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Shelby D. Green

Elisabeth Haub School of Law at Pace University

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SPECIFIC RELIEF FOR ANCIENT DEPRIVATIONS OF PROPERTY

*Shelby D. Green**

July 1998: "The Wiljen tribe in Western Australia staked a claim to 13.2 million square kilometres of Antarctica."¹

I. INTRODUCTION

In 1795, the State of New York purchased more than 64,000 acres of land from the Cayuga Indian Nation for roughly \$2,000, plus a small annual annuity.² Two centuries later, a federal court would declare that sale void because it violated a federal law.³ But what relief should be granted? Rescission of contract? Ejectment of the current possessors? Early in the litigation, the court ruled that specific relief, that is, the return of the land, would not be granted, that the Cayuga would have to accept instead a substitutionary relief, monetary compensation.⁴ Even monetary compensation would prove a difficult calculation if 200 years of interest would be added in. In all, the state was ordered to pay a sum far greater than the meager original purchase price, indeed, more than a quarter of a billion dollars.⁵ There will be more such reckonings in the State of New York and nationwide,⁶ as the Oneida Indian Nation is also

*Associate Professor of Law, Pace University School of Law, J.D. Georgetown University Law Center, B.S. Towson State College.

¹ "Aborigines Lay Claim to Antarctica," Deutsche Presse-Agentur, July 25, 1998, *available at* <http://www.lexis.com>.

² *Cayuga Indian Nation of N. Y. v. Pataki*, 165 F. Supp. 2d 266, 332 (N.D.N.Y. 2001). In subsequent transactions, the State of New York acquired tribal lands for four shillings, or the equivalent of fifty cents, per acre, which the state in turn sold by public auction at two dollars per acre. *Id.* at 331.

³ Indian Nonintercourse Act, 25 U.S.C. §177 (2002).

⁴ *Cayuga Indian Nation v. Cuomo*, Nos. 80-CV-930; 80-CV-960, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. June 30, 1999).

⁵ *Cayuga Indian Nation*, 165 F. Supp. 2d at 283. The amount awarded included \$211 million as prejudgment interest. *Id.* at 366.

⁶ Through negotiated settlements since 1970, the United States has restored to Native Americans more than a half billion acres of land. *See* Nell J. Newton, *Compensation, Reparations,*

seeking to recover some 270,000 acres in two New York counties⁷ and the Senecas are claiming title to some 19,000 acres making up the Niagara Islands.⁸ Last year, to the probable, though perhaps short-lived, relief of the State of Illinois and many individual landholders, the Miami Tribe of Oklahoma voluntarily dismissed, without prejudice, a complaint seeking to reclaim more than 2.6 million acres. They alleged that their original and ancient title to the land continued after European colonization because it was never extinguished by, nor ceded to, the federal government.⁹ One of the largest land claims brought against the federal government was won by the Sioux Nation in 1980 on the basis of a claim that the Black Hills of South Dakota had been taken a century earlier in breach of treaty.¹⁰ But the citizens of the Sioux Nation have refused the monetary award, insisting instead on the return of the land.¹¹

The claim to Antarctica seemed only the next logical assertion of

& *Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453 (1994).

⁷ *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) ("Oneida I"). This case was first dismissed for lack of subject matter jurisdiction on the ground that the complaint essentially alleged a state claim to possession. *Oneida Indian Nation v. Oneida*, 464 F.2d 916 (2d Cir. 1972). The Supreme Court reversed [in the cite above], holding that a claim to possession based on Indian title presented a question of federal law. *Oneida I*, 414 U.S. at 682. On remand, the district court held for the plaintiffs. *Oneida Indian Nation v. Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y. 1977). The Second Circuit rejected defendants' claims that there was no private right of action under the Nonintercourse Act or an action at federal common law. *Oneida Indian Nation v. Oneida*, 719 F.2d 525, 544 (2d Cir. 1983), *aff'd*, 470 U.S. 226. The Supreme Court granted certiorari and affirmed the Second Circuit in *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253-54 (1985) ("Oneida II"). In September 2000, the district court denied the Oneida's request for leave to amend their complaint to add ejectment, *Oneida Nation v. Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000), essentially on the ground that for most of the litigation, the Oneida had represented that they would not seek ejectment, where they had not originally. *Id.* at 86.

⁸ *Seneca Nation of Indians v. New York*, 26 F. Supp. 2d 555 (W.D.N.Y. 1998). In *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002), the court rejected an attempt by the Senecas to reclaim land consisting of the Niagara Islands that had been transferred in violation of federal law by finding that their aboriginal title had been extinguished before the alleged unlawful transfer. In *Alabama-Coushatta Tribe v. United States*, No. 3-83, 1996 U.S. Claims LEXIS 128, at *265 (July 22, 1996), the court ruled that the government was liable to pay full monetary compensation to the plaintiff tribe for breach of the government's fiduciary duties in failing to prevent the taking of the tribe's aboriginal lands, some 3.5 million acres in southeastern Texas. *Id.* The tribe had only sought monetary compensation and not the return of the land. *Id.* at *269.

⁹ *Miami Tribe v. Walden*, 206 F.R.D. 238, 239 (S.D. Ill. 2001). Intervening on the side of current possessors, Senator Peter G. Fitzgerald had introduced legislation to give aid to "certain Illinois families and landowners seriously threatened" by the suit. *Fitzgerald Bill Aids Illinois Families Named in Indian Lawsuit*, PR. NEWSWIRE, July 25, 2000 available at <http://www.lexis.com>.

¹⁰ *United States v. Sioux Nation*, 448 U.S. 371 (1980).

¹¹ *Sioux Nation* is discussed further *infra*, at note 165 and accompanying text. The monetary award remains in the federal treasury and stands at nearly half a billion dollars. See generally, DAVID GETCHES ET. AL., *FEDERAL INDIAN LAW* 361 (4th ed. 1998).

title by Australian aboriginals, given their recent successes at reclaiming title to native lands in Australia. Last year alone, they reclaimed more than 90,000 square miles of land.¹² As of July 2000, there were more than 500 aboriginal land claims pending, covering half of the state's crown land.¹³

In the last two years, by negotiated treaty and settlement, Canada has restored indigenous groups to hundreds of thousands of square miles of aboriginal land, including "old-growth forests, beach fronts and mountainsides" on beautiful Vancouver Island.¹⁴ The Nunavut Agreement¹⁵ is the largest land claims agreement in the world, covering some 350,000 square kilometres, including some 36,000 square

¹² Roger Martin, *Land title deal a bonanza for 500 Aborigines*, AUSTRALASIAN BUSINESS INTELLIGENCE, Oct. 17, 2000, available at 2000 WL 28459263. In October, 2000 "the Spinifex people of Western Australia have won Australia's largest land rights claim . . . [o]ver 50,000 square kilometres of land in the Great Victoria Desert, . . . representing 85 per cent of their traditional lands." *Id.* In October 2000, a federal court "handed down [a] negotiated determination that [gave] the Wik and Wik Way people exclusive rights [to] over 6,000 square kilometres of land and inland waters on the Western edge of the Cape York Peninsula." Cathy Pryor, *New struggle looms after Wik people win six-year land battle*, AUSTRALASIAN BUSINESS INTELLIGENCE, Oct. 4, 2000, available at 2000 WL 27948080. In August 2000, an agreement was reached on the "claim by the Nganawongka for 48,000 kms of pastoral country south of the Pilbara. The claim gave access to pastoral leases for hunting, fishing and other non-commercial purposes and compensation for mining." Ron Brunton, *Landmark native title agreement an eye-opener*, AUSTRALASIAN BUSINESS INTELLIGENCE, Dec. 9, 2000, available at <http://www.lexis.com>. In August 2000, a federal court in Perth, granted "native title" over an area of 47,607 square kilometres in Western Australia's Murchison-Gascoyne region, restoring to them "native title" rights over it, which included the right to hunt, fish and gather.

¹³ There were 194 claims in Queensland, 141 in Western Australia, 86 in New South Wales, 67 in the Northern Territory, 26 in South Australia, 21 in Victoria, three in the Australian Capital Territory, and none in Tasmania). It was reported that such native title claims were costing the Victoria government some \$3 million a year. AAP Information Services, Pty. Ltd. Nationwide General News, Australian General News, "Vic: Native Title Claim Costs Hit \$3 million Per Year." June 4, 1999, available at <http://www.lexis.com>. In an examination of recent statistics regarding land claims, one writer estimated that Aborigines have potential claims to seventy-nine percent of Australia's land. Gilda C. Rodriguez, Note, *Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights*, 23 N.C. J. INT'L L. & COM. REG. 711, 724 (1998).

