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Title
The History of Native American Lands and the Supreme Court

Permalink
https://escholarship.org/uc/item/7d32409m

Journal
Journal of Supreme Court History, 38

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Publication Date
2013

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JOURNAL OF
SUPREME COURT HISTORY

The History of Native American Lands and the Supreme Court

ANGELA R. RILEY

The Supreme Court has been instrumental in defining legal rights and obligations pertaining to Indian lands since its first path-marking decision in the field in *Johnson v. McIntosh* in 1823. But the groundwork for the Court's contemplation of such cases predates Supreme Court jurisprudence, and it in fact predates the formation of the Court and the United States itself.

When Europeans first made contact with this continent, they encountered hundreds of indigenous, sovereign nations representing enormous diversity in terms of language, culture, religion, and governance. For those indigenous groups—as is a common attribute of indigeneity of similarly situated groups around the world—this land was and is holy land. Indigenous creation stories root Indian people in this continent—Turtle Island to many—as the focal point of life, creation, religion, culture, and language. In the settlement of the country, the colonial powers initially—and the United States subsequently—treated with Indian nations to negotiate the transfer of lands from Indians to Europeans, often in exchange for peace and protection.

Historically, treaties were the primary mechanism for recognition of Indian lands. The United States negotiated hundreds of treaties with Indian nations on a government-to-government basis to obtain Indian lands and settle land disputes. This treaty-making authority was ultimately constitutionalized in Article II of the United States Constitution, which states: "The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties [with Indian nations],"[1] which, with the Supremacy Clause, made treaties the supreme law of the land.[2] Thus, along with the Indian Commerce Clause,[3] there are two constitutional bases for interactions between the United States and Indian nations.

But Congress ended treaty-making with tribes in 1871.[4] Since that time, Indian lands have primarily been recognized through various treaty-substitutes, including executive orders, congressional acts, and judicial decisions.[5] Today, there are approximately

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fifty-six million acres of land held in trust for Indian nations by the federal government.[6] Approximately 9.5 million are guaranteed by treaty. These vitally important—and oftentimes sacred—lands are the very places that commonly were desired most by non-Indians and competing sovereigns for their vast natural and cultural resources. As a consequence, these are also the places over which contested claims drove litigation to the United States Supreme Court.

Disputes over land arose almost from the point of contact between the Indian nations—who had pre-existing sovereignty and management over the continent—and Europeans, who sought to settle the New World. As pressure for Indian lands increased, the colonial powers—and later, the United States—began to establish parameters to govern land transactions. As legal historian Eric Kades explains, to navigate these disputes—particularly as they came to be settled, in the language of Chief Justice John Marshall, in the "courts of the conqueror"[7]—Americans sought a body of law to define land rights. But this task proved to be most complicated, as disputes had to be settled upon at least two axes: first, they needed to establish rules to deal with the claims by competing European sovereigns for the same lands; and, second, the European settlers had to determine "what rights, if any, Indians had to their own lands."[8]

Subsequently unfolding events tell the story of the settlement of the continent and formation of the country that would become the United States of America. Accordingly, the history of Native American lands in the United States Supreme Court is not a historical relic, but a living legacy that continues to define the relationship of the federal and state governments to the more than 566 federally recognized Indian nations within U.S. borders. Historically and today, the delineation of tribal lands holds enormous import for Indian nations, as lands form the basis of Indian economies and are also the focal point for social, political, cultural, religious, and familial life for American Indians.

Building on these preliminary ideas, this essay proceeds in three parts, framed by the language of contemporary legal theorist and Indian law expert Kristen Carpenter as *Property, Remedy, and Recovery*.[9] Part I, Property, addresses the critical role of the United States Supreme Court in defining Indian property rights and, concomitantly, the scope of the rights of Native peoples to their lands. Part II addresses the question of Remedy, and sets forth those cases that delineate the legal obligations of the United States government to compensate or provide a remedy for Indian land dispossession. Finally, Part III concludes by highlighting in brief terms the enduring legal consequences for tribal sovereignty resulting from Supreme Court decisions that continue to shape the practical realities and, indeed, Native peoples' efforts at Recovery arising from the colonial endeavor.

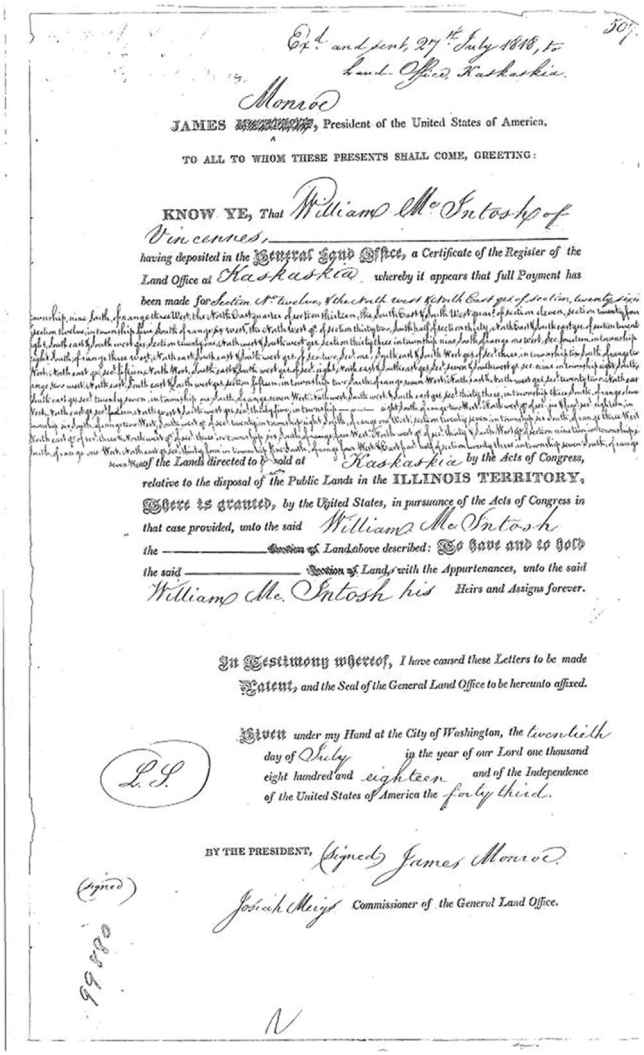
Part I: Property

Did Indians "Own" Their Lands?[10]

In the colonial period, the United States treated with Indian nations for their lands. Though certainly not always voluntary or balanced, these negotiations were premised on two ideals: first, that the Indian nations were pre-existing sovereign populations with legitimate, legal rights to their lands and resources; and, second, that conveyances of Indian lands would be based on principles of consent and fair compensation.[11]

Built around these ideals, in 1823, the Supreme Court decided the first canonical case in the field of Indian law, *Johnson v. M'Intosh*,[12] in which the Court addressed the issue of Indian title. *Johnson* marked the first of the famed Marshall Trilogy, three cases penned by Chief Justice John Marshall between 1823 and 1832 that continue to define Indian rights today, though *Johnson v.*

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Ex. and pent. 27th July 1818, to
Land Office Kaskaskia.

