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UNRAVELING THE RIDDLE OF ABORIGINAL TITLE

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Introduction

Something very important is wrong with a judicial acceptance of the modern paradigm[1] of "Indian title of Occupancy" as a passive title rather than a proprietary title under the land tenure system of the United States. This article is an attempt to isolate the error inherent in the modern paradigm and to analyze its relationship to the doctrinal foundations formulated in the seminal cases that grappled with the complex issue of Indian title. In order to understand the modern quandary surrounding "Indian title of Occupancy" and to challenge the validity of the modern paradigm the Supreme Court has formulated, it will be necessary to first briefly remind the legal profession of the nature and utility of land tenure systems; second, to examine the doctrinal origins of Indian title in the classic decisions of the Marshall Court in the early nineteenth century; third, to explore the subsequent conceptualization riddle that plagued "Indian title" following the Marshall Court, creating the modern paradigm in a shift of judicial thought; and finally, to conclude with a statement of the resulting modern predicament concerning tribal tenure and dominion in American law.

While the federal courts have continually restated their commitment to respect Indian title, it is submitted that the court's concept of Indian title has slowly but perceptibly changed from its original concept as established in the Marshall Court. The modern paradigm of Indian title,[2] the result of a sudden shift from the original precedent, nevertheless appears to be established under the authority of the classic cases. In actuality, however, the modern vision of Indian title took shape in the misty propositions of legal commentators attempting to coalesce the classic doctrine of Indian title into the structure of federal land law,[3] rather than in any conceptual fidelity to the classic doctrines. The quest for a unified theory of federal title undermined the actual holdings of Indian title in the seminal cases before the Supreme Court. It destroyed the inherent political, economic, and legal justification for Indian title and deprived the Indian tribes of their economic wealth and their dreams for a better future. Simplicity of explanation dominated conceptual fidelity.

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The modern paradigm of Indian title within the field of federal Indian law is, therefore, not only substantially different in its premises from the understanding of the Marshall Court, but also contains a latent potential for ruin of tribal self-determination and economic development. The severity of this fact situation demands reappraisal. Such reappraisal requires some criteria against which the present paradigm can be measured, a standard by which to understand its validity as a legal paradigm.

The classic cases of the Marshall Court are a standard.[4] Because of the importance of precedent in the development of a land tenure system within the United States,[5] these cases stand not just as a point of departure, but specifically as a source of judicial dependence for all federal courts. The doctrines inherent in these decisions were importantly prospective rather than retrospective. They were conceptual tools to aid the courts in choosing among various plausible grounds of decision; attempts to anticipate the future relevance of tribal property to the Indians and the federal government, and to create security in land ownership under the Federal Constitution. Hence, the seminal cases are the best criteria by which to measure the validity and legitimacy of the modern paradigm of Indian title. Indeed, the extrication of the insights of the classic cases is a crucial task.

In an initial attempt to correct one of the historical errors embedded in the doctrine of "Indian title of Occupancy," the term "tribal title" will be used equally and interchangeably. The modification of "Indian title" is more than quibbling over semantics. It is an attempt to isolate and remove the recurrent bias in the American legal system for individual ownership and against tribal ownership. While the growing concept of corporate ownership of property remains unquestioned in the judicial mind, the similar concept of tribal ownership has somehow remained questionable and subject to much judicial suspicion.

This bias is an unacceptable response in the American legal system, which has proclaimed consistently its commitment to being not only general and autonomous but also public and positive. In a substantive sense, this commitment toward autonomy and generality is translated into the premise that the paradigms formulated and enforced by the separate entities comprising the legal system cannot be persuasively analyzed as mere restatements of any identifiable set of nonlegal beliefs or norms, be they economic, political, or religious.[6] The present connotations of Indian title seemingly give rise to private or exclusive individual Indian ownership of land, rather than to tribal ownership. The classic cases, however, referred to territory held under tribal

ownership. While a transformation from tribal ownership to individual ownership did occur in the Court during the allotment period of federal Indian policy,[7] the allotment policy has been repealed by Congress and the emphasis has been on rebuilding the tribal domain rather than allowing fragmented individual estates to continue.[8]

The current policy of Congress values rebuilding the tribal domain and self-determination as of the highest priority.[9] In light of this statutory command, the inferences of individual Indian title inherent in "Indian title of Occupancy" are unwarranted and create false expectation interests within the tribal domain. Tribal citizens have extremely limited rights to land within a tribal reservation. For example, an Indian cannot sell his land or interest to another if it belongs to the tribe.[10] Hence, it is not analytically acceptable to continue to use the term "Indian title" when in legal theory and effect "tribal title" is the meaning being conveyed.

In contrast to the abstract commitment of the courts to the tribal title of occupancy, they have so far totally failed to provide any relevant, concrete, or analytical conceptualization of that phrase to the tribes or to their legal advocates.[11] Similarly, social science studies to date have failed to provide a clear reconstruction of tribal title in the past, or a model for the present or the future.[12] Instead, the entire test of tribal title has been established in terms of land acquisition policies, rather than in land tenure conceptualization in legal or social theory. The courts have been more concerned about whether the tribes can lay claim to aboriginal ownership because of a failure of the federal government to purchase or consensually extinguish title to such land, rather than being concerned with developing descriptive or analytical principles to explain why such federal extinguishment is important. The traditional test of tribal title was absence of proof of extinguishment of tribal title in the statutory manner to the federal government; the tribes held titles just as "sacred" as the right of the federal government to acquire the fee to such land by purchasing it from the tribes.[13] In spite of the continual restatement of such eulogisms, another test has been asserted which holds that some aboriginal title is unrecognized and therefore not a property right within the meaning of the fifth amendment of the Constitution.[14] Unrecognized aboriginal title is merely a right of occupancy at the will of the federal government.[15] It is this transformation which is at the heart of the modern paradigm, and the issue this article seeks to resolve by comparison with the classic paradigm cases of tribal title.

I. *Land Tenure System in the Legal Theory of the Modern Liberal State*

To understand the significance of the transition of the "sacred" nature of tribal title to a "naked possession," a review of the basic intersection between legal history, economics, and the theory of land tenure is necessary. One of the implicit assumptions of modern property law in the United States is that all title within its boundaries is under either federal or state tenurial systems of land. Indian title under this assumption is translated as neither a land tenure system nor a source of title under the American tenurial system of property law. Based on the influence of these assumptions, the modern paradigm of tribal title has established its major premise in the law.[16] This is a sharp break with the legal history of property in the United States, as well as the theories of land tenure systems in the liberal state.

In the history of the development of federal land tenure systems, the contemporary premise of the unity of federal land tenure was not a major premise.[17] Rather, it was a realizable goal inherent in the policies of the federal government, but subject to the task of developing a doctrine that recognized the tribal title in more than a trivial fashion while affirming it as a source of federal title in a manner acceptable to the tribes and the citizenry of the United States.

The quest toward fairly and justly extinguishing tribal title is the inherent spirit and unity of the classic cases of federal Indian law. The resolution of the problem of tribal title which could be conveyed to the federal government to create a federal land tenure system forced the Supreme Court to discover the relationship between tribal tenure and sovereignty and the European sovereigns' peripheral claims in North America. In the classic paradigm, the doctrine was announced that tribal title was the sole source of title which perfected the European entitlements under the doctrine of discovery.[18] Extinguishing tribal title, the classic paradigm held, was a monopoly of the federal government in terms of the Constitution.[19] It was a necessary prerequisite to establishing federal title, which could then be distributed by Congress to the citizens of the United States. It was the ultimate concern of the new constitutional government in the nineteenth century. It was measured in terms of probability rather than inevitability.

The modern paradigm stands in stark contrast to the classic

paradigm. Tribal title in the modern paradigm has been stripped of an inference of being a potential or historical source of title.[20] Yet, at the same time, the paradigm of law also holds that the right of tribal occupancy must be released or otherwise extinguished if federal title is to be clear of any encumbrances.[21] These conflicting positions of the modern paradigm are the manifestation of a perplexing but inevitable paradox of tribal tenure in the land tenure system of the United States. The persistent inability of the legal system to resolve this paradox of tribal title demands a reconsideration of the theory of land tenure in the modern liberal state and of its incoherence in relation to aboriginal tribal tenures.

The existence of the paradox has been obstructed by the relationship between the modern property paradigm's view of itself, as expressed in the premises of the paradigm, and the historical truth of the establishing of the federal land tenure system. Professor Powell noted the source of this obstruction in his treatise, *The Law of Real Property*. He stated that when many judges consider the present applicable rules of real property, there sometimes exists an ill-concealed contempt for "history," which he considers unsound.[22] Powell commented on this insight by stating:

> Social institutions are as much a product of the past as geologic formations or the human mechanism. It is not possible to acquire a fully intelligible picture of the present without some considerable attention to how things come to be as they are. Such knowledge is necessary even for the person most dissatisfied with what he finds in the existent law. Sound reform requires an understanding of the reasons and processes which brought into being that which is to be reformed.[23]

This antihistorical trend complicates the attempt to define and resolve the paradox of the aboriginal tribal territory's relationship to the sources of the federal tenurial system. The elucidation of the link between aboriginal tribal territory and the legal theory of land tenure and title in the modern liberal state becomes central to unraveling the paradox. Such elucidation is both conceptual and historical.

In theory, the land tenure systems developed by the territorial sovereign are based on the insight that in its essence, a land tenure system refers to the relationship among men and things in the world. There are two complementary ways to approach this issue. The first treats land tenure, or the conceptual system of property,

as a problem of the evolution of social consciousness;[24] the second, as a manifestation of a legitimate legal sovereignty.[25] Viewed separately, the two explanations are inadequate and misleading. Taken together, they compensate for each other's deficiencies, and forge a theory of a land tenure system which is both the psychological and legal foundation for all estates or interests in scarce resources within a defined boundary of a political society.[26]

A conceptual system of distribution of property within any society is an abstract and instrumental idea (or instinct), or alternatively, an elaborate social institution common to all societies. But it is not actuality. A land tenure system is conceptual and does not exist in the same sense that people exist in reality, but rather refers to the invisible social and cultural bonds that exist in the spaces between humans and material objects and which regulate their interrelationships. From this standpoint, a land tenure system is a conceptual way of "seeing" particular relationships among men in society, which are devised, developed, and practiced in social-economic life, but nevertheless exist as independent phenomena which are being structured.

All land tenure originates in some folk or cultural norms for regulating the holding of land between individuals in any given society.[27] At a subsequent date these folk concepts are conceptually solemnized and formalized in law by either the legitimate legal sovereign or the common law process of the courts.[28] Ownership theory springs from this formalized process, but remains relative to the folk notions. Its precise meaning is different in every culture, varying according to custom, tradition, and the relative social status of those who enjoy its privileges.[29] A prime example of this relative notion is the "estate" concept of Anglo-American land tenure systems. While the estate notion seems conceptually natural to the English and American legal professions, it must be pointed out that the notion is not replicated in any other land tenure system in the world.[30]

Because of the relativity of the concept of land tenure, the structuring of the distribution of property within any society has been intimately linked to the exercise of legitimate political power and, to a lesser extent, to economic reality. "Property and law are born together and die together," commented Jeremy Bentham on the relationship between man and property in civil society. "Before laws were made there was not property; take away the law and property ceases. "[31] This is not a theory of the origins of property, but rather a statement that property exists merely in the contemplation of legal theory. This relation is particularly true in the modern liberal state.

Law in the modern liberal state is the creation of an autonomous and general legal system composed of private parties, a legitimate legal sovereignty and its administrative agencies, and the independent judiciary. The legitimate legal sovereignty exists solely for the purpose of preventing the conflicts of the private parties from taking a disasterous tailspin into civil war.[32] Because property is a fundamental expectation of social man but also a scarce resource in most societies, the territorial sovereign must create certain legal forms to distribute the scarce resources among the members of its society.

The source of authority of the territorial sovereign resides in the social compact: men band together and create a liberal state by their own volitional allegiance in order to create a certain amount of stability in society.[33] The social compact concept also justifies the coercion of individuals by the state to overcome the competition for scarce goods, which is seen as a fundamental fact of social life and a product of either the inherent insatiability of human desires[34] or the perverse structure of social life.[35] To accomplish this social objective, the liberal state achieves its end by imposing a compromise on all citizens, in their struggle to maximize their share of the scarce satisfactions, by intervention into the market transactions to stabilize it.

The intervention of the state in relation to property is the establishment of a land tenure system. The government, as a legitimate legal sovereignty, creates legal rights among the citizens within its boundaries by establishing a land tenure system supposedly based on the social expectations of the citizenry, and is an acceptable compromise between disorder and stability within the society.[36] A land tenure system of real property, then, becomes both the manifestation of a legal system based on folk notions of the society and the cause for the creation of that particular legal system. In either event, an interest in property remains conceptual in its essence but concrete in application.

Tenurial systems of land, then, function by translating those cultural assumptions in society into the systematized prediction that is called law. All estates in land within the boundaries of a territorial sovereign reflect a socially acceptable and recognized distributional compromise and preference scheme in the modern liberal state. As a result, a dualism is created: not only are the rights in land the specific manifestation of the relations between the will of the citizenry, a democratic legislature, and an independent judiciary, but also the rights in the land are subject to distribution and adjustment by the legitimate institutions of government, and enforceable as long as the governmental action is

in conformity with the delegations of power granted in the Constitution, within the boundaries of the constitutional territory, and within the public interest.

A legal sovereign can transfer land to private parties or to corporations, therefore, only to the extent that the land is within its territorial boundaries, that is, within the limit of its authority and its land tenure system. Such transfers, however, are always conditional. The conditions of the transfer are relational to the purposes of civil government. The territorial sovereign always reserves some specific conditions: the right to tax, the right to condemn, the right to exercise police power. Other conditions are implied: the right to control land use and distribution through its spending power, and the right of escheat.[37]

The key to a land tenure system is a legitimate legal sovereign, representing the citizenry, and a judiciary system, which is in charge of applying the will of the citizenry or the sovereign. When the United States of America came into political existence, it had neither a legitimate legal sovereign nor a defined citizenry nor any ownership of land. The creation of an artificial legal sovereign (the Constitution), based on the volitional consent of the states and their citizenry, created a citizenry under the Constitution.[38] The problem of owning land and establishing a land tenure system was unresolved, but nevertheless allocated to the federal government.[39]

To acquire land, the federal government had to negotiate with the aboriginal sovereigns of America—the Indian tribes. This quickly became the most complex and important issue of the nineteenth century: How should a democratic nation extinguish tribal title under the authority of sovereign tribes of Indians? To establish relations between tribes and their property, the Supreme Court struggled in the world of conceptual thought, which the ordinary citizen was hardly conscious of, and which, moreover, the modern paradigm of tribal title fails to understand because the land tenure system it takes for granted now was itself invisible to the legal profession at the beginning of the nineteenth century and its operations abstruse. It was a mere cobweb of invisible filaments the Court would call "Indian title of Occupancy," which forged a conceptual relationship among the interrelations of two sovereign nations primarily in the western legal mind.

II. *The Classic Paradigm of Tribal Dominion and Title*

The question of tribal title was and still remains an issue of political and legal theory. It was a threshold question that ac-

companied the discovery of the New World by the European and Iberian kingdoms. While it is possible to describe the debate on the conceptual level as a collision between opposing "world views," it is best to illustrate that the fact situation of the New World confronted the intricate framework of the Aristotelian paradigm, and created in the process the fundamental ideology of the modern liberal state. The pivot of the controversy in relation to property theory was how could the non-Indian kingdoms acquire "title" in the New World. It was a question that not only created theory; it modified theory as answers were proposed and as the questions were discussed.

Believing that all men were created in the image of God, and that they were naturally social beings, it is hardly surprising that theoreticians made considerable efforts to integrate the Indians and their property into the framework of Christianized Aristotelianism and a divinely instituted ontological hierarchy.[40] With the growing separation of church and state, however, this Christian version merely became theoretical insights established by the Church. The seventeenth-century social contract theorists, rejecting the Church, created an alternative to the Aristotelian paradigm in terms of property acquisition, which was built on the anomalous evidence of the Indians in the New World.[41] The various responses to the nature of tribal title were often the speculative biases of interested parties, instead of concrete methods of tracing the complex scheme of titles, claims, privileges, and obligations, but they formed a constellation of theories that the newly instituted Supreme Court of the United States of America could select to make the law of the land. It was a period of formation of a national doctrine of land tenure in accordance with the tenets of human freedom and potentiality. It is necessary, then, to elucidate the resulting paradigm of tribal title which emerged from the Marshall Court.