¹⁴ Anthony DePalma, *Canada and British Columbia's Largest Indian Group Taking Steps to First Permanent Treaty*, N.Y. TIMES, Mar. 11, 2001. In March 2001, Canada and British Columbia's largest Indian group, the Nuu-chah-nulth, entered into a historic treaty that gave the Indians self-rule, \$152 million and shared control with non-Indians over almost 260 square miles. *Id.* In June 2000, Canada agreed to pay the indigenous Squamish Nation "\$92.5 million to settle claims to former reserves in Vancouver, North Vancouver and Squamish." "Ottawa pays B. C. Band \$92.5 to settle claims to former reserves [Squamish]", CANADIAN BUSINESS AND CURRENT AFFAIRS, June 9, 2000.

¹⁵ The agreement was signed on May 25, 1993, forming the Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in the Right of Canada. Nunavut Land Claims Agreement Act, ch. 29, S.C. 1993 (Can.). The federal implementation legislation is Nunavut Land Claims Agreement Act, ch.29, S.C. 1993 (Can.). It received royal assent on June 10, 1993 and became effective by order in council on July 9, 1993. *Id.*

kilometres with subsurface rights and exclusive or preferential game rights to particular species of wildlife, and monetary compensation of more than a billion dollars payable over 14 years.¹⁶

In these cases, there are the broad claims for the return of ancestral lands. There are also the more narrow ones for specific rights, such as to fish, hunt, mine, forest, and whale, as these are thought to inhere in title in the western conception of ownership and are said to be an aspect of aboriginal title that can be exercised unconnected to a specific parcel of land. There have even been claims to water as a species of aboriginal rights.¹⁷

In virtually all of these cases, both the rights and the claims being asserted are ancient. The rights are ancient in the formal sense of being pre-modern and founded upon or grounded in ancient, common, or customary law. The claims are ancient in the formal sense of having arisen in antiquity or centuries ago when the taking or dispossession occurred.¹⁸ They are also ancient in the legal sense of otherwise being subject to or barred by statutes of limitations. But as the recounted successes show, the rights and claims, though ancient, are yet viable and qualify for relief under prevailing property law theory.

Nations have responded variously to these claims, by establishing land claims commissions to acquire land from current possessors for the return to indigenous peoples,¹⁹ adopting constitutional amendments to

¹⁶ As part of the agreement, the federal government committed itself to a process to create the new territory of Nunavut on April 1, 1999.

¹⁷ In the Philippines, claims for the restoration of "ancestral domain," have included ancestral lands, forests, inland waters, coastal areas, natural resources and land for traditional access used by the groups for their subsistence and traditional activities. Luz Rimban, *Philippines: Legal Claim Opens Doors for Indigenous Islanders*, INTER PRESS Service, Oct. 1, 1988, available at <http://www.lexis.com>; The indigenous Tagbanua people established title not only to more than 22,000 hectares of land, but also to ancestral waters, the blue-green waters of the Coron Island in the Palawan province in central Philippines. *Id.* In *Yarmirr v. Northern Territory*, 2001 Aust. High Ct LEXIS 51 (Oct. 11, 2001), the Australian High Court rejected a claim by aboriginals to the seas and seabeds contained within aboriginal areas, including reefs, on the ground that under common law, an exclusive right to waters in individuals was inconsistent with the public right to navigate and to fish the waters. *Id.* at *90, *94.

¹⁸ In the Republic of South Africa, as of 1998, some 64,000 land claims had been lodged under the Restitution of Land Rights Act of 1994 for the return of land taken from black South Africans under the apartheid regime. Peter Wilhelm, "Rolling of Huge Boulder Begins to Gain Pace * Land Restitution", FINANCIAL MAIL, May 14, 1999, available at <http://www.lexis.com>.

¹⁹ *E.g.*, Philippines—The Indigenous People's Rights Act of 1997, Republic Act No. 8371 (1997). (Since 1994, the Philippines' environment department has awarded well over a hundred "Certificates of Ancestral Domain Claim"); Brazil—National Land Reform and Colonization Institute in Brasilia; Malaysia—(Some 30,000 applications per year have been filed to resolve ancestral land issues). See A. Yogeshwary, *Increase in number of ancestral land cases*, NEW STRAITS TIMES, Mar. 24, 2001. Since 1974, 600,000 of such cases have been resolved. *Id.*; See

protect aboriginal rights and provide for compensation in case of a taking of native lands,²⁰ enacting land rights acts that declare and define indigenous land rights,²¹ negotiating settlements,²² and entering into treaties.²³ Many aboriginal rights claims in the United States are being prosecuted in the courts.²⁴

Indigenous peoples in North America and Australia state a claim even though their interest in the soil first occupied by them was not formally recognized as a “property” interest until centuries after the coming of the Europeans. For centuries after that, it was difficult to discern a coherent theory of their aboriginal title. Aboriginal title or “original Indian title,” as it is referred to in the United States, is not fee simple title with all the usual empowering incidents. By the presumption of European sovereignty, aboriginal title is an inalienable right of occupancy, liable to extinguishment by the national sovereign, but immune from many of the burdens of fee simple title, such as state taxation and state powers of eminent domain. But why is aboriginal title so limited and vulnerable to sovereign prerogative while fee simple title is not? The difference between these types of title is not organic or intrinsic, that is, appertaining to the nature of the thing over which the claimant asserts rights.²⁵ In fact, aboriginal title has only to do with who

also, Zimbabwe—The Land Acquisition Act of 1992 (Zimbabwe); Chile—Corporacion Nacional de Desarrollo Indigena (“Conadi”) (six years ago in Chile, the government has begun the process of acquiring ancestral lands for the eventual conveyance to indigenous communities. See “Rights Claims in Chile,” Nov. 22, 1999, by Gustavo Gonzalez).

²⁰ CAN. CONST. (Constitution Act, 1982) (Rights of the Aboriginal Peoples of Canada), § 35(1); In the Republic of South Africa, the newly-adopted Constitution provides for government expropriation of private property so long as it is in accordance with law (*E.g.*, for public purposes or in the public interest) and subject to compensation. S. AFR. CONST. (1996) ch.II (Bill of Rights), § 25. The Constitution also provides for legislative action to implement land reform. *Id.* Under Section 25(7), “[a] person or community dispossessed of property after 19 June 1913 [Native Land Act of 1913] as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.” *Id.* § 25(7). Section 25(6) provides that “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.” *Id.* at § 25(6). The Lands Claim Court was established in 1996 and hears claims from the Commission on the Restitution of Land Rights, which mediates land claims arising from the forced removals after the enactment of the 1913 Act. If mediation fails to successfully resolve a claim, it is referred to the Land Claims Court for adjudication. Among other things, the Land Claims Court can order restitution to successful claimants in the form of land or other remedies, for which the state bears the burden of compensation.

²¹ Native Title Act of 1993 (Austl.) (establishing the National Native Title Tribunal).

²² See discussion *supra* note 13 and accompanying text.

²³ See discussion *supra* note 14 and accompanying text.

²⁴ See cases mentioned at text accompanying notes 7 through 9.

²⁵ There are numerous instances in the Western concept of property where whether there is

its original holders are. It can only exist in indigenous peoples as a group, but cannot be created in them from fee simple title. Aboriginal title is title that was so designated and excluded from the common law property system. While a system evolved to mark the contours and dimensions of fee simple title and to provide remedies for its fulfillment, that system generally was not available to holders of aboriginal title and no other system or scheme was quick to emerge to remedy infringements of aboriginal rights. For centuries, aboriginal claimants were left to appeal to the mercy of courts of equity and the grace of Congress for protection and redress of infringements.²⁶ But as the claims have found legal forums and as indigenous peoples have found political clout, the challenge for the courts has been to fashion just remedies for infringements to a kind of right that is of a wholly different order, and where the protection of which presents ancientness never allowed in the case of fee simple title.

I consider in this paper the extent to which courts rationally and on a principled basis can deny to aboriginal claimants, despite the ancientness of their claims, the specific relief of being restored to possession of their aboriginal lands where the case for such specific relief is otherwise made. The paper begins with a brief discussion of the foundations of property in the Western conception, then goes on to discuss the Europeans' asserted title to indigenous lands and the various theories of aboriginal title that have emerged. It then explores the past and existing legal obstacles to the judicial resolution of the indigenous peoples' claims and concludes with the proposition that unless the federal government intervenes to create new sovereign territory in substitution of aboriginal lands, specific relief is compelled. That is to say, the only just and legally sustainable substitutionary relief is substitute *land*. The paper's main focus is on aboriginal land claims in the United States, with some discussion of claims in Canada and Australia.

II. FIRST POSSESSION AND PROPERTY IN THE COMMON LAW

Foremost in the Western European canon is that property resulted

property or not depends on the character of the things in which property rights are sought. Claims to property in human body parts have been resisted. *Moore v. Regents of the Univ. of Ca.*, 793 P.2d 479 (Cal. 1990). One state has declared elk not eligible for private ownership (Wyoming) and no one can monopolize ideas. Copyright Act of 1976, 17 U.S.C. § 102 (West 2002); WYO. STAT. ANN § 23-1-103 (West, WESTLAW through 2002 Legis. Sess.).