Monroe

JAMES [redacted], President of the United States of America,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That William McIntosh of Vincennes, having deposited in the General Land Office, a Certificate of the Register of the Land Office at Kaskaskia whereby it appears that full Payment has been made for Section No. twelve, & the South west & South East qrs of section twenty six in township nine South of range three West, the North East quarter of section thirteen, the South East & South West quarter of section eleven, section twenty four in township nine South of range three West, the North East quarter of section thirty, & the North & South East qrs of section twenty one in township nine South of range two West, the South East & South West qrs of section twenty four in township nine South of range three West, the North East & South East & South West qrs of section thirty three in township nine South of range two West, the South East & South West qrs of section thirty four in township nine South of range three West, the North East & South East & South West qrs of section thirty 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West, the North East & South East & South West qrs of section thirty five in township fifteen South of range two West, the North East & South East & South West qrs of section thirty six in township fifteen South of range three West of the Lands directed to be sold at Kaskaskia by the Acts of Congress, relative to the disposal of the Public Lands in the ILLINOIS TERRITORY, Now know ye, that there is granted, by the United States, in pursuance of the Acts of Congress in that case provided, unto the said William McIntosh the [redacted] Section of Land above described: To have and to hold the said [redacted] Section of Land, with the Appurtenances, unto the said William McIntosh his Heirs and Assigns forever.

In Testimony whereof, I have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my Hand at the City of Washington, the twentieth day of July in the year of our Lord one thousand eight hundred and eighteen and of the Independence of the United States of America the forty third.

L. S.

BY THE PRESIDENT, Signed James Monroe

(signed) Josiah Meigs Commissioner of the General Land Office.

99 880

N

Above is the original land grant to William McIntosh, the plaintiff in the 1823 Supreme Court decision holding that private citizens could not purchase lands from Native Americans. Note that James Madison's name is crossed out at the top and "Monroe" is handwritten.

M'Intosh was the only case in the trio that dealt squarely with Native American land rights.

Johnson arose in the context of a nascent America, wherein settlers, Native American tribes, and colonial forces competed for dominance over the new world.[13] In the late 1700s, land speculators—on behalf of the Illinois Company and then, a few years later, for the Wabash Company—bought lands from a delegation of Illinois and Piankashaw Indian nations "straddling the present-day border of Illinois and Indiana."[14] The four tracts were, respectively, vast and ambiguously demarcated, constituting thousands of square miles of land.[15] As legal historian Stuart Banner explains, "[t]he companies' purchases were clearly unlawful when they were made, because the Proclamation of 1763 prohibited private land purchasing. Land speculators remained active even after the proclamation, however, because they were gambling that the proclamation would eventually be repealed or modified, and that their purchases would eventually be confirmed retroactively by the government."[16]

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But after years of lobbying to get their land titles recognized without success, as a last resort, the parties appealed to the United States Supreme Court to remove any cloud of doubt over questions of ownership.[17] Historical accounts describe the litigation as "collusive."[18] That is, to put forth a claim for land title in the nineteenth century, all that was needed was the construction of a lawsuit whereby "fictional tenants of the plaintiff sought to oust from possession fictional tenants of the defendant."[19] In this case, according to Banner, "[t]he speculators' nominal opponent was an Illinois resident who was alleged to own a parcel within one of the Wabash tracts, which he purchased from the federal government, which in turn had bought much of the same land from the same tribes in the first decade of the nineteenth century."[20]

And thus, the case of *Johnson v. M'Intosh*, the first major precedent in federal Indian law, addressed a fundamental question, the answer to which would not only define the rights of those land speculators at the time, but would establish a property regime of trust—a disaggregation of land title—between the Indian nations and the federal government that continues today.[21] That is: what real property rights did Europeans acquire, and indigenous peoples lose, by virtue of the European settlement of America?

In rejecting the doctrine of first possession as giving rise to property rights, the Court adopted, instead, the international rule of the doctrine of discovery. As Chief Justice Marshall explained, the Indian tribes were the rightful "occupants" of the soil, with rights of possession and use, but "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."[22] As Joseph Singer writes, put simply, "the Supreme Court ruled that 'discovery' of new lands by colonial powers gave the authority to exclude other colonial powers from the discovered area."[23] Thus, the doctrine prevented Indian tribes from treating with any sovereign, locking the Indian nations into a sovereign-to-sovereign treaty relationship with the United States.[24]

With the creation of Indian title—wherein "ultimate title" is held by the United States and a "title of occupancy" is held by the relevant Indian nation[25]—*Johnson* laid the foundations for the trust relationship between the federal government and Indian nations. And the "split title remains to this day"; with the majority of Indian lands held in trust by the United States for the benefit of the Indian tribes.[26]

In the context of Native American land rights—but also other seminal arrangements unique to the relationship between Indian nations and the United States—Johnson consequences reverberated across the country and still linger today. On the one hand, *Johnson* is seen as effecting a compromise in recognizing Indians' rights to their lands.[27] Though denied the right of alienation, aboriginal title protected Indians' rights to continued use and occupancy of their ancestral territories.