Fletcher v. Peck

The Supreme Court first addressed the issue of tribal title in 1810 in the case of *Fletcher v. Peck.*[42] In order to resolve the conflict concerning the status of tribal title, and possession and alleged ownership of the land by both the federal and state governments, the Court established a divergent theoretical framework which would haunt subsequent courts in their attempts to understand the nature of tribal title. The key issue presented in the case, in relationship to tribal title, was whether the disputed territory

was within the boundaries of either the United States or the state of Georgia, even though it was in the actual possession of the Indian tribes concerned.

The majority decision of the Court, authored by Chief Justice Marshall, held that the land was within the boundaries of the state of Georgia. As far as tribal title and possession were concerned, he avoided the issue by holding that such was to be respected by all courts until legitimately extinguished. Until such time as tribal title might be legitimately extinguished, it was not absolutely repugnant to seisin in fee on the part of Georgia. He stated for the majority:

> It was doubted, whether the state can be seised in fee of lands, subject to Indian title, and whether such a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of the 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.[43]

A different conclusion of law, however, was arrived at by Justice Johnson's dissenting opinion. Justice Johnson, in contrast to Marshall, determined that the Indian nations held the land as fee simple absolute proprietors; the interest of the state of Georgia was a preemptive interest which had already been ceded to the federal government. The Indian nations had a higher title, according to Justice Johnson, than either the state or the federal government.[44]

Both of these decisions are more important for the arguments they reject than for the arguments they explain. Arguing for the land companies and Mr. Peck, both Joseph Story and John Quincy Adams strongly asserted the theoretical proposition that while the Indian tribes were independent nations, they "had no idea of property in the soil." These powerful attorneys in the development of American law admitted the political sovereignty of the tribes, but proposed to the Court that in terms of property rights—if any—the Indians had a "mere occupancy for the purpose of hunting."[45] They also argued that such occupancy "was not like our tenures," but rather "a right regulated by treaties, not by deeds of conveyances," and that treaties were the "effects of conquest."[46]

In response to these arguments, both the majority and dissen-

ting opinions rejected the land companies' theories concerning the nature of tribal title. Both opinions clearly held that tribal title existed as a recognizable and protectable property right, but divergent explanations were offered as to the source of the property right. The crucial difference between these divergent explanations in the two opinions can be resolved by land tenure theory. Chief Justice Marshall, writing for the majority of the Court, attempted to establish tribal title as a system of tenurial rights distinct from the Anglo-American tenurial system.[47] On the other side, Justice Johnson attempted to create a unitarian doctrine of federal title, under which the Indian tribes had a "fee-simple absolute title" under a federal tenurial system of land.[48]

The majority of the Court failed to elaborate on the precise nature of tribal title. The Court avoided the issue by holding that it was a distinct form of property rights which "is not such as to be absolutely repugnant to a seisin in fee on the part of the state."[49] This explanation was insufficient to Justice Johnson. He disagreed that tribal title was not absolutely repugnant to seisin in fee of Georgia. The Court was asked whether the state of Georgia was legally seised in fee of the soil, subject only to the extinguishment of part of the Indian title. "[O]f an estate in fee simple in the lands in question, subject to another estate [in the Indian tribes]," Johnson noted, "we know not what nor whether it may not swallow up the whole estate decided to exist in Georgia . . . ."[50] The question is," stated Johnson, as he came to the ultimate conflict in the case, "whether it can be correctly predicated of the interest or estate which the State of Georgia had in these lands 'that the state was seized, thereof, in fee simple.'"[51]

Noting but not commenting on the relationship between property rights and political sovereignty, Johnson's answer to the question was partially dependent upon the political status of the Indians involved in the fact situation. In the present case, the Court was dealing with Indian nations, which, Johnson concluded, had "limited sovereignty and the absolute proprietorship of their soil."[52] Even though pronounced a limited sovereignty, the treaties acknowledged the Indian nations as an independent people. While it was noted by Justice Johnson that the national government can both "legislate upon the conduct of strangers or citizens within their limits" and restrain "all strangers from encroaching upon their territory," this legislation (he held) does not limit their independence.[53] This congressional legislation limits not the tribes or nations, but rather citizens and subjects of the United States. Hence, despite the label of "limited sovereignty," Justice Johnson

believed the nations and tribes indeed to be separate nations as illustrated by the treaties signed with them by the federal government.

"Can, then, one nation be said to be seized in lands, the rights of soil of which is in another nation?" asked Justice Johnson.[54] "All the restriction upon the right of soil in the Indian amounts only to an exclusion of all competitors from their market," he answered, and concluded that "the limitation upon their sovereignty amounts to the rights [if agreed upon in the treaties with the national government] to governing every person within their [territorial] limits except themselves [as a foreign nation in America].[55] The tribal interest in the land was characterized as "absolute proprietors" and "possessory" by Justice Johnson, while the interest of the state of Georgia was a "mere possibility" or "preemption" and the ceded interest to the federal government was considered as a future interest upon extinguishment of the absolute tribal title.[56] The method of extinguishment of tribal title by the national government was fully established: "the uniform practice of acknowledging their rights of soil, but purchases from them."[57]

Returning to the ultimate conflict in the case, Justice Johnson pointed out that "if the interest of Georgia was nothing more than a pre-emptive right, how could that [right] be called a fee simple?"[58] A fee simple estate under the federal and state land tenure systems had no restrictions, but rather might last forever. It is the absolute ownership insofar as an individual has an interest in the land under the American tenurial system.[59] It is not qualified or subject to any contingency to vest absolute ownership.[60] A preemptive ownership in American tenurial law stood in contrast to a fee simple estate.[61] It was merely a right of first acceptance or refusal if the owner of a fee simple land places it on the market. It is contingent upon the motivation and desires of the fee simple owners. "How could [a preemptive right] be called a fee-simple," pleaded a dismayed Justice Johnson, "when the interest in the State of Georgia [under Anglo-American law] was nothing more than a power to acquire a fee-simple by purchase, when the [tribal] proprietory should be pleased to sell?"[62] A fee simple estate may be held in reversion, Johnson noted, "but our law will not admit the idea of its being limited after a fee-simple."[63]

It was conceptually impossible for Georgia to have a fee simple interest in the land under Anglo-American law. This was the thrust of Johnson's analytical opinion. With clear and exceptional logic, Justice Johnson established that if the land were under the possession and control of a sovereign Indian nation or tribe under

the Anglo-American land tenure system,[64] that interest was fee simple in nature. Unfortunately, Johnson had misperceived the arguments of Chief Justice Marshall in the majority opinion, but had nevertheless cast the riddle of tribal title which would continue to haunt later courts. The majority opinion had not attempted to incorporate tribal title into the land tenure system of the federal or state governments. On the contrary, it had suggested that the tribal tenurial system was compatible with other American tenurial systems until the tribal title was extinguished, presumably by statutory purchase.[65] Until such time, however, the courts were bound to respect tribal title as an equally valid and legitimate title to either federal or state systems.

This difference between Justice Johnson's opinion and that of the majority opinion turned on whether tribal title was viewed as within or equal but separate to the American tenurial system of land. Both the logic and the reasons given in Johnson's opinion would be extremely valid if tribal title was placed totally under federal land tenure, *i.e.*, the tribal title would be a fee simple title.[66] But the majority decision strongly implied that the legal recognition of tribal title was neither dependent upon nor within the land tenure of the United States. The tribes were independent nations with a distinct land tenure system which was to continue separate from American land tenure systems until extinguished.

Johnson & Graham's Lessee v. M'Intosh

The Supreme Court affirmed its holding in *Fletcher v. Peck* in 1823 in the case of *Johnson & Graham's Lessee v. M'Intosh.*[67] It clearly established that tribal title was a distinct pattern of land tenure right not derived from the common law, but merely recognized and respected as a tenure system by federal law until purchased by the federal government. In this unanimous opinion the Court elaborated at length on the source of the exclusive entitlement vested in the federal government to extinguish tribal title, clarified the compatible nature of tribal title with federal title, and further explained the effect of a treaty conveyance on the holders under tribal title, both tribal and non-Indian.

The central issues presented in *M'Intosh* are difficult to isolate because of the tumbling logic of the opinion. It did, however, resume the translegal conflict of land of *Fletcher* in relation to a conflict between non-Indian purchasers of tribal title and holders of a federal patent. This fact situation, unfortunately, was not conducive to a clarification of the effects of a translegal issue, but

it did provide a forum for the Court to establish its entitlement theory under discovery.[68] Still, the contextual configuration was only indirectly concerned with tribal title because it centered its substantive discussions on the rights of non-Indian purchasers under tribal title.[69] The fact configuration necessarily limits the holding of the case in terms of the rights of tribal members to land under tribal title because neither of the parties were tribal members, nor did they directly represent any recognizable tribal interest that was distinct from advocacy of their position.

The involved parties in the fact situation were third party lessees of non-Indians who claimed divergent sources of ownership. On the one side were the lessees of the purchaser claiming title directly from the Indian tribe, and on the other side was a holder of a federal patent which derived from a treaty conveyance from the same tribes to the federal government but at a subsequent date.[70] Thus, the holding of the case did not concern aboriginal title, but rather the validity of a federal patent issued under an unrestricted treaty conveyance against an antecedent purchase by individuals directly from tribes. The central issue was transferable interests that derived from tribal title. Specifically, it was the validity of an antecedent grant of land by the tribes to English subjects and a later tribal conveyance by an unrestricted treaty of the same land to the federal government.

On this issue the Court held that the title exhibited by the non-Indian purchasers of Indian title was not sufficient to be sustained in a federal court.[71] The exact reason was not clearly stated on why the title would not be sustained, but the reasoning appeared to surround the subsequent unrestricted treaty conveyance of the land to the federal government. There were, however, other issues the Court had to address in the process of writing the opinion.

The first issue was whether tribal title could be recognized in the courts of the United States. Another logically related issue was whether the tribes had the power to give, and private individuals to receive, a title that could be sustained in the courts of this country.[72] The Court affirmed both these issues.

In attempting to deal with the validity of tribal title and the issue of whether it could be given to an individual, the Court resorted to the land tenure theory. This strategem is obvious where the Court applied a mixed form of law to resolve these issues.[73] The first form of law was the principles of abstract justice which regulate the rights of civilized nations; the second form was those principles "which our own government has adopted in the particular case and given us as the rule of decision."[74] The resort to

both international and domestic law reflects and argues for the proposition that legal recognition of tribal title was under a tribal tenurial system and did not depend on its conformity to federal tenure systems.[75] This proposition also reflected the Court's concept of the land tenure theory, *i.e.*, "the right of society to prescribe those rules by which property may be acquired and preserved" is "a function of the law of the nations in which they lie" in "the rights of civilized nations."[76] This position probably was taken by the Court in order to distinguish this decision from the unity of federal title theory raised in the dissenting opinion of Justice Johnson in *Fletcher v. Peck*.

In the absence of a jurisdictional statement, and in light of the Court's failure to elaborate on the reasons why it refused to sustain the plaintiff's estate, which was purchased from the tribes, it is interesting to note that the Court explicitly recognized that "title to lands" was dependent entirely on the law of the nation in which the land was situated. Also, it is interesting that the Court acknowledged the "authority" of the tribal chiefs to grant title to private individuals under tribal law, *i.e.*, "[a]s far as it could be given by their own people."[77] The only theory, then, which could invalidate the private individual's title was a subsequent unrestricted treaty between the tribe and the United States. In short, the treaty conveyance was an exercise of eminent domain by the tribe and abolished all rights held under tribal law which were not reserved in the treaty.[78]

The Court also acknowledged that the particular tribes were in "rightful possession" of the land they conveyed to the individuals. With the holding that the tribes had actual possession to the land in question, and that it had the authority to grant an estate under the tribal tenurial system to both private individuals and to governments, the Court clearly and without qualification established and recognized a tribal tenurial system that was distinct from federal and state tenurial systems. It also recognized tribal law as regulating the estates under that tribal tenurial system.

In sum, on the issue present for resolution in *M'Intosh*, tribal land tenure was held to exist as a legitimate land tenure system; the land tenure system was recognized by federal law and remained separate but compatible with other land tenure systems under federal law until extinguished. The only remaining issue was to explain the federal authority for entering an unrestricted treaty that could abolish the individual titles under the tribal land tenure system.

In contrast to the quick resolution of the arguments on tribal land tenure, the Court spent an extravagant amount of time in establishing the principle that the ultimate title to land within the United States was held by the federal government as the successor-in-interest to the discovery by England.[79] This response was undoubtedly an attempt to modify the position the majority opinion had taken in *Fletcher v. Peck*, to the effect that the state did own the tribal land, rather than the federal government. This conclusion was undiscussed in the opinion, however.[80]

In *M'Intosh*, the Court established the principle that discovery created an entitlement in the discovered nations to extinguish tribal title. Discovery did not convey or vest a perfect title, as too often is alleged, but rather it merely was evidence of an entitlement to extinguish tribal title.[81] In fact, the Court treated discovery as more an evidentiary principle in international law than a substantive principle of international law. It was clearly aware that discovery did not vest property rights in the discovering nation, but rather had a terminological problem of describing the interest the discovering nation possessed.[82] Justice Johnson in *Fletcher* labeled it a preemptive right in terms of the potential interest of the state, but the Court in *M'Intosh* merely called it a "title."[83] In legal effect, discovery created a potential interest consensual among the European nations and created a monopoly to extinguish tribal title and possession.[84] This title is an "inchoate title," or rather an "evanescent entitlement" to extinguish tribal title. Inherent in the conceptualization of discovery was a theory which validated tribal property.

The relationship between land tenure theory and the notion of discovery resided in the derivation of discovery as a principle. It was consensual among all the European nations. That is to say, it was a principle all European nations or kingdoms "acknowledged as the law by which the right of acquisition [of land in the New World] should be regulated as between themselves."[85] As a European principle it could limit competition among those nations for land, but it could not perfect their titles without extinguishing tribal title.

Discovery, then, was a distributional preference by which the Europeans agreed to divide up entitlements to acquire tribal lands.[86] It was based on the time of the first discovery of the new continent. It was, in essence, a labor theory of distributional preferences creating a consensual entitlement. All property laws within a land tenure system reflect such distributional preferences in society, and in this regard discovery is no different.

Discovery gave a "title," Chief Justice Marshall wrote in *M'Intosh*, "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."[87] Again, it should be stressed that "title" is used as a perfectable entitlement rather than an already perfect title. It was a distributional preference the European nations consensually agreed upon as they rejected the previous papal distributional preference to the territory of the New World based on the propagation of Christianity to the natives.

The principle of discovery did not negate tribal title; on the contrary, it recognized and validated tribal title. "In the establishment of these relations," native inhabitants were admitted by the Court "to be the rightful occupants of the soil, with a *legal* as well as a just claim to retaining possession of it."[88] More important, the Court held that the tribes had a right to "regulate" the relations with the holder of the entitlement under the principle of discovery.[89]

Under the principle of discovery, the tribes had a right to possess the land and to prescribe the rules by which tribal land could be acquired or preserved. The limitation of discovery on tribal title lay in the free marketability of the land to whomever the tribes might determine had offered the best price. This limitation was not a limitation of tribal title because the tribe could withhold its land from the holder of an entitlement to purchase, but rather a limitation inherent in the consensual agreement of the other European nations not to intervene. The limitation was based on an external, consensual agreement, and was not a limitation on the internal nature of tribal title. Yet, from the European perspective, it seemingly limited the sovereignty of the tribe. The tribal "rights to complete sovereignty, as independent nations," the Court stated, "were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it."[90]

The statement that discovery limited tribal sovereignty more than it did the European sovereigns who consented to the creation of the principle limiting their potential acquisition of tribal title in America is a problematic conclusion. The conclusion breaks down to a question of whether the right to reserve or to dispose of property is more inherently an attribute of sovereignty than the rights which constrict the potential acquisition of property. At any rate, the question is strictly a historical dilemma of feudal thought

because in modern political theory "sovereignty" has been transformed into the consent of the governed rather than with any dependent incidents of land tenure. One should also be reminded that the phrase "exclusive title" is merely descriptive of a consensual entitlement to acquire tribal title without interference from other European nations.