²⁶ See discussion *infra*.

from first possession.²⁷ According to Blackstone “occupancy is the thing by which . . . title was in fact originally gained; every man seizing . . . such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.”²⁸ It is a theory that is venerable and persistent, dating back to Roman law.²⁹ While Blackstone’s articulation has in the forefront notions of territoriality and might, others have proposed that private property was necessitated by scarcity, that is, as consumption in common led to the scarcity of the natural riches of the earth, private property became necessary to preserve peace.³⁰ Through explicit agreement and agreement implied by occupation, it became understood that whatever a person had taken possession of should be that person’s property.³¹

John Locke built upon the first possession theory by incorporating aspects of natural law. He posited that property resulted from mixing one’s labor with objects belonging to no one.³² This is because, as a principle of natural law, we indisputably “own” ourselves and, by extension, everything we produce.³³ Self-preservation thus required the

²⁷ See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73-88 (1985).

²⁸ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *8-9. This was so by the law of nature and reason that in the beginning, “he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the *right* of possession continued for the some time only that the *act* of possession lasted.” *Id.* at *2-3. It later “became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediately *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. . . .” *Id.* at 4.

²⁹ LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS 49 (1977).

³⁰ BLACKSTONE, *supra* note 27, at 8.

³¹ JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 14 (Little, Brown & Co. Ltd. (3d ed. 1993); see also RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 130-31 (1951). “Despite its persistence, the normative case for first possession—its force as a justification—is commonly thought to be rather weak.” Dukeminier at 15. Other equally logical bases for property include need, on the one hand, and efficiency on another. There is also the rationale of social utility. For a general discussion of the theories of property, see Jeremy Waldron, *What is Private Property?*, 5 OXFORD J. LEG. STUD. 313, 318 (1985); Becker, *supra* note 29; STEPHEN R. MUNZER, A THEORY OF PROPERTY (1990); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).

³² JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 20 (Prometheus Books 1986) (1690).

³³ *Id.* at 22. Locke’s theory has been described as “a philosophy of property that justifi[ed] private ownership not as a means for capitalist accumulation but as a means for withstanding the abuse of authority by government.” Bradley Bryan, *Property as Ontology: On Aboriginal and English Understandings of Ownership*, 13 CAN. J. L. & JURIS. 3, 10-11 (2000).

recognition and protection of those things thus resulting from one's labor and one's dominion.³⁴ According to Hume, rules of property are conventions that have evolved spontaneously, arisen gradually and acquired force by slow progression and repeated experience.³⁵

One modern conception of property, "conflates [it] with wealth, or rather, with . . . 'goods' and 'items of consumption.'"³⁶ Property as such has lost its distinct moral difference such that the idea of 'use' (acts of dominion or adding labor) as fundamental, is now based primarily in its exchange value.³⁷ Even though the avowed meaning of property is the right that characterizes a particular relationship between an individual and the rest of society, the varieties of relationships have increasingly become transactional in nature. In this sense, the social relationships and moral understandings that had previously undergirded property theory have since been rationalized and structured according to the demands of production.³⁸

The homily of the common law, though, is that possession is the root of title.³⁹ But what does it mean to possess? Possession includes a clear act, some sort of statement, or a declaration of one's intent to appropriate. That act must give notice to the world that the possessor has appropriated the property.⁴⁰ Professor Rose writes that the requisite

³⁴ Locke offered his theory of property before the industrial revolution. In the views of one scholar, "[t]he kinds of changes that happen[ed] in the eighteenth and nineteenth century, properly understood, alter[ed] the nature of property rights through their application to industrial enterprise, and hence can be best understood through the analysis of the development of contract law and of the law of remedies for trespass." *Id.* at 12. Property thus acquires an exchange value. *Id.*

Such a transformation in English property law speaks volumes of how we understand our own relationship to the natural world. Specifically, what something is is not determined by who owns it but rather by what it is worth. This is reflected in the modern practice of property law: as property is really (crudely) a bundle of rights, these rights reflect the abilities one has with respect to what one can do with one's property, and usually this is reflected in contractual or succession arrangements of one sort or another The 'use' value of a thing disappears because property becomes understood in terms for which it can be bargained, i.e., in contract.

Id. at 12-13.

³⁵ 2 DAVID HUME, TREATISE ON HUMAN NATURE 273-84 (T.H. Green & T.H. Grose eds., London, Longmans, Green & Co. 1874).

³⁶ Bryan, *supra* note 33, at 14.

³⁷ *Id.*

³⁸ *Id.* As we discuss *infra*, however, aboriginal title, since it cannot be voluntarily exchanged, continues to have only "use" value.

³⁹ "Occupancy has long been regarded as the basis for original title to territory by the law of nature, and hence in international law." KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 135 (1989); A.W. SIMPSON, A HISTORY OF THE LAND LAW (Clarendon Press, 1986); Rosalie Schaffer, International law and sovereign rights of indigenous peoples, in INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 19-42 (Barbara Hocking, ed., 2d. 1988)."

⁴⁰ See generally, I. F. Pollock & R.S. Wright, An Essay on Possession in the Common Law

act must make a statement, meaning that “acts of possession” are a “text,” and “the common law rewards the author of that text.”⁴¹ But the clearest text may have ambiguous subjects and it is inevitable that the interpretation and meaning of “text” and “subjects” will be read differently by different audiences and depending upon the readers’ ultimate objectives or interests.⁴² There is also the doubtful proposition that “there is such a thing as a ‘clear act,’ unequivocally proclaiming” to the world at large that one is appropriating that any relevant audience will naturally and easily interpret as a property claim.⁴³ Yet in defining the acts of possession that makeup a claim to property, the law not only rewards the author of the “text;” it also puts an imprimatur on a particular symbolic system and on the audience that uses this system.⁴⁴

III. INVENTIONS AND FICTIONS FOR TITLE

Henry Maine defined “fiction” in law as “any assumption which conceals or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.”⁴⁵ In the workings of the law, fictions serve to introduce change behind the facade of adherence to existing law.⁴⁶ Lon Fuller wrote of several motivations behind the use of fictions: First, policy, that is, to conceal something from others, particularly that judges do not make law, but only declare what has always been law;⁴⁷ second, emotional conservatism, that is, as a way of satisfying the judge’s own craving for certainty and stability; third, convenience, by making use of existing legal institutions by pretending that certain facts exists; and fourth, intellectual conservatism, where the judge does not know how else to state and explain the new principle he is applying.⁴⁸ Fuller explained that legal fiction probably owes its origin “not so much to a

16 (1888) (“possession in law” is “the fact of control coupled with a legal claim and right to exercise it in one’s own name against the world at large, . . . not as against all men without exception.”)

⁴¹ Rose, *supra* note 27, at 82.

⁴² *Id.* at 83. Rose states: “[But] it is not always easy to establish a symbolic structure in which the text of first possession can be ‘published’. . . Some objects of property claims [indeed] seem inherently incapable of clear demarcation [altogether]—ideas, for example. [note omitted].” *Id.*

⁴³ *Id.* at 84.

⁴⁴ *Id.* at 85.

⁴⁵ HENRY S. MAINE, *ANCIENT LAW* 25 (4th ed. 1906).

⁴⁶ DIAS, *supra* note 47, at 318; R.W. DIAS, *JURISPRUDENCE*, 408 (2d ed. 1964).

⁴⁷ DIAS at 319, citing MAINE at 38. *See generally*, DIAS, *supra* note 47, at 407-15.

⁴⁸ LON L. FULLER, *ANATOMY OF THE LAW* 52 (1968).

superstitious disrelish for change or some instinct for self-deceit, as to an impulse toward harmony and system. By giving to the new law the verbal form of the old it facilitated its absorption into the existing corpus of rules.”⁴⁹

The enlarged concept of *terra nullius*,⁵⁰ that lands inhabited by “backward peoples,” were vacant and occupied by no one was a fiction, although not one that can be said to serve any of the ends identified by Fuller and others. In any other setting, the indigenous peoples’ occupation of their lands would have been seen as “statements” or “texts” that could be understood and their prior claims to the land then taken seriously. Instead, Europeans declared indigenous lands that were in fact occupied, nonetheless open to their “discovery.”⁵¹ This fiction enabled the European “discoverers” to disregard the customary rights of the indigenous inhabitants in a way that appeared consistent with international law.⁵²

⁴⁹ *Id.*

⁵⁰ The general concept refers to a thing or territory belonging to no one. BLACK’S LAW DICTIONARY 1483 (7th ed. 1999).