Johnson also laid the groundwork for *Cherokee Nation v. Georgia*[28] and *Worcester v. Georgia*,[29] respectively, the last two cases of the Marshall trilogy. *Cherokee Nation* defined the rights of the Cherokee—and other Indian tribes—not as states of the union or foreign states, but, in the now-famous words of Justice Marshall, as "domestic dependent nations," in a relationship with the United States as that of a "ward to his guardian," further reinforcing the concept of a trust relationship between the tribes and the federal government.[30] And Justice Baldwin's concurrence in *Cherokee Nation* relied on *Johnson* to first articulate the oft-repeated admonition by the Court that "Indians have rights of occupancy to their lands,"[31] and this right is "as sacred as the fee-simple, absolute title of the whites."[32] This statement appeared repeatedly over the years to affirm the Indian

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Elizabeth Stevens, a veteran of the U.S. Army's internment and forced relocation of approximately sixteen thousand Cherokees in the fall and winter of 1838–1839, was photographed in 1903 at age eighty-two. Approximately four thousand members of her tribe died along the route between Georgia and what is now Oklahoma.

right of occupancy.[33] And in the third opinion in the trilogy, *Worcester v. Georgia*, Chief Justice Marshall clarified the rights of Indian nations to be free from state jurisdiction, holding that "the laws of [the state] can have no force" in Indian country.[34]

As Charles Wilkinson has explained, the Chief Justice's pivotal opinions "conceived a model that can be described broadly as calling for largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control."[35] The Marshall trilogy in many ways remains the cornerstone of federal Indian law and continues to shape and guide the conceptualization of relations between the tribal, state, and federal governments in questions that bear on rights and duties related to trust, sovereignty, property, and autonomy in our liberal democracy.

Of course, the Marshall trilogy only laid the groundwork for establishing the parameters of Part I of this Essay: that is, setting forth the rules to govern the question of what rights, if any, the Indians had to their lands. As settlers moved further west, questions related to Indian property rights continued to percolate through the courts. Ultimately, despite the Court's rulings in the Cherokee cases, pressure for Indian lands intensified in the mid-to-late nineteenth century and the states continued to attempt to acquire Indian lands, until the federal government conceded that it could no longer adequately protect the tribes. The American President at the time, Andrew Jackson, purportedly held animus for tribal interests and is (likely incorrectly) credited with the quote: "John Marshall has made his decision. Now let him enforce it."[36] Though the quote is widely believed to have never actually been uttered by President Jackson, his Message to Congress on Indian Removal in 1830 less succinctly, but just as clearly, summarized his views:

> What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms … [and] occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization and religion?[37]

At the urging of the President, Congress passed a series of Removal Acts in the early 1800s, which "forced most of the remaining eastern Indians to migrate west of the Mississippi River."[38] Between 1828 and 1838, an estimated eighty thousand Indians were forcibly relocated from the eastern part of the United States, with many removed to the Indian country, now the state of Oklahoma. As Stuart Banner recounts, "[t]he enduring image of the period is the Trail of Tears—the U.S. Army's internment and forced relocation of approximately sixteen thousand Cherokees in the fall and winter of 1838–1839, under circumstances so dire that four thousand are said to have died along the

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route between Georgia and what is now Oklahoma."[39]

By the late 1800's, more than thirty Indian tribes had been "removed" from eastern lands to the Indian Territory to make room for white expansion. The promise of removal was that tribes would be allowed to continue to live together, isolated from the encroaching society, subject to their own laws, and free from state or federal interference. But the promise of "measured separatism," too, would go unmet, as railroad development and mineral extraction were spreading west, causing an influx of non-Indians into the region.[40] To greatly reduce tribal land holdings in exchange for, among other things, protected white passage and westward expansion, the United States continued an active policy of treaty making with the tribes. One set of negotiations resulted in the Treaty of Medicine Lodge, which ultimately served as the central source of contention between the Kiowa, Comanche, and Apache tribes and the United States thirty years later in the pivotal 1903 case of *Lone Wolf v. Hitchcock*, discussed herein.

The process of removal and confinement of Indian peoples onto reservations had devastating consequences for Indians and for Indian economies. Particularly for those tribes of the northern and southern plains, but certainly others, the subsistence culture of seasonal migration, game hunting, and gathering practices all but came to an end. American Indians had spent thousands of years perfecting skills of survival that could no longer be meaningfully employed in the small, harsh, starkly limited reservations of the Plains.[41] Even post-contact Indian economies that had developed and flourished in exchanges with whites—including buffalo hunting and the related trade in animal pelts, buckskin creations, and Indian handicrafts of all kinds, which fed a voracious and deeply curious European market—ceased, as the American bison was hunted almost to extinction, and the United States more vociferously than ever enforced the conditions of reservation confinement with military force.[42]

With so many factors working against Indian survival, tribes became increasingly dependent on the federal government. Allotment was promoted as a remedy for this dependence. Thus, only twenty years after the signing of the Medicine Lodge Treaty guaranteeing Kiowa, Comanche, and Apache ("KCA") reservation lands, Congress passed the General Allotment Act of 1887, pursuant to which the federal government took tribal land and redistributed it in parcels (or "allotments") to be held in trust for a term of years by the federal government for the benefit of tribal members.[43] So-called "surplus" lands left over became available for non-Indian settlement.

The rugged individualism of the day—personified classically in President Theodore Roosevelt—was on a collision course with the concept of Indian nationhood and collective, tribal rights. In advocating for Allotment, President Roosevelt stated: "The time has arrived when we should definitely make up



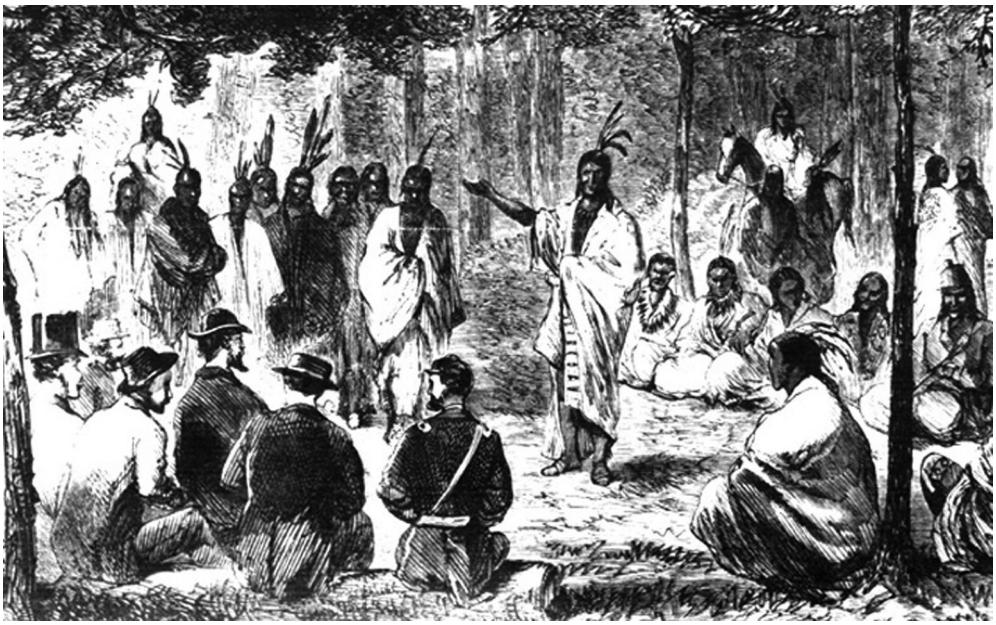
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our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual. . . ."[44] Consistent with concurrent assimilative policies—including the mass, forced removal of Indian children into Indian boarding schools—allotment furthered the American mission to "kill the Indian, save the man."[45]