The Court examined two ways of perfecting the entitlement granted by discovery: conquest and purchase.[91] In the context of the fact situation, the Court validated purchase theory rather than any conquest theory. The holding of the Court decision was that purchase from an Indian tribe created an estate under the tribal tenure system, which estate could be abolished in a treaty conveyance between the tribe and the federal government unless reserved in the treaty. This relationship between conquest and purchase was best summed up later by Felix Cohen in "Original Indian Title", in which he stated: "Notwithstanding the prevailing mythology, the historical 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."[92]

Much of the confusion of the mythology of conquest as a manner of perfecting the governmental entitlement was created in later cases which cite *M'Intosh* for a conquest theory the case did not in fact establish. This confusion revolves around the statement of Marshall that the entitlements of Great Britain were held "by the sword,"[93] as well as around a later statement that the American courts cannot question the validity of that title or sustain one that is incompatible with it.[94] This confusion is unnecessary, because the conquests to which the Court refers were not directed against the Indian tribes of America, but rather against other European nations attempting to encroach upon the distributional preferences of Great Britain under the discovery principle. These transgressions, however, were resolved by warfare in Europe, for the most part, or in European treaty conferences.[95]

The *M'Intosh* decision did not validate the European concept of conquest.[96] It merely noted the potentiality of the conquest theory in law.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; *if* the principle has been asserted in the first instance, and afterwards sustained; *if* a country has been acquired and held under it; *if* the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be

> questioned . . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, *if* it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, *perhaps*, be supported by reason, and certainly cannot be rejected by courts of justice.[97]

Fortunately for the Indian tribes, the Court refused to establish such a theory, but rather referred to the "new and different rule" of *Fletcher v. Peck*, which was better adapted to the actual condition, where the Court rejected similar arguments.[98] The Court summed up *Fletcher* by stating:

> This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancey, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.[99]

That Indian tribes may grant their land to anyone is without question, but the purchasers acquire a right only under tribal land tenure—not under American land tenure. The purchasers of land under tribal tenurial principles are immune to neither the exercise of the powers of sovereignty by the tribe nor to shifts in tribal land law. In response to the argument that only the British Crown could convey title to land in America, the Court stated:

> If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title.[100]

Under the Court's conceptualization of tribal title, it is separate from the federal title. The tribe may determine the different estates under tribal tenure as the estates are derivative of the tribal will.

"The person who purchases lands from the Indians, within their territory," the Court continued,

> incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We can perceive no legal principle which will authorize a Court to say, the different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title . . . . Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity.[101]

Under the Court's holding, then, the tribes "had an unquestionable right to annul any grant they had made to American citizens,"[102] because the tribe as a sovereign government chooses to convey all the lands by treaty to the United States, without reservation of certain estates under the tribal tenurial system. This theory is consistent with the modern police powers of the state, as well as with the eminent domain theory.

The Court's statement is well established authority for the concept of tribal title as well as for a tribal tenurial system. Moreover, the statements are supported by the political theories of the English philosophers James Harrington and John Locke. Both of these political philosophers were among the most popular authors of the revolutionary era, and influenced the powerful revolutionary leaders.[103]

James Harrington, in his book *Oceana*, developed an analysis of the relationship between economics and political power. Political power, he suggested, was determined by the distribution of land in a society. Given a certain distribution of property, Harrington held, a certain normative government tended to emerge. If most of the property was held by a king, an absolute monarchy would emerge; if nobility controlled, then either an aristocracy or a mixed monarchy would emerge; and if people owned most of the land, a popular form of government would emerge. The historical distribution of property determined the governmental form of society, then, in Harrington' estimation; the political society was a mere reflection of socio-economic conditions.[104]

John Locke agreed with Harrington on the relationship between

property and political forms, but he differed concerning how a legitimate government was created in civil society. Property, Locke admitted, tends to give power, but he denied that property gives political authority. Consent, not property, was the foundation of legitimate political authority; yet Locke admitted that the chief end of government was the preservation of property.[105] Political society secures and guarantees to the individuals their property and other goods by overcoming the three deficiencies of the state of nature: the lack of peace, safety, and the public good of the people.[106]

Property, Locke offered, was a form by which the consensus that establishes society continued to be operationally manifested.[107] If one dislikes the form of civil society, he is free to leave it, but if one continues to hold property in society, he is assumed to continue to accept society. This operational consensus also gave political sovereigns the right to redistribute the estates and interests of individuals in society for the public good, as well as the right to regulate property by taxation.[108]

These theories of Harrington and Locke are fundamental to any explanation of tribal tenurial systems. If a person purchases tribal title and lives under tribal law and regulation, he "operationally consents" to the will of the tribe. Or in the words of the Court in *M'Intosh*, "[t]he person who purchases lands from the Indian tribes, within their territory, incorporates himself with them, so far as respects the property purchased."[109]

Justice Smith Thompson (Circuit Court, New York), in the case of *Jackson v. Porter*, restated the holding in *M'Intosh* in 1825, stating that:

> A purchaser, from the natives, at all events, could acquire only the Indian title, and must hold under them and according to their laws. The grant must derive its efficacy from their will, and if they choose to resume it and make a different disposition of it, courts cannot protect the right before granted. The purchaser incorporates himself with the Indians, and the purchase is to be considered in the same light as if the grant had been made to an Indian; and might be resumed by the tribe, and granted over again at their pleasure.[110]

Other seminal cases in the classic paradigm all support the principle of the distinct but compatible tribal tenurial system announced in *M'Intosh*, rather than the modern paradigm.

Finally, it should be apparent that the Court recognized tribal tenure systems predicated on tribal sovereignty. It refused to sustain the purchaser's title, primarily on the grounds of the unrestricted treaty conveyance. The mere fact that the Court refused to sustain the non-Indian purchaser's interest did not affect the legality of the tribal tenurial system, tribal sovereignty, nor tribal title. All these tribal attributes were clearly sustained in *M'Intosh.*

Antecedent Authority of M'Intosh's Tribal Tenure Theory

The unanimous opinion[11] of the Court in *M'Intosh* was not innovative, but rather the culmination of decisions coming down from the middle of the seventeenth century. If we are to retain the importance of the insights of the Court in *M'Intosh* with a hope of understanding the error of later cases, we might do well to begin where they did: with an interpretation of tribal title as it existed in the jurisprudential consciousness prior to *M'Intosh.*

A comprehension of the doctrinal foundation of the Court's theory of tribal title in *M'Intosh* must commence with the opinion of the Attorney General of the United States in 1821.[12] This opinion, which reflects governmental policy, was designated *Seneca Lands.* The holding of the opinion both supports *M'Intosh* and clarifies some of its implications. The Attorney General, speaking for the federal government on the issue of tribal title, determined:

> So long as a tribe exists and remains in possession of his land, its title and possession are sovereign and exclusive . . . . Although the Indian title continues only during their possession, yet that possession has been always held sacred, and can never be disturbed but by their consent. They do not hold under the states, nor under the United States; their title is original, sovereign, and exclusive.[13]

Under this conceptualization, the tribal land tenurial system is clearly distinct and separate from the land tenure systems of both the state and federal governments. It is not held under those land tenure systems, nor does it emanate from them. The opinion on this is the governmental counterpart to the judicial holding in *Fletcher v. Peck* and *M'Intosh.*

In the same manner that *Fletcher, Seneca Lands*, and *M'Intosh* establish the doctrinal trinity creating tribal land tenure systems in American law as separate and distinct from the other systems of land tenure, there also exists a congruent trinity in the law of the

British Empire. Central to the British doctrinal trinity is the case of *Mohegan Indians v. Connecticut*, which has been called "the greatest cause ever . . . heard at the [Privy] Council Board."[114] The residual components of the British trinity are the opinions concerning tribal purchase by English subjects for the Crown, and the legitimization of tribal title in the colony of Massachusetts. These controlling authorities clearly establish the doctrine of tribal land tenure consistent with the holding of *M'Intosh.*

The history of the *Mohegan Indians v. Connecticut* case is long and tedious,[115] but can be summarized briefly to illustrate its importance. The case began in 1703 when the Mohegan Tribe petitioned the Queen in Council, alleging that the tribe had been deprived of certain tracts of land which had been reserved to them by treaty with the royal colony of Connecticut. Their attempts to resolve the issue with the colony had failed, so the tribe requested that a Royal Commission adjudicate their land issue. Attorney General Northely determined that the royal charter of Connecticut did not include tribal land, and therefore the Queen could lawfully erect a court within the colony with an appeal to the Queen in Council. [116] The first Royal Commission, in an *ex parte* hearing, held for the Mohegan Tribe in 1705. In a unanimous opinion, the Commission restored the land to the tribe and gave the cost of litigation to the tribe.[117]

The colony appealed this judgment to the Queen in Council on the premise that it had absolute title to the lands through conquest, that the tribe was subservient to the colony, and that the Royal Commission was illegal because a judicial determination of title to land ought rightfully to be decided by jury and not a commission. The arguments of the colony were rejected by the Privy Council, and the propriety of the Royal Commission was upheld. The Committee of the Privy Council held that the status of the Mohegan Tribe was as a sovereign nation which was not subservient to the colony. It also rejected the theory of conquest as a source of absolute title for the colony. However, the Committee did reverse the awarding of the litigation cost to the tribal advocates, and advised that a new commission of review should reexamine this issue.[118]

The second Royal Commission of 1738 was a total failure. It acted as a commission of review, but refused to consider either the judgment of the first Commission or the results of the appeals to the Committee, while reversing the decisions of these tribunals. The tribe appealed the acts of the second Commission to the King in Council because of its irregularities; the Crown agreed with the

tribe's contentions and established the third and last commission of review.[119]

The Court of Commissioners, as the third Royal Commission called itself, convened in 1743 to rehear the entire issue. It summoned the numerous tenants in possession of the controverted land to defend their titles against the tribal title, but the tenants refused to appear before this Commission. The tenants challenged the jurisdiction of the court to determine individual land titles on the premise that such a court was contrary to the laws of England, of Connecticut, and of the royal charter of the colony. This issue tested the authority of the Crown over individual land titles within the colony, and was a direct challenge to the King and his Privy Council. More importantly, for our purposes, it also presented a regal court with the first opportunity to determine the legal status of Indian tribes within the British Empire.

The argument advanced by the colonists was that the Indians were subjects of Great Britain, and as subjects, the Indians' title must therefore be determined by the laws of either Great Britain or the colony.[120] The Court of Commissioners rejected this argument. Commissioner Horfmanden, writing for the majority of the Court of Commissioners in 1743, held that:

> The Indians, though living amongst the king's subjects in these countries, are a *separate and distinct people from them*, they are treated with as such, they *have a policy of their own*, they make peace and war with any nation of Indians, when they think fit, *without countroul* from the English It is apparent the crown looks upon them not as subjects, *but as a distinct people*, for they are mentioned as such throughout Queen Anne's and his present majesty's commissions by which we now sit. And it is as plain, in my conception, that the crown looks upon the Indians as having, the *property of the soil* of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a colony, thereby impropriated in his subject till they have made *fair and honest* purchases of the natives .... So that from hence I draw this consequence, that a matter of property in lands in dispute between the Indians as a *distinct people* (for no act has been shown whereby they became *subjects*) and the English subjects, cannot be determined by thelaw of our land, but by a law *equal to both parties*, which is the law of *nature* and *nations*; and upon this *foundation*, as I take it, these commissions have most properly issued .... And now

> to maintain that the tenants in possession of the land in controversy are not bound to answer the complaint before this court, is to endeavor to defeat the *very end and design* of our commission; for surely it would be a very lame and defective execution of it, to hear only the matter of complaint between the *tribe* of Indians and *this* government.[121]

Embodied in this decision and its subsequent confirmation were the ideas of tribal sovereignty, tribal tenure and title, adjudication of tribal conflicts in the law of nature and nations, and the concept of fair and honest purchases which dominated the opinion in *M'Intosh.* This opinion was confirmed by the Privy Council, the highest judicial power in the British Empire.[122]

The second source of authority for the validity of tribal title as a source of title in the Empire was the opinion of the Privy Council to the Crown in the seventeenth century.[123] The concern of this opinion was the effects of purchases of land by individual subjects of Great Britain from Indian tribes without the approval of the Crown. The conclusion of the Privy Council was that:

> In respect to such places as have been, or shall be, acquired by treaty, or grant, from any of the Indian principles, or government, *your majesty's letters patent are not necessary*; the property of the soil vesting in the grantees, by the Indian grants *subject only to* your majesty's right of sovereignty over the settlements, as English settlements, and over the inhabitants, as English subjects, who carry with them your majesty's laws, wherever they form colonies, and receive your majesty's protection, by virtue of your royal charters.[124]

The importance of the official opinion of the Privy Council resides in the fact that it sheds crucial enlightenment to the relationship between the claims of absolute title and the authority of a "subject to" qualification of federal title in *M'Intosh.* "An absolute title to lands cannot exist, at the same time, in different persons, or in different government," explains Marshall in one segment of his arguments; "an absolute title, must be an exclusive title, or at least a title which excludes all others not compatible with it."[125] Great Britain had an "absolute title," Marshall concluded, which was "subject only to the Indian right of occupancy and recognized the absolute right of the Crown to extinguish that right."[126] American title was also held by the Court to be subject to an Indian right of occupancy.[127]

Typically, subsequent courts and commentators have inter-

preted his "subject to" inference as an inferior title. Yet, when the origins of the "subject to" arguments of Attorney Pratt and Solicitor General Yorke for the Privy Council are compared to the statements in *M'Intosh*, such interpretation becomes suspicious. What the Chief Justice was attempting to assert was that the absolute title of both Britain and America was an exclusive entitlement to purchase aboriginal title. But tribal title, being a separate but compatible system of title from either of the British and American systems, it did not affect the absoluteness of title held under either system. Until tribal title was extinguished, the federal entitlement was subject to the tribal right of sovereignty and land tenure law. This did not mean that people could not purchase the land but rather implied that they could purchase subject to a future conveyance. This is totally consistent with the holding in *M'Intosh* that a subsequent treaty conveyance could impair individual rights established under tribal tenurial systems. The "subject to" condition of federal title merely confirmed the legal right of the tribes to sell or not to sell their land until a compromise could be reached by the federal and tribal governments. Under the *M'Intosh* theory, until such consensual agreement, the tribe regulated its own domain. This is a much different position than that ordinarily assumed by the courts and commentators.

A third and final example of tribal sovereignty and land tenure systems in the American colonies under the British Empire occurred in the colony of Massachusetts in the last decade of the seventeenth century.[128] As a result of the 1683 declaration of the Crown, the Lords of Trade attempted to confirm the titles and quit-rents to the inhabitants of Massachusetts. But the Lords found it impossible to confirm these titles because of rival and defective claims. The confirmation of this title would signify the Crown's approval of their absolute title, as well as bring uniformity into the Massachusetts land tenure system. Prior to this confirmation process, the Massachusetts government, probably fearing land tenure problems with the Crown,[129] had sent its commissioners into regions where "squatters" had settled on land without any title and forced them to recognize the rights of the tribal tenurial system by payment of quitrents to the tribes.[130]

Under the regal confirmation process, the Lords of Trade were instructed by the Massachusetts commissioners to confirm all title held under tribal deeds. This validated tribal deeds as a source of title, subject to regal sovereignty. Commissioner Andros reported that the Puritan theocrats considered that it was far more important to hold the land under a tribal deed by "fair contract or just

conquest" than under English law.[131] This theory is confirmed in the writings of John Cotton. Speaking for the Puritan position of tribal title, Cotton stated in 1647:

> [T]hat it was neither the King's intendement, nor the English Planters to take possession of the Country by murther of the Natives, or by robbery: but either to take possession of the voyd places of the Country by the Law of Nature, (for Vaccuum Domicilium credit occupanti:) or if we tooke any Lands from the Natives, it was by way of purchase and free consent.[132]

Cotton's concept of the Puritans' position is consistent with the *M'Intosh* concept, and with the other authority mentioned in this section. Its explanation also rejects the theory that all land in America was considered vacant land, as is commonly attributed to John Winthrop.[133] In fact, Winthrop claimed his land by purchase from an Indian tribe under a deed.[134] Another Puritan, John White, advocated the Biblical arguments but still asserted that "[t]he land affords ground enough to receive more people," and "the Natives invite us to set downe by them, and offer us what grounds wee will: so that eyther want of possession by others, or the possessors gift, and sale, may assure our right: we neede not feare a clear title to the soyle."[135] Thus, the Puritan position was more correctly a purchase theory than a theory of vacant land or a Biblical labor theory, which is often proposed by courts and commentators.[136]

These examples clearly illustrate that the tribes were considered as sovereign nations with the rights to their territories. The combination of political sovereignty and the proprietary powers establish a theory of dominion. The regulation of land under the distributional preferences of a sovereign with proprietary powers establishes the essence of a theory of land tenure. As a result, it could clearly be supported, in the laws of nations and nature of both the British Empire and America, that the Indian tribes not only had tribal dominion, but also had a recognized and separate land tenure system.