⁵¹ Bryan, *supra* note 33, at 4-5. Professor Bryan asserts that:

[T]o answer the claim of *terra nullius*, on its own terms, is dangerous because it re-describes Aboriginal relationships to land as ‘occupation,’ ‘possession,’ and ‘property.’ We fall into the language and logic used by many legal practitioners and anthropologists who describe images of an Aboriginal past marred by its barbarism because we take on the categories of what will count as civilization—property being one of these. . . . [T]o re-describe native reality is to actually change native reality: changed descriptions create new webs of meaning, and hence practices, identity, and worldviews will all be affected.

Id.

⁵² Professor McNeil explains:

At the dawn of the colonial era towards the end of the fifteenth century, there were no set rules for the acquisition of territories which were not already within the jurisdiction of the recognized sovereign. The European powers sought to fortify shaky claims by whatever means they could, including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties with rival States or local chiefs and princes, the establishment of settlements, and outright conquest by force of arms. . . . [The] practical [effect] . . . [was] that a sovereign who succeeded in exercising a sufficient degree of exclusive control was generally regarded as having acquired sovereignty.

MCNEIL, *supra* note 39, at 110. It thus became a rule that acquisition of sovereignty over *terra nullius* depend[ed] on effective occupation.” *Id.*; see also MARK F. LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION (Negro Univ. Press 1969) (1926); Eric Kades, *History and Interpretation of the Great Case of Johnson v. M’Intosh*, 19 LAW & HISTORY REV. 67, 71 (2001). In any case, the discovery rule did not dictate what rule determined the rights of the sovereign vis-a-vis the natives. The French permitted their colonists to purchase directly from the Indians. *Id.* In the United States, some early settlers simply declared that the Indians had no rights to their own lands, largely on account of, in the eyes of the Europeans, the Indians’ non-European styled civilization. *Id.* at 72.

What the law of England and international law otherwise required was recognition of title in the indigenous peoples. The theory was that the moment sovereignty was acquired over a vacant territory, the Crown became “seised in demesne”⁵³ of all lands, and remained so until it granted them out,⁵⁴ but the pre-sovereignty rights of the indigenous people were not extinguished by the acquisition of sovereignty alone. Under the doctrine of continuity, there was a “presumption that in the absence of express confiscation or expropriatory legislation, those rights [held under local laws] would continue after a change in sovereignty.”⁵⁵ The rights allowed and preserved to the indigenous peoples depended, however, upon a classification of territories, which determined the law in force in the territory.⁵⁶ In conquered and ceded territories [those acquired by war or treaty] local laws and customs, in so far as they were not unconscionable or incompatible with the change in sovereignty, remained in force until altered or replaced by the Crown.⁵⁷ The “public property rights held by [the former ruler] would generally pass to the Crown along with sovereignty.”⁵⁸ As for private property, the Crown would have an absolute power at the time of conquest or cession to seize, and thus acquire title to, both lands and chattel.⁵⁹ Where the Crown chose to do so, private persons who were deprived of their property in this way would have no remedy because the seizure would be an act of state, that is an act of sovereign power which is outside the jurisdiction of the courts.⁶⁰ However, once the Crown accepted the territory into its dominions, the subjects of the former sovereign would be British subjects, and as a result, the Crown’s power to deal with them

⁵³ The feudalistic concept of “seisin” meant the right of possession and also the burdens of delivering up feudal services to the overlord. See S.F. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 118-19 (1969).

⁵⁴ MCNEIL, *supra* note 39, at 135.

⁵⁵ *Id.* at 161; Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 30-31 (1947). In contrast, under the recognition doctrine, it is said that only such rights as the Crown deigned to recognize would be enforceable under the new regime. *Id.* McNeil believes that only the doctrine of continuity is historically supportable. MCNEIL, *supra* note 39, at 177. For example, on October 7, 1763, soon after the Treaty of Paris was signed and the English Crown acquired sovereignty of certain parts of Canada, “a Royal Proclamation was issued which, among other things, ‘for the present’ reserved certain lands to the nations or tribes of Indians who were connected with and living under the protection of the Crown, and prohibited colonial governors from granting warrants of survey or issuing patents for, and private persons from settling on or purchasing, those lands.” *Id.* at 270. This meant that whatever rights the Indians had under the French had survived. *Id.*

⁵⁶ *Id.* at 113.

⁵⁷ *Id.*

⁵⁸ *Id.* at 117.

⁵⁹ *Id.* at 162.

⁶⁰ *Id.* at 162-63.

and their property by act of state would be at an end.⁶¹ The Crown “none the less retain[ed] prerogative legislative powers by virtue of which it could extinguish property rights,” but with compensation.⁶²

“In settled territories, English law accompanied the colonists to the extent it was applicable to the local circumstances.”⁶³ Where such territories had indigenous populations, the importation of English law “did not necessarily abrogate pre-existing customary law,” but the extent to which English law was introduced and local law retained, varied with the circumstances.⁶⁴ What is important is that the mere act of settling did not have the effect of vesting title in the sovereign.⁶⁵ As a general matter, English law did not apply to regulate the internal affairs of indigenous people who had their own systems of law.⁶⁶ At the same time, though, indigenous people would be protected by English law.⁶⁷ Thus, “if a settler—or even the Crown—attempted to justify seizure of lands occupied by [aboriginals] from pre-settlement times on the grounds that [indigenous] laws gave them no title,” English law would have given the aboriginals a remedy to fill the gap.⁶⁸ If the territory did not have a customary system of real property law, English law would apply to give them a “common law aboriginal title.”⁶⁹

It was the case then that customary law was the source of indigenous rights in both conquered and ceded territories and settled territories.⁷⁰ Customary law is generally a matter of fact, but it has proven difficult in the case of cultures with oral traditions and where the evaluation is Eurocentric.⁷¹ Possession under English law could ground title in the indigenous peoples. But because possession is a conclusion of law, it could not exist apart from a legal system. Accordingly, indigenous peoples who were not known to have had a system of law could not be said to have been in possession. They could, however, have

⁶¹ *Id.* at 163-64.

⁶² *Id.* at 164.

⁶³ MCNEIL, *supra* note 39, at 114.

⁶⁴ *Id.* at 115-16.

⁶⁵ *Id.* at 179; Cohen, *supra* note 53, at 31-32.

⁶⁶ MCNEIL, *supra* note 38, at 182. “However, as British subjects and residents of one of the Crown’s dominions, in general [indigenous peoples] would have to respect English public law, especially law relating to serious crimes.” *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 183.

⁶⁹ *Id.* at 183, 207-08.

⁷⁰ *Id.* at 161, 193.

⁷¹ *Id.* at 193, 195. The indigenous peoples’ conception of land was not as a commodity that could be owned, but more as something of “a sacred provider, to be used with respect bordering on reverence.” *Id.* at 194.

been in occupation, because that is a matter of fact, which does not depend on the existence of law.⁷² Thus, if they were in occupation, English law would accord them possession in the absence of proof that possession was in another.⁷³ The legal effect of this is that they would have been presumed to have been in possession, which would mean presumptive title and the right to defend against dispossession.⁷⁴ This presumptive title at the moment a territory was acquired by settlement, would have given rise to common law aboriginal title.⁷⁵ “Unless rebutted, it would be as effectual to defend or recover possession as a valid title by limitation, descent or purchase” and “would cover all lands occupied,” including the subsurface (except precious minerals, which by prerogative right belonged to the Crown) and “would entitle indigenous possessors to fee simple estates, for possession.”⁷⁶ As the history reveals, however, it was the fiction and not the theory that held in North America and Australia.

A. Variations on Aboriginal Title in Three Nations: Canada, Australia and the United States

When the English Crown asserted sovereignty over lands in what is now Canada, the aboriginal people became English subjects and entitled to rights, including the possession of their lands, but not fee simple title.⁷⁷ In 1763, the Royal Proclamation by the English King George III “acknowledged the aboriginal people as “nations or tribes,” and . . . recognized that they continued to possess their traditional territories until they [were] “ceded to or purchased by the Crown.”⁷⁸ The Canadian

⁷² *Id.* at 196-97.

⁷³ *Id.* at 197. The acts of occupation that should have been sufficient included the erection of permanent dwellings and other structures, cultivation of lands, identification of definite tracts over which domestic animals were herded and the occupation of land to which they resorted on a regular basis to hunt, fish, or collect the natural products of the earth. Even outlying areas that were visited occasionally and regarded as being under their exclusive control and lands over which so-called “hunters and gathers” passed should have been deemed in possession of the indigenous people. Modern anthropological evidence is that few were indiscriminate wanderers, but tended to be attached to definite areas where they often had spiritual ties. MCNEIL, *supra* note 39, at 201-03.

⁷⁴ *Id.* at 207.

⁷⁵ *Id.* at 207-08.

⁷⁶ *Id.* at 208. In the United States, the term used is “original Indian title” and in Australia, it is “native title.” For convenience in this introduction to the concept, the single term, “aboriginal title” will be used. The variations occurring among nations are discussed later.

⁷⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.); Fred R. Fenwick, “Unresolved aboriginal land claims in British Columbia,” *Law Now*, January 1999, available at <http://www.lexis.com>.