To negotiate an allotment treaty, the federal government sent negotiators to the KCA reservation to get consensus on the terms of abrogation of the Treaty of Medicine Lodge and an allotment policy. But before federal negotiators even left the reservation with a purported agreement, Lone Wolf and others contested its veracity. Despite opposition, the commission hurriedly left the reservation and Congress ultimately ratified the agreement anyway. Soon thereafter, Lone Wolf brought suit on behalf of the Kiowa, Comanche, and Apache tribes challenging the agreement abrogating the Treaty of Medicine Lodge and attempting to halt the government's allotment of their lands.[46]

Through the treaty, the United States had promised no further cessions of land unless three quarters of the adult males of the tribe agreed.[47] Congress nevertheless enacted a statute mandating the allotment of the Indian reservation. And when *Lone Wolf v. Hitchcock*[48] reached the Supreme Court in 1903, the Court declined to hear the case on the merits, instead attributing to Congress a "plenary authority" over Indian affairs, including the capacity to break Indian treaties at its discretion and without judicial review.[49] As Phil Frickey characterized the opinion: "The Court in *Lone Wolf* viewed Congress as having a special fiduciary responsibility toward tribes and presumed that Congress would act in good faith in Indian affairs, but saw no judicial role in second-guessing congressional acts in the field."[50] The *Lone Wolf*



Twenty years after the signing of the Medicine Lodge Treaty, guaranteeing Kiowa, Comanche, and Apache reservation lands (pictured), Congress passed the General Allotment Act of 1887, pursuant to which the federal government took tribal land and redistributed it in parcels (or "allotments") to be held in trust for a term of years by the federal government for the benefit of tribal members. Allotment was promoted as a remedy for dependence on the government.

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Court's refusal to adjudicate the tribes' complaints on the merits ultimately "solidif[ied] the allotment program as a cornerstone of federal Indian policy."[51]

In subsequent years, the Court mediated *Lone Wolf's* holding—first, in *Delaware Tribal Business Committee v. Weeks*[52] in 1977 and again in a case discussed herein, *United States v. Sioux Nation*[53] in 1980—both of which held specifically that Congress's plenary power in Indian affairs granted by the U.S. Constitution[54] does not mean that litigation involving such matters necessarily entails nonjusticiable political questions.[55]

Despite *Lone Wolf*'s devastating holding, in truth, the practical reality of allotment had already taken effect on the ground by the time the Supreme Court issued its ruling. President McKinley's proclamation that the government would open up the "surplus" lands of Indian Territory on August 6, 1901 had already spurred a massive influx of non-Indian would-be settlers.[56] Over a year before *Lone Wolf* even reached the Supreme Court, 150 thousand people had already registered for the lottery that would be held to select those entitled to a 160-acre homestead.[57] As 1901 drew to a close, thousands of homesteads formed on the plains and White society surrounded and engulfed the Kiowa and other Indians.[58] Even the 480 thousand acres of land set aside for the common use of the Kiowa, Comanche, and Apache in the 1900 Allotment Act, known by the Indians as "Big Pasture," was opened up six years later for white settlement only.[59]

From the point of allotment until present day, there was a devastating loss recorded of ninety percent of all landholdings for the Kiowa, from a pre-allotment total of 2.9 million acres to just above three thousand acres.[60] Ultimately, 118 reservations were allotted and forty-four of those reservations were opened to white homesteading.[61] Thus, a dark period fell over Indian country until the repudiation of the Allotment Act via the Indian Reorganization Act of 1934.[62]

Part II: Remedy

Compensating for Indian Land Loss

By mid-century, the initial question addressed by Part I of this essay, that is, whether Indians had legally cognizable rights to their lands, had been answered in the affirmative. *Johnson* and its progeny had settled the matter. But in regards to the necessarily related question—by what means would such land transactions occur?—the historical record is more mixed. On the one hand, a bevy of governmental policy and practice—significantly, the inclusion of treaty making in the Constitution—confirm the view that transactions with Indian nations should be voluntary, consensual, and fair. Nevertheless, as the balance of power between Indian nations and the United States shifted over time, very often corresponding to larger American policy objectives, we see great variation in the degree to which such transactions embodied these principles.

Historically, tribes could only bring suit against the United States for land claims pursuant to specially enacted jurisdictional statutes.[63] But in the post–World War II era, sentiments regarding the treatment of American Indians began to shift. Indian people had fought in significant numbers during both World Wars, and the United States, in assessing the treatment of racial and ethnic minorities in Europe, began more carefully to scrutinize its own actions towards Native Americans.[64] Thus, in a time of post-War reflection, in 1946, Congress passed the Indian Claims Commission Act, specifically for the disposition of so-called "ancient" claims, or those accruing before August 13, 1946. The Commission expired on September 31, 1978 and transferred the remaining 102 dockets to the Court of Claims, now the United States Court of Federal Claims. The Commission settled numerous Indian land claims. But, because the Commission interpreted its charge as providing compensation for Indian nations, not by the return of lands,

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but with monetary relief alone, its work largely left American Indians, in the words of Joseph Singer, "bereft of a continent."[65]

The consequences of this system have reverberated throughout Indian country and can be seen in cases such as the 1985 Supreme Court case of *United States v. Dann*.[66] There, the United States had brought a trespass suit against Western Shoshone sisters Mary and Carrie Dann for grazing livestock on public lands without federal permit. The Danns' defense to the trespass action was based on a claim of aboriginal title. They argued that extinguishment of Western Shoshone aboriginal title had never been determined as a matter of law, and that a 1977 Indian Claims Commission judgment could not preclude their defense of aboriginal title since the monetary damages had not been disbursed to the Western Shoshone. But the Court disagreed. In a unanimous opinion, the Court ruled that judgments and settlements in Indian Claims Commission litigation resulted in the formal extinguishment of any aboriginal title claim to lands for which compensation was paid, even if the Native beneficiaries resist efforts to take payment in full satisfaction of their land claims.[67]

