use pattern, addressed the propriety of awarding money judgments to the descendants of the generation originally wronged. The *Tee-Hit-Ton* rule provided the court with a way to avoid sanctioning a land use pattern its members regarded as inferior, to give Congress a free hand to acquire Alaska, and to protect the Treasury from having to pay large money judgments to the "descendants of exploited Indians."[217] Thus, deep-seated ethnocentric thinking, coupled with a concern for ruinous damage awards against the government, may well have motivated the Court in *Tee-Hit-Ton*.

The previous analysis demonstrates several significant shortcomings with the Court's rationale in *Tee-Hit-Ton*. First, the decision, though purportedly based on the doctrine of discovery, succeeded in significantly limiting the protection that doctrine traditionally has afforded Indian-held aboriginal title. The distinction between recognized and aboriginal title relied on by the Court was derived from erroneous interpretations of precedent and was used to rationalize previous holdings by the Court in which the existence of such a distinction had never been acknowledged. By adopting the distinction, the Court not only made an unwarranted break from the prior deferential treatment of Indian title by the Court, but undermined what traditionally had been regarded as a form of ownership having the characteristics of a legal property right.[218]

217. *Id.* at 274.

218. Notwithstanding the historic deference accorded aboriginal title, other reasons exist for regarding aboriginal title as a compensable property right. The United States Supreme Court itself has defined property for the purposes of the fifth amendment as "the group of rights inhering in the citizen's relations to the physical thing, as the right to possess, use and dispose of it . . . . The Constitutional provision is addressed to every sort of interest the citizens may possess." United States v. General Motors Corp., 323 U.S. 373, 378 (1945), *cited in 2* NICHOLS, *supra* note 124, § 5.1[1], at 5-8 n.6 (emphasis deleted). This definition resembles that proposed by Bentham, who identified the following four characteristics of property: the right of occupation, the right of exclusion, the right of alienation, and the right of transmission after death. 3 J. BENTHAM, BENTHAM'S WORKS 182 (1843), *quoted in* 2 NICHOLS, *supra* note 124, § 51.1(1), at 5-8. Both recognized and aboriginal title satisfy all but the third of these characteristics, the right to transfer aboriginal title having been restricted in an effort to protect Indians. Federal Power Comm'n v. Tuscarora Indian Nation,

Second, the Court bolstered its conclusion through misplaced reliance on cases holding that determinations by Congress regarding aboriginal title were unreviewable under the political question doctrine. Analysis of these cases strongly draws into question the Court's use of the doctrine to shield Congress from liability.[219] Moreover, the Court's reliance in *Tee-Hit-Ton* on the political question doctrine is even more suspect in light of recent decisions limiting considerably the scope of the doctrine.[220]

Finally, analysis of the historical context of the case suggests that the result in *Tee-Hit-Ton* was precipitated by fiscal and political considerations. As a consequence, the traditional decisionmaking procedure of the Court was subverted, and the rights of Indians to their aboriginal lands were narrowed significantly.

The Effect of Tee-Hit-Ton

Although the *Tee-Hit-Ton* decision is analytically unsound, one might argue that the rule is uncontroversial today because few cases remain in which the rule could operate inequitably. One might also conclude that, even admitting the theoretical inequity of the rule, its impact on other areas of Indian rights law is negligible. Unfortunately,

362 U.S. 99, 119 (1960) (interpreting 25 U.S.C. § 177 (1976)). Since recognized title has been determined to be a property right, the absence of a right to alienate freely, being common to both types of title, cannot be determinative of the characterization of aboriginal title as a property interest.

Professors Ackerman and Tribe have avoided a definitional approach to determining property rights or interests, emphasizing instead the need to consider whether, in a particular case, it is in the public interest to require just compensation. *See* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-40 (1977); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-3, at 459-63 (1978). Considering the various kinds of property interests protected by the fifth amendment, it appears that a common feature of all protected property is the owner's reasonable basis for relying on continued ownership. *See, e.g.*, Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303 (1976) (the rights of periodic tenants); Choate v. Trapp, 224 U.S. 665, 677-78 (1912) (tax exemptions); United States v. Welch, 217 U.S. 333, 339 (1910) (easements); Swanson v. United States, 156 F.2d 442, 445 (9th Cir. 1946), *cert. denied*, 329 U.S. 800 (1947) (the rights of mortgagors and mortgagees in lien mortgages); United States v. 376.21 Acres, 240 F. Supp. 163, 165 (1965) (future interests); United States v. Certain Lands, 220 F. Supp. 696, 701 (1963) (equitable servitudes). *Cf.* Acton v. United States, 401 F.2d 896, 899 (9th Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969) (majority rule recognizes only vested property rights and not rights under licenses and permits). *See generally* 2 NICHOLS, *supra* note 124, at § 5.1[1]-[4]. To the extent that customary use and habit supply much of the basis for determining whether one's reliance on continued ownership is reasonable, aboriginal title easily qualifies for status as a property interest. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-4, at 465 (1978).

219. See notes 182-89 & accompanying text *supra*.

220. *Compare* Baker v. Carr, 369 U.S. 186 (1962), *with* Powell v. McCormack, 395 U.S. 486 (1969), *and* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977).

as this portion of the Article demonstrates, *Tee-Hit-Ton* has had a pervasive, continuing effect on litigation involving Indian rights.[221] The impact of *Tee-Hit-Ton* has been felt most heavily in four areas of Indian law. First, and most obvious, *Tee-Hit-Ton* limited the protection afforded by the takings clause to land recognized by Congress in a "treaty or other agreement."[222] Since Congress alone can recognize title, not all tribes living on reservations carved out from cessions by treaty or created by executive order have been held to possess recognized title. Second, the deference to congressional power shown in *Tee-Hit-Ton* has encouraged lower courts to give an even more expansive reading to the scope of Congress's authority over Indian lands. For example, *Tee-Hit-Ton* now presents both actual and potential obstacles to derivative claims brought by Indian tribes, *i.e.*, claims based on, but legally separate from, the Indians' claims to aboriginal land. In addition, *Tee-Hit-Ton* recently has been relied on to support the authority of Congress to extinguish retroactively claims based on aboriginal title, a power never intimated in the opinion.

Taking Claims

The Claims Courts

The immediate impact of the *Tee-Hit-Ton* rule was felt by both the Indian Claims Commission and the Court of Claims, the only tribunals

221. *Tee-Hit-Ton* also has had a dramatic effect on the land claims of other indigeneous peoples, especially in the British Commonwealth. As several commentators have demonstrated, *Tee-Hit-Ton* has inspired courts of other countries to shift their position on aboriginal land rights. In New Zealand, Australia, and British Columbia, for example, a series of cases protecting Indian land rights, by courts often acknowledging *Johnson* as persuasively reasoned, has been followed by a sudden shift to the position that the sovereign has the right to extinguish aboriginal title by any means and without any duty to pay just compensation. In each instance the court has cited *Tee-Hit-Ton* with approval. For discussions of these trends, see Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85, 98-102 (1972) (review of aboriginal land claims in New Zealand, Africa, Australia, and British Columbia); Mickenberg, *Aboriginal Rights in Canada and the United States*, 9 OSGOODE HALL L.J. 119, 135-38 (1971). *See also* Smith, *The Concept of Native Title*, 24 U. TORONTO L.J. 1 (1974). Indeed, until recently, some of the sternest criticisms of *Tee-Hit-Ton* were made in the law journals of commonwealth countries. Professor Hookey called *Tee-Hit-Ton* a "spectre that was partly semantic and partly racial." The rule was a "surprising finding made in the course of following rather than, as might have been supposed, overruling *Johnson*." Hookey, *The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?*, 5 FED. L. REV. 85, 99, 101 (1972). Professor Mickenberg's criticism was even more scathing. The case was a "perfidious rationalization for the outright theft of private property by the United States Government." Mickenberg, *Aboriginal Rights in Canada and the United States*, 9 OSGOODE HALL L.J. 119, 136 (1971).

222. 348 U.S. at 277.

in which a tribe could present a claim for money damages against the government. To appreciate *Tee-Hit-Ton's* effect on the claims courts, it is necessary to understand their jurisdiction over Indian claims. Before 1946, Indian tribes were barred from suing the United States for damages unless they were able to secure the passage of a special jurisdictional act waiving sovereign immunity and granting jurisdiction to the Court of Claims.[223] This expensive,[224] cumbersome,[225] and often unfair procedure ended with the passage of the Indian Claims Commission Act (Claims Act) in 1946,[226] which was designed to compensate the Indians for injuries caused by the United States government. The Claims Act distinguished between claims accruing before 1946, thought to present the most complex problems, and claims arising after 1946. The pre-1946 claims, some of which were a century old, were adjudicable before a special five-person commission,[227] the Indian Claims Commission, only if they fell into one or more of five broad classes of

223. 1942 HANDBOOK, *supra* note 84, at 373-78. *See also* THE LEGAL CONSCIENCE, *supra* note 108, at 269-72; Wilkinson, *supra* note 90, at 511-17. Tribes could not sue the Government because when Congress created the Court of Claims in 1863, it expressly removed from its jurisdiction claims for money damages "growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes." Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767. As a result, a tribe wishing to redress a grievance was forced to petition Congress. The Claims Act removed this nearly insurmountable barrier. See note 226 & accompanying text *infra*. Over 800 claims were filed in the five year period that the tribes were given to present all past claims against the government, in contrast to the 142 claims adjudicated in the period between 1881 and 1946. *See* Wilkinson, *supra* note 90, at 512.

224. *See* V. DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES 217-20 (1974) [hereinafter cited as BROKEN TREATIES].

225. *See* 1942 HANDBOOK, *supra* note 84, at 373. The Sioux Nation's attempt to get compensation for the confiscation of the Black Hills is an example. The tribe first sued under a jurisdictional act passed in 1920. In 1942, the Court of Claims ruled that the act did not grant jurisdiction to consider a fifth amendment taking claim. Sioux Tribe v. United States, 97 Ct. Cl. 613, 666 (1942), *cert. denied*, 318 U.S. 789 (1943). After the Indian Claims Commission Act was enacted, the Sioux resubmitted their claim to the newly created commission. A decision was finally reached in 1980. Sioux Nation v. United States, 48 U.S.L.W. 4960 (1980).

226. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. §§ 70 to 70v-3 (1976 & Supp. II 1978); 28 U.S.C. § 1505 (1976)).

227. Congress had expected the older claims to be the most difficult and time-consuming to prove, requiring the testimony of historians and anthropologists. It determined that these claims could be most efficiently settled by a commission charged only with this task and thus able to develop the expertise needed to resolve the claims efficiently. Indeed, Congress originally viewed the five-member commission as an advisory body only, designed to find facts and determine whether or not a tribe had a right to compensation in a non-adversary proceeding. The Commission soon adopted the adversary model, however, and evolved into a judicial tribunal. *See* Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 326-35 (1969).

claims.[228] Three of the five classes created by the Claims Act could be applied to a land claim: clause 1, for claims based on the Constitution; clause 3, for claims involving treaties; and clause 4, for claims that land "owned or occupied" by Indians had been taken.[229] The Court of Claims was given appellate jurisdiction over the Commission, with further opportunity for review by the Supreme Court on a writ of certiorari.[230] Claims arising after 1946, in contrast, could be maintained by Indian tribes only on the same legal and equitable theories available to non-Indians.[231]

Shortly after *Tee-Hit-Ton* was decided, the government argued that the three relevant land claims under the Claims Act, passed nine years before *Tee-Hit-Ton*, had been intended to relate only to claims based on title recognized in the *Tee-Hit-Ton* sense. Under this interpretation, many tribes would be prevented from recovering anything for either unjust land transactions or absolute confiscations of their aboriginal land. Fortunately, the argument was rejected in *Otoe & Missouria Tribe v. United States*,[232] thereby mitigating *Tee-Hit-Ton's* effect

228. 25 U.S.C. § 70a (1976). The tribes were given five years within which to file all claims or lose them forever. *Id.* § 70k. The Commission divided up the 370 broad claims filed by the tribes into more than 600 dockets, one for each separate claim. UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT 5 (1978).