⁷⁸ Fenwick, *supra* note 77. “Nearly one-third [of the text of the Royal Proclamation of 1763] is devoted to British relations with Indigenous Nations, many of whom were allied with the

Supreme Court has since declared that the Proclamation pronounced assurances to aboriginals, but that is not the source of aboriginal title. Instead, aboriginal title is a legal right that pre-existed European contact and which did not need government recognition to exist.⁷⁹

The 1997 decision in *Delgamuukw v. Province of British Columbia*,⁸⁰ is the seminal case on the nature and scope of aboriginal title in Canada. As a foundational principle, the Court explained that “aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title.”⁸¹ That exclusive right gives the

British victors, referring to the Indigenous Peoples as “Nations,” as distinct societies with their own forms of political organization with whom treaties had to be negotiated. It also enshrined protection of Indigenous lands by the British Crown, and a process for seeking Indigenous consent through a treaty process to allow for European settlement.” *Id.* at 8-9. It also spelled out that indigenous nations had an inalienable right to their lands. *Id.* It was a codification of the norms of customary international law for the Crown to enter into treaties with indigenous nations in the Americas. SHARON H. VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS 8 (1998).

⁷⁹ *Calder v. Attorney-Gen. of B. C.*, [1973] S.C.R. 313 (Can.).

⁸⁰ [1997] 3 S.C.R. 1010. There, appellants claimed 58,000 square kilometres in British Columbia, to which the Gitksan and Wet’suwet’en (who together are some 5,500 to 7,000 members) claimed aboriginal title. *Id.* at 1028-29. But the claimed land was occupied also by some 30,000 non-aboriginals. *Id.* at 1029. British Columbia “counterclaimed for a declaration that the appellants have no right or interest in and to the territory or alternatively, that the appellants’ cause of action ought to be for compensation from the Government of Canada.” *Id.* The trial court denied the complaint and the Supreme Court reversed and ordered a new trial. *Id.* at 1028. The Court stated that the factual findings made at trial could not stand because of the trial judge’s rejection of various kinds of oral histories which were offered in an attempt to establish occupation and use of the disputed territory, an essential requirement for aboriginal title. *Id.* at 1079. Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been different. *Id.*

⁸¹ *Delgamuukw*, [1997] 3 S.C.R. at 1083. To establish a claim to aboriginal title, the group asserting the claim must demonstrate that its ancestors had exclusive occupation of the lands at the time the Crown asserted sovereignty. *Id.* at 1097-98, 1104. Occupation can be established by the construction of dwellings, through the cultivation and enclosure of fields, by the regular use of definite tracts for hunting, fishing or by otherwise exploiting the land’s resources. *Id.* at 1101. In determining whether such occupation is sufficient to ground title, the group’s size, manner of life, material resources, technological abilities, and the character of the lands claimed must be taken into account as well as both the common law and the aboriginal perspective on land are considered. *Id.* at 1101 (relying on *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.)). The Court ruled that “the ‘key’ factors for recognizing aboriginal rights were met: 1) the nature of an aboriginal claim was identified precisely with regard to particular practices, customs and traditions; 2) the aboriginal society specified the area that had been continuously used and occupied by identifying general boundaries; 3) the aboriginal right of possession was based on the continued occupation and use of traditional tribal lands since the assertion of Crown sovereignty (although the date of sovereignty is not the only relevant time to consider as continuity could still exist where the present occupation of one area is connected to the pre-sovereignty occupation of another area and present occupation may be proof of prior occupation and it is not necessary to establish an unbroken chain of continuity); 4) the aboriginal peoples continued to occupy and use the land as part of their traditional way of life, the land being of central significance to them. *Delgamuukw* [1997] 3 S.C.R. at 1128-31. Whether aboriginal rights are proprietary or usufructuary in nature was not made entirely clear in

right to engage in specific activities that are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture,⁸² as well as the right to use the land in ways that meet current needs and aspirations.⁸³ Leaving no doubt, the Court declared that "the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land," but also "to afford legal protection to prior occupation in the present day."⁸⁴ Implicit in this is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time. Nonetheless, the Court said, those uses must not be irreconcilable with the nature of the attachment to the land which forms the basis of the group's aboriginal title.⁸⁵

This grounding of aboriginal title in historic occupation by reference to traditional activities and uses marks it as *sui generis* and so distinguished from fee simple title.⁸⁶ So standing apart, aboriginal title is inalienable, except to the Crown. It can only be held communally. If lands covered by aboriginal title are used in a way that *sui generis* title does not permit, they must be surrendered and the lands converted into non-title lands.⁸⁷

Aboriginal title, by the gross demarcations laid out in *Delgamuukw* that nonetheless provide a kind of template, have since been held to include the right of self-governance. In *Campbell v. British Columbia*,⁸⁸ there was a constitutional challenge to certain provisions of the Nisga'a treaty that purported to give the Nisga'a the right of self-governance within their territory.⁸⁹ The court identified three critical points in

Delgamuukw. Before that decision, these rights were long thought to be essentially usufructuary in nature. See, *St. Catherine's Milling and Lumber Co. v. The Queen*, 14 App. Cas. 46 at 54 (1889). Some language in the decision, though, can be read to conclude that the rights are proprietary in nature, more like fee simple ownership. *Id.*

⁸² *Delgamuukw*, [1997] 3 S.C.R. at 1080-81.

⁸³ *Id.* at 1083-85; Cf. *Guerin v. Canada*, [1984] 2 S.C.R. 335 (Can.) (declaring the aboriginal interest in reserve and aboriginal title lands as the same and that the right to occupy is not qualified by reference to traditional and customary uses of those lands). "[A]boriginal title encompass[es] mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. . . ." *Delgamuukw*, [1997] 3 S.C.R. at 1015.

⁸⁴ *Id.* at 1088.

⁸⁵ *Id.* at 1080, 1088.

⁸⁶ *Id.* at 1080-81.

⁸⁷ *Id.* at 1081-83.

⁸⁸ [2000] 189 D.L.R. (4th) 333, 2000 C.R.D.J. LEXIS 310.

⁸⁹ *Id.* The challengers argued that inasmuch as the constitution had distributed all legislative power to Parliament, no legislative power could be recognized in any other body. *Id.* at 10. It was undisputed that long before the arrival of the Europeans, the Nisga'a occupied substantial areas in British Columbia and had identifiable cultural traditions, their own language, territories and legal

Delgamuukw that required the finding of a right of self-governance: 1) “aboriginal title originates in part from pre-existing systems of aboriginal law;” 2) Section 35 (1) of the Constitution provides protection to aboriginal rights “in its full form”; and 3) “aboriginal title encompasses within it a right to choose to what ends a piece of land can be put.”⁹⁰ The court drew from this that as aboriginal title in its full form gives the right to make decisions about the use of the land, there is a right to a political structure for making those decisions.⁹¹

While these aboriginal rights are different from other common law rights, particularly in that they do not derive from or take their meaning solely from Western philosophies,⁹² the Supreme Court has emphasized that their essence is the bridging of aboriginal and non-aboriginal cultures, that they are a “form of intersocietal” law that evolved from long-standing practices linking the various communities.⁹³ This *sui generis* characterization may mean that the extent to which indigenous peoples are entitled to be restored to land wrongfully taken should not be

systems. *Id.* at *38-39. They were recognized as political communities, with the power to make laws in the constitutional sense. *Id.* at *39-40, ¶ 106-107.

⁹⁰ *Id.* at *62, ¶ 154.

⁹¹ *Id.* at *63-64, ¶ 157, *62, ¶ 154, citing *Delgamuukw*, [1997] 3 S.C.R. at 1088. In December 1995, the Canadian federal government published a policy statement entitled *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*. It stated, *inter alia*: “The Government of Canada recognizes the inherent right of self-government as an existing aboriginal right under section 35 of the Constitution Act, 1982.” *Campbell*, [2000] 189 D.L.R. (4th) 333 at *79-80.

⁹² John Borrows & Leonard I. Rotman, *The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?*, 35 ALBERTA L. REV. 9, 10 (1997) (discussing generally the development of the use of the *sui generis* term to describe aboriginal rights in Canada).

⁹³ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1108. The Aboriginal conception of property would include things like “intuitive relationships with nature, or particular understandings of the community's relationship to territory. Such arrangements necessarily involve specific understandings of trapping lines, of fishing grounds that are expressed through kinship ties, and of the particular way that territory is familiar to each society.” Bryan, *supra* note 33, at 26. Westerners “accustomed to see land and territory in terms of Cartesian space, and to see ownership based in transactional value” fail to grasp the full resonance of aboriginal relationship. *Id.* at 27.