The British trinity also reveals that individuals could purchase from the Indian tribes. This tribal title was valid under the British law, until the British government extinguished tribal lands and perfected its title. This is consistent with the holding in *M'Intosh*, but this established a quandary as to whether the title of the colonies was held under English tenure or tribal tenure until tribal title was extinguished. The Court in *M'Intosh* avoided discussing

these problems on fact distinctions. The Court arguments in this regard were not particularly convincing.[137]

The Cherokee Cases

In the now famous Cherokee Cases, *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, the Supreme Court affirmed the theory of tribal title in *M'Intosh.* Tribal title was seen as a distinct pattern of rights derived solely from tribal authority, and not dependent upon either the state or federal land tenure systems. Although some confusion was created about the relationship between tribal sovereignty and tribal title in the case of *Cherokee Nation*, the source of that confusion was clarified by the Court in the subsequent *Worcester* holding.

Cherokee Nation v. Georgia was a case of jurisdiction rather than land, and did not affect the nature of tribal tenures. It involved the original jurisdiction of the Supreme Court under Article III of the Constitution. Chief Justice Marshall, speaking for himself (and perhaps the absent J. Duvall), created a source of confusion that still plagues tribal rights when he stated:

> Though the Indians are acknowledged to have an *unquestionable*, and, heretofore, *unquestioned right* to the lands they occupy, and that right shall be extinguished by a voluntary cession to our government, yet it may be doubted whether the tribes within the acknowledged boundaries of the United States can, with strict accuracy, be dominated by foreign nations [within the sense of the Federal Constitution]. They may, more correctly perhaps, be designated domestic dependent nations. They occupy a territory to which we must assert a title independent of their will, which must take effect in point of possession when their right to possession ceases. Their relation to the United States resembles that of a ward to his guardian.[138]

This paragraph contains two different statements. The first is a property statement. It holds that tribes have an unquestionable right to the lands they occupy until that possessory right is extinguished by a *voluntary* cession from the tribes to the federal government. Also in this paragraph is an obscure reaffirmation of the discovery principle: "[the tribes] occupy a territory of which we must assert a title independent of their will, which must take effect in point of possession when their right to possession ceases." The second statement concerns political status: it holds that Indian

tribes are not, in the sense of the Constitution, "foreign nations," but rather are labeled by Marshall as "domestic dependent nations"—but *nations* nevertheless in American law.

The conceptualization of the analogy of ward to guardian has since perplexed the legal profession. The central issue has not been understood by subsequent courts, nor addressed by them, because of the instrumental reading of federal powers by the federal government and the federal courts. To illustrate the one-sided nature of the federal interpretation of this clause in *Cherokee Nation*, the concept of ward must be reviewed. There exist in legal history and theory two potential definitions of wardship.[139] The first is the Roman theory of wardship as a political relationship. The second is an English theory of property, but the English incidents of wardship were abolished by the Statute of Tenure in 1660, one hundred and seventy years before the opinion in *Cherokee Nation.*

In Roman law, on the one hand, "wardship" was the political status of semi-dependent house communities which attached themselves to powerful lords and masters. "[W]e think of these communities as walled round preserves," Professor Noyes writes in his book, *The Institution of Property*, "within peace, without war."[140] It was necessary, especially for indigenous people under Roman rule, for the "subject people to attach themselves to one or another house in order to participate thus indirectly in the economic and political advantages established by the association."[141] This was most likely to occur where the indigenous people under Roman rule were too numerous to be enslaved. The concept of "ward" was derived from the Roman word *tutela*, which means "to protect."[142] This was also the foundation of the early Spanish and French recognition of the status of the Indians, as in a "state of tutelage."[143]

In the development of English feudal tenures, on the other hand, wardship was a burden placed upon the land in an effort to maintain control.[144] The lord's rights of wardship arose, after feudal rights became hereditary, when the tenant died leaving a minor child as heir. During the child's minority, the lord was entitled to the profits of the land of the ward and was not bound to account for the profit from the land.[145] The Magna Charta corrected this abuse by providing that the lord holding by wardship should take nothing more than customary produce and should maintain the property in good condition.[146] But the Statute of Tenure in 1660 abolished wardship because of its abuse.[147] Like the Spanish and French concepts of tutelage, the feudal incident was in relation to individual persons rather than political entities.

When these two concepts are compared with the Chief Justice's suggestive analogy in *Cherokee Nation*, it is obvious that he referred to the Roman version of wardship rather than the English version in regard to the political relationship between the tribe and the federal government. This is further evidenced by his reasoning, which followed the suggested analogy of political relationship:

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form political connection with them, would be considered by all as an invasion of our territory and an act of hostility.[148]

This discussion is actually only a restatement of the principle of discovery and the right of the federal government to its entitlement as against all other foreign powers. The unique argument is the protection argument. Because this argument has been misinterpreted as a surrender of power of the tribes to the federal government, it is necessary to correct this assumption. In this regard it is important to note that the Supreme Court of the United States in its decision in *Worcester v. Georgia*, elaborately explained "protection" in the following year. The Court held that protection, as applied to the Cherokee Nation, "involved, practically, no claim to [their] land, [and] no dominion over their person."[149] Protection merely bound the tribe to the United States as a "dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character . . . ."[150] Protection does not imply the destruction of the protected."[151] It should be totally clear by now that wardship is a political relationship that supports, rather than destroys, tribal tenurial systems, as pronounced in *M'Intosh*. In fact, it strengthens tribal authority to police its own internal land, based on original inherent sovereignty.

In *Worcester v. Georgia*, Chief Justice Marshall then reversed the political status of tribes outlined in *Cherokee Nation*. Instead of labeling the Cherokee Nation a "domestic dependent nation" in the jurisprudential sense, he held as a matter of law under the Constitution that: "The Indian nations had *always* been con-

sidered as *distinct, independent* political communities, retaining their *original* natural rights, as the undisputed possessors of the soil from time immemorial. . . ."[152] Marshall did not discuss the doctrine of wardship in this case. He did, however, reject the inference of Indians being subject to the Laws of the Master.[153] The solid inference is that he reversed his dicta in *Cherokee Nation*, and considered his previous classification of "domestic dependent nation" as overruled. *Worcester* was essentially the same case as *Cherokee Nation.*

Chief Justice Marshall did not seem to find it necessary to make any detailed analysis of tribal land tenures. This recognition of tribal land tenures, while apparently consistent with the policies of Congress and the Executive of the United States in the early nineteenth century, was clearly not dependent on these policies, but rather a proposition recognized in the federal common law and land tenure system.[154] The recognition of tribal land tenures was not dependent on the original constitutional status of the concerned land: rather, the recognition of the distinct tribal tenures flowed from the original natural rights of the tribe.[155] Furthermore, tribal tenure was not solely dependent upon treaty recognition of Indian rights in land because such right survived the changes of sovereignty and were qualified primarily by the restriction of alienation inherent in the preemptive title of the United States.[156]

Under the classic paradigm the tribes had dominion. They had not only possession but title and the right to self-government. In relationship to the federal government, all cession or conveyances of land were voluntary and consensual. The tribes had unlimited rights to establish a land tenure system without interference from the federal or state governments. The federal government held the exclusive right to purchase the aboriginal title, but until such an agreement was made with the tribes the federal government guaranteed to control its citizens and prevent them from encroaching on tribal lands and establish exclusive trading privileges.[157]

III. *The Paradigmatic Shift in Tribal Title*
The Riddle of Tribal Title

In contrast to the doctrinal clarity and uniformity of tribal title in the classic paradigm embodied in the Marshall Court, the subsequent courts failed to understand its doctrine and its implications. Tribal title and the significance of the holding in *M'Intosh* slowly faded in the jurisprudential consciousness. The divergent Indian

policies of Congress embodied in removal and allotments were the major sources of decline for the theory of tribal title, but this is little excuse for the courts' lack of analytical sophistication in cases dealing with tribal property.

One of the best explanations, perhaps, for the development of this riddle of tribal title was that the subsequent courts were less concerned with the theoretical issues of land tenure and more concerned with implementing a unitary theory of federal title; they were concerned with formalistically filling in the gaps in the outline of American land tenure systems, not in questioning those systems' very existence. These courts viewed tribal title as transitional, and a major influence on this transitional theory was the mandates of the policies of manifest destiny and the melting-pot ideology. The best illustration of the results of this transitional theory is embodied in the works of Felix H. Cohen, the first scholar of Indian law, who failed to understand the insights of the classic paradigm of tribal title. Much of his intellectual oversight was undoubtedly due to his preoccupation of attempting to merge tribal title under federal title, rather than keeping conceptual fidelity to separate land tenure systems. This preoccupation is embodied in his 1942 book, *Federal Indian Law*.[158] In the Langdellian case-analysis tradition of legal scholarship, Cohen attempted to forge an explanatory principle of aboriginal title *under* federal land tenure, establishing the modern riddle of tribal title. Thus, he states:

> Cases and opinions subsequent to the *M'Intosh* case oscillate between a stress on the content of Indian possessory right and stress on the limitation of that right. These opinions and cases might perhaps be classified according to whether they refer to the Indian right of occupancy as "mere" right of occupancy or as a "sacred" right of occupancy. All the cases, however, agree in saying that the aboriginal Indian title involves an exclusive right of occupancy and does not involve an ultimate fee . . . .[159]

Much of the riddle of aboriginal title in *Federal Indian Law* surrounds this misreading of *M'Intosh*. *M'Intosh* was read as establishing a principle of federal title and as not recognizing tribal title.[160]

While teaching at Yale Law School, Cohen reevaluated the riddle of tribal title. "[T]he dismissal of the plaintiff's complaint in this case was not based upon any defect in the Indian's title," Cohen acknowledged in his article, "Original Indian Title," con-

cerning *M'Intosh*, "but solely upon the invalidity of the Indian deed through which the white plaintiffs claimed title."[161] He failed to explain that the deed was not invalid, but that the subsequent unrestricted treaty abrogated all rights the white plaintiffs held under tribal dominion. His preoccupation with the unity of federal title hindered his discernment of the separate tenurial system inherent in the classic paradigm. "[T]he federal government and the Indians both had exclusive title to the same land at the same time," was the Pickwickian conclusion Cohen elucidated from the decision in *M'Intosh*.[162] Hence, a federal grant of Indian lands could convey an interest, but this conveyed interest was not possessory interest until the federal government extinguished the possessory interest of the tribes.[163] The insight that the extinguishment of tribal title was necessary before the federal government could convey an interest remained, but in a different form than before, *i.e.*, in terms of possession, not title. This step is important to an understanding of the paradigmatic shift in tribal title.

Equally as important to the emergence of the modern paradigm of tribal title were the vacillating congressional policies in Indian affiars, in particular, the land policies inherent in the removal policy[164] and in the general allotment acts.[165] These vacillating policies were compounded by the federal courts' surprisingly mechanical applications of jurisprudence. Searching for fundamental principles in law, the courts treated all tribes as similar before the courts, and failed to understand or distinguish between the concepts of aboriginal title and tribal title under federal title. In terms of our analysis of tribal title, both of these responses by the legal system were detrimental to the tribes and to a juridical understanding of the classic paradigm of tribal title. The implications of the removal policy in terms of tribal title were the most obfuscating for policy, while allotment was the most turbid.

Removal of Indian tribes from the southeast to Indian Territory extinguished their aboriginal tribal title, and the land to which they were moved was land to which the federal government had already extinguished the indigenous tribes' aboriginal title and brought under federal dominion. The legal effect of such extinguishment of aboriginal title by the federal government was to bring the land under congressional authority through the property clause of the Constitution.[166] The fact that Congress decided to reserve this land for the removed Indian tribes does not negate the congressional power to establish distributive rules and regulations for land tenure (*i.e.*, allotments or common tribal property); rather, it strengthened the police power of Congress over Indian

tribes. The only limitation on this power was in reference to aboriginal tribes occupying a section of their aboriginal land through consensual agreements with the federal government.

The removal of the Five Civilized Tribes to Indian Territory is a pertinent example for analysis. Upon removal from their aboriginal territory in the southeast, the Five Civilized Tribes acquired land from the United States in conformity with treaties and agreements that provided for a fee simple patent to the tribes for their members.[167] There was a subsequent condition: that the fee simple patent exist so long as the tribes continued to occupy the land.[168] In legal effect, the Five Civilized Tribes had secured from the United States the fee to the lands they occupied, and had converted the right of aboriginal title under tribal dominion to a fee simple tribal estate under the dominion of the United States. This did not affect their right to self-government or sovereignty because that authority originated in the inherent consent of the tribal members to vest allegiance in the tribe, versus the federal or state governments.[169] Likewise, the converting of aboriginal title to fee simple did not affect the tribes' rights to establish land tenure systems, but land tenure systems so established were subject to the extended police power of Congress over territories under the Constitution because the land tenure system emanated from the United States rather than strictly from tribal dominion.

Under the land tenure system of the United States, Congress could and did unilaterally regulate tribal land by legislation.[170] It extinguished the fee simple title of those tribes aligning themselves with the Confederated States of America during the Civil War.[171] It mandated the division of tribal land into allotments in severalty among the members of the removed tribes. It granted lands to the railroads, and for other federal purposes, with some compensation paid to the individuals as well as to the tribes.[172] These unilateral congressional acts rested on the sole authority that the land was not aboriginal land under tribal dominion, but rather territories that emanated from the United States and which were regulated by Congress.[173]

In contrast to the allotment policy of tribal land held under federal tenure is the allotment of aboriginal title. An example of this policy is found in the Sioux Indian tribes of the High Plains.[174] The Sioux reservations were aboriginal tribal title, expressly reserved in their treaties with the federal government.[175] In order to implement the allotment policy in this context, the federal government had to obtain the consent of three-fourths of the male tribal members pursuant to the terms of the Treaty of 1868.[176] The mere

fact that the tribal lands were divided did not extinguish the aboriginal title to the lands. If the allotments were perfected by the federal government and transferred in fee simple to the individual tribal members, then the land passed from aboriginal tribal title to a fee simple estate under federal title. Congress, however, ended the allotment policy in 1934, and reestablished a policy of consolidating land under tribal ownership.[177]

Allotted land on aboriginal tribal reservations is called trust patented land rather than restricted fee land. The distinction is important. Trust patented land corresponds to allotments in aboriginal tribal title, while restricted fee corresponds to tribal title under federal land tenure. Trust patent land, on the one hand, usually denotes the fact that the United States has not perfected its entitlement but has ultimate fee.[178] Restricted fee, on the other hand, involves the holding of legal fee by an allottee under federal title, but subject to federal restrictions.[179]

While the distinction between aboriginal tribal reservations and lands under federal title is important, it does not affect or modify the ultimate fee title of the United States, which is the power to extinguish tribal title. But the tribal holding of aboriginal title does more narrowly limit the power of Congress over tribal dominion, and over the tribal police power over tribal members and their allotments under tribal tenures, even though these lands are still subject to the ultimate fee of the United States. The appropriate test of congressional power in an original title reservation established under the Indian Reorganization Act is clearly upheld by Justice Van Devanter in *Chippewa Indians v. United States*:

> Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and *does not* enable the government to give the lands of one tribe or band to another or *to deal with them as its own.*[180]

Furthermore, under the Indian Reorganization Act which ended allotment, the tribes were given concurrent jurisdiction to regulate their civil affairs.[181] The preamble of the Indian Self-Determination Act has recently reaffirmed this concurrent jurisdiction and established federal policy more congruent with tribal control.[182]

The Paradigmatic Shift: Tee-Hit-Ton Indians v. United States

At the height of the termination period of federal Indian policy,

a divided Supreme Court inaugurated the shift in the legal paradigm of "Indian title of Occupancy" under the guise of following *M'Intosh* and the older precedent of tribal title. The Court held in *Tee-Hit-Ton Indians v. United States* that the property rights established by occupancy "since time immemorial" by the natives of Alaska were not legal property rights under American law: rather, that such occupancy was permissive occupancy.[183] Under this distinction, the rights of occupancy could be canceled unilaterally by Congress at its discretion, without compensation to the native clans or tribes.

This theory, although much criticized by the legal profession, established the modern paradigm of tribal title of occupancy as a naked possession. More importantly, the reasoning of the Court is an example of the confusion accorded the *M'Intosh* opinion by the modern Supreme Court when it fails to adhere to the conceptual fidelity of the classic paradigm, which was an attempt to reconcile the two complementary land tenure systems, tribal and federal. It is the problem of categorical reasoning on paradigmatic assumption in law, rather than attempting to adhere to conceptual and precedential fidelity. The riddle of tribal title which haunted the legal commentators finally emerged clearly in the case of *Tee-Hit-Ton Indians v. United States*, creating the modern paradigm of tribal title.