229. 25 U.S.C. § 70a (1976).

230. *Id.* § 70s.

231. 28 U.S.C. § 1505 (1976). Originally the Commission was to have concluded its work by 1956. Act of Aug. 13, 1946, ch. 959, § 23, 60 Stat. 1049. After granting four extensions, Congress finally ordered it to complete its work by the end of fiscal year 1978. 25 U.S.C. § 70v (1976). *See* UNITED STATES INDIAN CLAIMS COMMISSION, FINAL REPORT 16-20 (1978); Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325 (1969). On January 1, 1978, the Commission transferred the remaining cases, comprising 102 dockets, to the Court of Claims. As of September, 1978, 68 of these cases had not been disposed of. INDIAN CLAIMS COMMISSION, FINAL REPORT 20 (1978).

232. 131 F. Supp. 265 (Ct. Cl.), *cert. denied*, 350 U.S. 848 (1955) (treaty revision and breach of fair and honorable dealing claims). The Government had based one of its arguments on the assumption that the Congress of 1946 had been cognizant of the distinction between recognized and aboriginal title. The argument presented was that clauses 3 (treaty revision), 4 (takings), and 5 (fair and honorable dealings) were intended to provide only for recovery for loss of recognized title, because Congress deliberately omitted the term "Indian title" from the provisions. *Id.* at 271-72, 275. The court stated that one just as easily could argue that the omissions of the term "recognized title" meant Congress only intended to provide for recovery for the loss of aboriginal land. *Id.* at 271-72. In addition, the court observed that Congress did not always differentiate between recognized and aboriginal title in treaties, often only referring to "Indian land." *Id.* Of course, this reasoning opposes Justice Reed's arguments on recognition in *Tee-Hit-Ton*. There was ample evidence, however, of congressional intent to support the court's conclusion that Congress intended to provide a remedy for the loss of all Indian land, whether title was aboriginal, recognized, or even fee simple absolute. *Id.* at 272-85. The court thus upheld the Commission's determination that the government was liable under the treaty revision clause for aboriginal land

on Claims Act cases. Therefore, although *Tee-Hit-Ton* prevents recovery for a taking of aboriginal land occurring after 1946, a tribe whose land had been confiscated before 1946 has a claim under the Claims Act for the land's fair market value at the time of taking, despite the lack of recognized title.[233] Only a tribe holding recognized title could recover the measure of damages for a fifth amendment taking, however, which includes an amount for interest from the time of taking to the time of award.[234] Nonetheless, tribes have recovered substantial damages under clause 4 for a taking of aboriginal title.[235]

Executive Order Reservations

Tee-Hit-Ton established that only recognition by Congress results in recognized title.[236] Although several presidents have created reservations by executive order,[237] these reservations are not protected against confiscation unless Congress subsequently has recognized the

sold for an unconscionable consideration. Although *Otoe & Missouria* was not a clause 4 takings claim, the court stressed in dicta that the reference in clause 4 to land "owned" or "occupied" demonstrated an intent to provide a recovery for taking of aboriginal title. *Id.* at 276. The court's dicta contradicts somewhat the earlier argument based on Congress's failure to differentiate between the two types of title. If Congress had been aware of the distinction, however, it clearly would have omitted land "owned" by Indian tribes from clause 4, since such land was covered under clause 1, covering constitutional claims, but the Congress in 1946 was still doubtful whether any kind of Indian title was protected from confiscation, and thus included the words "owned and occupied" to make clear the intent to grant recovery for takings, even if they were not covered by the Constitution.

233. 131 F. Supp. at 291 (construing United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951) (per curiam) (recovery at market value, not "subsistence" value of the land to the tribe).

234. *See* United States v. Creek Nation, 295 U.S. 103, 111-12 (1935). Because some claims were over one hundred years old, the interest amount could be much greater than the value of the land at the time of taking. *See* Sioux Tribe v. United States, 48 U.S.L.W. 4960 (1980).

235. *See, e.g.*, Kiowa, Comanche & Apache Tribes v. United States, 34 Ind. Cl. Comm. 263 (1974) (compromise agreement of $35,060,000 for taking of aboriginal land); Thompson v. United States, 13 Ind. Cl. Comm. 513 (1964) ($29,100,000 compromise agreement for taking aboriginal land in California); Jicarilla Apache Tribe v. United States, 12 Ind. Cl. Comm. 470 (1963) (separate opinion), 25 Ind. Cl. Comm. 248 (1971) (final award of $9,150,000).

236. 348 U.S. at 277-78.

237. Congress ended the treaty making era in 1871. 1942 HANDBOOK, *supra* note 84, at 66-67. Before this time, however, presidents had created and enlarged reservations by executive orders removing land from the public domain. Originally attacked as an unconstitutional infringement of the plenary power of Congress over Indian affairs, the president's power was held valid, first upon a theory of implied delegation by Congress, Mason v. United States, 260 U.S. 545 (1923), and later by express delegation. General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388. In 1919, the practice was outlawed by Congress. Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (current version codified at 43 U.S.C. § 150 (1976)). *See* 1942 HANDBOOK, *supra* note 84, at 299-300.

tribe's right to the land. Some executive order land has been recognized explicitly by Congress, most notably Najavo and Hopi land,[238] but over 2,000,000 acres of unrecognized executive order land existed as of 1953,[239] the last date for which any figures are available. These two million acres of Indian reservation conceivably could be confiscated by congressional fiat under the rule in *Tee-Hit-Ton* without compensation to the occupants.[240]

The only Supreme Court cases that have considered the compensability of takings of executive order reservations are *Sioux Tribe v. United States*[241] and *Confederated Bands of Ute Indians v. United States*,[242] both of which were decided before *Tee-Hit-Ton*. In both cases, the Court held that the tribes did not have compensable rights in executive order reservations that were subsequently restored to the public domain.[243] In addition, *Hynes v. Grimes Packing*[244] decided immediately before *Tee-Hit-Ton*, suggested in dicta that executive orders creating reservations did not confer compensable property rights.[245]

The holdings of *Sioux Tribe* and *Confederated Utes* are questionable precedent. Both were decided when the importance of recognized title was unknown and both involved reservations not intended as a permanent home for the tribal members. The surrounding circumstances in *Sioux Tribe* indicated that the President only intended to create a temporary buffer zone to keep liquor traffic away from the Great Sioux reservation.[246] In *Confederated Utes* the President had set aside additional land to effectuate the purpose of a previous treaty.[247] The tribes in both cases had other extensive land holdings. Thus, the

238. *See* Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968); Sekaquaptewa v. MacDonald, 448 F. Supp. 1183 (D. Ariz. 1978) (construing Act of June 14, 1934, ch. 521, 48 Stat. 960) (9,000,000 acres on Navajo reservation explicitly recognized by statute); Healing v. Jones, 174 F. Supp. 211 (D. Ariz. 1959), *aff'd*, 373 U.S. 758 (1963) (construing Act of July 22, 1958, 72 Stat. 402) (jurisdictional act recognized Hopi or Navajo had vested right in disputed joint use area).

239. *See* Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 629 n.14 (1960).

240. *Id.*

241. 316 U.S. 317 (1942).

242. 330 U.S. 169 (1947).

243. Confederated Bands of Ute Indians v. United States, 330 U.S. 169, 176-77 (1947); Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1942).

244. 337 U.S. 86 (1949).

245. *Id.* at 103. *Hynes* dealt with the authority of the Secretary of the Interior to bar non-Indians from fishing within 3,000 feet of an executive order reservation.

246. 316 U.S. at 319-22.

247. 330 U.S. at 172-73.

comparatively small executive order land which was taken away may not have appeared to the Court such a harsh loss.

The potentially severe effects of *Tee-Hit-Ton* on tribes seeking recovery for takings of executive order land under the fifth amendment have been mitigated somewhat by the Court of Claims. The court, in addressing pre-1946 takings of executive order land, has held that such takings are covered by clause 4 of the Claims Act, which creates a claim for takings "arising under . . . Executive Orders of the president."[248] Therefore, only the post-1946 claims are subject to the rule in *Tee-Hit-Ton*. Accordingly, if the government were to confiscate reservation land created by executive order after 1946, the tribe would have to prove that Congress recognized its right to live on the reservation permanently. In such a case, the broad language of *Sioux Tribe* and *Confederated Utes*[249] might prevent recovery. It is hoped, however, that courts will view the circumstances of each case broadly and find implied, if not express, recognition by Congress of the Indians' interest.[250]

Reservations Created by Treaty

Although *Tee-Hit-Ton* requires congressional recognition of aboriginal title by treaty, merely because a tribe bases its claim on the existence of a treaty is not dispositive because not all treaties have been

248. Fort Berthold Reservation v. United States, 390 F.2d 686, 696-97 (Ct. Cl. 1968).

249. *Sioux Tribe, Confederated Utes*, and the dicta in *Hynes* were cited with approval in three lower court cases, although they did not influence the outcome of the lower court decisions. *See* United States v. Southern Pac. Trans. Co., 543 F.2d 676, 687 (9th Cir. 1976) (action seeking declaratory judgment that tribe, not railroad, owned portion of executive order reservation and damages for trespass; *held* for tribe); Sekaquaptewa v. MacDonald, 448 F. Supp. 1183, 1189, 1191 (D. Ariz. 1978) (executive order reservation recognized by Congress); Healing v. Jones, 174 F. Supp. 211, 216 (D. Ariz. 1959) (same).

250. The equities are strong in this area, for many executive order reservations were created for friendly tribes who had no treaties with the United States because they never had warred with the government. *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 494 F.2d 1386, 1388 (1974). One Note argued that a 1927 federal law regarding oil and gas leases was intended to recognize all executive order Indian land. Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 631-39 (1960). The author pointed to extensive legislative history demonstrating an intent to give all the royalties derived from oil and gas on executive order reservations to tribes occupying these reservations. Unfortunately, the language relied on by the author only indicated an intent to guarantee to the tribes an equitable interest in the land against third parties, the same interest a tribe owning purely aboriginal land would have had. *See, e.g.*, United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938). The author's contentions were rejected in a recent decision. *See* Sekaquaptewa v. MacDonald, 448 F. Supp. 1183, 1192-93 (D. Ariz. 1978).

construed as recognizing title.[251] Precedent as to what constitutes recognition in the *Tee-Hit-Ton* sense is confusing and fails to give adequate guidance to courts considering tribal claims. An analysis of the decisions shows that three periods—the years before *Tee-Hit-Ton*, the fifteen years following the decision and the decade of the 1970's—exhibit distinct and conflicting trends that account for much of this confusion.