Looking generally at the kinds of relations we might tend to call ‘proprietary’ in Aboriginal cultures, ‘property’ becomes embedded in seasonal significance, in kinship significance, in spiritual significance, or in terms of general cultural practice, not in ‘chattels’ or ‘real property.’ . . . Thus, a tree is never simply timber; indeed a tree is often something else, and can even be one's grandfather (the important thing is that it is one's grandfather). . . .

Id. Bryan calls for new political and legal institutions that will allow divergent ways of life to cohere; and a model for understanding the area of differences between Canadian (common law and civilian) legal culture and the legal cultures of Aboriginal societies as they have developed. *Id.* at 29. “In creating a new relationship we need to ensure that the Canadian side does not continue in its colonizing effects by using language and ideas instead of force as a form of unconscious eradication of alternative understandings of the world.” *Id.* at 27-28.

governed, at least not entirely, by European common law.⁹⁴ It may also mean that conventional common law analogies have force only to the degree that they can be reconciled with the tradition, custom, practice or law of the aboriginal group claiming the right. Essentially, “*sui generis* territory allows for the expression and protection of Aboriginal rights that existed prior to, and independently of, the common law.”⁹⁵

In Australia, “native title” is recognized where it is not inconsistent with the common law. The High Court of Australia so declared in *Mabo v. Queensland* (“*Mabo II*”).⁹⁶ There, the Meriam people of the Murray Islands⁹⁷ successfully sought a declaration that they had “native title” to the island.⁹⁸ Upon their annexation by the English Crown, the Murray

⁹⁴ See Kent McNeil, *Aboriginal Title and Aboriginal Rights: What's The Connection?*, 35 ALBERTA L. REV. 117, 118, 120 (1997).

⁹⁵ Borrows & Rotman, *supra* note 92, at 30-31. These authors argue that the narrow focus of the Supreme Court on what constitutes a unique culture for purposes of finding aboriginal rights has removed the attention from formulations that consistently had their basis in the continued existence of prior legal systems within Canada and the contemporary legal conceptions these generate. The result of this focus is that “the Court has departed from exploring *how* Aboriginal rights have come to existence within the common law and, instead, overly concentrated on *who* holds the right as grounding their existence.” *Id.* at 36. A misplaced focus on “aboriginality” as defining aboriginal rights may cause the court to focus upon “what was, once upon a time, integral to indigenous cultures,” and not on the dynamics of a living culture, with contemporary traditions, customs, practices and laws. *Id.* at 36, 38.

⁹⁶ [No. 2] (1992) 175 C.L.R. 1. *Mabo* was presaged by *Coe v. Commonwealth of Australia*, (1979) 24 A.L.R. 118, in which an Aborigine made a broad complaint for an injunction against anyone using land currently being used by Aborigines. The complaint was dismissed on procedural grounds. *Id.* Also before *Mabo*, was *Milirrpum v. Nabalco Pty. Ltd.*, (1971) 17 F.L.R. 141, where the High Court of Australia ruled that Australia did not recognize communal native title and that the relationship of the aboriginal people to the territory they claimed did not create a right of property. The court did recognize that Aboriginal rights could exist, but that they could only be created by statute. After the decision in *Milirrpum*, the Australian Parliament passed the Aboriginal Land Rights (Northern Territory) Act, (1976) c. 119 (Austl.) that gave an Aborigine statutory title to land once he proved that he had owned that land, so long as a claim was filed by June 5, 1997.

⁹⁷ The Murray Islands lie in the Torres Strait, easternmost of the Eastern Islands of the Strait. *Mabo II*, 175 C.L.R. at 16. *Id.* Their total land area is approximately 9 square kilometres. The Meriam people, Melanesian, were in occupation of the Islands for generations before the first Europeans arrived. *Id.* They lived a communal life in which gardening was of profound importance, significant not only for purposes of subsistence but for facilitating various rituals associated with different aspects of community life. *Id.* “Meriam society was regulated more by custom than by law.” *Id.* at 18.

⁹⁸ The Murray Islands were annexed to Queensland in 1879. *Id.* at 1. Upon annexation, the Meriam People were told that the Islands would be held amenable to British law. *Id.* at 8. By an act of the Queensland Government in 1882, the Murray Islands were “reserved” for native inhabitants. *Mabo II*, 175 C.L.R. at 2. In the same year, a special lease of two acres on one of the islands was granted by the Queensland Government to the London Missionary Society, which had assumed some responsibility for law and order and for the peaceful resolution of disputes. *Id.* The chief question for the court was whether these transactions had the effect of vesting in the Crown absolute ownership of, legal possession of, and exclusive power to confer title to, all land in the Murray Islands. *Id.* at 25. The Court answered in the negative. *Id.* at 2.

Islands were deemed “desert and uninhabited,” thereby becoming subject to the laws in force in Queensland, the common law becoming the basic law.⁹⁹ A century later, the High Court of Australia would reject this characterization. Rather than *terra nullius*, the evidence reconsidered showed that the Meriam had “a subtle and elaborate [political] system” adapted to the country, providing a stable order of society. It was a government of laws, and not of men.¹⁰⁰ It was admitted that the application of the enlarged notion of *terra nullius* “depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs,” and was justified by a policy which has “no place in the contemporary law of this country.”¹⁰¹ Though the rejection of *terra nullius* cleared away the fictional impediment to the recognition of indigenous rights and interests in colonial land, it would still be impossible to recognize native title if the basic doctrines of the common law were inconsistent with their recognition.¹⁰² They were not.¹⁰³

The characteristics of native title mirror those of aboriginal title in Canada in the sense of title being founded in and given its content by the traditional laws and customs acknowledged and observed by the indigenous occupants.¹⁰⁴ It is also so in the sense of being extinguishable if the indigenous group ceases to acknowledge those traditional laws and customs on which native title is founded, loses its

⁹⁹ *Id.* at 58.

¹⁰⁰ *Id.* at 38.

¹⁰¹ *Id.* at 41-43. Referring to Human Rights Committee under the Optional Protocol.

¹⁰² *Id.* at 68; *see also* Wik Peoples v. Queensland, (1996) 187 C.L.R. 1, *available at* [1996] WL 33102484.

¹⁰³ *Mabo II*, 175 C.L.R. at 71. First, the Court concluded that “[r]ecognition of the radical title of the Crown [was] quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown’s territory).” *Id.* at 50. Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown’s territory should not continue to be subject to native title.” *Id.* at 50-51. The Court went on to reject the “patrimony of the nation” basis of the proposition of absolute Crown ownership, to the extent that the political power to dispose of land in disregard of native title has not occurred, native title can still be recognized. *Id.* at 52. The Court also rejected the Royal Prerogative basis of the proposition of absolute Crown sovereignty, relying on the rule that in the absence of express confiscation or of subsequent expropriatory legislation, the conqueror has respected indigenous claims to land and forbore to diminish or modify them and further, that a mere change in sovereignty does not extinguish native title to land. *Id.* at 53.

¹⁰⁴ *Id.* at 71; *see generally*, Matthew C. Miller, Comments, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT’L L. REV. 1175, 1195 (1998).

connection with the land or ceases to exist as a group or clan.¹⁰⁵ Like Canadian aboriginal title, native title is inalienable except to the Crown.¹⁰⁶ Where a difference in theory, may lie if only subtly, is where Australia has assigned native title in the Australian property law system. Native title is neither an institution of the common law, nor a form of common law land tenure, but it is recognized by the common law.¹⁰⁷ Rights and interests possessed under the traditional laws or customs of the aboriginal peoples are therefore not enforceable *per se*, but only to the extent that the common law or some statute recognizes and gives effect to them.¹⁰⁸ Looked upon as rights that are in a sense alien or extraneous to the common law system, they are inferior and precarious.¹⁰⁹

“Original Indian title”¹¹⁰ is a federal common law right that gives a “right of occupancy” to recognized Indian Tribes.¹¹¹ The Supreme Court has spoken of original Indian title as an “unquestioned right” to the exclusive possession of aboriginal lands¹¹² and as a right of occupancy “as sacred as the fee simple of the whites.”¹¹³ That characterization was not altogether true.¹¹⁴

¹⁰⁵ *Mabo II*, 175 C.L.R. at 71.

¹⁰⁶ It follows, therefore, that one who is not a member of the indigenous people holding native title, who does not acknowledge their laws and observe their customs, can acquire no interest in the land by transfer. The Meriam people from the advent of the English “asserted an exclusive right to occupy the Murray Islands and, as a community, held a proprietary interest in the Islands. They have maintained their identity as a people and they observ[ed] customs which [were] traditionally based.” *Id.* at 61.

¹⁰⁷ *Id.* at 59-61.

¹⁰⁸ *Id.* at 59, 61; *Wik Peoples v. Queensland*, (1996) 187 C.L.R. 1, *3, available at [1996] WL 33102484. [*Wik Peoples v. Queensland*].