Even after the establishment of the Court of Claims, however, cases continued to reach the Supreme Court on questions of both the scope of and legal basis for the obligation of the United States, if any, to compensate for Indian land losses. Thus, Part II of this Essay focuses specifically on two cases critical to establishing and clarifying the Supreme Court's holdings in regards to the United State's Fifth Amendment Constitutional obligations to compensate for the taking of Indian lands: *Tee-Hit-Ton Indians v. United States*[68] and *United States v. Sioux Nation*.[69]

As *Tee-Hit-Ton*, in particular, illustrates, the ethos of American expansion continued aggressively even until mid-century, as the United States began to pursue statehood for territories previously acquired from foreign sovereigns. One such expansion had come via the Treaty of Cession from Russia in 1867, by which the United States purchased Alaska, the name used by the Aleuts to refer to the "mainland" portion of their territory. Those lands were occupied by numerous Native Alaskan tribes, which had maintained subsistence lifestyles there since time immemorial.[70] For decades after the purchase from Russia, the United States largely stayed out of Native Alaskan affairs. But, beginning in the 1920s until statehood in 1959, settlement of Alaska by non-Natives became more common and encroachment on Native lands became an increasing problem. Eventually Native Alaskans' land claims—much as Indian land claims had all across the continent—"began to be seen as obstacles to development."[71]

A 1947 Act of Congress opening the Tongass National Forest to timber sales threatened the subsistence lifestyle of the Tee-Hit-Ton Indians, a subgroup of Tlingit and Haida Indian nations, who asserted a property interest in the timber on their lands. When timber sales in the forest began in 1951, the tribe sued.[72] The case was initially heard in the Court of Claims, which had set out to resolve the question of what rights the Alaska Natives had retained after Russia ceded Alaska to the United States, and, if such rights had been abrogated, what compensation was legally required.

The legal scholar Felix Cohen, who is credited with founding the field of Federal Indian law, served as assistant and associate solicitor at the Department of the Interior. Most notably, he crystallized and advanced the field through his masterful work in the **Handbook of Federal Indian Law**, which he first published in 1941. Cohen had earlier called the acquisition of Alaska Native lands—those ultimately at issue in *Tee-Hit-Ton*—evidence of the government's "feeling that Indians are not quite human, and certainly not fit to own their own homes, cut their own trees, or mine their own lands," and contended that policy regarding the Alaska Natives

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manifested "hollow rationalizations of racial prejudice."[73]

Throughout his career, Cohen defended Indian land rights, arguing in his 1947 article, "Original Indian Title," that:

> ***Every American schoolboy*** is taught to believe that the lands of this United States were acquired by purchase or treaty from Britain, Spain, France, Mexico, and Russia and for all the continental lands so purchased we paid about 50 million dollars out of the U.S. Treasury. . . . Notwithstanding this prevailing mythology, the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian Owners.[74]

To be sure, Cohen acknowledged that the government employed coercion in some instances and paid inadequate consideration in many others. He hoped, however, that these inadequacies would be remedied through the Indian Claims Commission process.

The Supreme Court's opinion in *Tee-Hit-Ton*—decided in 1955, only one year after the Court's groundbreaking decision in *Brown v. Board of Education*—focused on whether the Alaska Natives' original Indian title was "property" within the meaning of the Fifth Amendment to the Constitution. If so, then the United States could not take it without paying compensation. Despite numerous earlier rulings that Indian title was as sacred as the fee simple title of the whites, the Court held that the Tee-Hit-Ton Indians' aboriginal title—which had never been recognized by treaty or statute—amounted to no more than a "license" to be on the land.[75] According to the Court, Indian title meant merely that the Indian nations had "permission from the whites to occupy" those lands and that Indian property rights are not constitutionally protected unless "recognized" by treaty or statute.[76]

In holding that the United States had no constitutional duty to compensate the Tee-Hit-Ton Indians for their property, Justice Reed's words were eerily—and likely not coincidentally—critical of Cohen and his views on Indian rights. Reed opined, "***[e]very American schoolboy*** knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."[77]

It is curious that such a devastating opinion on Indian rights could follow the Court's unanimous, path-marking decision in *Brown* by only one year. However, there are some plausible explanations for the Court's departure from the principles of racial justice it had laid out in *Brown*. For one thing, there had been relatively little connection made up to that point between the nation's move towards racial justice for African-Americans and the contemplation of Indian rights.

Moreover, the Court engaged in what has been called "judicial fiscal restraint."[78] As Reed himself notes in footnote seventeen of the opinion, had the Court concluded that aboriginal property interests were "property" for Fifth Amendment purposes, and that just compensation must be paid for the taking, the federal government would have been exposed to substantial liability in the Indian claims process. According to Justice Reed, approximately nine billion dollars in claims and interest had already accrued against the government.[79]

Perhaps the greatest case for reconciling *Brown* and *Tee-Hit-Ton*, however, lies in an examination of the prevailing American policy at the time. As Mary Dudziak has written, Cold War concerns about the impact of racial discrimination on America's reputation abroad led the Truman Administration to adopt a pro–civil rights platform as part of its

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international agenda to promote democracy and contain communism.[80] In this sense, the ruling in *Tee-Hit-Ton* fits in with larger American ideals by minimizing the colonial foundations of the United States, making it possible to advance externally the image of America as a just nation. And, of course, at their core, both cases tapped into a philosophy of individual rights and freedoms, whereas collective, tribal land holdings evoked for the Court and the country the all-too-dangerous conception of communism.

But *Tee-Hit-Ton* would not be the last word on constitutionally required compensation for the taking of Indian lands. In contrast to *Tee-Hit-Ton*, Part II of this Essay concludes with one of the most famous and longest running legal disputes in American history, the battle for the Black Hills, which led to the Supreme Court's Fifth Amendment takings ruling in the 1980 case of *United States v. Sioux Nation*.[81]

There is perhaps no American lore that looms as large as that surrounding the story of the Sioux Nation, the Black Hills, the Battle of Little Bighorn and the massacre at Wounded Knee, which marked the close of the Indian wars on the northern plains. But the legal history leading up to the loss of the Black Hills by the Sioux is perhaps less well known.