The land in question in *Tee-Hit-Ton* was aboriginal tribal land, but the Court treated the land as if it had emanated from the United States as in the situation of removed tribes. The United States had acquired the territory from Russia by a treaty in 1867, and the Court held that this treaty transfer was sufficient to extinguish aboriginal tribal title.[184] The Court of Claims had reached a contrary conclusion that the tribal interest existed prior to the Alaskan purchase, and termed this title "original Indian title," or "Indian right of Occupancy."[185] It also determined that this original Indian title was not recognized by Congress; therefore, the Indians had no legal right to the land under the Constitution.[186] The Supreme Court never questioned the notion that aboriginal title exists within the land tenure system of the United States, not as a recognized principle of law concerning separate land tenure systems, as asserted in *M'Intosh*, but rather as possession unless recognized as a property right by the United States. It was a creation of the decision—a misunderstanding of both the classic paradigm and the significance of the subsequent cases that followed the holdings of the classic paradigm.

This is a clear example of how to perfect title to lands taken not

by fraud, duress, or other illegal means, but rather by assertion of a unitary federal tenure test, and finding no evidence of title under the created judicial test. It does not address itself to the situation where the United States has not attempted to perfect its entitlements purchased from Russia by further purchasing the tribal title, but, indeed, asserts the right to limit an aboriginal right by a recognition test independent of the extinguishing of tribal title. In this fact situation before the Court, the correct judicial test should have been controlled by Section 177 of the United States Code: *e.g.*, the Court should have asked whether the treaty between Russia and the United States was "subject to Indian title," as it did in *M'Intosh* regarding treaty transfers from foreign nations to the United States.[187]

The Tee-Hit-Ton Indians, a clan of the Tlingit tribes whose land was in question, argued to the Court that they had either a "full proprietary ownership" in land, or "at least a recognized right to restricted possession, occupation, and use."[188] Any such confiscation of these property rights by the United States was therefore compensable under the fifth amendment to the Constitution.[189] In opposition, the government argued that the Indians' claim to the land was not compensable because their interest was merely a right to use the land at the government's pleasure.[190] The government also stressed the fact the Congress had never recognized any legal interest of Indians in their land.[191] The Supreme Court agreed with the position of the government.[192] Through the framing of the issues in this case, the Tee-Hit-Ton Indians were caught in the legal riddle of Indian title.

The test of congressional recognition of aboriginal title assumes the issues which are before the Court.[193] It is founded on legal presumption that the federal government must have the burden of proof of purchase of tribal title; absent such proof, the legal presumption ought to have been that the property remains in tribal dominion and land tenure systems. This, at essence, is the error of the recognition test. It was created and applied to the wrong fact situation.

The Court in *Tee-Hit-Ton* realized that there was no particular form of congressional recognition of "Indian rights of permanent occupancy,"[194] and that such recognition might be established in a variety of ways. However, it still held that there must be "the definite intention by congressional action or authority to accord legal rights not merely permissive occupancy."[195] The standard the Court utilized was that where Congress, by treaty or other agreement, has declared that thereafter Indians were to hold the land

permanently, compensation must then be paid for subsequent taking.[196]

This was not the question before the Court at all. The recognition test is not concerned directly with aboriginal title. It is concerned with *conveyances* and *reservations* of aboriginal title by either treaty or agreements in which the United States has guaranteed to the tribes certain lands.[197] These consensual conveyances create legal rights which the tribe can enforce against congressional action. But if *no* conveyance has been entered into by the tribe, the federal government, in order to acquire rights to the aboriginal title, must purchase it. If the government refuses to purchase, then the land resides under tribal dominion. Any taking of aboriginal land without purchase is blatant confiscation. The Court did not interpret the fifth amendment as imposing limitations on *actions by the federal government* but rather as concerning the nature of the property being confiscated. This is a bizarre reading of the fifth amendment.

The advocates for the tribes, faced with the recognition test, maintained that both the Organic Act of Alaska and the act providing for civil government for Alaska sufficiently recognized the permanence of the clan title to best legal rights.

The eighth section of the Organic Act stated:

> That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress . . . .[198]

The act for civil government reaffirms the Organic Act, stating: "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any land now actually in their use and occupancy . . . .[199] The Court of Appeals had previously determined that this act constituted recognition of Indian ownership.[200] The Supreme Court, however, held that neither of these statutes nor pertinent legislation indicated any such intention by Congress to "grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken, . . . "[201] In short, the Court inaugurated a new judicial test of aboriginal property: the legal theory that Congress has the sole right to *delegate* to the Indian tribes their rights to aboriginal titles. Aboriginal title did not exist, then, because of

the tribes' "original natural rights as the undisputed possessors of the soil from time immemorial," as stated in *Worcester.*[202] Rather, under the Court's new theory of aboriginal title, it was vested in Congress! This is a juridical fiction that is completely refuted by all the classic cases of Indian law, grounded as they are in the notion of inherent title rather than in recognized or delegated aboriginal title.

If the Court's case is correct in that aboriginal title needs congressional recognition in order to be permanent, why did the Court in *M'Intosh* establish in such painstaking detail that discovery granted the right to acquire tribal title through purchases? This recognition test allows the Court to ignore the fundamental principles of intertenurial transfer of property established in *M'Intosh.*

The first question in the Court's rationale is the theory that the Organic Act merely intended to retain the status quo. This implies maintenance of property rights, but the Court rejects its own inferences. In assessing the status quo inference of the *Tee-Hit-Ton* Court, the chain of title theory of *M'Intosh* and *Worcester* must be seriously reexamined. "[N]either the Declaration of Independence, nor the treaties confirming it," the Court held in *M'Intosh*, "could give us more than that which we before possessed, or to which Great Britain was before entitled."[203] This is a clear judicial validation that the rights established under Great Britain and under the federal government survive the changes in sovereignty. The Court continued:

> It has never been doubted that either the United States or the several states, had a clear title to all the lands within the boundary lines described in the treaty [between the United States and Great Britain], subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.[204]

Similarly, when the *M'Intosh* Court discussed the legal effect of the treaty transfer of entitlements between France and Great Britain in 1763, the Court concluded that:

> It had never been supposed that [Great Britain] surrendered nothing although she was not in actual possession of a foot of land. She surrendered all right to acquire country [from the aboriginal Indian tribes]; and any after attempts to purchase it from the Indians, would have been considered and treated as an invasion of the territory of France.[205]

There is nothing in the terms of the treaty transfer from Russia to the United States which could make such a conveyance not subject to extinguishing Indian title, similar to the fact situation in *M'Intosh.*[206] The treaty by rights *should* have established an entitlement to purchase Indian title—not a perfected title.

The status quo inference the Court creates and then takes so lightly is, in effect, a validation of tribal dominion and unextinguished aboriginal title of the Indians, as well as the rights of other persons under either tribal dominion or Russian law which survive the change of sovereignty. It is those status quo rights which are vested under the Organic Act of Alaska. Under the Court's theory in *Tee-Hit-Ton*, however, no person—Indian or non-Indian— has any legal rights to land in Alaska; all were totally abolished by the change of sovereignty. If the Court interpreted this statute as merely limited to the Indians and not to the "other persons," then such an interpretation would be violative of the equal protection of law under the Constitution.[207]

The Court in *Tee-Hit-Ton* next utilized the "further congressional action" test as the second part of its recognition test rationale to defeat tribal title. However, this test does not refer to tribal title, but to "other persons." Section 177 of the United States Code expressly provides procedures for the extinguishing of aboriginal title by the federal government.[208] The only remaining procedures this further action contemplates is the offer of lands for public land sale, *i.e.*, the distribution of extinguished tribal lands by the federal government to other citizens. Implicit in the Organic Act, as well as the act for civil government in Alaska, is the recognition that unless the federal government extinguishes tribal title, such title is as permanent as the law recognizes and vested in the Indian tribes. This concept is consistent with federal Indian law, with the chain of title theory of *M'Intosh*, the classic paradigm of tribal title, and with the property theories of Locke regarding the relationship between property and government in the modern liberal state.

The Court's analysis of Indian title also suffers from the same legal errors as the recognition test. Original Indian title was equated with "permission from the whites to occupy" lands, rather than as an original natural right of the tribes, as in the holdings of *M'Intosh* and *Worcester.* Moreover, the Court stated,

> [original Indian title] means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty" as we use that

> term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusions by third parties but which rights of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligations to compensate the Indians.[209]

The authority of the Court for such a sweeping conclusion of law was no less than "the great case" of *Johnson & Graham's Lessee v. M'Intosh.*[210]

In *Tee-Hit-Ton, M'Intosh* was cited for the legal proposition "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest,"[211] and for the proposition that it "denied the power of an Indian tribe to pass their right of occupancy to another."[212] Moreover, the Court held that *M'Intosh* stands for a "rule" not even before the Court, *i.e.*, that the taking by the United States of unrecognized Indian title is not compensable under the fifth amendment.[213] Except for the proposition that discovery gave an exclusive right to extinguish tribal title, these holdings and interpretations are not correct. This was a clear abuse of precedent by the Court.

To understand the inadequacy of the conquest theory of the Court's decision in relation to aboriginal title in *Tee-Hit-Ton*, it should be noted that *Fletcher v. Peck, M'Intosh*, and *Worcester* all rejected conquest as a source of land title. In fact, in *United States v. Percheman*, Chief Justice Marshall restated the same legal principle he had established in *M'Intosh*:

> It may not be unworthy of remark that it is very unusual, even in the cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nation, which has become law, could be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled.[214]

Yet, this is precisely the theory which the *Tee-Hit-Ton* decision used to defeat tribal title, in spite of a conspicuous lack of warfare between the United States and the Alaskan natives which might thereby justify such a theory of conquest.[215] The theory of conquest was popularized in *Federal Indian Law* and not in any of the classic cases of Indian law. In *Federal Indian Law*, it is stated that conquest ends external sovereignty, but does not affect internal

sovereignty. Internal sovereignty is the regulating source for land tenure and distribution, and such land tenure regulation is not an attribute of external sovereignty.[216] The *Tee-Hit-Ton* Court infers that conquest refers to property, not political sovereignty. This was the crux of the Court's error: it was implicit in the Court's reasoning, but never articulated in the opinion. It operated, in short, on the assumptive level. The conceptual confusion, itself a form of legal mysticism, was the result of assuming the tribal title of occupancy was under the tenurial system of the United States.

Cohen's theory is that

> [C]onquest renders the tribe subject to the legislative power of the United States and in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government.[217]

But the Cohen book also states that "it is only by positive enactments, even in the cases of conquered and subdued nations, that their laws are changed by the conqueror."[218] Thus, in *Tee-Hit-Ton*, the legal presumption should have been that unless there exists a congressional statute abolishing aboriginal title, not only should the courts assume that the clan title was recognized by Congress, but that such title must be purchased from the tribe as the sole means of perfecting the United States entitlements in Alaska. Conquest did not limit the internal sovereignty of the tribes, which is where the right to tribal power over property resides; it merely limits the entitlements of other European nations.

The last and most fundamental issue was the identification of aboriginal title as the equivalent of "occupancy" in modern legal theory. With the absence of any detailed examination of tribal tenurial systems, the Court merely assumed that tribal title of occupancy was analogous to the term "occupancy" under American tenurial systems. The presumption that the tribal titles of ownership must be basically the same as occupancy in American tenurial systems finally helps us make sense out of the tortured opinion given in *Tee-Hit-Ton.* The Marshall Court took great pains to avoid describing tribal tenurial systems within the technical language of the estates of England and the United States. Marshall's contrast between tribal tenurial systems of land and those within Anglo-American law was not only an act of great judicial sensitivity, but also an attempt to prevent subsequent courts from concluding that Indian tribes did in fact possess a fee simple, as

Justice Johnson concluded in *Fletcher v. Peck.* By utilizing the term "Indian title of Occupancy," the Marshall Court had attempted to prevent subsequent courts from arriving at any conclusion which might be seen as either a limitation on the original sovereignty of the tribes, or as destroying the exclusive federal entitlement to purchase tribal title. To describe tribal rights in the technical language of American law would have been misleading, as the Court was here distinguishing tribal dominion from federal dominion.[219]

The inappropriateness of equating aboriginal tribal title with "occupancy" as defined under American property law becomes all the more clear when it is realized that the Court revised the classic paradigm of tribal title without explanations or elaborations. It violated the classic paradigm's differentiation of tribal tenurial systems from the federal tenurial system: the two paradigms were seen as compatible within a single tenurial system in *Tee-Hit-Ton.*

The British Privy Council, in the spirit of *M'Intosh*, addressed the nature of the interpretive error the *Tee-Hit-Ton* Court blundered into in *Amodu Tijani v. The Secretary S. Nigeria* in 1921. In that case the lordship observed that:

> In interpreting the native title to land, not only in Southern Nigeria but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to the systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with.[220]

Here, then, is precisely the problem with the decision in *Tee-Hit-Ton.* The Court confused the aboriginal title of occupancy with the American concepts of occupancy and possession, which have their own technical connotations in American tenurial interests in real property, particularly in juxtaposition with the terms "fee simple" and "proprietary." In short, the Court employed the American terms to the concept, which the Marshall Court so studiously avoided doing, and the American terms bear only a superficial resemblance to the meanings of the tribal concepts. "All proprietary rights are not equal in sanctity," warned Justice Tawney, "merely because identical in name."[221] The central difficulty with the Court's opinion in *Tee-Hit-Ton* is that its core

is assertion rather than reasoned explanation. The Court's approach to explanation is its assertion that it follows *M'Intosh* and precedent, whereas in reality it merely assumes the conclusions it purports to derive.

The Predicament of the Modern Paradigm

"The law," states Charles Miller, "is not majestic enough in the American system to endure for good but unexplained or unexplainable reason."[222] The Supreme Court's interpretation of the tribal title of occupancy in *Tee-Hit-Ton* raises the question of judicial sincerity and commitment to neutral principles and precedent in law. Judicial opinions are the most permanent and public manifestation of the legal system. What counts in the public life of the judicial system is the process by which the Court reaches its decisions and formulates its reasoning into the decision, *i.e.*, an opinion of a form of public communication. For this communication to be functional and credible in modern society, the opinions of the Court must ultimately be accepted for the actual justification that was offered to the public, regardless of how the decisions came about or how the opinions happen to be written. When the reasoning of an opinion fails to adequately support the decision in a particular case, the entire judicial process suffers. Both the absence of reasoning in the form of coherent argument and the unprincipled use of precedent are detrimental to the Court's legal function, as well as its political role in the legal system.[223]

The *Tee-Hit-Ton* decision is assumptive. It commits most of the errors of judicial reasoning. It creates a legal test of recognition, which before was merely a legal fact and not a clearly defined test, and then applies the new test to the wrong fact situation. Moreover, it does not justify or elaborate on the test nor on its implications. Furthermore, the decision of the Court ignored the congressional scheme for acquiring aboriginal tribal title embodied in Section 177 of the United States Code. Next, the decision molds a folk notion of conquest into a theory of extinguishing aboriginal tribal title, which had never been validated in American law prior to its decision. The Court ignored the doctrine of purchase of aboriginal title, which is the basis of federal title and which creates the assumption that validates tribal title as a property interest. Not content with creating the conquest theory of aboriginal title, the Court once again applied a theory to an incorrect fact situation: the Alaskan natives never had any military warfare with the United States. Lastly, the Court confused the definition of oc-

cupancy in American law with the wording of "Indian title of Occupancy" in the classic paradigm without any reasoned elaboration.

After totally destroying the legal sophistication of the classic paradigm, the Court inferred that payment for the lands of the Tee-Hit-Ton clans resided in Congress rather than the Court. Traditionally, the Court has been the sole authority on determining the nature of property interests. By inferring that the question of determining aboriginal title is a political question, the tribes were deprived of their right to have a judicial determination of their property interest like other citizens of groups in the United States. Also, this theory is of questionable constitutional validity. It is a situation where the governmental entity which is alleged to have taken one's land is also the entity to determine whether or not the thing taken was protected by the Constitution. This approach to justice is contrary to the theory of separation of power in the federal government, as well as the notion of the importance of an independent judiciary in the modern liberal state.

The decision in *Tee-Hit-Ton* illustrates clearly that law is a practical science even at the highest levels. The Court does not dwell on fundamental questions concerning land tenure embodied in case law, or the political and economic functions of the existing legal order. Content with the implicit working assumptions of the common law, legal scholarship and litigation move rapidly to the more current and tractable questions. But when the solutions to social problems offered by the law then fail to satisfy society, it becomes necessary to examine the fundamental theories from which the legal paradigms are derived, and to thereby contrast the fundamental decisions with the working assumptions.[224] The paradigmatic shift in tribal title of occupancy is such a situation, and thereby demands a reformation of the basic theory.