¹⁰⁹ See Nehal Bhuta, *Mabo, Wik and the Art of Paradigm Management*, 22 MELBOURNE U. L. R. 24, 36, 40 (1998) (discussing the place of native title in the Australian property law hierarchy); Michael Mansell, *Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most?*, 15 SYDNEY L. REV. 168 (1993).

¹¹⁰ See generally, Cohen, *supra* note 55. Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1977).

¹¹¹ Cohen, *supra* note 55, at 28.

¹¹² *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Mem.).

¹¹³ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

¹¹⁴ In fact, during the early expansionist movement in this country, the government pursued a policy of “removal and relocation of many tribes, often by treaty but also by force.” *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001); see generally, Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1022 (1997). “In the second half of the nineteenth century, the policy of relocation was replaced with one of assimilation, . . . [when] the federal government began to divide Indian lands into individual parcels, taking lands that had been set aside for Indian tribes and allotting them to individual tribal members.” *Cobell*, 240 F.3d at 1087; see generally, FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 210 (Univ. of New Mexico Press

The Supreme Court decision in *Johnson v. M'Intosh*¹¹⁵ is often the starting point for understanding the nature of original Indian title. But the opinion is fraught with incoherence and *ad hoc* rationalizations. Chief Justice Marshall vacillated on the theory that the European nations acquired title to land first occupied by Indian Tribes, first referring to the doctrine of discovery,¹¹⁶ then stating that discovery could be converted into conquest, by which means Indian lands could be taken against their will.¹¹⁷

1971) (1942). The objectives were "to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Cobell*, 240 F.3d at 1087, citing *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). "Once tribal lands were allotted in fee to individual Indians, white settlers could purchase the lands for settlement. . . . [The assimilationist policy] may not have achieved assimilation, [but] it did result in the widespread transfer of land from Indians to white settlers. . . . [Between] 1887 to 1934, an estimated 90 million acres, accounting for approximately two-thirds of all Indian lands, left Indian ownership." *Cobell*, 240 F.3d at 1087. Citing *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999) ("Cobell V"). "Allotment of tribal lands [ended] with enactment of the Indian Reorganization Act of 1934 ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et. seq.*)" *Cobell*, 240 F.3d at 1087. "After passage of the IRA, federal Indian policy changed yet again. In the 1950's, Congress adopted a 'termination policy,' whereby it sought to release Indian tribes from federal supervision and terminate the government-Indian relationship." *Id.* "The termination policy . . . was replaced with the current policy of 'self-determination and self-governance.'" . . . *Id.* at 1088.

¹¹⁵ 21 U.S. (8 Wheat.) 543 (1823). There, plaintiffs claimed title through Indian tribes on the basis of deeds made out some fifty years earlier. *Id.* at 571-72. The defendants claimed the same land under later-executed patents from the United States. *Id.* at 578. The plaintiffs sought the remedy of ejectment. *Id.* at 571. The facts showed the "authority of the Indian chiefs who executed [the] conveyance" and also that the "particular tribes for whom these chiefs acted were in rightful possession of the land they sold." *Id.* at 572. Thus, if the received first principle of first possession had been applied, plaintiffs' title should have been found to be good and defendant's void. *Id.* at 596-97.

¹¹⁶ *Johnson*, 21 U.S. (8 Wheat.) at 572; see also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312 (1990). In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall wrote that the principle agreed to by the colonial powers "regulated the right given by discovery among the european discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessors to sell." *Id.* at 544.

¹¹⁷ *Johnson*, 21 U.S. (8 Wheat.) at 589. Compare the views of Justice Johnson in his dissent in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 146 (1810). In his dissent, Justice Johnson pointed out that Indian nations whose lands had not been acquired by conquest or purchase were "absolute proprietors of their soil." *Id.* at 147. Since more than one fee simple could not exist in the same land at the same time, the absolute proprietorship of the Indians excluded the seisin in fee of another. *Id.* at 146-47. On what interest the United States had in the soil, Justice Johnson explained that "[u]naffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets." *Id.* at 147. McNeil points out, though, that neither Johnson, nor Marshall got it right. In English law, "the solution to the problem . . . would

The theory of conquest seemed belied by the continual warring between settlers and the Indians.¹¹⁸ With respect to discovery, the Court applied neither English common law nor international law, under which the Indians would have been regarded as English subjects and given protections against the taking of lands occupied by them.¹¹⁹ Professor McNeil's assessment is that

[W]hen questions involving indigenous land rights began to come before the courts, the tendency was to look for answers outside English law. Chief Justice Marshall's early American decisions in particular ignored common law principles and constructed a vague theory of Indian title on the basis of doubtful premises drawn to some extent from his own perceptions of international law. In effect, what Marshall did was invent a body of law which was virtually without precedent.¹²⁰

Professor Cohen added:

It is perhaps Pickwickian to say that the Federal Government exercised power to make grants of lands still in Indian possession as a consequence of its 'dominion' or 'title.' A realist would say that Federal 'dominion' or 'title' over land recognized to be in Indian ownership was merely a fiction devised to get around a theoretical difficulty posed by common law concepts. . . . [that], a grant by a private person of land belonging to another would convey no title. To apply this rule to the Federal Government would have produced a cruel dilemma: either Indians had no title and no rights or the Federal land grants on which much of our economy rested were void. The Supreme Court would accept neither horn of this dilemma, nor would it say . . .

have been to accord the State seisin in fee of a paramount lordship over lands of which the Indian occupiers would have been seised in demesne for fee simple estates." MCNEIL, *supra* note 39, at 252.

¹¹⁸ In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Court settled on the theory of conquest. The Court declared that the American colonies were acquired by conquest such that absolute title to the soil vested in the conquering European power automatically, along with sovereignty. *Id.* at 280. This meant that while the new sovereign allowed the Indian inhabitants to remain in occupation, the Indians had a right of occupancy as against third parties, but no rights at all as against the sovereign, unless he recognized their occupation as ownership. *Id.* Absent such recognition, their original Indian title would be non-proprietary, amounting merely to permissive occupation at the will of the sovereign. *Id.* Indeed, according to Congress, the United States claimed title by right of conquest only once and then only half-heartedly. Kades, *supra* note 52, at 74. In fact, the United States purchased much of the land it obtained from Indian Tribes. *Id.*

¹¹⁹ MCNEIL, *supra* note 39, at 246. Indeed, the Royal Proclamation of 1763 did this. *Id.* at 248. Where persons of European descent were concerned, American courts adopted an approach based on the doctrine of continuity. *Id.*; *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833).

¹²⁰ MCNEIL, *supra* note 39, at 301.

that the Federal Government is not bound by the limitation of common law doctrine . . . [this] . . . would have run contrary to the spirit of the times by claiming for the Federal Government a right to disregard rules of real property law more sacred than the Constitution itself. And this theoretical dilemma was neatly solved by Chief Justice Marshall's doctrine that the Federal Government and the Indians both had exclusive title to the same land at the same time.¹²¹

Chief Justice Marshall was not otherwise inclined to examine the legality of acts upon which the land titles of so many Americans depended. The result of this constraint was to make the issue of the Indians' land rights a political one and nonjusticiable.¹²² The consequence of "drawing this judicial blind on the past, was to sanction future seizures of Indian lands as well as to assign the whole matter to the political arena. Where their original title was concerned . . . , Indians [were] therefore denied constitutional protection accorded to [other] American citizens."¹²³

Decisions about the nature and contours of original Indian title were virtually ad hoc until 1955 when the Supreme Court finally concluded that such title conferred no proprietary interest in the Indians, merely

¹²¹ Cohen, *supra* note 56, at 48-49.

¹²² Johnson v. M'Intosh, 21 U.S. (8 Wheat.) at 574, 588-92.

¹²³ MCNEIL, *supra* note 39, at 261. The defendant in *M'Intosh* would have denied all rights to the Indians, arguing that they could not have passed title to the plaintiffs' predecessors because "by the law of nature," the Indians themselves had never done acts on the land sufficient to establish property in it, i.e., the Indians had never really undertaken those acts of possession that gave rise to a property right in the first place. *Johnson*, 21 U.S. (8 Wheat.) at 569. It was the case that the Indian tribes moved from place to place, leaving few traces to indicate that they claimed the land (if indeed they did). The argument was essentially that Indian cultures before the coming of the Europeans was in the "state of nature," that is, pre-society and pre-government, that the land occupied by Indian nations was *terra nullius* and as such could be appropriated by those who would dominate. Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. R. 1, 3 (1983). This argument did have appeal at the time of the decision to the extent that the theory of first possession made sense in an agrarian society or among commercial people—a people whose activities with respect to the objects around them required an unequivocal assertion of dominion such that those objects could be either managed or traded. On the other hand, "some Indians professed bewilderment at the concept of owning the land. Indeed they prided themselves on not marking the land but rather on moving lightly through it, living with the land and with its creatures as members of the same family rather than as strangers who visited only to conquer the objects of nature." Rose, *supra* note 27, at 87-88. See generally, Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); see generally, WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* (1983). While that was not the nature of the American Indian society, evaluating the Indians' connection with the land on the basis of their own conditions of life and their own perspectives, would no doubt be regarded as occupation sufficient for grounding title. MCNEIL, *supra* note 39, at 117.

permission to occupy government-owned lands.¹²⁴ As it stands then, it is a perpetual right that entitles the holders to full beneficial use of aboriginal lands including the right to standing timber and subsurface minerals,¹²⁵ but it is not alienable either voluntarily or involuntarily, except to, or with the approval of, the federal government.¹²⁶

B. Sovereign Prerogative of Extinguishment

By constitutional amendment: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are . . . recognized and affirmed.”¹²⁷ They nevertheless can be infringed, under certain circumstances,¹²⁸ where there is a valid governmental objective sought to be accomplished by the challenged infringement,¹²⁹ those objectives are “compelling and substantial,”¹³⁰ there is not an underlying unconstitutional objective, the infringement is “absolutely necessary to accomplish the required limitation,” and the infringement is consistent with the Crown’s fiduciary duty to the Aboriginal peoples.¹³¹ Because

¹²⁴ *Tee-Hit-Ton Indians*, 348 U.S. at 285.