Before *Tee-Hit-Ton*, the claims courts did not distinguish between recognized and aboriginal title. The term "recognized" was used by the courts to denote only that the federal government had acknowledged that the tribe actually used and occupied aboriginal land at the relevant time.[252] This freed the tribe from having to prove that it actually and exclusively occupied the land,[253] a time-consuming and expensive process in which the tribe was not always successful.[254] When courts subsequently began to use the term "recognition" in the *Tee-Hit-Ton* sense, the previous cases were not distinguished.[255] Consequently, pre-*Tee-*

251. See notes 265-73 & accompanying text, *infra*.

252. *See, e.g.*, Miami Tribe of Oklahoma v. United States, 2 Ind. Cl. Comm. 617, 640-43 (1954), *remanded on other grounds*, 175 F. Supp. 926 (Ct. Cl. 1959); Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 474, 491 (1951), *aff'd*, 120 F. Supp. 283 (Ct. Cl. 1954); Pawnee Indian Tribe of Oklahoma v. United States, 1 Ind. Cl. Comm. 245. 265, 281 (1950), *remanded on other grounds*, 301 F.2d 667 (Ct. Cl.), *cert. denied*, 301 U.S. 918 (1962). In *Quapaw Tribe*, for example, the term "recognition" was not used in describing the process of creation of a reservation. In determining whether the reservation had been recognized, the Commission did not look to the congressional language in the treaty itself, which merely described the boundaries of the reservation, but focused instead on instructions given to the treaty commissioner by John C. Calhoun, then Secretary of War. 1 Ind. Cl. Comm. at 489-90. The Commission held that the facts amounted to "a recognition of aboriginal possessory title in those Indians," because the treaty "was a confirmation of the original title to the Indians to the reserved lands." *Id.* at 491-92. For the elements necessary to prove aboriginal title, see Pawnee Indian Tribe of Oklahoma v. United States, 1 Ind. Cl. Comm. 245, 258-62 (1950), *rev'd in part on other grounds*, 301 F. Supp. 667 (Ct. Cl. 1962).

253. *See generally* Annot., 41 A.L.R. FED. 425 (1979).

254. *See, e.g.*, Strong v. United States, 518 F.2d 556 (Ct. Cl.), *cert. denied*, 423 U.S. 1015 (1975) (use not exclusive); Red Lake, Pembina & White Earth Bands v. United States, 164 Ct. Cl. 389 (1964) (not exclusive occupancy); Quapaw Tribe v. United States, 120 F. Supp. 283 (Ct. Cl. 1954) (failure of proof as to exclusive use).

255. *Compare, e.g.*, Miami Tribe of Oklahoma v. United States, 2 Ind. Cl. Comm. 617 (1954) (opinion of the Commission), *with* Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926 (Ct. Cl. 1959) (affirmance in pertinent part by Court of Claims). The Commission's opinion, written prior to *Tee-Hit-Ton*, used the terms "recognized" and "acknowledged" interchangeably. 2 Ind. Cl. Comm. at 639. Moreover, the definition given "recognized" was much broader than the *Tee-Hit-Ton* definition, one that would be consonant with the idea of acknowledgment of boundaries. For instance, the Commission stated that recognition "may appear in pronouncements and conduct of responsible government officials," a proposition at odds with *Tee-Hit-Ton*'s requirement of an explicit congressional grant of land. *Compare* Miami Tribe of Oklahoma v. United States, 2 Ind. Cl. Comm. at

Hit-Ton cases are a poor source of precedent for an attorney seeking to establish that a tribe holds recognized title as a compensable property right, even if the treaty in question is identical to one involved in a prior case.[256]

It was not until the late 1950's and 1960's that the Commission and the Court of Claims began to develop consistent case law on what constituted recognition in the *Tee-Hit-Ton* sense. During this period, the claims courts began to require more than an acknowledgement of boundaries,[257] which seems to have been the sole requirement in the early cases.[258] The most significant case of this era was *Miami Tribe of Oklahoma v. United States*.[259] The Court of Claims, in upholding the Commission's decision that the claimant held recognized title, stressed that a treaty or statute need only promise the tribe a permanent home to meet the *Tee-Hit-Ton* test: "Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as 'treaty title,' 'reservation title,' 'recognized title,' and 'acknowledged title.' "[260]

During this period, the claims courts were fairly liberal in construing congressional action as having recognized title in the Indians. In some instances treaty language explicitly promised that land would be set aside "for . . . permanent settlement and occupation"[261] or otherwise clearly acknowledged the Indians as permanent owners of the land.[262] In other instances, less explicit language, often not involving

640, *with* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 (1955). In contrast, the Court of Claims, while treating the issue of recognition as relevant only to excuse the tribe from having to prove exclusive use and occupancy, applied the standards for recognition from *Tee-Hit-Ton*. 175 F. Supp. at 928, 936.

256. *See* Annot., 41 A.L.R. FED. 425, 448 n.33 (1979).

257. In Sac & Fox Tribe v. United States, 315 F.2d 896 (Ct. Cl. 1963), the Court of Claims stated that "[m]ere executive recognition is insufficient, as is a simple acknowledgement that Indians physically lived in a certain region. There must be an intention to accord or recognize a *legal* interest in the land." *Id.* at 897.

258. See note 255 & accompanying text *supra*.

259. 175 F. Supp. 926 (Ct. Cl. 1959).

260. *Id.* at 936 (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)).

261. *See, e.g.*, Uintah & White River Bands of Ute Indians v. United States, 152 F. Supp. 953, 955 (Ct. Cl. 1957) (special jurisdictional act held to include fifth amendment taking of recognized title land).

262. *See, e.g.*, Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926, 931, 940 (Ct. Cl. 1959) (Treaty of Greenville gave the right to occupy "as long as they please" without interference); United States v. Kickapoo Tribe, 174 Ct. Cl. 550, 533 (1966) (Treaty of Grouseland stated that "the United States does hereby engage to consider them as joint

terms associated with the granting of land, were construed by the court as recognizing Indian title.[263] The courts also construed treaties in which tribes acknowledged their own boundaries in relation to the boundaries of neighboring tribes as treaties of recognition in the *Tee-Hit-Ton* sense.[264]

The 1970's, however, marked a shift away from the liberal construction of the prior decade.[265] In *United States v. Kiowa, Comanche & Apache Tribes*,[266] for example, the tribes argued that an 1865 treaty had recognized title to their land, later ceded for an unconscionably low consideration in an 1867 treaty. The 1865 treaty stated in part:

> The United States hereby agree that the district of country embraced within the following limits, or such portion of the same as may hereafter from time to time be designated by the President of the United States for that purpose . . . shall be and is hereby *set apart for the absolute and undisturbed use and occupation of the tribes who are parties to this treaty*, and of such other friendly tribes as have heretofore resided within said limits, or as they may from time to time agree to admit among them . . . . *The Indians . . . expressly agree to remove to and accept as their permanent home the country*.[267]

Despite the language regarding permanency, treated in *Miami Tribe* as determinative,[268] the Court of Claims overruled the Commission's

owners of all the country . . . [and] will not purchase any part of the said country without the consent of each of the said tribes").

263. *See* Oneida Tribe v. United States, 165 Ct. Cl. 487, 491, *cert. denied*, 379 U.S. 946 (1964). *Oneida* illustrates the doctrinal confusion created by *Tee-Hit-Ton*. The Court of Claims relied on two cases decided before *Tee-Hit-Ton* in which tribes had been compensated for takings of land reserved by similar treaty language: United States v. Klamath & Moadoc Tribes, 304 U.S. 119, 122-23 (1938) ("held and regarded as an Indian reservation"), and Menominee Tribe v. United States, 101 Ct. Cl. 22 (1944) ("held as Indian lands are held"). Although neither case discussed the notion of recognition, the court felt bound by both cases, apparently on the theory that since each tribe had been compensated as for a fifth amendment taking, their title must have been recognized in the *Tee-Hit-Ton* sense.

264. *See, e.g.*, Crow Tribe v. United States, 284 F.2d 361, 364, 367 (Ct. Cl. 1960), *cert. denied*, 366 U.S. 924 (1961). In Minnesota Chippewa Tribe v. United States, 315 F.2d 906 (Ct. Cl. 1963), a series of treaties, beginning with the Treaty of Prairie du Chien and culminating in an 1854 treaty, led the court to conclude that the entire sequence of treaties taken together constituted recognition in the *Tee-Hit-Ton* sense. *Id.* at 908-11.

265. This change may have been influenced by an earlier series of dissents by Judges Whitaker and Jones. *See, e.g.*, Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 914 (Ct. Cl. 1963) (Whitaker & Jones, JJ., dissenting); Crow Tribe v. United States, 284 F.2d 361, 374 (Ct. Cl. 1960) (Whitaker & Jones, JJ., dissenting), *cert. denied*, 366 U.S. 924 (1961); Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926, 957 (Ct. Cl. 1959) (Whitaker & Jones, JJ., dissenting).

266. 479 F.2d 1369 (Ct. Cl. 1973), *cert. denied sub nom.* Wichita Indian Tribe v. United States, 416 U.S. 936 (1974).

267. Treaty of Oct. 18, 1865, art. II, 14 Stat. 717, 718.

268. See text accompanying note 260 *supra*.

holding that the treaty recognized title.[269] The court gave little weight to the rule of liberal construction of treaties with Indian tribes.[270] Rather, the court concluded that because the area granted was "subject to redefinition and diminution at the will of the President," Congress had not intended to recognize title.[271]

Subsequently, in *Strong v. United States*,[272] the court, without discussing the language of the relevant treaties, held that title had not been recognized because extrinsic evidence revealed an intent on the part of the government to rid the area of Indians. The Court, in a manner analogous to *Tee-Hit-Ton*, disregarded both the general course of conduct between the Indian tribes and the government and the specific language of the treaty. Considering relevant only the intent of Congress to take the land away, the Court noted that although the government had negotiated with the Indians for cessions, the negotiations were a sham, thus justifying the Commission's conclusion that the intent of the government was "unequivocally the opposite of what is required to establish recognized title."[273] *Strong* thus subverted the principles of treaty interpretation followed by previous cases.

The inconsistent results in these cases demonstrate the failings of the distinction created in *Tee-Hit-Ton*. The inability of that distinction to withstand analytic scrutiny has meant that courts confronted with the issue of recognition have had little guidance in making their decisions. As a consequence, even a tribe fortunate enough to possess a ratified treaty with the United States does not necessarily acquire recognized title.[274] Additionally, a tribe found to have recognized Indian

269. 479 F.2d at 1373-76.

270. *See, e.g.*, Peoria Tribe v. United States, 390 U.S. 468, 472-73 (1968) (quoting Peoria Tribe v. United States, 369 F.2d 1001, 1006-07 (Ct. Cl. 1966)); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Jones v. Meehan, 175 U.S. 1, 10-12 (1889). *See also* 1942 HANDBOOK, *supra* note 79, at 37-38; Wilkinson & Volkmar, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601, 617-20 (1975).

271. 479 F.2d at 1373. If the court had followed the reasoning of *Oneida Tribe*, discussed note 263 *supra*, it would have held the title recognized, following the Supreme Court's 1938 decision in United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938). The tribe in *Klamath & Moadoc Tribes* had been compensated for a fifth amendment taking even though the reservation was subject to redefinition by the president. *Id.* at 121-22 (construing Treaty with the Klamath & Moadoc Tribes, Oct. 18, 1864, 16 Stat. 707, 708) (land to be set aside "until otherwise directed by the President").

272. 518 F.2d 556 (Ct. Cl. 1975).

273. *Id.* at 564 (quoting Strong v. United States, 31 Ind. Cl. Comm. 99, 107 (1973)).