It is submitted that there is no way to unite the paradigm inherent in the *Tee-Hit-Ton* opinion with its authority, *i.e.*, "the great case" of *M'Intosh*. In both legal and economic effect, the classic paradigm is not only different from the modern paradigm but the better of the two. The classic paradigm, on the one hand, grants the tribe both proprietary and governmental power, *i.e.*, tribal dominion. The modern paradigm, on the other hand, establishes the theory that proprietary powers are derivative of the federal government's recognition, not the original natural rights of tribes. Moreover, the modern paradigm holds that aboriginal title is of no economic value, or at the most of little value. Ironically, the economic value of aboriginal property in the modern paradigm is the equivalent of owning a dream.

In terms of the relationship between governmental power and proprietary power, the Court appeared to have developed a federal instrumentality test. The aboriginal land may be protected against third parties because it furthers a federal purpose. But that purpose is largely directed toward maintaining the special relationship of the Indian tribes and clans to the federal government. The serious defect in the instrumental property doctrine is that it makes all tribal power a function of federal policy, just as it makes all aboriginal lands a function of a federal recognition test. Both leave little room for independent tribal initiative in self-determination and economic development.

The recognition test for either tribal power or for social benefits has recently been in disfavor in the Court.[225] In *Oneida Indian Nation v. County of Oneida*, the Court used the recognition test of *Tee-Hit-Ton* when it discussed the significance of Section 177 of the United States Code. The Court stated:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nations and later the original states and the United States—a right of occupancy in the Indian tribes was nevertheless *recognized.* That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian land became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specific areas of land.[226]

While the Court still considered Indian title to be a right of occupancy under American property law, the error inherent in *Tee-Hit-Ton*, the Court did nevertheless render the recognition questionable. *Oneida Indian Nation* holds that the right of occupancy was directly recognized by the federal government at the creation of the United States and that the treaties only recognize and guarantee the rights of Indians to *specific areas* of land. This is a correct reading of the cases which the *Tee-Hit-Ton* Court misinterpreted. Recognition of aboriginal title cannot be delegated. The tribes may consent, in one form or another, to the

establishment of a reservation, *i.e.*, a specific area of land—but this is extinguishment of general aboriginal lands, not all aboriginal rights. The Indian Non-Intercourse Act of 1790, from which Section 177 of the United States Code is derivative, is recognition of aboriginal title. A strong argument can be made that the Act established an uninterrupted principle that Indian tribes were to enjoy special property rights with respect to aboriginal lands significantly different from those granted to federal lands. Protections against the taking of real property rights of individuals and groups under the federal land tenure system are embodied in the fifth amendment to the Constitution, and protections for estates under state land tenure systems are in the fourteenth amendment. But tribal lands under a tribal tenure system were guaranteed protection under the Indian Non-Intercourse Act, which is part of the trust relationship between the United States and the Indian tribes even in the absence of a formal treaty.

Under the Indian Non-Intercourse Act, the tribes are guaranteed that their lands are recognized by the federal government, and the fifth amendment is then utilized to prevent the federal government from taking tribal lands without compensation. This is the proper reading of the federal statutory scheme. It should be remembered that the Constitution is a limitation on governmental powers and the fifth amendment is directed at federal action.

The modern paradigm of tribal title clashes with the entire statutory scheme of Congress for regulating land purchases and with the fifth amendment of the Constitution. It clashes with the classic paradigm of tribal title and with economic theory. But, more importantly, it violates the theory of treaty federalism derived from the classic paradigm. It should be steadfastly remembered that the Indian tribes entered into treaties with the United States under the expectation of retaining their original natural rights of sovereignty and land tenure under the classic paradigm. It was their reliance on these principles that created a political relationship with the federal government, not any show of military might.

The tribes accepted the fact that they would not have immediate representation in Congress, and that being a separate people would rob them of political speech in the federal government. The main incentive for their entering into treaties, then, was to secure independence from external governmental oppression. From this tribal perspective the overruling of any of the holdings of the classic paradigm is a violation of the integrity of the United States. If changes are necessary, then tribes should be granted direct

representation in the Senate to compensate for their loss of political liberty and cultural integrity. It must be understood that as with the relationship of the Magna Charta to English society, and the Bill of Rights to American society, the treaties and the classic paradigm create rights sacred to the Indian tribes. These sacred rights should not be overruled by implication or by erroneous interpretation by the courts or Congress. It is a matter of integrity. This is the predicament of tribal title in the modern paradigm.

IV. *Tribal Title in the Unconcluded Present*

In the previous section, efforts have been made to illustrate the errors originating in the modern paradigm of tribal title in comparison to the classic paradigm. This was necessary because the United States Supreme Court justified its holding in the *Tee-Hit-Ton* decision as mandated by and consistent with the classic paradigm of tribal title. It is here reiterated that the modern paradigm is a sharp and distinguishable break with the classic paradigm and not justified in legal reasoning or reality. If the analysis of the distinction between the classic paradigm and the modern paradigm of tribal title—underlying the argument in this paper—is correct, then revision is needed in the basic institutional arrangements between the Indian tribes and the federal government. Congress has created the legal environment for the change by stressing the rights of self-determination and economic development. The courts should follow this policy and allow the tribal judiciary on "aboriginal title" reservations to develop a theory of tribal land tenure without interference from the federal government's wardship or the newer trusteeship arguments. Other changes are also necessary, but these are dependent upon the status of the reservation lands, *i.e.*, whether the lands are aboriginal tribal lands or tribal lands under federal tenure. This conclusion will be limited to a brief discussion of the theory of tribal land tenure and its relationship to trusteeship.

The Court has validated that the tribal governments exercise both proprietary and government power, but rarely do they combine these powers in any one decision. Some courts assume that tribal power is essentially proprietary and limit all tribal activities accordingly, while others assume that tribal power is essentially a police power and not proprietary.[227] This has created its own special confusion in an area of law known for its inconsistencies.

In establishing a tribal theory of land tenure, both powers must

be combined. If the modern paradigm of tribal title as "naked possession" is incorrect as a matter of law and precedent, then a return to the concept of tribal dominion as conceptualized and delineated in the classic paradigm is appropriate. Tribal dominion under the classic paradigm in contemporary society would again combine the two powers of proprietary (or executory) power and governmental (regulatory) powers. Tribal government, a public form of ownership, would include the powers of disposal, regulation and administration of land tenures, and distribution of assignments, as well as the power to create business entities for exploitation of private property for public benefit.

While the police power of the tribe (an original, inherent, and residual power which cannot be lost except by consent of the tribal citizens) would largely depend on the ends to which it is applied as well as the limitations embodied in the Indian Civil Rights Act, it should be interpreted the same as the police power of the several states. This would include the power to regulate entry and location, or to determine licensing for businesses and zoning, the power to appropriate and distribute land, the power to supervise competition in contract and property law as well as environmental damage, and the power to compact (which is analogous to the proprietary contract).

Because of the implications of the modern paradigm, these distinct tribal powers, which are complementary to reservation economic development and stable tribal government, have been confused by reference to ownership. Regulatory or police power is implicit in the consensual nature of modern society and tribal society, but it is analytically distinct from and unrelated to land ownership. Ownership thinking is most dangerously reflected in those cases in which the courts differentiate tribal jurisdiction on the basis of the three general classes of reservation land tenure pursuant to federal law: tribal, trust allotments, and fee patents.[228] There are few cases where jurisdiction attaches only to tribal land under the modern paradigm of tribal title, but most courts have attempted to draw a line between trust property and fee lands. Another test the courts utilize is the race of the owner of land within the reservation or the allegiance of the owner. In other words, the test for jurisdiction over Indians on tribal reservations is territoriality, while for non-Indians the test is ownership of land, consent to tribal jurisdiction, or absolute immunities. These lines of distinction are based on the nonrecognition of the proprietary power in the modern paradigm which leaves the tribe with mere governmental power to regulate. These distinctions

under the classic paradigm should be nonexistent—they are lingering vestiges of the outmoded federal policy of gradually submitting Indians as individuals to the jurisdiction of the states by easing them into state property-owner and taxpayer status. Under the authority of the classic paradigm, the tribes should have the proprietary power to regulate this land use, as well as the governmental power, without regard to the status of the land.

This theory will necessarily clash with the federal policy of trusteeship. But this problem is part historical and part illusory under the modern theory of property in the United States. In its doctrinal essence, trusteeship is designed primarily to protect the title of that land and to preserve the land in Indian ownership, but the trustee role has never been well defined.[229] Two different theories have been advanced by the United States to limit the power of disposal, both ultimately seeking justification in some need for protection. First, it is said that trusteeship is derived from the decision of the Supreme Court in *Cherokee Nation.* This theory is questionable at best, as shown in earlier attempts at illustration.[230] Nowhere in the classic paradigm of tribal dominion and title did the Court assert that there existed absolute federal authority to dispose of or regulate tribal assets without their consent. The second theory is that trusteeship is alleged to be inherent in treaties. This argument is also subject to question. In *Worcester v. Georgia*, the Court stressed that treaties do not grant unlimited power to the federal government.[231]

Actually, every citizen of the United States holds his land subject to the authority of the United States. Private property, which was originally sanctioned as control over property, has now almost entirely disappeared in American property law. The theory replacing control is that of protections. A system of contract relations is based solely upon the foundation of material objects and requires and obtains from the law a system of protections in relation to these objects. In this paradigm, property is conceived as that specialized organization which functions primarily for purposes that society now calls "economic." Property exists as a system of functional relations between citizens and the state with regard to material objects. The relationships are defined by the philosophy of law as claims, privileges, powers and immunities and their correlatives, duties, and the like. The tenure system in the United States, then, largely consists of protections, or viewed in another way, of limited permissions from the state. A right under this tenurial system is guaranteed against other persons, not as against the state. This new property relationship has led many

commentators to conclude that what an individual actually owns is *rights to use* of resources.[232]

Under this theory, the tribes are in a position equal to other governments to determine their residents' rights of use of resources within the boundaries of the reservation. They do not have this right, due to the modern paradigm and to a translegal problem in legal theory. When federal control of tribal property originated, it appeared drastic in comparison to the private property control theory. It caught the attention of the legal profession. Under the modern theory of protection, however, trusteeship is not as novel as it once was; hence, there is no reason why tribal property is different in terms of federal regulation and control than condominium communities or shareholders of a corporation. The crucial distinction between tribal communities and these entities is that tribal tenure is still distinct from federal tenure and the original natural rights of sovereignty and proprietary power.

It is quite possible to establish a tribal land tenure system based on a leasehold tenure with an ultimate fee residing in the federal government. It is neither mandatory nor necessary that tribal tenurial systems be founded on a freehold tenure in order to be a viable tenurial system. The advantages of a freehold tenure system are that it provides the best form of security for credit and an illusory sense of absolute ownership, which is in effect a powerful incentive to develop the land. The freehold tenure system provides opportunities for large profits, control of land, and symbolic political freedom or social status. But there are obvious disadvantages to a freehold tenure system: the ability to purchase a freehold may entail the exhaustion of capital resources in poor communities or limit the ability to develop the land; the inability to borrow money on freehold property has been a curse to poor communities everywhere; and excessive fractioning of the land also is a concern, especially in communities with an increasing population and limited land. Another problem of freehold tenures concerns the older members of the society and the infirm or crippled members of society. Freehold tenures have always viewed these people as obstacles in the path of progress and have attempted to displace them.

Under a leasehold tenure system, a tribe could, if it desired, ensure economical use of the lands within the reservations, be able to take steps to meet new conditions, and could insist on measures that would improve the tribal lands and natural resources. Adequate security of tenure can be granted, especially under the mandates of the Indian Civil Rights Act. But it is hardly necessary to

observe that many of the arguments against a freehold can be equally valid against very lengthy leases. There is no doubt that the tribes could create a land tenure system of their choice which would meet the needs of the elders and the less fortunate in tribal society.

In any event, under the classic paradigm of tribal title and dominion, the tribes should have the right to formulate their own system of land tenure based on their values and culture. In this situation the Bureau of Indian Affairs or the Department of Interior should play an extremely limited role, if any, in the tribal tenure system. This is not rhetoric nor scapegoating the Bureau, but a matter of economic efficiency and self-determination. The Bureau should allow the tribal governments the maximum latitude in making their own decisions concerning the use of their property. Trusteeship should yield to tribal self-determination.

The limited role of the Bureau is necessary because tribal reservations of aboriginal title are the last remains of land which is not under the federal land tenure until extinguished by voluntary arrangements. Because it is outside the federal land tenure, the power of the federal government should strictly be held to constitutional standards, rather than the plenary power of Congress over its territories. These distinctions are important to tribal development, liberating the tribe from administrative restraints and regulations.

It should always be remembered that the notion of trusteeship is the result of rapid expansion of the governmental interpretation of a very open-ended delegation of power to administrative agencies by Congress in general legislation. The justification for trusteeship is circular and a result of policy rather than principle. Trusteeship is policy oriented. It is purposive in the sense that when the decision about how the administrative agencies determine how to apply a statute to the "best interest" of the Indian people, the decision-making process usually depends on factors that contribute more to national goals than to tribal needs. The history of the land policy is indicative of this instrumentalism in the administrative agencies. But this is also the result of open-ended delegation with vague standards resulting in an ad hoc balancing of interests that resists reduction to general principles.

The tribes have been oppressed by this ad hoc balancing for at least one hundred and fifty years. Now is their opportunity to establish a land tenure system which may result in both economic development and self-determination. Under the classic paradigm, this result could occur; under the modern paradigm, it cannot.

NOTES

1. *Cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). A paradigm, for our purposes, is a set of shared conceptions held by any academic or professional community concerning what is possible. It defines the boundaries of acceptable inquiry and the limiting assumptions within a discipline: It is a set of implicit assumptions, concepts, theories, and postulates held in common by several members of a community, which enables them to explore jointly a well-defined and delimited area of inquiry and to communicate in a specialized language about the subject. In regard to law or jurisprudence, a paradigm may be roughly described in like manner as the study of lawyers' fundamental assumptions. Bentham spoke of it as "the art of being methodically ignorant of what everybody knows." If "lawyer" is substituted for "everybody," the paradigms of jurisprudence are established. Every lawyer, whether a practitioner or a legal scholar, usually takes for granted the meanings of such statements as "that is a rule of law," "the decision is binding on the Court of Appeals," and "X has a legal right to be paid by Y." All these implicit assumptions are paradigms. The purpose of jurisprudence and legal scholarship is to elucidate the statements of the juridical paradigms and to evaluate them. Another important function of jurisprudence is to be alert to the inherent dangers of paradigms in legal practice that create a certain conservatism and resistance to any input in order to gain a certain measure of security in law, but at the cost of acting as a barrier to understanding any other possibilities beyond its own particular set of working assumptions. It is the latter issue that this article seeks to clarify and reform.

2. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). This case established the modern paradigm of tribal title, which holds that Indian title is not a source of title under American law. It has been characterized purely as a right of occupancy, subject to the superior and ultimate title in fee of the sovereign. Occupancy is defined as a naked possession at the will of the sovereign under this paradigm, *e.g.*, United States v. Gemmill, 535 F.2d. 1145 (9th Cir. 1976).

3. The lack of descriptive or analytical principles of Indian title was first addressed in 1901. S. BLEDSOLE, INDIAN LAND LAW (1909). The attempts to reconcile Indian title with federal title are primarily limited to the works of Felix H. Cohen. His first work in Indian law was FEDERAL INDIAN LAW, (1942; rev., 1958). Also important is *Original Indian Title*, 32 MINN. L. REV. (1947). Other important modern notes which have influenced the development of tribal title under the modern paradigm are *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445 (1970) and *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975). *See also* Smith, *The Concept of Native Title*, 24 U. TORONTO L.J. 1 (1974) This article discusses Indian title from the Canadian perspective and determines that native title arises from fundamental property principles common to nearly all property and legal systems, but has no basis in international law or common law. Smith also asserts that the confusion concerning native title arises from a failure to distinguish the native property institutions from other legal and nonlegal property institutions involving the same territory. The author does not reach an understanding of land tenure theory.

4. Mitchell v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 31 U.S. (5 Pet.) 1 (1831); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

5. Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973). This is a crucial article in the development of property law in America. It illustrates the problem of adjusting the eighteenth-century concepts of property inherited by the American legal profession to the social and economic realities of the nineteenth-century American economy. In the process of change, land came to be viewed almost exclusively as a productive asset. Ownership of property was justified in the courts under an "instrumental" form of jurisprudence almost exclusively based on land's contribution in increasing national wealth. A similar process occurred in the conceptualization of tribal property.