Pursuant to the Fort Laramie Treaty of 1868, the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux Nation, and that no treaty for the cession of any part of the reservation would be valid as against the Sioux unless executed and signed by at least three quarters of the adult male Sioux population.[82] The treaty also reserved



In the 1870s, the U.S. Army and Sioux warriors clashed over ownership of land in the Black Hills, leading to the massacre at Wounded Knee (pictured). The defeated Sioux were confined to a small portion of the reservation, deprived of horses and weapons, and then had their rations cut off until they agreed to sign an agreement of cession, which relinquished their rights to the Black Hills. More than 100 years later, the Sioux's takings case regarding that land finally reached the Supreme Court.

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the Sioux's right to hunt in certain unceded territories.[83]

However, Lieutenant Colonel George Custer led an expedition into the Black Hills, searching for and discovering gold in 1874. Immediately thereafter, fortune seekers invaded Sioux country. The U.S. government at first attempted to secure the Sioux lands from invaders, but to no avail. Sioux warriors and the Army battled at Little Bighorn, wherein the Sioux defeated the Army, but the United States ultimately prevailed at the now-infamous massacre at Wounded Knee. The Sioux were confined to a small portion of the reservation, deprived of horses and weapons, and then had their rations cut off until they agreed to sign an agreement of cession, which relinquished their rights to the Black Hills and abrogated the Treaty of Fort Laramie. That agreement was ratified in 1877.[84]

More than 100 years after the case arose, the Sioux's takings case regarding the Black Hills finally reached the Supreme Court. Justice Blackmun delivered the Opinion, stating: "This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West."[85] Ultimately, Justice Blackmun's opinion affirmed the Sioux Nation's claim that the United States unlawfully abrogated the Fort Laramie Treaty of 1868.[86]

Sioux Nation further explicated the second of two doctrinal strands established by the Court in determining the scope of Fifth Amendment compensation for the taking of Indian lands.[87] The first, as set forth in *Tee-Hit-Ton*, is that unrecognized aboriginal Indian title is not "property" for purposes of the Fifth Amendment and, thus, compensation is not constitutionally required. The second, delineated in *Sioux Nation*, is that the Court will not treat nonconsensual transfers of Indian tribal land to third parties as takings when the government acts as guardian of the tribe rather than as a sovereign.[88] In other words, when the government can show it "fairly (or in good faith) attempt(ed) to provide (its) ward with property of equivalent value," no constitutionally protected taking has occurred.[89]

But because the Court in *Sioux Nation* found that the government had not made a good faith effort to give the Sioux a fair equivalent for their land, the land acquisition rendered it the act of a sovereign exercising its eminent domain power, rather than the act of a trustee trying to benefit its ward, and just compensation was required, measured by the value of the land at the time of taking plus interest from that date.[90] As a result, the Court upheld the award of more than $120 million (at the time) to compensate the Sioux Nation for the 1877 appropriation of more than seven million mineral-rich acres of the Black Hills of South Dakota.

Of course, the story of the Sioux Nation and the Black Hills remains an open one. Despite the award to the Sioux Nation, each of the tribes refused to accept it. The undistributed judgment has reportedly grown to nearly a billion dollars.[91] Meanwhile, the Sioux, some of the poorest people in the United States, continue to reject the monetary judgment and fight to restore portions of the Black Hills to tribal control.[92] Still today, *Sioux Nation* echoes through Indian country as Indian nations continue to grapple with the consequences of the dispossession of their ancestral lands, which, in addition to greatly impacting tribes' economic concerns, shape the potential for the survival of indigenous land-based religious practices, as well as tribes' governmental and societal functions.

PART III: Recovery

Sovereignty and Property[93]

The Supreme Court, having defined the rights of Indians to their lands (Property), as well as delineated the scope of compensation available to Indian nations in the courts for land losses (Remedy), is in contemporary

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times actively engaged in adjudicating issues around Indian nations' Recovery—that is, defining the metes and bounds of the rights of Indians to access, use, and govern their traditional lands in ways that bear on questions of the survival of Indian culture, language, religion, and sovereignty. Thus, Part III of this Essay briefly demonstrates how questions of Indian property rights are intricately tied to Indian peoples' Recovery and their continued cultural and political survival.

Official U.S. policy concerning American Indian nations and their place in the federal system shifted to one of self-determination in the 1970s; concomitantly, Indian nations are ever more actively pursuing rights of self-governance. In recent decades, the Supreme Court has increasingly decided cases that directly bear on rights related to Native American lands and the corresponding exercise of tribal sovereignty. Of course, the Court does not now—nor has it ever—considered cases in a vacuum. In contemporary times, Indian law cases before the Supreme Court are often situated in a larger conversation about how best to contemplate the role of hundreds of sovereign, indigenous, self-governing tribal nations within the border of our larger, democratic state. Against this backdrop, in recent decades, tribal claims to recovery of lands and its related activities, including protections for religious practices, tribal jurisdiction, and immunity from state taxation, among others, have reached the Supreme Court.

One of the defining cases of the last thirty years is *Lyng v. Northwest Indian Cemetery Protective Association*.[94] *Lyng* involved claims by the Yurok, Karuk, and Tolowa Indian tribes alleging that a United States Forest Service plan to build a logging road through the tribes' sacred High Country would violate rights protected under the First Amendment and various federal statutes because of the devastating impact it would have on their land-based religious ceremonies.

As scholarly accounts describe, these tribes have resided along the Klamath River since time immemorial, having never been the subject of governmental policies to either "remove" or relocate them.[95] To the contrary, "[t]heir aboriginal territory encompasses the sacred High Country, which the Tribes continue to use for spiritual and medicinal purposes today."[96] The United States, on the other hand, was a relative "late comer to this region," staking claim to these lands only after 1850, when the Senate failed to ratify dozens of treaties with these and other tribes situated in what is now California.[97] For the tribes of the High Country, this meant that the federally established reservation excluded their most sacred lands, which the United States then treated as within the public domain and under federal control.[98]

Despite evidence in *Lyng* that construction of the road would, in the words of Justice O'Connor, "virtually destroy the Indians' ability to practice their religion,"[99] the Court held there was no Free Exercise Clause violation on the part of the United States, because the government's activity did not coerce the tribes to violate their religious beliefs. Moreover, focusing on the component of current ownership of the land, O'Connor added: "whatever rights the Indian may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all ***its*** land."[100] The case thus sharply limited the extent to which Indian nations may employ the First Amendment's religious freedom protections to safeguard lands used for religious practices that, today, are beyond the boundaries of the tribe's recognized lands. *Lyng* continues to resonate throughout Indian country, as the federal courts actively rely on the case to limit religious freedom claims for land-based religious practitioners.