274. *See, e.g.*, Strong v. United States, 518 F.2d 556 (Ct. Cl. 1975); Sac & Fox Tribe v. United States, 315 F.2d 896 (Ct. Cl. 1963).

title from a treaty in a pre-*Tee-Hit-Ton* case has no assurance the treaty will be held to grant recognized title in the *Tee-Hit-Ton* sense.[275]

Tee-Hit-Ton and the Lone Wolf Doctrine

Although the Court in *Tee-Hit-Ton* may have wanted to avoid a rule requiring compensation for the taking of aboriginal land, a rule denying compensation for a taking of *any* Indian land would have been morally and politically unacceptable, especially in light of the solemn promises made in many Indian treaties. As Justice Black was to say later: "Great nations, like great men, should keep their word."[276] In many ways, this statement reflects the genius of Justice Reed's characterization of recognized title as a more protected type of Indian ownership; in expressly denying aboriginal land fifth amendment protection, *Tee-Hit-Ton* implicitly affirmed solemn treaty promises to protect Indians' occupancy of their retained reservation land.

Nonetheless, judicial deference to congressional authority has its limits, particularly when the actions of Congress infringe upon constitutional rights.[277] *Tee-Hit-Ton*, however, may have inadvertently furnished Congress with a justification for such unconstitutional activity. Considered alone, *Tee-Hit-Ton*'s distinction between aboriginal and recognized title appears to result in at least recognized title being protected under the fifth amendment. But, considered in conjunction with other cases, even this minimal protection may not be afforded, thereby leaving both aboriginal and recognized title unprotected from fifth amendment confiscations. In the recent case of *Sioux Nations v. United States*,[278] the government advanced such a claim, based on *Lone Wolf v. Hitchcock*,[279] a 1903 case most frequently cited for the proposition that Congress may unilaterally abrogate Indian treaties, as it can abro-

275. *See* Quapaw Tribe v. United States, 120 F. Supp. 283, 286 (Ct. Cl. 1954) (court assumed existence of treaty had an impact on amount of compensation; no holding on recognition). The tribe also may not be able to rely on collateral estoppel, because in a separate claim between the same parties, collateral estoppel attaches only to an issue actually litigated and necessary to the decision. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). The government could argue that the pre-*Tee-Hit-Ton* case was decided on the assumption that there was only one kind of title and that the only determination made was with respect to acknowledgment. Therefore, the issue as to whether title had been recognized in the *Tee-Hit-Ton* sense had never been raised, litigated, and adjudicated.

276. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

277. *Cf.* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-85 (1977) (judicial review appropriate to determine whether a congressional scheme of distribution to tribe members violated equal protection component of fifth amendment).

278. 48 U.S.L.W. 4960 (1980).

279. 187 U.S. 553 (1903). *Lone Wolf* has the dubious distinction of having been referred to as "the Indian's *Dred Scott* decision." Sioux Nation v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd*, 48 U.S.L.W. 4960 (1980).

gate any treaty with a foreign nation.[280] The government argued in *Sioux Nation* that Congress has virtually unreviewable power[281] to dispose of even recognized title, as long as Congress acts in the best interests of the tribes.[282]

In *Lone Wolf* the Supreme Court held that Congress could abrogate the provisions of an Indian treaty by passing a law in conflict with the treaty.[283] If the fifth amendment required compensation upon extinguishment of aboriginal title, the *Lone Wolf* doctrine would present no obstacle to cases involving congressional abrogation of a treaty recognizing tribal title to land; the tribe could still receive compensation for the government's taking of aboriginal title. But because *Tee-Hit-Ton* does not require compensation for the extinguishment of purely aboriginal title and because *Lone Wolf* authorizes the abrogation of treaties, *even those recognizing title*, the two cases in conjunction formed the basis of the government's arguments in *Sioux Nation* that congressional action in Indian land compensation cases was a political

280. *See, e.g.*, 1942 HANDBOOK, *supra* note 84, at 34-35. *Lone Wolf* was directly on point in *Sioux Nation* because the tribes in each case alleged a government breach of identical treaty language. *Compare* Treaty with the Sioux at Fort Laramie, April 29, 1868, art. XII, 15 Stat. 635, 639 *with* Treaty with the Kiowas & Commanches at Medicine Lodge, Oct. 21, 1867, art. XII, 15 Stat. 581, 585.

281. Brief for United States at 57-59 & n.49, United States v. Sioux Nation, 48 U.S.L.W. 4960 (1980) (urging court to apply minimal rationality standard of Williamson v. Lee Optical, 348 U.S. 485 (1955)). See note 284 & accompanying text *infra*.

282. *Id.* at 52-57. The Court of Claims in *Sioux Nation* had rejected the government's argument, holding that *Lone Wolf* addressed only the issue of the Court's power to enjoin the enforcement of a statute appropriating Indian lands and not whether the taking would be compensable under the fifth amendment. The majority thus awarded the tribe over $1,000,000 in damages. 601 F.2d 1157, 1169-70 (Ct. Cl. 1979). Both the concurring and dissenting judges argued that *Lone Wolf* had involved a fifth amendment taking. *Compare id.* at 1173-74 (Nichols, J., concurring) *with id.* at 1176-77 (Bennett & Kunzig, JJ., dissenting). The Supreme Court in affirming found that a fifth amendment taking had in fact occurred. 48 U.S.L.W. at 4974. See note 284 & accompanying text *infra*.

283. 187 U.S. at 566. *Lone Wolf* involved a suit by a tribe, whose land would be regarded as treaty-recognized under the rule for recognition in *Tee-Hit-Ton*, to enjoin a survey of land ceded by fewer than three-fourths of the adult male members of the tribe in violation of the Treaty of Medicine Lodge. 15 Stat 581, 582 ("set apart for the absolute and undisturbed use and occupation of the tribes"). The Court of Claims later stated that the Medicine Lodge treaty had recognized title to the land reserved in that treaty. United States v. Kiowa, Comanche & Apache Tribes, 163 F. Supp. 603, 606 (Ct. Cl. 1958), *aff'g* 1 Ind. Cl. Comm. 528 (1951) (liability decisions); *cf.* United States v. Kiowa, Comanche & Apache Tribes, 479 F.2d 1369, 1375 (Ct. Cl. 1973) (dicta).

Justice Reed did not rely on *Lone Wolf* in *Tee-Hit-Ton*, although it contained much language favorable to his views. For example, *Lone Wolf* distinguished several "sacred-as-fee-simple" cases by pointing out that none of them involved a direct challenge to the sovereign's power to administer property of the Indians. *Id.* at 564-65.

question not subject to judicial review and that recognized title abrogated pursuant to such congressional action was not compensable under the fifth amendment.

The Supreme Court's decision in *Sioux Nation* rejected the government argument on the reach of governmental power by formulating a standard of judicial review over the government's action in disposing of recognized title land. The Court provided that a loss of recognized title land would not be regarded as a taking only where Congress makes a good faith attempt to provide the Indian ward with property that is equivalent to the last recognized title land.[284] Although the standard set forth by the Supreme Court in *Sioux Nation* for ascertaining when a taking has occurred relies on *Lone Wolf* to formulate a different rule in Indian confiscation cases than is used when non-Indian land is taken by eminent domain, the Court's rejection of the government's position that congressional power over Indian land is not subject to judicial review nonetheless is to be applauded.

The decision in *Sioux Nation* indicates the Supreme Court would reject any future arguments by the government that it may break a treaty of recognition with impunity. Whatever the effect of *Sioux Nation* on future land claims involving recognized title, the government's argument in *Sioux Nation* was not unusual in its use of *Tee-Hit-Ton* as exemplifying the extent of congressional power over Indians.[285] For example, a federal court recently reasoned that *Tee-Hit-Ton* gave Con-

284. United States v. Sioux Nation, 48 U.S.L.W. 4960 (1980). The Court rejected the Court of Claims' analysis that had distinguished *Lone Wolf* because it had involved an injunction. See note 283 *supra*. Instead, the Court disapproved the portion of *Lone Wolf* which characterized congressional actions in confiscation cases as a political question, stating that an earlier case had "discredited that view in taking cases." *Id.* at 4972 (citing Deleware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

The Court of Claims had relied on the *Fort Berthold* good faith rule in developing a standard for determining when a confiscation of Indian land is a taking. *See* Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968). For a criticism of *Berthold*, see Friedman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U.L. REV. 26 (1970). The Supreme Court affirmed the Court of Claims, but arguably narrowed the good faith rule by stressing that the courts must look to adequacy of consideration and by reducing the importance of the government's subjective good faith in confiscation cases. *See* 48 U.S.L.W. 4972-73 n.30.

285. *Sioux Tribe* does not limit the application of this argument except in cases involving recognized title. "The principles . . . set forth . . . are applicable only to instances in which 'Congress by treaty or other agreement has disclared that thereafter Indians were to hold the lands permanently.' " 48 U.S.L.W. at 4972 n.29 (quoting Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277 (1955)). The Court expressly reaffirmed the continued validity of *Tee-Hit-Ton* in "unrecognized" and "aboriginal" title cases. 48 U.S.L.W. at 4972 n.29.

gress the power to extinguish accrued tort claims by retroactively extinguishing aboriginal title.[286]

Retroactive Extinguishment and Derivative Claims

After *Tee-Hit-Ton*, a tribe having aboriginal title to land had no legal claim for damages against the government under the fifth amendment.[287] In the 1960's and 1970's, however, tribal attorneys, spurred by the new generation of public interest attorneys,[288] began avoiding the rule in *Tee-Hit-Ton* by pressing new claims, none of which involved a

286. United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1030-31 (D. Alaska 1977), *aff'g*, 612 F.2d 1132 (9th Cir. 1980).

287. The government may condemn land by two methods. First, it may act directly by bringing suit in the federal district court. 28 U.S.C. § 1358 (1976) (original jurisdiction over all federal proceedings condemning real estate). To do so, the government must act under a statute granting the particular officer of the government authority to exercise eminent domain. *See, e.g.*, 16 U.S.C. §§ 517, 577 (1976) (national forests); *id.* § 814 (condemnation power delegated to licensees under the Federal Power Act). *See generally* 6A NICHOLS, *supra* note 124, § 27.1, at 27-4 to 27-5. These statutes provide for just compensation. *See, e.g.*, 16 U.S.C. § 517a (1976) (national forests); *id.* § 814 (Federal Power Act) (by implication). Thus, if the government were to condemn Indian land under one of these statutes, the tribe would receive just compensation. *See, e.g.*, FPC v. Tuscarora Indian Nation, 362 U.S. 99, 115, 136 (1960) (licensee of FPC could condemn fee simple reservation despite treaty promise to "forever secure and guaranty" the reservation land). *Tee-Hit-Ton* should not be held to affect the right to compensation under such statutes because they represent the congressional directive to pay just compensation as required by *Tee-Hit-Ton*.

Second, the government may take Indian land without formal condemnation proceedings, although a tribe may have an action for inverse condemnation. 28 U.S.C. §§ 1346(a)(2) (1976) (district court has concurrent jurisdiction with Court of Claims if amount does not exceed $10,000); *id.* § 1491 (Court of Claims jurisdiction). *See generally* 6A NICHOLS, *supra* note 124, § 29.1. *Tee-Hit-Ton* would preclude a tribe holding aboriginal title from bringing an inverse condemnation action in the Court of Claims.