6. R. UNGER, LAW AND MODERN SOCIETY 52-54, 66-86 (1976).

7. Cramer v. United States, 261 U.S. 219 (1923). "[Indian right of occupancy] had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well."

8. Indian Reorganization Act, 25 U.S.C. 476, 477 (1970). *See* 25 U.S.C. 465, 483 (1970).

9. Indian Self-Determination and Education Assistance Act, Pub. L.93-638, 25 U.S.C. 450 (1970). *See* Barsh & Trosper, *Title I of Indian Self-Determination and Education Assistance Act of 1975,"* 3 AM. INDIAN L. REV. 361 (1975). This article illustrates the problems of federal delegations of self-determination to tribes in terms of the repetition of certain policy errors which could hinder tribal self-determination rather than promote it.

10. An Indian cannot sell his land or its interest to another if it belongs to the tribe. 9 OP. ATTY GEN. 24 (1857). Nevertheless, the Supreme Court has determined that an individual Indian's interest in the tribal property is as perfect as that of any other person within the boundaries of the tribal lands, but this is not the same form of interest as a tenancy in common under American land tenure systems. Journeycake v. Cherokee Nation & the United States, 155 U.S. 196 (1894). The Court has also stated that individual members of a tribe are not entitled to share in the common property of the tribe due to the nature of the relationship between the tribe and the federal government. Shoshone Tribe v. United States, 299 U.S. 476 (1937). The opinion may have been modified by the Indian Civil Rights Act of 1968, 25 U.S.C. 302. Under this Act the individual members of tribes must be granted due process by the tribal government in regard to their possession of tribal property.

11. See note 3 *supra.*

12. I. SUTTON, INDIAN LAND TENURE 1316, 23-34 (1975).

13. See cases cited at note 4, *supra. See also* United States v. Shoshone Tribe, 304 U.S. 111, 115-17 (1938); BLEDSOLE *supra* note 3.

14. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

15. *Id.* at 279.

16. See cases cited at note 4, *supra.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See note 2, *supra.*

21. J. SACKMAN, TITLES 1-6 (1958). *Compare* 1 L. DEMBITZ, LAND TITLES 65 (1895).

22. C. POWELL, REAL PROPETY 39 (1963). The contempt for history and its resulting bias to the practicing lawyer is somewhat justified by the law school experience. Most property classes present an unquestioned paradigm to law students that there is a unity of federal title which precludes tribal title. This paradigm does not present to law students any penetrating analysis or discussion of the manner in which this unity of title was acquired, but leaves them with the belief that it was derived from Great Britain after the Revolutionary War. This limited approach to legal history has created a situation whereby property is seen as devoid of any moral and ethical principles, in the tradition of Langdellian case analysis. B. ACKERMAN, THE ECONOMIC FOUNDATIONS OF PROPERTY LAW vi-ix (1975). Ackerman suggests that the trans-national acquisition of land from aboriginal peoples in combination with economic theory will provide a framework that will overcome the absence of moral principles in introductory property classes.

It is also suggested that the lack of attention to origins of the federal land tenure system and its development has created a situation that is inherently biased against tribal land tenure systems, and that this is currently reflected in the decisions of the courts, as well as in the judgment of practicing attorneys. This bias is directly contrary to the spirit of a neutral and general legal system, establishing a particular set of beliefs within the legal education process contrary to the existing law. This omission of trans-national or intertenurial acquisition of land and its legal implications in the traditional introductory property class might appropriately be labeled as a manifestation of "cognitive imperialism" from a tribal point of view.

23. *Id.*

24. *For example, see* 1 J. LOCKE, TWO TREATISES ON GOVERNMENT §§ 27, 40, 45 (the

origin of property is an extension of human personality and labor); Reich, *The New Property*, 73 YALE L.J. 733-37 (1964).

25. *For example, see* J. BENTHAM, THEORY OF LEGISLATION 111-13 (Hildreth ed. 1864); Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

26. See notes 24-25, *supra*.

27. O. HOLMES, THE COMMON LAW 5 (1885). "The customs, beliefs, or needs or a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reduce it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and it enters on a new career."

28. *Id.*

29. *See* Lowie, *Land Tenure*, 5 ENCY. OF SOC. SCI. 76 (1933); Biebuyck, *Land Tenure*, 8 INT'L ENCY. OF SOC. SCI. 562 (1968).

30. A. CASNER & W.LEACH, PROPERTY 247-51 (1969).

31. See note 25, *supra*.

32. T. HOBBES, LEVIATHAN, 74 (Rhys ed. 1914); LOCKE, *supra* note 24, §§27, 40, 45; THE FEDERALIST PAPERS (A. Hamilton) (Rossiter ed.); C. MACPERSON, THE POLITICAL THEORIES OF PROGRESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

33. *Id. See also* Kettner, *The Development of American Citizenship in the Revolutionary Era: The Ideal of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208 (1974).

34. This school is associated with Hobbes, *supra* note 32, and the tradition of legal positivism from Bentham and Holmes through H.L.A. Hart.

35. This school is associated loosely with Locke and the traditions of natural law, and the welfare economics of J.S. Mills and R.H. Coarse.

36. See notes 32, 34, 35, *supra*.

37. HARRIS, THE ORIGINS OF LAND TENURE IN THE UNITED STATES 5-14 (1953).

38. FEDERALIST PAPERS, *supra* note 32.

39. U.S. CONST. art. 4.

40. L. HANKE, ARISTOTLE AND THE AMERICAN INDIANS (1959).

41. Ashcraft, *Hobbe's Natural Man: A Study of Ideology Formation*, 33 J. OF POLITICS 1076 (1971); L. HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA (1949); Cohen, *Spanish Origins of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, (1942).

42. 10 U.S. (6 Cranch) 87 (1810). The tribal title issue in this case was but a small portion of the opinion, but it was the ultimate conflict in the fact situation which the Court avoided. For a more detailed description of the case, *see*, HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 314-28 (1944).

43. *Id.* at 142-43.

44. *Id.* at 147.

45. *Id.* at 121-23.

46. *Id.* at 121, citing 1 VATTEL, §§ 81, 209, 2, § 97; MONTESQUIEU, b.18, c.12; A. SMITH, WEALTH OF NATIONS, b.5, c.1. *Accord*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 545-46. (1832); Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543,588 (1823).

47. *See* HAINES, *supra* note 42, at 121.

48. *Id.* at 147.

49. *Id.* at 143.

50. *Id.* at 122. This issue also perplexed the Court. In oral arguments the Court asked the attorneys for Mr. Peck whether the rights Georgia had before extinguishment of Indian title were susceptible of conveyance or was the title in fee simple. Rather than answer this question, the attorneys stressed conquest as extinguishing the Indian title. For elaboration on conveyance arguments, *see* Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 583-84 (1823).

51. HAINES, *supra* note 42.

52. *Id.*

53. *Id.*

54. *Id.* at 146-47. The terminology of "limited sovereignty" did not suggest any connotation that tribes were a lower form of property than the federal government (which held less power than the states at this time), nor that Congress had the right to control the Indian nations. In legal theory, it was probably meant to convey the idea of the treaty agreements to limit the market of tribal title and trade solely to the federal government.

55. *Id.* at 147.

56. *Id.*

57. *Id. But see* FEDERAL INDIAN LAW, *supra* note 3, at 592.

58. HAINES, *supra* note 42, at 146.

59. *Id.* at 147.

60. A. CASNER & W. LEACH, PROPERTY 247-51 (1969). A fee simple is absolute ownership so far as *our* law knows it.

61. *Id.* at 1008. "Preemptive rights" in the sense used by Justice Johnson were a restraint on alienation, rather than a right to acquire title by the United States as successor-in-interest to Great Britain's interest. *See* 3 KENT, COMMENTARIES 385 (1848). Preemption seems to be a derivative of the principle of discovery, but its relationship is uncertain as discovery and preemption were used interchangeably in the classic paradigm. *Accord,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832) (preemptive privilege). In intertenurial conveyances, discovery is more proper to use than preemptive rights, but the better descriptive concept is that of an "entitlement." *See* Calabesi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV 1089 (1972). Calabesi and Melamed hold that, "In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement of private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property." *Id.* at 1105. Therefore, "[w]henever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such decision, access to goods, services, and life itself will be decided on the basis of 'might makes right'—whoever is stronger or shrewder will win. Hence, the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail . . . . Having made its initial choice, society must enforce the choice . . . ." *Id.* at 1090. "These decisions go to the manner in which entitlements are protected and to whether an individual is allowed to sell or trade the entitlements." *Id.* at 1092.

62. *See* HAINES, *supra* note 42, at 147.

63. *Id.*

64. *Id.* There existed little doubt that the Indian tribes were in actual possession of the land. President Washington forbade the first Yazoo sales by a vigorous and decisive stand against it.

65. The controlling statute was passed by Congress in 1790 and is now embodied in 25 U.S.C. 177 (1970). Section 4 of the Indian Trade and Intercourse Act of July 22, 1790, declared as national policy and law that "[n]o sale of lands made by and from Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." *See* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 144-47 (1962).

66. This would the the position today of most tribal reservations carved out of their aboriginal territory. If tribal lands were placed under a unitary theory of federal ownership, the tribal land could be considered easily as a fee simple absolute with the federal government holding preemptive interest or an entitlement.

67. 21 U.S. (8 Wheat.) 543 (1823).

68. See note 61, *supra*, on preemption.

69. CASNER & LEACH, *supra* note 60, at 550-59. The purchasers of the land under tribal dominion claimed the land under a proper legal conveyance: a deed pool, duly executed and delivered at the British military post at a public treaty council. *Compare* the discussion in note 65 *and* Worcester v. Georgia, 31 U.S. (8 Wheat.) 543, 585 (1832). This policy was inaugrated by the Board of Trade after a recommendation to such effect at the Albany Con-

ference in 1754. *See*, NAMMACK, FRAUD, POLITICS, AND DISPOSSESSION OF THE INDIANS (1969). *Accord*, Worcester v. Georgia, 31 U.S. (8 Wheat.) 543, 547 (1832).

70. Treaty of Aug. 3, 1795, 7 Stat. 49; Treaty of June 7, 1803, 7 Stat. 74. The treaties were, presumably, part of the federal question of jurisdiction. The exact nature of the federal patent was not discussed in the opinion or statement of facts. The parties also alleged diversity of citizenship and a jurisdictional amount over $2,000. However, the Court's grounds for federal jurisdiction of the case are not clear.

71. *See* HAINES, *supra* note 42, at 605. There are some problems with the decision. First, it is contrary to the position of the British law of the Empire. A more important objection was that this doctrine is in conflict with the doctrine that titles derived from grants made by a previous sovereign were not affected by the change of sovereignty of territory in which the land was involved. This principle is well recognized in subsequent cases in the Supreme Court and is fundamental to international law, which enjoins respect for and protection of preexisting private rights. Delassus v. United States, 34 U.S. (9 Pet.) 117 (1835); United States v. Clark, 33 U.S. (8 Pet.) 436 (1834); United States v. Arredoonds, 31 U.S. (6 Pet.) 691 (1832). *Compare* Mitchell v. United States, 34 U.S. (9 Pet.) 711 (1835) *and* Choteau v. Molony, 57 U.S. (16 How.) 203 (1853). *See* HAINES, at 594-604, for the strained reasoning of the Court on this issue.

72. *Id.* at 593-94.

73. *Id.* at 572.

74. *Id.*

75. *Id.*.

76. *Id.* See also note 120, *infra* (Mohegan Indians).

77. *Id.*

78. *Id.* at 572-93.

79. See note 61, *supra*. *Accord*, Mitchell v. United States, 34 U.S. (9 Pet.) 711 (1835); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832).

80. The Court stated in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), that "the question of vacant lands within the United States become joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundations. This important contest had been compromised and the compromised is not now to be disturbed." But the fact situation of *Fletcher* and *M'Intosh* are similar in respect to the Indians. It could be argued that the Court was indeed compromising that compromise by placing the federal government as the exclusive owner of the tribal lands.

81. 21 U.S. (8 Wheat.) 543, 572 (1823).

82. *Id.* at 573.

83. *Id.* See also note 61, *supra*.

84. *Id.* at 574.

85. *Id.* at 573.

86. *Id.* at 574. Compare with note 61, *supra*.

87. *Id.* at 573.

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

89. *Id.* at 573. See also *supra* note 55.

90. *Id.* at 574.

91. *Id.* at 487. Discovery also gave the Europeans only as much sovereignty as the natives would allow them to exercise. In short, the authority of the Europeans was consensual and not absolute over the natives under a discovery theory.

92. See text of note 96, *infra*. Compare FEDERAL INDIAN LAW, *supra* note 3, at 122-23, with *Original Indian Title*, *supra* note 3. There is a change in Cohen's position from conquest to a purchase theory in relation to land acquisition.

93. Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

94. *Id.* at 589.

95. *Id.* at 577-85.

96. *Id.* at 589-91. Conquest in the Roman and European legal and political theory was the utilization of armed force to acquire and maintain territories, but it also required that the conquering nation incorporate the conquered people into its society. However, the pro-

perty rights of the conquered people remained unimpaired as conquest was not a property theory. It was a political allegiance theory. *Id.* at 589. Faced with this situation, the Court concluded that "resort to some new and different rule, better adapted to the actual state of things, was unavoidable." *Id.* at 591. The new theory was that of discovery and purchase of tribal lands. *Accord*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 545-46 (1832).

97. HAINES, *supra* note 42, at 591-92.

98. *Id.* at 592.

99. *Id.*

100. *Id.* at 593. *Accord*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 547 (1832).

101. *Id.* at 593-94. Another commentator on transfers of Indian title has reached the same conclusion, stating that "The 'sale' in the Indian's mind meant the admission of the white man to a Sachem's rights with the area specified." Gookin, *Indian Deeds on the Vineyard*, 13 BULL. MASS. ARCH. SOC. 7 (1952). *See* JENNINGS, THE INVASION OF AMERICA 128-46 (1975); Washburn, *The Historical Context of American Indian Legal Problems*, 40 LAW & CONTEMP. PROB. 12, 14-15(1976).

102. HAINES, *supra* note 42, at 594.

103. *Id.*

104. Dwight, *Harrington and His Influence Upon American Political Institutions*, 2 POL. SCI. Q. 1 (1887).

105. HARRINGTON (Blitzer ed. 1955). Harrington is important because of his notion of the relationship of land distribution to the form of government which made the Founding Fathers nervous about purchases from Indian tribes, as well made them aware of the need for the federal government to regulate land use and the distributional preferences of land purchased from the tribes. In other words, Harrington's theories haunted the concept of democracy with the warning that individual ownership would continue democracy, large landed estates could create aristocracy, etc.

106. 2 LOCKE, *supra* note 24, at §§ 3, 27.

107. *Id.* at §§ 124, 127, 134, 138. Compare with §§ 24-25, 94.

108. *Id.* at §§ 140, 142, 149, 172.

109. *Id.*

110. 1 Paine 457, 13 Cas. (1825) (No. 7143).

111. It should be stressed that *M'Intosh* was the only opinion of the classic paradigm in the Marshall Court that was unanimous.

112. 1 OP. ATT'Y GEN. 465 (1821).

113. *Id.* at 465.

114. J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 418 (1950).

115. 126-27 (1743) (Houghton Library, Harvard University). *See* SMITH, *supra* note 114, at 422-42.

116. SMITH, *supra* note 114, at 425 (Indian lands not intended to pass to colony in charter).

117. *Id.* at 426.

118. *Id.* at 427-28.

119. *Id.* at 429-32.

120. *Id.* at 433.

121. *Id.* at 434. In *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the Supreme Court of the United States held that *Mohegan Indians* did not stand for the "assertion of the principle that an individual might obtain a complete and valid title from the tribes." This was an error. Mohegan Indians did assert that principle and the Privy Council did affirm. *Id.* at 598. The Court in *M'Intosh* was faced with a profound dilemma in denying the power of the individual to purchase from tribes. It could have merely asserted this as a matter of federal law, but it attempted to discuss the British trinity by fallacious arguments in distinguishing the facts of the plaintiff's argument. See note 71, *supra.*

122. SMITH, *supra* note 114, at 441-42 (Jan. 15, 1773).

123. CHALMERS, OPINIONS OF EMINENT LAWYERS ON THE COLONIES, 204. Like *Mohegan Indians*, this opinion was also rejected in *M'Intosh*. The Court asserted the fallacious argument that this opinion referred to the East Indians, not American Indians, on the grounds that the opinion commences with the words "princes and government." "We speak of their

sachems, their warriors, their chief man, their nation, or tribes, not of their 'princes and government,'" Marshall stated. This argument is absurd. The leading figure in one New England war was *Prince* Philip, and it was named the Prince Philip War. I. MATHER,, A BRIEF HISTORY OF THE WAR WITH THE INDIANS IN NEW ENGLAND (1676).