Finally, as Indian tribes entered the modern era and moved into a policy period of tribal self-determination, in numerous instances they began to reorganize and engage in the process of recovery—both in terms of

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land and sovereignty. Some of the New England tribes, generally the first to be impacted by contact with Europeans, have since turned to the courts to adjudicate centuries' old land claims that had arisen in the colonial period. For many of these New England tribes, competing claims between tribes and states over unlawful colonial-era land transfers resulted in large land claims settlement acts in the past several decades. But not all land claims have produced successful settlements with states, and they have, as a result, gone to the Court for adjudication, as with the case of *City of Sherrill v. Oneida Indian Nation*.[101]

The facts underlying *Sherrill* reach back two centuries in American history. During the colonial period, under both British law and the federal Non-Intercourse Acts, first enacted in 1790, a transfer of the tribal right of possession is void unless sanctioned by the United States. Despite Congress's clear policy that no person or entity should purchase Indian land without the approval of the federal government, in 1795 the State of New York bought much of the lands of the Oneida Indian Nation, one of the Six Nations of the Haudenosaunee (The People of the Longhouse), pursuant to agreements that were never approved by the federal government. For two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units.

In the early 1970s, the Oneida Indian Nation sued over these unlawful transactions, and, in 1985, the Supreme Court held that the Oneidas stated a triable claim for damages against the County of Oneida for wrongful possession of lands they conveyed to New York State in 1795 in violation of federal law.[102] In the 1990s, the federal government intervened on behalf of the tribe, and, from that time forward, the state and the tribe attempted to negotiate a settlement, but to no avail. Over time, as the Oneidas began to rebuild their economic base, they bought back some of their homelands on the open market from the non-Indian possessors, lands that had been reserved to them under 1788 and 1794 treaties and that had been previously alienated from the tribe in violation of federal statute.[103] The property in question—purchased in 1997 and 1998—fell within the historic boundaries of the Oneida Indian Reservation and were last possessed by the Oneidas as a tribal entity in 1805.[104]

The City of Sherrill attempted to impose property taxes on these lands as against the Oneida Indian Nation. Oneida argued it had never lost Indian title to the land, and that, by regaining possession of the lands through purchase, it had unified fee and aboriginal title and the lands were within the sovereign authority of the Oneida Nation and, accordingly, immune from state taxation.[105] Lower courts agreed.

Thus, the Oneida Indian Nation returned to the Supreme Court in 2005, contending that regulatory authority over these lands does not reside in the City of Sherrill. But the Supreme Court disagreed, holding that the relief sought by the tribe—"recognition of present and future sovereign authority to remove the land from local taxation"[106]—was barred by the equitable defenses of laches, impossibility, and acquiescence.[107] The Court focused on "the long lapse of time, during which New York's governance remained undisturbed" and the "present-day and future disruption such relief would engender." Though the Court's opinion cabined *Sherrill's* holding, lower courts have relied on the case to reverse a monetary judgment secured by another Indian nation in a similar Eastern land claims case.

For Indian nations, the process of recovery means undertaking the hard work of engaging in and, in some cases, revitalizing Native governance. As *Lyng*, *Sherrill*, and numerous other cases not discussed in this essay, demonstrate, our esteemed federal courts, and the Supreme Court of the United States, in particular, play a pivotal role in

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shaping the possibilities for Native peoples' continued cultural and political sovereignty.

Conclusion

The central role of the Supreme Court in defining Native American rights to land and resources cannot be overstated. Though the United States Constitution contemplates the existence of Indian nations in several respects, it does not constitutionalize Indian rights. As a result, much of federal Indian law, including the Native American lands cases highlighted herein, has developed as a matter of federal common law, in a field which—constitutionally, historically, and jurisprudentially—is characterized by exceptionalism.[108] This unique feature of the field makes the judicial branch—and the Supreme Court in particular—of pivotal importance to Native nations going forward.

In some respects, the class of Indian law cases that might be contemplated as those involving Native American lands comprises a capacious category. For Indian peoples, virtually all rights of cultural and political sovereignty attach to land, making the scope of land rights—in relation to religion, economics, culture, and governance—of critical importance. But I have attempted to document here select historical and doctrinal features of Native American land cases to demonstrate how they have been shaped in the Supreme Court of the United States, that highly esteemed and vital body in our democratic society wherein all peoples ultimately seek justice.

In 1953, Felix Cohen wrote: "the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[109]

Far from fulfilling the nineteenth century prophecy of the "vanishing Indian," the story of the Native peoples of this continent is far from over, as Indian nations continue to adhere to a belief in the long-term sustenance of autonomous, sovereign governments within our great nation.

Chi-megwetch.

Author's Note: An earlier version of this essay was delivered as part of the 2012 lecture series on property rights hosted by the Supreme Court Historical Society, to which I am grateful for the opportunity. My thanks to Stuart Banner, Lorie Graham, and Joseph Singer for their keen insights in the field, and especially to Kristen Carpenter for providing detailed feedback and thoughtful criticism at all stages of this project.

ENDNOTES

[1] U.S. Const. art. II, § 2, cl. 2.
[2] U.S. Const. art. VI, cl. 2.
[3] U.S. Const. art. I, § 8, cl. 3.
[4] *See* Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2006)) ("[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty[, but] nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.").
[5] Charles F. Wilkinson, AMERICAN INDIANS, TIME, AND THE LAW 24 (1987).
[6] David Listokin, et al., Center for Urban Policy Research, Housing and Development in Indian Country: Challenge and Opportunity 100 (2004).
[7] *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823).
[8] Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1073 (2000).
[9] Kristen A. Carpenter, *Property, Remedy, and Recovery* (manuscript on file with author).
[10] Stuart Banner, HOW THE INDIANS LOST THEIR LAND 10 (2005).
[11] Felix Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 44-46 (1947).
[12] 21 U.S. 543 (1823).
[13] *See*, Lindsay G. Robertson, *The Judicial Conquest of Native America: The Story of* Johnson v. M'Intosh, *in* INDIAN LAW STORIES 29, 29-31 (Carole Goldberg, Kevin W. Washburn, & Philip P. Frickey, eds., 2011).
[14] Banner, *supra* note 9 at 179-80.