288. *See generally* BROKEN TREATIES, *supra* note 223, at 23-41; Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 ARIZ. ST. L.J. 161, 190-92, 196-98. Before the 1960's the emphasis in Indian law had been on claims work, because so many tribes had pre-1946 claims to prosecute. *See* BROKEN TREATIES, *supra* note 223, at 207-28. The attorneys were willing to take on protracted litigation on a contingency fee basis because the financial rewards could be very high in a successful case. *Id.* at 226. Although the statutory maximum fee for such cases was 10% of any award obtained, 25 U.S.C. § 70n (1976), the money judgment could run into the millions of dollars. See notes 233-34 *supra*. This system worked very well for the pre-1946 claims. *But see* Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 ARIZ. ST. L.J. 161, 187-90, 194. Tribes with no resources were able to hire competent lawyers to prosecute their claims before the commission. The system did not work as well when the tribe did not have a claim against the United States cognizable in the Court of Claims. Such would be the case when a tribe either wished to sue third parties or looked for equitable relief instead of money damages. *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1235 (1975); *Indian Land Claims in Maine and Elsewhere: A Long, Costly Path*, AM. INDIAN J., Dec. 1978, at 45-47. A tribe without resources would find it very hard to engage counsel when the chance of success seemed slim or when the judgment would not produce a fee. In addition, attorneys engaged primarily in claims work tended to

direct claim against the federal government for a fifth amendment taking of tribal land. Some tribes attempted to sue third parties for trespasses on their unextinguished aboriginal land[289] while others, barred from asserting a takings claim, began to use the trust relationship doctrine[290] as a source of tribal rights against the government. Traditionally, the trust relationship theory had been cited by the courts as a source of federal power over Indian affairs.[291] Tribal attorneys, arguing that the theory also imposed fiduciary obligations on the government, began asserting the doctrine as a means of requiring the federal government to be accountable to its tribal beneficiaries.[292] In land cases, for example, those espousing the trust theory conceded that the government could extinguish Indian title with no duty to pay compensation, but argued that Congress must act in the tribe's best interest.[293]

At the same time the trust relationship theory was developing as a source of tribal rights, tribal attorneys in the East also began to rely on

accept the *Tee-Hit-Ton* rule as precluding any kind of claims based on aboriginal title in any forum.

Public interest attorneys, however, were willing to represent Indian claims without the incentive of large fees and in areas other than claims against the United States government for money damages. See text accompanying note 201 *supra*. Despite *Tee-Hit-Ton*, they began to develop new theories to protect Indian land from arbitrary action by the government. *See, e.g.*, Chambers, *supra*, at 1218-19 & n.34, 1235-38 (trust relationship protects Indian land); Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 ARIZ. ST. L.J. 161, 187-88 & n.48 (new theories necessary because of plenary power).

289. *See, e.g.*, United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976); United States v. Atlantic Richfield, Co., 435 F. Supp. 1009 (D. Alaska 1977).

290. See cases cited note 296 *infra*.

291. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903) (treaty abrogation power); United States v. Kagama, 118 U.S. 375, 377-78 (1886) (plenary power doctrine) (upholding constitutionality of the Major Crimes Act); Fort Berthold Reservation v. United States, 390 F.2d 686, 691-70 (Ct. Cl. 1968) (good faith may convert a fifth amendment taking into an act of guardianship).

292. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975) (duty to represent Indian tribe in Nonintercourse Act claim); Manchester Band of Pomo Indians v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) (duty to invest tribal trust funds); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (duty to preserve water for tribal lake). *See generally* Chambers, *supra* note 288, at 1234-38.

293. *See* Edwardsen v. Morton, 369 F. Supp. 1358 (D.D.C. 1973) (action against Secretary of State for breach of trust in allowing third party trespasses); Chambers, *supra* note 288, at 1218-19 & n.34, 1235-38; Memorandum to the Honorable William B. Gunter from Archibald Cox at 19-20 (April 29, 1977) (regarding the Maine mediation) (on file with *The Hastings Law Journal*). Portions of the Memorandum are reprinted in D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW, CASES AND MATERIALS 249 (1979). *But cf.* United States v. Mitchell, 100 S. Ct. 1349 (1980) (a tribe may not sue the United States for breach of fiduciary duty to manage timber held in trust by the government absent an express congressional assumption of liability for failure to fulfill such duties).

the Nonintercourse Act.[294] This statute, originally enacted in 1790, expressly invalidates all conveyances of Indian land made without federal consent.[295] Basing their claims on the Nonintercourse Act and the trust theory, tribes initiated suits against third parties in possession of land acquired in violation of the statute.[296]

Although these claims against third parties were not cognizable in the Court of Claims,[297] in 1973 the Supreme Court opened the federal courts to these suits in *Oneida Indian Nation v. County of Oneida*.[298] The Court in *Oneida* held that the tribe's claim against the county for the fair rental value of land sold to the state allegedly in violation of the Nonintercourse Act stated a controversy arising under the laws of the United States. The complaint, based on the doctrine of discovery, was found adequately to allege a violation of federal law.[299] The tribe thus was able to invoke the jurisdiction of the district court.

Oneida not surprisingly precipitated a host of Nonintercourse Act suits in federal courts. Tribes filed suits seeking invalidation of conveyances based on void purchases by the states,[300] fair rental value for use

294. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 375-76 (1st Cir. 1975).

295. 25 U.S.C. § 177 (1976). "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.*

296. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976). Tribes also brought suit to require the federal government, as trustee, to represent them in their aboriginal land claims against third parties. *See, e.g.*, Joint Tribal Council of Passamaquoddy Tribe v. Morton, 538 F.2d 370 (1st Cir. 1975); Edwardsen v. Morton, 369 F. Supp. 1358 (D.D.C. 1973). *See generally* Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 M.L. REV. 17 (1979); O'Toole & Tureen, *State Power and the Passamaquoddy Tribe: "A Gross National Hypocrisy?"*, 23 M.L. REV. 1 (1971); Paterson & Roseman, *A Reexamination of Passamaquoddy v. Morton*, 31 M.L. REV. 115 (1979); Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 AM. U.L. REV. 695 (1978).

297. While the claims may have been brought in state courts, they often proved to be inhospitable forums. *See, e.g.*, St. Regis Tribe of Mohawk Indians v. State of New York, 5 N.Y.2d 24, 152 N.E.2d 411, 177 N.Y.S.2d 289 (1958), *cert. denied*, 359 U.S. 910 (1959) (Nonintercourse Act not applicable to State of New York); *cf.* McClanahan v. Arizona State Tax Comm'n, 14 Ariz. App. 452, 606, 484 P.2d 221 (1971), *rev'd*, 411 U.S. 164 (1973) (state may not tax income of Indian earned on the reservation).

298. 414 U.S. 661 (1974).

299. *Id.* at 666. In addition to opening the federal courts to Nonintercourse Act cases, *Oneida* may have signaled a willingness on the part of the present Court to reconsider *Tee-Hit-Ton*. See notes 355-59 & accompanying text *infra*.

300. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979) (action for possession unsuccessful because unable to prove status as a tribe); Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976) (action for possession); Narragansett

of the land,[301] or for damages for trespass based on interference with the tribe's possessory rights.[302] Suits for ejectment and damages also were filed by the federal government as guardian of several tribes.[303]

Although trial proceedings have begun in only one case,[304] there are indications that many of these claims are likely to be successful.[305] Furthermore, because law suits cloud title to millions of acres of land in at least eight states, the federal and state governments are under ex-

Tribe v. Southern R.I. Land Dev. Co., 418 F. Supp. 798 (D.R.I. 1976) (action for possession).

301. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977).

302. Miccosukee Tribe v. State of Florida, No. 79-253-Civ. JAG (S.D. Fl., filed Jan. 17, 1979).

303. The United States filed protective claims on behalf of both the Passamaquoddy and Penobscot tribes in Maine in February of 1977. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 373 (1st Cir. 1975). These suits have been stayed pending settlement negotiations. *See* Vollmann, *A Survey of Eastern Indian Land Claims: 1970-1979*, 31 M.L. REV. 5, 10 (1979) [hereinafter cited as Vollmann]. In addition, Congress extended the statute of limitations until April 1, 1980, to prevent the possibly needless expense to the government of filing hundreds of protective actions. 28 U.S.C. § 2415(b) (Supp. II 1978). The Interior Department meanwhile has attempted to bring about settlements of the claims. *See* Vollmann, *supra*, at 12-14.

304. *See* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977). The Interior Department has been involved in eight eastern land claim suits, including the claims of the Penobscots and Passamaquoddies in Maine; the Oneidas, Cayugas, and St. Regis Mohawk tribes in New York; the Catawbas in South Carolina; the Chitimacha tribe in Louisiana; and the Narragansetts of Rhode Island. *See* Vollmann, *supra* note 303, at 11-14.

305. The courts in the First Circuit have adopted a four step test to establish a Nonintercourse Act claim. *See* Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977). First, the plaintiff must show that the claimant tribe is a tribe within the meaning of the Nonintercourse Act as defined by Montoya v. United States, 180 U.S. 261, 266 (1901). Second, the tribe must show that its tribal land was covered by the Act. Third, the tribe must prove the United States has never approved the alienation of the land. Fourth, the tribe must show that the trust relationship between the federal government and the tribe has never been terminated. If the plaintiffs are successful in establishing these elements, the defendants may raise no state law defenses, such as laches, adverse possession, or bona fide purchaser for value. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 542 (N.D.N.Y. 1977). This is true even in cases brought by the tribe itself, for "[i]t would be anomalous to permit the government, as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf." *Id.* at 543. Consequently, once the tribe proves each of the four elements constituting its claim, it has won its case. *See* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977), *aff'd*, 592 F.2d 575 (1st Cir. 1979); Narragansett Tribe v. Southern R. I. Dev. Corp., 418 F. Supp. 798 (1976); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 656-57, *aff'd*, 528 F.2d 370 (1st Cir. 1975). In cases in which the tribe itself has sued, the fourth element—continuing existence of a trust relationship—need not be shown. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 543 (1977). *Accord*, Schaghticoke Tribe v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976); Narragansett Tribe v. Southern R.I. Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).

treme pressure to propose settlement agreements.[306] In 1977, President Carter apppointed former Georgia Supreme Court Justice William B. Gunter to mediate the largest of the claims, that of the Penobscots and Passamaquoddies to over 12 million acres in Maine. Although no final settlement has been reached in that case, the State of Maine and the tribes recently reached a tentative agreement which would give $81,500,000.[307] In addition, the Narragansett and Cayuga tribes have almost finalized settlements of their claims.[308] An Interior Department attorney familiar with the negotiations recently expressed confidence that all the claims will be settled amicably in the near future.[309]

A recent case, however, indicates that the newly asserted derivative claims are not immune from the influence of *Tee-Hit-Ton*. In *United States v. Atlantic Richfield Co.*[310] (*ARCO*), a federal district court construed *Tee-Hit-Ton* to authorize not only congressional extinguishment of tribal derivative claims based on presently held aboriginal title, but also congressional extinguishment of previously accrued derivative claims.[311] *ARCO* thus interpreted *Tee-Hit-Ton* as recognizing Congress's authority to extinguish *retroactively* rights based on aboriginal title.

The following section analyzes two cases arising from Alaska natives' claims for trespass violations. Both cases address the authority of Congress to extinguish tribal derivative claims, with particular emphasis on the *ARCO* decision. This analysis is followed by an examination of the validity and propriety of congressional authority to extinguish retroactively either aboriginal title or rights based on aboriginal title.

Edwardsen and ARCO—Two Views of Congressional Power to Extinguish

An understanding of the Alaskan trespass claims requires familiarity with both the land selection provision of the Alaska Statehood Act[312] and the extinguishment provision of the Alaska Native Claims Settlement Act.[313] When Alaska was admitted into the Union in 1959,

306. *See* Vollmann, *supra* note 303, at 12-16.