124. *Id. Compare* Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 599-600 (1823).

125. *See* Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823).

126. *Id.*

127. *Id.*

128. M. EGLESTON, THE LAND SYSTEM OF THE NEW ENGLAND COLONIES 7-10 (1886).

129. W. MACLEOD, THE AMERICAN INDIAN FRONTIER 197-200 (1928). As early as 1629, two successive letters instructed Governor Endicott of the Massachusetts Bay Colony to pay particular attention to quieting Indians' claims to lands.

130. 1 ANDROS, THE ANDROS TRACTS 50-51 (1868-74).

131. *Id.* at 51.

132. Eisinger, *Puritan Justification for the Taking of Indian Land*, ESSEX INSTITUTE HIST. COLL. 131, 141 (1948).

133. Locke's theory regarding labor and vacant land was never applied by the Court. It applied to man as a *species*, not to man in society. This theory was at the heart of the arguments of Winthrop's vacant land and Biblical tests. In *M'Intosh*, the Court avoided the argument (21 U.S. (8 Wheat.) 543, 588 (1823)), but in Worcester, 31 U.S. (6 Pet.) 515, 553 (1832), the Court entered into the controversy and stated, "To the United States, it could be a matter of no concern, whether [the Indian tribe's] whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional cornfield, interrupted, and gave some variety to the scene." The use "could not, however, be supposed than any intention existed of restricting the full use of land they reserved" in a treaty.

134. JENNINGS, *supra* note 101.

135. Eisinger, *supra* note 132, at 138.

136. *Id.*

137. 21 U.S. (8 Wheat.) 543, 560-605. (1823). See also notes 121, 123.

138. 30 U.S. (5 Pet.) 1, 17 (1831).

139. In part, the confusion surrounding wardship is a problem of legal theory. The land tenure system of the United States is founded on a problematic foundation: the intersection of Roman law and English common law. The Roman law supplies a small part of the modern law of property, but practically all of the modern theory of property, while the English common law supplies the greatest part of the law, but very little theory. An example of the Roman law influence is seen in the works of Bentham and especially in the works of Austin, while Blackstone is an example of the source of English law. The convergence of the folk concepts of English law with the more theoretical Roman law created the totality of American property law.

140. NOYES, THE INSTITUTION OF PROPERTY 80-82 (19-).

141. *Id.* at 80.

142. *Id.* at 81.

143. Chouteau v. Molony, 57 U.S. (16 How.) 203, 237 (1853).

144. NOYES, *supra* note 140, at 96; HARRIS, *supra* note 37, at 42.

145. *Id.*

146. NOYES, *supra* note 140, at 60.

147. *Id.* at 410.

148. 30 U.S. (5 Pet.) 1, 17-18 (1831).

149. 31 U.S. (6 Pet.) 515, 552 (1832).

150. *Id.* In terms of a later provision in the treaty to the effect that the United States in Congress shall have the sole and exclusive right of regulating the trade with Indians, and manage all their affairs, as it thinks proper, the Court held that would be "[t]o construe the expression of their necessary meaning, and a departure from the construction which has been uniformly put on them." With regard to the theory that the section grants the right to regulate all the trade affairs of the tribes, the Court stated, "[This theory] cannot be true as respecting the management of all their affairs. The most important of these are cession of

their lands, and security against intruders on them. Is it credible, that they should have considered themselves as giving to the United States the right to dictate their future cessions, and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade .... Had such a result been intended, it would have been openly avowed." *Id.* at 545. The same result was reached in interpreting a later treaty with the tribe. *Id.* at 555-56.

151. *Id.* at 559. The Court also stated that the "[v]arious acts of [Georgia's] legislature ... prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent." *Id.* at 560. Also, it should be noted that the laws the state of Georgia attempted to extend over tribal lands were labeled "extraterritorial" by the Court, signifying a distinction. As *M'Intosh* created and held tribal dominion as distinct from federal title, this case distinguishes it from the tenures of the states.

152. *Id.* at 559.

153. *Id.* at 556, 560-61.

154. The Court did not cite to any governmental policy, although it alleged that both international law and governmental policy would control. Instead, it relied solely on legal decision and treaties in making its decision. *See* Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587, 591 (1823).

155. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832), and cases cited at note 71, *supra*. *See also* Holden v. Joy, 84 U.S. 211, 244 (1872) (Indian title of occupancy absolute, subject only to the right of purchase). *Accord*, United States v. Shoshone Tribe, 304 U.S. 111, 116 (1937); Cramer v. United States, 261 U.S. 219, 225 (1922); Minnesota v. Hitchcock, 185 U.S. 373, 389 (1901); Jones v. Meehan, 175 U.S. 1 (1899); Leavenworth v. United States, 92 U.S. 733, 743 (1877).

156. The limitation of alienation was not inherent in the nature of tribal title, but rather was imposed by discovery through statutes or acts. In *M'Intosh* three statutes were involved: the Royal Proclamation of 1763, the Virginia statute prohibiting individual purchase (at 585), and the Non-Intercourse Act. These statutes reflected the distributional preference of the entitlement granted by the principle of discovery, which was valid to all the subjects or citizens under the control of the discovering nation or its successor-in-interest. These statutory limitations on the right to purchase Indian title illustrate the transferability of tribal title. It was the transferability of tribal title that created the need for limitation on the right to purchase by the legitimate sovereign on its citizens. Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839) (Indian right of Occupancy protected by the political power, and respected by the Court). *Accord*, United States v. Cook, 86 U.S. (19 Wall.) 591 (1873). *See also* HAINES, *supra* note 42, at 147.

157. In cases that follow the classic paradigm, there is a rather formalistic manner with little understanding of the theories of the Marshall Court, in particular the genius of Chief Justice Marshall. *See* FEDERAL INDIAN LAW, *supra* note 3, and *Original Indian Title*, *supra* note 3.

158. See note 3, *supra*.

159. *Id.*

160. FEDERAL INDIAN LAW, *supra* note 3, at 292 (Indian tribes did not enjoy and could not convey complete title to the soil).

161. *Id.*; *Original Indian Title*, *supra* note 3, at 47.

162. *Id.*

163. *Id.*

164. *See generally* G. FOREMAN, INDIAN REMOVAL (1932); BLEDSOLE, *supra* note 3, at 1-5; W. SEMPLE, OKLAHOMA INDIAN LAND TITLE 3-17 (1952).

165. *See* ch. 119, § 1, 24 Stat. 288, *as amended* 25 U.S.C. 331 (1970). *See also* BLEDSOLE, *supra* note 3, at 220-37; SEMPLE, *supra* note 164, at 18-39, 512-77.

166. U.S. CONST. art. IV, § 3, cl. a (the Congress shall have power to *dispose* of and make all needful rules and regulation respecting the territory or other property *belonging to* the United States; and nothing in this Constitution shall be so construed as to prejudice any

claims of the United States or of any particular State). Congress' power to control land under federal tenure is derived from this paragraph. It is also considered the source to which the federal courts have traced the power of the United States to govern territories, although this power has also been ascribed to the inherent sovereignty of the federal government. Downes v. Bidwell, 182 U.S. 244 (1901); American Ins. Co. v. Canter, 27 U.S. (1 Pet.) 511, 542 (1828). But it is through the treaty-making power that the United States can acquire territory. U.S. CONST., art. VI, § 2.

In the situation of removed tribes and tribes within territory purchased by the United States from indigenous tribes, this power was transferred into a theory of plenary power. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) (the power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deeded a political one, not subject to control by the judicial department of the government). Both of these cases arise in Indian Territory, and confuse wardship with ownership of the involved land. In the instance of tribal territory that is aboriginal or a reservation of tribal aboriginal land for a tribe, the property is not under control of Congress nor does it belong to the United States until extinguished from tribal tenure. *See* FEDERAL INDIAN LAW, *supra* note 3.

167. BLEDSOLE, *supra* note 3, at 3.

168. *Id.*

169. Stephans v. Cherokee Nation, 174 U.S. 445, 484 (1899); Atlantic & Pac. R.R. v. Mingus, 165 U.S. 413 (1897); Cherokee Nation v. Southern Kan. R.R., 135 U.S. 641, 653 (1890).

170. BLEDSOLE, *supra* note 3, at 3.

171. See note 165, *supra*.

172. FEDERAL INDIAN LAW, *supra* note 3, at 288-89. It should be noted, however, that in the vast majority of statutes covering right-of-way across tribal reservations under federal title, damages were payable to the tribe. The tribe, then, determined the loss to the individual Indians according to tribal laws, customs, and usages. This illustrates the compensational powers of a tribe even under federal title.

173. Organization of Indian Territory, Report No. 336, 41st Cong., 3d Sess. (1871). This report stressed that Indian Territory was a "territory of the United States' and that the tribes could not be called the "owner of the land" because the paramount reversion title vested in the United States. This is a correct interpretation of tribal title under federal tenure. Nevertheless, it was also stated that this tribal right of occupancy under federal tenure was "sacred." This is confusing tribal title under federal tenure with aboriginal title.

174. JOHNSON, FEDERAL RELATIONS WITH GREAT SIOUX INDIANS OF SOUTH DAKOTA 1887-1933 (1948).

175. Treaty of 1968, 15 Stat. 635 (Fort Laramie).

176. Sioux Allotment Agreement of 1889, 25 Stat. 888 (1889).

177. Indian Reorganization Act, 25 U.S.C. 476 (1970). There is no statute granting the Bureau exclusive authority to regulate *all aspects of allotted land.*

178. FEDERAL INDIAN LAW, *supra* note 3, at 73-77.

179. *Id.* at 75-76.

180. 301 U.S. 358, 375-76 (1937).

181. *See* Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 961-68 (1972).

182. Barsh & Trosper, *supra* note 9. *See also* Coomes v. Adkinson, 414 F. Supp. 975, 995 (D.S.D. 1976) (Bureau officers are not landowners with free choice but rather the servants of the Indian people as they carry out the expressed federal purposes embodied in congressional statutes).

183. 348 U.S. 272, 275 (1954). The land in question in this case had not been sold to an individual or to a group. It was located near and within the exterior boundaries of the Tongass National Forest. *Compare with* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (federal forest also involved).

184. 348 U.S. 272, 277 (1954). *But see* FEDERAL INDIAN LAW, *supra* note 3, at n.92.

185. 348 U.S. 272, 277 (1954).
186. *Id.*
187. *Id.* at 276-77.
188. *Id.* at 277.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 290-91. It is not clear whether Indian title was a political question for Congress ("gratuities for the termination of Indian occupancy of Government owned land" vested in Congress), or that the fifth amendment did not apply to nonrecognized aboriginal title.
193. The case was dismissed for lack of jurisdiction because of no recognized Indian title upon which to claim fifth amendment rights. For congressional solution, *see* Native Land Claims Act. *But see* Mitchell v. United States, 34 U.S. (9 Pet.) 711 (1835) (tribes' perpetual right of possession as sacred as fee simple of whites), and the dissenting opinion.
194. 348 U.S. 272, 278 (1954).
195. *Id.* at 278-79.
196. *Id.* at 277-78.
197. The "test" of recognition was not specifically a test in the authority cited to support the Court's decision. Recognition was merely one of the common legal facts within the opinion. Sometimes it was central to the holding of the case, other times it was not. The seminal authority the case cited for its recognition test was United States v. Creek Nation, 295 U.S. 103, 109-10 (1935). This case was not concerned with aboriginal title. It was concerned with tribal title under federal title: "The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States." *Id.* at 109. The other cases cited this case, but they usually dealt with reserved aboriginal title, not the unextinguished aboriginal title before the Court in this case. *See* FEDERAL INDIAN LAW, *supra* note 3, at 294-302 (establishing tribal ownership by treaty, statutes, and executive order is different than aboriginal possession). *Compare* Alcea Band of Tillamooks v. United States, 329 U.S. 40, 51 (1946) (jurisdiction based on Duwamish Indians v. United States, 79 Ct. Cl. 530 (1934), *cert. denied*, 295 U.S. 755 (1935).
198. 348 U.S. 272, 278 (1954). In the Court's opinion there seemed to be some uncertainty about the relationship between the Organic Act of 1884 and any claim of possessory rights. Aboriginal occupancy or title was defined as a possessory right in this resolution, but it also provided that "[n]othing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to land or timber within the exterior boundaries of the Tongass National Forest." This resolution, which is in no way similar in legal effect to a law of Congress, was seen by the Court as sometimes important, yet unimportant at other times. The issue the Court was asked to redress was not statutes or resolutions of Congress, but rather whether acts of the federal government were constitutional. *Id.* at 273. The issue in *Tee-Hit-Ton* did not arise under a special jurisdictional act, but was based on the Indian Claims Commission Act asserting that aboriginal title was compensable under the fifth amendment. See also note 192, *supra*.
199. See sources at note 3, *supra*.
200. See Note, *supra* note 181.
201. 348 U.S. 272, 278 (1954).
202. See note 198, *supra*.
203. 21 U.S. (8 Wheat.) 543, 584-85 (1823). *Accord*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832).
204. 21 U.S. (8 Wheat.) 543, 585 (1823).
205. *Id.* at 583-84.
206. See sources cited at note 3, *supra*.
207. U.S. CONST. amend. V; Steele v. L. & N.R. Co., 323 U.S. 192 (1944).
208. See note 65, *supra*, and cases cited in note 226, *infra*.
209. 348 U.S. 272, 279 (1954).
210. *Id.*
211. *Id.* at 280.
212. *Id.* at 279-80.

213. *Id.* at 284-85.

214. 32 U.S. (7 Pet.) 51, 86 (1833).

215. Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962) (no Indian wars in Alaska); United States v. Santa Fe Pac. Ry., 314 U.S. 339 (1941) (conquest not governmental theory that justifies taking tribal land without just compensation).

216. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (taxing power a proprietary power which may be legitimately exercised only within the territory of the governmental proprietor).

217. FEDERAL INDIAN LAW, *supra* note 3, at 122-23.

218. *Id.* at 122.

219. *See* Hookey, *the Gove Land Rights Case: A Judicial Dispensation for the taking of Aboriginal Lands in Australia*, 5 F.L. REV. 85, 99 (1973) (holds that recognition of tribal title is founded on international common law. Does not perceive that it is concerned with land tenure theory). *See also* Priestly, *Communal Native Title and the Common Law: further thoughts on the Gove Land rights case*, 6 F.L. REV 150 (1974); Hookey, *Chief Justice Marshall and the English Oak: a comment*, 6 F.L.REV. 174 (1974).

220. 2 A.C. 399 (1921).

221. SUMMERS & C. HOWARD, LAW: ITS NATURE, FUNCTIONS, AND LIMITS 679 (1972).

222. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 14 (1969).

223. *See* Deutsh, *Neutrality, Legitimacy and The Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1967).

224. Trubek, *Toward a Social Theory of Law: An Essay on Law and Development*, 82 YALE L. REV. 1 (1972).

225. Morton v. Ruiz, 415 U.S. 199 (1974).

226. 414 U.S. 661 (1974). *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d. 370 (1st Cir. 1975), *aff'd* 388 F. Supp. 649 (N.D. Me. 1975). *But see* FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

227. For example, McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) treats the taxing power as a police power, while its companion case, Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) treats taxing power as a proprietary power.

228. Indian Civil Rights Task Force, *Development of Tripartite Jurisdiction in Indian Country*, 22 KAN. L. REV. 351 (1974).

229. Chambers & Price, *Regulation Sovereignty: Secretarial Discretion and Leasing of Indian Lands*, 26 STAN. L. REV. 1061 (1974); Chambers, *Judical Enforcement of Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975); Green, *North America's Indians and the Trusteeship Concept*, 4 ANGLO AMERICA L. REV. 137-62 (1975); Barsh & Henderson, *Tribal Administration of Natural Resource Development*, 52 N.D.L. REV. 307-27 (1976).

230. See Part II, *supra*.

231. 21 U.S. (8 Wheat.) 543, 549-56 (1823).

232. Alchian & Demsetz, *Property Rights Paradigm*, 33 J. ECON. HIST. 16 (1970); Sax, *Takings, Private Property and Public Right*, 81 YALE L.J. 149-86 (1971) (property as interdependent network of competing uses, rather than independent and isolated entities).