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[15] *Id*. at 179.
[16] *Id*.
[17] *Id*. at 180.
[18] *Id*. at 179.
[19] Robertson, *supra* note 13, at 31-32.
[20] Banner, *supra* note 10, at 179.
[21] Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L. J. 763, 767 (2011) [hereinafter Singer, *Original Acquisition*].
[22] *Johnson*, 21 U.S. at 574.
[23] Joseph William Singer, *Erasing Indian Country: The Story of* Tee-Hit-Ton Indians v. United States, in INDIAN LAW STORIES, *supra* note 11, at 229, 243 [hereinafter Singer, *Erasing Indian Country*].
[24] Philip P. Frickey, *Doctrine, Context, Institutional Relationships and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 19 (2002) [hereinafter Frickey, *Doctrine*].
[25] Singer, *Erasing Indian Country, supra* note 23, at 244-45.
[26] Singer, *Original Acquisition, supra* note 20, at 767.
[27] Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 492 (1994).
[28] 30 U.S. 1 (1831).
[29] 31 U.S. 515 (1832).
[30] *Cherokee Nation*, 30 U.S. at 17.
[31] *Id*. at 48.
[32] *Id*.
[33] Felix Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 8 (1942).
[34] *Worcester*, 31 U.S. at 561.
[35] Wilkinson, *supra* note 5, at 24.
[36] Banner, *supra* note 10, at 221.
[37] Andrew Jackson, *Second Annual Message*, in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 500, 521 (James D. Richardson, ed., 1896), also available at http://www.ourdocuments.gov/doc.php?doc=25&page=transcript.
[38] Banner, *supra* note 10, at 191.
[39] *Id*.
[40] Wilkinson, *supra* note 5 at 14.
[41] Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1676, 1699 (2011).
[42] *Id*.
[43] An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations (General Allotment Act), 24 Stat. 388.
[44] Wilkinson, *supra* note 5, at 6.
[45] Riley, *Indians and Guns*, s*upra* note 41, at 1711.
[46] Blue Clark, LONE WOLF V. HITCHCOCK: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY 2, 57–66 (1994) [hereinafter Clark, LONE WOLF]; *see* Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, in INDIAN LAW STORIES, *supra* note 13, at 189, 224.
[47] Frickey, *Doctrine, supra* note 24, at 6.
[48] 187 U.S. 553 (1903).
[49] *Id*. at 565-66.
[50] Frickey, *Doctrine, supra* note 24, at 12-13.
[51] *Id*. at 6.
[52] 430 U.S. 73 (1977).
[53] 448 U.S. 371 (1980).
[54] U.S. Const. Art. 1 Section 8, clause 3
[55] Frickey, *Doctrine, supra* note 24, at 14.
[56] Clark, LONE WOLF, *supra* note 46, at 65-66.
[57] Riley, *The Apex of Congress' Plenary Power over Indian Affairs, supra* note 46, at 189, 224.
[58] Clark, LONE WOLF, *supra* note 46, at 66.
[59] *Id*. at 94.
[60] *Id*. at 54-55.
[61] OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, INDIAN LAND TENURE, ECONOMIC STATUS AND POPULATION TRENDS 6 (1935) [hereinafter INDIAN LAND TENURE].
[62] Indian Reorganization Act, 48 Stat. 984.
[63] Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM U. L. REV. 753, 771 (1992) [hereinafter Newton, *Indian Claims*].
[64] Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468 (1994) [hereinafter Newton, *Compensation, Reparations, & Restitution*].
[65] Joseph Singer, Book Review, in Banner, HOW THE INDIANS LOST THEIR LAND, *supra*, note 8 (reviewing Banner on back jacket).
[66] *United States v. Dann*, 470 U.S. 39 (1985).
[67] *Dann*, 470 U.S. at 50. *See*, Allison M. Dussias, *Squaw Drudges, Farm Wives and the Dann Sister's Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 715-17 (1999).
[68] 348 U.S. 272 (1955).
[69] 448 U.S. 371 (1980).
[70] Singer, *Erasing Indian Country, supra* note 23, at 230.
[71] *Id*.
[72] *Id*. at 235.
[73] Felix S. Cohen, *Breaking Faith with Our First Americans*, INDIAN TRUTH, Mar.-Apr. 1948, at 6.
[74] *See*, Cohen, *Original Indian Title*, *supra* note 11, at 34-35 [emphasis added].
[75] *Tee-Hit-Ton*, 348 U.S. 277-279.
[76] *Id*. at 229-30.
[77] *Id*. at 289 [emphasis added].
[78] Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 95 n. 11 (1996).
[79] *Tee-Hit-Ton*, 348 U.S. at 283, n. 17; *see id*.
[80] *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 79-81 (2000).
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[82] Fort Laramie Treaty art. 2, Apr. 29, 1868, 15 Stat. 649.
[83] *Id*.
[84] Newton*, Indian Claims, supra* note 63, at 763-64.
[85] *Sioux Nation*, 448 U.S. at 374.
[86] *Id*. at 424.
[87] Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 248 (1982).
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[89] *Sioux Nation*, 448 U.S at 408-09, 416.
[90] *Id*. at 424.
[91] *See*, Tim Giago, *Black Hills Claims Settlement Funds Top $1 Billion*, Huffingtonpost.com (apr. 11, 2010, 12:06 PM), http://www.huffingtonpost.com/tim-giago/black-hills-claims-settle_b_533267.html.
[92] Newton, *Compensation, Reparations, & Restitution, supra* note 55, at 476.
[93] Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).
[94] 485 U.S. 439 (1988).
[95] Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, in INDIAN LAW STORIES, *supra* note 13, at 489, 491.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Lyng*, 484 U.S. at 440.
[100] *Id*. at 453.
[101] 544 U.S. 197 (2005).
[102] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).
[103] Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 12 (2006) (citing *City of Sherrill*, 544 U.S. at 222); *see* Non-Intercourse Act 25 U.S.C.§ 177 (2000).
[104] *Id*. at 8.
[105] Joseph William Singer, *Nine Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 607 (2006).
[106] *City of Sherrill*, 544 U.S. at 216 n.9.
[107] *Id*. at 221.
[108] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 433-34 (2005).
[109] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953).

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