307. Washington Post, April 4, 1980, at A5. The agreement will not become final until Congress agrees to assume the entire financial burden and enacts the settlement into law. Because of the current state of the economy, Maine's attorney general predicted "a very tough battle." *Id.* at A7.

308. *See* Vollmann, *supra* note 303, at 13 & n.41.1 (Cayuga), 13-14 & nn.43, 43.1 (Narrangansett).

309. *Id.* at 16.

310. 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).

311. *Id.* at 1029-30.

312. Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339.

313. 43 U.S.C. §§ 1601-1624 (1976 & Supp. II 1978).

the Statehood Act permitted the state to choose approximately 100,000,000 acres of "vacant, unappropriated, and unreserved" public land.[314] The statutory scheme required the Secretary of the Interior to approve all such land selections. Once the Secretary had tentatively approved the selections, however, the state could lease or sell the land conditioned upon his final approval.[315] During the selection period, Alaska natives claimed unextinguished aboriginal title to most of Alaska's 272,000,000 acres. In 1966, Secretary Udall responded by imposing a freeze on further tentative approvals until the extent of the claims could be ascertained. Tentative approvals already had been issued, however, for state selections in the Arctic Slope, where Prudhoe Bay was located. When oil deposits were discovered in Prudhoe Bay, the state immediately leased the area to oil companies for more than $900,000,000.[316] Although previously approved land was lost by the lease, the land freeze did preserve the unselected native land and, more importantly, spurred Congress to resolve the claims.[317]

Because *Tee-Hit-Ton* allowed Congress to extinguish the native's aboriginal title without compensation, native groups lobbied Congress to fulfill a moral obligation to recompense them. Congress responded in 1971 by enacting the Alaska Native Claims Settlement Act.[318] The Settlement Act extinguished all aboriginal title to Alaska land, while creating a compensation scheme giving the natives over $950,000,000. Furthermore, the Settlement Act gave the natives the right to select 38,000,000 acres of formerly aboriginal land to be patented in fee to native corporations set up under the statute.[319]

Section 1603 of the Settlement Act[320] purported to extinguish all

314. Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339.

315. *Id.* § 6(g), 72 Stat. at 340-41.

316. *See* Edwardsen v. Morton, 369 F. Supp. 1359, 1364 (D.D.C. 1973).

317. *Id.* at 1364-65.

318. 43 U.S.C. §§ 1601-1624 (1976 & Supp. II 1978). *See generally* Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 U.C.L.A.-ALASKA L. REV. 89 (1979).

319. 43 U.S.C. §§ 1605, 1611 (1976 & Supp. II 1978).

320. "(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

"(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

"(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and

claims to aboriginal land and all claims against anyone based on aboriginal title. Rather than extinguishing claims to aboriginal lands as of the date of the Settlement Act, however, the statute explicitly ratified all prior conveyances and tentative approvals of aboriginal lands made by the Secretary of the Interior pursuant to the Statehood Act. Hence, the Settlement Act retroactively extinguished aboriginal title. With respect to retroactive extinguishment of claims based on that aboriginal title, the statute was unclear, stating only that the claims "are hereby extinguished."[321]

Edwardsen v. Morton

The first of the Alaska trespass suits, *Edwardsen v. Morton*,[322] was brought by Arctic Slope natives. The crux of the complaint was that the natives' oil-rich land in the Arctic Slope had never passed rightfully to the State of Alaska when the state chose their land during the selection period. They argued first that the Settlement Act authorized the Secretary of the Interior to approve selections only of "vacant, unappropriated, and unreserved [land]," not aboriginal land.[323] The natives alleged that because the Secretary of the Interior acted in excess of his authority, the tentative approvals granting the natives' aboriginal land were void. Second, the natives argued that the activities of oil and construction companies in prospecting for and exploiting oil deposits, being unauthorized, were trespasses. Because the federal government had been responsible for these illegal entrances by wrongfully issuing tentative approvals to land selections made in the native-claimed area, the natives argued that the federal government had breached its fiduciary duty to protect their interests.[324] Among the damages claimed for this breach of duty was compensation " 'for all monies received by the State of Alaska and other third persons' " resulting from the allegedly improper approvals of state selections.[325] The defendant moved for summary judgment, arguing that section 1603 of the Settlement Act had extinguished all the claims.[326]

occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished." *Id.* § 1603.

321. *Id.*
322. 369 F. Supp. 1359 (D.D.C. 1973).
323. *Id.* at 1366-67.
324. *Id.* at 1367.
325. *Id.* at 1368.
326. *Id.*

The court in *Edwardsen* distinguished between those claims directly challenging title to land[327] and those derivative claims based on aboriginal ownership.[328] In addressing the native's claims directly challenging the extinguishment of aboriginal title, the court first noted that the Secretary of the Interior had acted in excess of his authority in granting the tentative approvals. Despite this lack of authority, however, the court held that Congress could validate the grants by retroactively authorizing the actions of its agents made outside the scope of their authority.[329] Accordingly, the court reasoned that the Settlement Act had extinguished all claims directly challenging the extinguishment of aboriginal title. Summary judgment was therefore granted for the defendant on all the claims that would have resulted in the cancellation of any leases or conveyances made under the Settlement Act.[330]

The court refused to grant summary judgment for the defendant on the plaintiff's derivative breach of fiduciary duty claims: reasoning that despite language in section 1603(c) extinguishing claims based on aboriginal title,[331] the plaintiffs had legitimate claims for trespass against the construction and oil companies for interfering with their possessory rights to the land.[332] In addition, if the plaintiffs could prove that the physical intrusions on their land were caused by the defendant's actions in approving the leases, then the defendant had breached its fiduciary duty to the plaintiffs to protect their land against these intrusions.[333] The claims, accruing before the date of the Settlement Act, were therefore found to be "vested property rights protected by the fifth amendment."[334] The court's construction of section 1603(c)

327. *Id.* at 1377.

328. *Id.* at 1378-79.

329. *Id.* at 1377.

330. *Id.* at 1378.

331. See note 320 *supra*.

332. The court noted that trespass actions protect those in possession of the land. In addition, the defendants could not escape liability by asserting that they mistakenly believed they were entitled to enter, or by asserting that they had permission to enter. 369 F. Supp. at 1371 (citing RESTATEMENT (SECOND) OF TORTS § 164 (1965)). *See also* W. PROSSER, THE LAW OF TORTS § 13, at 68-69 (4th ed. 1971).

333. Edwardsen v. Morton, 369 F. Supp. 1359, 1378-79 (D.D.C. 1973).

334. *Id.* at 1379 (citing Coombes v. Getz, 285 U.S. 434, 448 (1932); Ettor v. City of Tacoma, 228 U.S. 148 (1913)). Although the opinion did not state what clause of the fifth amendment would be violated, the court cited cases relying on the due process clause. Thus, it appears that had the court faced an explicit provision extinguishing accrued claims based on aboriginal title, it might have struck down the provision because it violated a substantive guarantee of the due process clause, rather than the taking clause. This argument recently has been raised in the settlement negotiations in the Maine case. See note 307 & accompanying text *supra*.

thus avoided the constitutional difficulties attendant to a broader interpretation.[335]

United States v. Atlantic Richfield Co.

As part of a settlement agreement between the parties in *Edwardsen*, the federal government brought suit in federal court against the State of Alaska and 140 corporate defendants for pre-Settlement Act trespasses on the Arctic Slope. Contrary to the approach taken in *Edwardsen*, however, the trial court in *United States v. Atlantic Richfield Co.*[336] (*ARCO*) held that section 1603(c) did extinguish all derivative tort claims, including those occurring before the Settlement Act.[337] The court first held that section 1603(a), by extinguishing aboriginal title as of the date of the pre-Settlement Act approvals, also extinguished any trespass claims based on the entries "authorized" by the invalid tentative approvals.[338] The natives also had asserted trespass claims against the defendants for entries on the North Slope that had not been authorized by a pre-Settlement Act approval and, therefore, were not covered by section 1603(a). Nevertheless, the court held these trespasses also to have been extinguished by section 1603(c).[339] In further contrast to *Edwardsen*, the court ruled that this extinguishment did not violate the fifth amendment because "trespass claims based on unrecognized aboriginal title are not protected property interests and, therefore, the Settlement Act's extinguishment of Native trespass claims against third parties presents no constitutional problem."[340] Relying on *Tee-Hit-Ton*, which held that the federal government can extinguish aboriginal title without compensation, the court reasoned:

> It follows that a claim of a past interference with aboriginal use and occupancy is not a property interest and therefore such claim may also be terminated by Congress at will without compensation. Since the underlying interest . . . is not constitutionally protected, trespass or other claims of interference with the underlying interest likewise fall outside of constitutional protection.[341]

The court noted that its holding did not preclude Indians having aboriginal title from being able to invoke the judicial aid to prevent interference with their possessory rights; rather, the extent to which the courts would protect aboriginal title against third party intrusion was a

335. 369 F. Supp. at 1379.
336. 435 F. Supp. 1009 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980).
337. *Id.* at 1025-29.
338. *Id.* at 1025.
339. *Id.* at 1025-26.
340. *Id.* at 1029-30.
341. *Id.* at 1030.

question to be decided in a proper case.[342] The federal government and the Inupiat Community, intervenors in the district court, appealed this decision to the Ninth Circuit, which only recently affirmed the lower court's holding that the Native Claims Settlement Act had extinguished retroactively all the native trespass claims.[343] The court of appeal refused to reach the constitutional issue, however, because it was not properly before the court in a trespass claim against private parties.[344]

The constitutional issue will eventually have to be decided, because the Inupiat Community, intervenors in the *ARCO* case, are currently litigating a fifth amendment taking action in the court of claims.[345] In resolving that question, the court of claims will surely pay close attention to the reasoning in the district court opinions of both *ARCO* and *Edwardsen*.

Analysis

The district court opinions in *ARCO* and *Edwardsen* represent two competing views as to the scope of the *Tee-Hit-Ton* decision. The court in *Edwardsen* read *Tee-Hit-Ton* as not permitting Congress to destroy accrued causes of action for breach of fiduciary duty to protect aboriginal land. The lower court in *ARCO*, however, interpreted *Tee-Hit-Ton* more broadly, holding no claim based on or related to aboriginal title is a property right.

The degree to which the district court in *ARCO* was willing to extend the rule of *Tee-Hit-Ton* is surprising. Justice Reed, author of *Tee-Hit-Ton*, recognized the proper limits of *Tee-Hit-Ton* when he stated that aboriginal title is "not a property right but . . . a right of occupancy which the sovereign grants and protects against intrusion by third parties."[346] Although the district court in *ARCO* conceded that for some third party intrusions the government may provide a remedy "to effectuate the United States' policy of protecting Indian occupancy against third party intrusion,"[347] it concluded that no such provision

342. *Id.* at 1030-31.

343. 612 F.2d at 1134.

344. *See id.* at 1139. The district courts in *ARCO* and *Edwardsen* had reached the constitutional issue by applying the rule that statutes should be construed to avoid constitutional questions. *Compare* Edwardsen v. Morton, 69 F. Supp. 1359, 1379 (D.D.C. 1973), *with* United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1029 (D. Alas. 1977).

345. Inupiat Community v. United States, No. 77-596 (Ct. Cl., filed Dec. 16, 1977).

346. 348 U.S. at 279.

347. 435 F. Supp. at 1030.

existed in that case.[348] Moreover, the likelihood of relief in any case following the rationale of the district court in *ARCO* is slim, as evidenced by the court's observation that no decision had ever squarely held that aboriginal title, in and of itself, gave the Indian owner any kind of property right, including a right sufficient to sue for trespass.[349] Thus, from the narrow holding in *Tee-Hit-Ton* that aboriginal title is not a property right protected against seizure by the sovereign, the district court in *ARCO* concluded that aboriginal title is not a property right for any reason.[350] Because the core of a property right is the right to exclude,[351] if the aboriginal owner cannot keep others off his land, he has no property at all; any rights of the aboriginal owner to use the land would be meaningless.

The interpretation of *Tee-Hit-Ton* by the district court in *ARCO* may have as strong a potential effect on derivative claims as *Tee-Hit-Ton* had on direct claims. Under this reasoning, even a tribe holding extinguished aboriginal title to land may be deemed not to have a sufficient property right to enforce claims for third party intrusions. Hence, tribes occupying executive order reservations or other land reserved by treaties that did not recognize title in the *Tee-Hit-Ton* sense would have no power to exclude trespassers or to enforce the federal government's fiduciary duty to protect Indian occupancy. By undermining the derivative claims and authorizing activity in violation of the tribe's right to exclude third parties, the rationale of the lower court in *ARCO* potentially jeopardizes the minimal protection aboriginal title has traditionally received.

Retroactive Extinguishment: Remaining Questions

Those supporting congressional authority to extinguish tribal rights retroactively can be expected to rely heavily on the approach taken by the lower court in *ARCO*. For example, in recent eastern tribal land claims litigation, the American Land Title Association

348. *Id.* at 1030-31.

349. *Id.* at 1029-30. The court distinguished two cases in which tribes successfully asserted trespass claims as involving "more than mere unrecognized aboriginal title" because the tribes in those cases had occupancy rights "recognized in an Executive Order Reservation." *Id.* at 1030 n.66. Executive orders, however, do not create recognized title. See text accompanying notes 236-50 *supra*. Both cases also permitted recovery for trespass to purely aboriginal land before the executive order reservations were created. *See* United States *ex rel.* Hualpai Indians v. Sante Fe Pac. R.R., 314 U.S. 339 (1941) (discussed in text accompanying notes 186-89 *supra*); United States v. Southern Pac. Transp. Co., 543 F.2d 676 (9th Cir. 1976).

350. 435 F. Supp. at 1030-31.

351. *See* 2 NICHOLS, *supra* note 124, § 5.1(1), at 5-8 (quoting Jeremy Bentham).

(ALTA) urged that Congress rely on its "plenary and absolute power" to settle the claims unilaterally.[352] In so urging, ALTA submitted to Congress proposed legislation, entitled "Model Statutory Language to Clear Title of Indian Claims," expressly providing for the retroactive extinguishment of derivative claims as of the date of the purportedly invalid transfer.[353]

This proposed legislation has more than speculative value. The congressional ratification of the Narragansett settlement contains an extinguishment provision tracking ALTA's model language almost verbatim.[354] Although that settlement was voluntary and thus raises no constitutional questions,[355] adoption by Congress of ALTA's model language indicates that the committee members have read the lobbying brief carefully.

Because of the possible adverse consequences resulting from retroactive extinguishment of aboriginal rights, it is important to examine the legal foundation supporting such extinguishment. The analyses employed by the district courts in *ARCO* and *Edwardsen* have not been helpful in this regard, because they focused too narrowly on Indian law and not sufficiently on constitutional law.

The district court opinions in both *ARCO* and *Edwardsen* reveal the respective courts' failure to consider adequately the issue of retroactive extinguishment. In *Edwardsen*, Judge Gasch relied on the impermissibility of abrogating "vested property rights" in refusing to give the statute retroactive effect.[356] Although earlier decisions also have used the term "vested property rights,"[357] the expression has yet to acquire a precise meaning. More significantly, reliance on the "vested property rights" theory results in circular reasoning; the courts determine that a

352. American Land Title Association, Indian Land Claims Under the Nonintercourse Act: The Constitutional Basis and Need for a Legislative Solution 43 (1978) [hereinafter cited as ALTA Lobbying Brief].

353. *Id.* app., at 1-2.

354. *Compare* Rhode Island Indian Claims Settlement Act, §§ 6, 13, 25 U.S.C. §§ 1705, 1712 (Supp. II 1978), *with* ALTA Lobbying Brief, *supra* note 352, app. §§ (a)-(c), at 1-2.

355. Forbearing suit on even an invalid claim can be sufficient consideration for a contract. *See, e.g.*, Fiege v. Boehm, 210 Md. 352, 360, 123 A.2d 316, 321 (1956); A. CORBIN, CORBIN ON CONTRACTS § 140, at 202-04 (one vol. ed. 1952); RESTATEMENT (SECOND) OF CONTRACTS § 76B (1973). As a matter of constitutional law, the settlement also would be held to be a knowing, voluntary waiver of any constitutional right in the property rights represented by aboriginal title and the accrued causes of action based upon such property rights. *Cf.* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (waiver of due process rights to a civil proceeding must be knowingly, voluntarily, and intelligently given).

356. 369 F. Supp. at 1379.

357. *See, e.g.*, Ettor v. City of Tacoma, 228 U.S. 148, 155-58 (1913); Addison v. Huron Stevedoring Corp., 204 F.2d 88, 102 (2d Cir. 1953) (Frank, J., dissenting).

retroactive statute is improper and then state this conclusion by finding the preenactment legal relationships as being based on a vested right, without explaining the phrase. For this reason, the vested rights analysis has been the subject of much criticism.[358] On the other hand, the district court in *ARCO* failed even to address the constitutional legitimacy of congressional authority to extinguish rights retroactively. Instead, the court relied on *Tee-Hit-Ton* as establishing that virtually all governmental action abrogating rights connected with aboriginal land is constitutional,[359] despite the fact that *Tee-Hit-Ton* did not involve retroactive legislation.

An analysis of the few sources considering retroactivity as it affects congressional power to extinguish the eastern land claims reveals similar doctrinal confusion.[360] For example, ALTA's lobbying brief, while devoting considerable discussion to retroactivity from a fifth amendment taking clause perspective,[361] fails to consider the general constitutional problems of retroactivity; rather, the brief concentrates on case law peculiar to Indian affairs.[362] Moreover, the decisions relied upon by ALTA did not consider the legitimacy of retroactive legislation, but rather the propriety of a congressional action "relating" back to a date for the specific purpose of determining the amount of damages recoverable by a tribe.[363] Each of these opinions relied on the theory of ratification, whereby the government is deemed to have ratified the wrongful action of a third party.[364]

358. *See, e.g.*, Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 NW. U.L. REV. 540, 561-62 (1956) [hereinafter cited as Greenblatt]; Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 696 (1960) [hereinafter cited as Hochman]; Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 220 (1960) [hereinafter cited as Slawson]; Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246-47 (1927).

359. 435 F. Supp. at 1030.

360. For example, the House Committee Report on the proposed Rhode Island Indian Claim Settlement Act alluded vaguely to "potentially troublesome legal issues" raised by the involuntary retroactive provisions of the bill. H.R. REP. No. 1454, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1948, 1953.

361. ALTA Lobbying Brief, *supra* note 352, at 62-73.

362. *Id.*

363. *See* Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974).

364. For an example of this use of ratification in a successful fifth amendment taking claim, and the only Supreme Court ratification case, see Shoshone Tribe v. United States, 299 U.S. 476 (1937), discussed in text accompanying notes 168-71 *supra*. In 1878, the Army escorted a band of homeless Arapahoes to the Shoshone reservation. The Shoshones allowed the Arapahoes to stay temporarily at the urging of the Indian agent attached to the Shoshone reservation. Within one month the entire Arapahoe tribe arrived and settled. The Shoshones protested unsuccessfully. Finally, in 1891, the Commissioner of Indian Affairs,

The ratification doctrine has been employed in contexts other than Indian law, usually to uphold "curative legislation," so-called because it is designed to cure unanticipated defects in the interpretation or administration of an earlier law.[365] The ratification analysis, however, has been criticized as a false analogy to agency law,[366] and for confusing rather than resolving the due process questions raised by retroactive legislation.[367] Concededly, the due process objections to the application of the ratification theory raised in the cases cited by ALTA are minimal because the ratification generally resulted in federal government liability.[368] Application of the ratification theory to cases involving retroactive extinguishment of aboriginal title to foreclose tribal

who had ignored the Shoshone's protests for thirteen years, issued a formal opinion that the Arapahoes had an equal right to the land on the reservation. 299 U.S. at 488-89. The Court of Claims held that the forced settling of the Arapahoes on Shoshone land was a taking of an undivided one-half interest of the land. *Id.* at 485, 492. The only question presented to the Supreme Court was the measure of damages, which in turn raised the issue of when the taking had occurred. The Supreme Court held that the land was to be valued as of March, 1878, the date of the original entry on the land, and not thirteen years later when the Commissioner issued his formal opinion. Noting that the Commissioner did not have the authority to exercise the government's power of eminent domain, the Court stated that the opinion letter merely capped thirteen years of the Commissioner's efforts to cause the very event he then officially acknowledged. *Id.* at 494. Accordingly, the Court opted for the date of the original trespass. Although neither the Army, the Indian agent, nor the Arapahoes themselves had the power to exercise eminent domain, thereby making the original settlement a trespass, the Court commented that "however tortious in its origin, it has been permanent in fact . . . . [T]he Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning." *Id.* at 495. *Cf.* United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974) (ratification of tortious entries in the Comstock by miners extinguishing trespass claims and creating a statutory claim for taking of aboriginal title valued as of the time of the original trespasses).

365. *Compare* United States v. Heinszen & Co., 206 U.S. 370 (1907) (statutory confirmation of preenactment collection of duties by Philippine government upheld because the statute cured the earlier failure to delegate power), *with* Forbes Pioneer Boat Lines v. Board of Comm'rs., 258 U.S. 338 (1922) (statutory confirmation of preenactment collection of taxes violated due process because no colorable argument for authority could have been made when the taxes were collected). Professor Slawson has distinguished the latter case as one influenced by a judicial desire not to encourage official irresponsibility. Slawson, *supra* note 358, at 239.

366. *See, e.g.*, Slawson, *supra* note 358, at 240.

367. *See, e.g., id.*; Greenblatt, *supra* note 358, at 561-62. *Cf.* Hochman, *supra* note 358, at 704 (confining ratification to fact patterns fitting the agency concept).

368. The analogy to agency law is still inappropriate, however. The ratification doctrine was developed primarily "to cure minor defects in an agent's authority, minimizing technical defenses and preventing unnecessary law suits." RESTATEMENT (SECOND) OF AGENCY § 82, Comment d (1957). Ratification properly should be used to create liabilities for the principal, not to minimize or destroy them. *See, e.g.*, W. SEAVEY, THE LAW OF AGENCY § 35, at 63 (1964); RESTATEMENT (SECOND) OF AGENCY § 90, Comment a (1957). Neverthe-

recovery absolutely,[369] however, expands the theory beyond its intended scope and furthers confusion regarding the legitimacy of retroactive extinguishment of aboriginal rights.[370]

The shortcomings of both the ratification and vested rights theories are strong reasons for discarding them in determining the legitimacy of retroactive extinguishment of aboriginal rights.

Whether phrased as present extinguishment coupled with validation of past unlawful transfers[371] or as retroactive extinguishment of

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less, the Court in *Shoshone* related back the taking to the original tort, resulting in governmental nonliability.

One case cited by ALTA relied on ratification to permit the state and federal government to escape liability. Seneca Nation v. United States, 173 Ct. Cl. 912 (1965). *See* ALTA Lobbying Brief, *supra* note 352, at 47-48. The Court of Claims in *Seneca* held that a 1927 statute referring to Seneca land condemned by the State of New York to build a dam in 1858 implicitly ratified the condemnation, which otherwise would have been void as a violation of the Nonintercourse Act. 173 Ct. Cl. at 913. Having concluded that there was no Nonintercourse Act claim because of the ratification, the court held that the Senecas could not recover against the United States for breach of the government's duty to prevent the state from acquiring this land. *Id.* at 916. The court incorrectly interpreted the ambiguous legislation as retroactive. *See* Greenblatt, *supra* note 358, at 551-53. The result might nonetheless have been the same had the court engaged in a careful due process analysis. First, the amount of land was small, only 50 acres. Second, the state condemned the land to build a dam and canal system, traditionally regarded as a legitimate objective serving the interests of the public, both Indians and non-Indians. Third, the tribe apparently did not protest until the suit was filed with the Indian Claims Commission, sometime after 1946. Finally, the state had paid fair market value for the acquired land, a point the tribe conceded in its suit against the federal government. 173 Ct. Cl. at 914-16.

369. ALTA argued that Congress may ratify by legislation all past illegal transfers of aboriginal title lands, whether consensual or not, and thereby extinguish aboriginal title "without giving rise to any valid claims that such legislation constitutes a taking of property compensable under the Fifth Amendment." ALTA Lobbying Brief, *supra* note 352, at 42.

370. The tribes' attorneys have not been immune from the confusion surrounding the constitutional underpinnings of retroactive legislation. In a memorandum to Judge Gunter concerning the Maine settlement negotiations, attorneys for the tribe addressed the constitutional issues merely by asserting that trespass claims are protected by the fifth amendment taking clause. Memorandum to the Honorable William B. Gunter from Archibald Cox, at 26-27 (April 29, 1977) (on file with *The Hastings Law Journal*).

In addition, the tribes argued that the eastern treaties could not be ratified retroactively because agency law does not permit ratification of an unconstitutional act or an act taken by someone standing in no agency relationship to the government. *Id.* at 26. If ratification is seen as an agency concept, the tribal attorneys are correct as a matter of agency law. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 85 (1957) (essential element of ratification is that agent purported to act on behalf of a principal or intended to so act). *See also id.* § 88, Comment a (ratification not effective if the third party has attempted to withdraw from the transaction, because the third party is treated as an offeror, who can revoke his offer prior to affirmance by the principal). The eastern tribes might therefore argue that they revoked their offers by filing lawsuits and that ratification thus is no longer possible.

371. *See* H.R. REP. NO. 1453, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1948, 1953.

claims directly or derivatively based on aboriginal title as of the date of the invalid transfer,[372] legislation giving "preenactment conduct a different legal effect from that which it would have had without the passage of the statute"[373] is retroactive legislation. Although legislation affecting preenactment rights occasionally has been analyzed under other constitutional provisions,[374] most commentators consider the due process clause to be the provision safeguarding against retroactive legislation.[375] Indeed, the only Supreme Court decision invalidating legislation affecting accrued causes of action in tort relied on the due process clause.[376]

Outside the context of Indian law, a due process analysis of retroactive legislation requires balancing the competing interests of private parties and the public. To be sustained, the legislation must appear reasonable.[377] Professor Hochman has suggested three factors that courts should consider when determining the constitutionality of retroactive legislation: "the nature and strength of the public interest served by the statute, the extent to which the statute modifies or abrogates the assorted preenactment right, and the nature of the right which the statute alters."[378]

The complexity of the factors that must be considered in determining the legitimacy of congressional authority to extinguish retroactively

372. *See* Rhode Island Indian Claims Settlement Act, § 6(a)(2)-(3), 25 U.S.C. § 1705(a)(2)-(3) (Supp. II 1978).

373. Hochman, *supra* note 358, at 692.

374. The Supreme Court decided long ago that the *ex post facto* prohibition in the Constitution applied only to retroactive criminal legislation. Calder v. Bull, 3 U.S. (3 Dall.) 385 (1978) (construing U.S. CONST. art. I, §§ 9, cl. 3; 10, cl. 1). The Court then began to apply the contract clause to retroactive legislation affecting contract rights. *See, e.g.*, Coombes v. Getz, 285 U.S. 434, 448 (1932); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136-48 (1810).

375. *See, e.g.*, Greenblatt, *supra* note 358, at 543; Hochman, *supra* note 358, at 694-95; Slawson, *supra* note 358, at 221.

376. *See* Ettor v. City of Tacoma, 228 U.S. 148 (1913). *Ettor* involved the repeal of an ordinance that granted property owners a cause of action for consequential damages as a result of street grading. The Court found a due process violation when the new ordinance was applied retroactively to those whose property was damaged before the repeal. *Id.* at 150, 156. For a critique of the Court's conclusion in *Ettor*, see Slawson, *supra* note 358, at 224-25.

377. Leedom v. International Bhd. of Elec. Workers Local 108, 278 F.2d 237, 240 (1960). *See* Hochman, *supra* note 358, at 694-95; Greenblatt, *supra* note 358, at 554, 561 (court should consider the reasonableness of legislative objectives and balance the asserted right against them); Slawson, *supra* note 358, at 251 (court should balance factors normally associated with substantive due process, such as protection from irresponsibility of governmental officials and protection from "punishment for choices made without knowledge of their wrongful character"). *Cf.* Shaffer v. Heitner, 433 U.S. 186 (1977) (due process requires balancing of interests to test constitutionality of assertions of judicial jurisdiction).

378. Hochman, *supra* note 358, at 697.

rights based on aboriginal title is beyond the scope of this Article. Brief attention, however, must be given to two signficant factors. First, courts must be cautious in labeling legislation that retroactively extinguishes aboriginal rights as "curative." A curative statute is one designed retroactively to cure defects in an administrative system or to ratify prior official conduct of government officers who acted beyond their authority.[379] Thus, curative legislation is designed to restore what was believed to have been the status quo. In determining whether or not a statute is curative the courts should consider not only the rights of private land owners, but the effects the legislation may have on the tribe. The significant detrimental effects on the tribe, if the statute is held valid, distinguish legislation retroactively extinguishing aboriginal rights from all other legitimate retroactive legislation. Second, courts should examine carefully legislation that effectively eliminates all liability.[380] For example, legislation foreclosing tribal claims against the government for breach of its fiduciary duties should be scrutinized closely.

One final point deserves consideration. A due process analysis of legislation affecting Indian rights may require heightened judicial scrutiny. Several recent decisions have required more than minimal scrutiny of congressional actions affecting Indian tribes on the basis of a trust obligation between the government and the tribes. For example, in *Morton v. Mancari*[381] the Court sustained a statutory provision granting Indians employment preference against attack under the due process clause of the fifth amendment. The Court's standard required the special treatment to be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[382] This same test was employed more recently in *Delaware Tribal Business Committee v. Weeks*,[383] involving the exclusion of certain Indian groups from distribution of funds by Congress pursuant to an award redressing damages caused by a breach of treaty.

379. *See id.* at 705; Slawson, *supra* note 358, at 227-28.

380. *See* Hochman, *supra* note 358 at 722-24 (discussing Perry v. United States, 294 U.S. 330 (1935), which upheld the Gold Clause Resolution as applied to private obligations but not to obligations of the federal government). In the past, the courts have been less likely to sustain curative legislation whose purpose is to immunize the government from liability, as opposed to immunization of third parties. *See* Hochman, *supra* note 358, at 722-24.

381. 417 U.S. 535 (1974).

382. *Id.* at 555.

383. 430 U.S. 73 (1977).

Arguably, because the Court has held that Congress owes a duty of protection to Indians,[384] this standard may be the appropriate level of review for all congressional actions affecting tribal rights. The standard assumes that legislation affecting Indians has as its goal the fulfillment of Congress's obligation to Indian tribes. Accordingly, the standard requires that the means be tailored to achieve that end. This heightened standard of review would temper congressional power by requiring that Congress act consistently with its duty of protection. Legislation retroactively extinguishing the eastern land claims surely could not be justified if this standard of review were employed.

Conclusion

Legislation extinguishing Indian land claims, apart from the secondary issue of retroactivity, may be upheld only if the Supreme Court adheres to the *Tee-Hit-Ton* rule. Recent events indicate that the Court may be willing to reconsider *Tee-Hit-Ton*. In *Oneida Nation*,[385] the case opening the federal courts to the eastern land claims, the Court quoted the "sacred as fee simple" language of *Walapai Tribe*,[386] deeming it to "succinctly summariz[e] the essence of past cases."[387] The Court also relied on *Walapai Tribe* to reaffirm the principle that a tribal right of occupancy is entitled to federal protection whether or not it is based on a treaty or other formal action.[388] The Court referred to *Tee-Hit-Ton* only once, in a list of citations in a footnote.[389] In addition, recent cases indicate that the Court may be disposed to reject arguments, based on the political question and plenary power doctrines, that the power of Congress over Indians is virtually unreviewable.[390]

At a minimum, the Court may be unwilling to extend the scope of *Tee-Hit-Ton* as far as the *ARCO* court. Notably, *Tee-Hit-Ton* was decided during the termination era, at a time when policymakers thought Indian reservations would soon be nonexistent.[391] The termination era is over, and federal Indian policy now favors tribal self-determina-

384. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903); United States v. Kagama, 118 U.S. 375, 384 (1886) (discussing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)). *But cf.* United States v. Mitchell, 100 S. Ct. 1349 (1980).

385. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

386. United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339 (1941) (discussed in text accompanying notes 186-89 *supra*).

387. 414 U.S. at 668.

388. *Id.* at 669.

389. *Id.* at 669 n.5.

390. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946)) ("power of Congress over Indian affairs may be of a plenary nature; but it is not absolute").

391. *See generally* 1 AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT

tion.[392] In this spirit, the Court should be willing to reexamine its holding that aboriginal title can never be a property right for purposes of the fifth amendment taking clause.

Of course, the Court's decision to overrule *Tee-Hit-Ton* could subject the federal government to enormous financial liability. The Alaska Native Claims Settlement Act was arguably consensual, so that Act's extinguishment provisions probably would survive a challenge. The eastern claims, however, involve large areas of land worth millions of dollars. Yet a judgment by the Court reaffirming *Tee-Hit-Ton* because of fiscal considerations would not contribute to a principled resolution of the fifth amendment issue in relation to other Indian lands. The Court could fashion a rule to fit the eastern land claims which would extend fifth amendment protection to *all* Indian land presently occupied by Indian tribes and yet not subject the government to liability for the eastern land claims. That decision could rest on reasons such as the passage of time since the eastern tribes lost the use of their aboriginal land and the equities of the innocent parties. A narrow application of the *Tee-Hit-Ton* rule would clear the way for the Court to take a step mandated by fairness and extend fifth amendment protection to *all* Indian land, no matter what it is called, presently occupied by an Indian tribe. Indian tribes should not have to depend on the whim of the sovereign to keep the land they have inhabited from time immemorial.

443-54 (1977); S. Tyler, A HISTORY OF INDIAN POLICY 151-88 (1973); *Termination Policy, supra* note 204.

392. *See* S. Tyler, A HISTORY OF INDIAN POLICY 189-201 (1973).