¹²⁵ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).

¹²⁶ *Johnson*, 21 U.S. (8 Wheat.) at 574.

¹²⁷ CAN. CONST. (Constitution Act, 1982), § 35(1). After the assertion of sovereignty by the British Crown, and continuing to and after the time of Confederation, although the right of aboriginal people to govern themselves was diminished, it was not extinguished. Any aboriginal right to self-government could be extinguished after Confederation and before the 1982 constitutional amendment by federal legislation which plainly expressed that intention, or it could be replaced or modified by the negotiation of treaty. After 1982, such rights could not be extinguished, but could be defined (given content) in a treaty. [The Nisga’a Treaty does the latter] See *Campbell v. British Columbia*, [2000] 189 D.L.R. (4th) 333, 2000 C.R.D.J. LEXIS 281 at *2-3.

¹²⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The case involved the traditional rights of Aboriginal peoples to fish and whether those rights fell under the regulatory scheme established by federal fishing legislation. *Id.* The court laid down what has since come to be known as the “Sparrow justificatory test” for determining when aboriginal rights can be curtailed. It must be established that: 1) an applicant for relief was acting pursuant to aboriginal authority; 2) the right was extinguished prior to the enactment of § 35(1); 3) the right had been infringed; and 4) the infringement was justified. *Id.*

¹²⁹ These include objectives concerned with conservation and management, “agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims.” *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1021. However, a general aim to further the “public interest” is not an adequate justification. *Id.*

¹³⁰ In this vein, the right to exclusive use and occupation of land is relevant to the degree of scrutiny the infringing measure or action should be given.

¹³¹ The fulfillment of this fiduciary duty requires that in appropriate circumstances, the Crown is obliged to choose those methods involving the least amount of infringement on Aboriginal rights to effect the desired result and to consult with the Aboriginal peoples. The right of the Crown

lands held pursuant to aboriginal title have an inescapable economic component, fair compensation will ordinarily be required when aboriginal title is infringed.¹³²

In *Mabo II*, the High Court of Australia lamented the misfortune of the Aboriginal peoples of Australia that over the last 200 years, “the government . . . [having] alienated or appropriated to its own purposes most of the [traditional aboriginal lands] . . . in th[e] country.”¹³³ That was a consequence of sovereignty which carried the power to create and to extinguish private rights and interests in land within the sovereign’s territory.¹³⁴ That sovereign power may or may not be exercised with solicitude for the welfare of indigenous inhabitants, and in the case of the Aboriginal people, it seems it was not. The Aboriginals “were dispossessed by the Crown’s exercise of its sovereign powers to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown’s purposes.”¹³⁵ Nevertheless, native title was not extinguished by the mere operation of the common law on first settlement by British colonists. Extinguishment instead required the exercise of a power to extinguish and needed to be accomplished by a clear and plain intention to do so.¹³⁶ Consequently, where the Crown had not granted interests in land or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survived and is legally enforceable.¹³⁷ This means that grants of estates of freehold or of leases; the appropriation for use by the government (whether by dedication, setting aside, reservation or other valid means); and the use of native lands for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of

to choose the uses to which the land can be put, subject to the ultimate limitation that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples requires the involvement of Aboriginal peoples in such decisions.

¹³² *Sparrow*, [1990] 1 S.C.R. at 1075.

¹³³ *Mabo II*, at 175 C.L.R. 1, *68.

¹³⁴ *Id.* The exercise of sovereignty was nonetheless subject to the Constitution and other valid laws, such as the Racial Discrimination Act. For example, the Queensland Coast Island Declaratory Act of 1985 purported to extinguish retrospectively any and all traditional rights to land in the Torres Strait without compensation. That Act was declared invalid by the High Court, as being contrary to the Racial Discrimination Act of 1975. *Mabo v. Queensland (“Mabo I”)*, (1988) 166 C.L.R. 186.

¹³⁵ *Mabo II*, 175 C.L.R. at *68.

¹³⁶ *Id.* citing *Calder v. Attorney-Gen.* [1973] S.C.R. 313, 404; *Baker Lake v. Minister of Indian Affairs* [1979] 107 D.L.R. (3d) 513, 552; *Sparrow*, [1990] 1 S.C.R. 1075; *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941); *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967).

¹³⁷ *Mabo II*, 175 C.L.R. at *68-69.

native title, extinguished native title, but grants of lesser interests (such as the authority to prospect for minerals), did not.¹³⁸ As it stands, aboriginal lands that have been conveyed to private holders are forever lost.

Original Indian title can be terminated and fully disposed of by the federal government with no obligation to compensate its holders.¹³⁹ The Supreme Court declared: "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."¹⁴⁰ The sovereign's intent to extinguish original Indian title, though, must be "plain and unambiguous" and will not "lightly be implied."¹⁴¹ It is not extinguished by a grant by the government of the fee, but that grantee takes title subject to the Indian right of occupancy.¹⁴² The "right of occupancy" that original Indian title gives should be distinguished from "recognized title," the latter existing where Congress, by treaty or other agreement, has declared that thereafter Indians are to hold lands permanently. Recognized title cannot be abrogated by the government without due process of law and compensation. In contrast, where Congress has made provision to Indian Tribes to recover for injury by the disposal of original Indian title, it was simply as a matter of grace.¹⁴³

¹³⁸ In *Mabo II*, the High Court explained that "[a] clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title [fn omitted] or which creates a regime of control that is consistent with the continued enjoyment of native title. [fn omitted] A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment." *Id.* at *64-65.

¹³⁹ *Shoshone Tribe v. United States*, 299 U.S. 476 (1937).

¹⁴⁰ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955). There, by a resolution of Congress, "the Secretary of Agriculture was authorized to contract for the sale of national forest timber within [the] National Forest 'notwithstanding any claim of possessory rights,'" which were defined as "all rights . . . which are based upon aboriginal occupancy or title." *Id.* at 276.

¹⁴¹ *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 227 (1985).

¹⁴² *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *see generally*, Cohen, *supra* note 121, at 29-30.

¹⁴³ *Tee-Hit-Ton*, 348 U.S. at 281. Although not constitutionally compelled to do so, Congress eventually passed a statute compensating native inhabitants of Alaska for the loss of their land in the amount of \$962.5 million plus about 40 million acres of federal lands. Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601, *et. seq.* The act extinguished land claims to 335 million acres.

IV. RECLAIMING ABORIGINAL LANDS

A. Legal Theories

Can the Wiljen People establish aboriginal title to Antarctica? Can the Miami Tribe do the same in the State of Illinois? Can the Gitksan and Wet'suwet'en establish title to British Vancouver? In Canada, by constitutional provision, aboriginal title is recognized, although it is left to the aboriginal claimants to establish title in accordance with the principles laid down by the Canadian Supreme Court. Indigenous peoples therefore are offering proof of prior possession and adherence to traditional customs and laws as the predicate for a judicial declaration of aboriginal title. In Australia, indigenous people have been prosecuting claims under the Native Title Act¹⁴⁴ for declarations of native title based on traditional connections to the land.¹⁴⁵ Although under the principles laid out in *Mabo II*, the only land available for such claims is that held by the Crown and by mineral interest lessees of the Crown, but not lands covered by grants from the Crown, those grants having extinguished native title.¹⁴⁶

¹⁴⁴ Native Title Act of 1993, c. 110 (Austl.).

¹⁴⁵ See, e.g., *Ngalakan People v. Northern Territory*, Fed. Ct. of Austl., 2001 Aust. Fed. Ct. LEXIS 49, *6, *58 (June 5, 2001) (establishing title over a small area on the southern bank of the Roper River in the Northern Territory by evidence that at the time the Crown acquired sovereignty, the claimants were an identifiable community or organized society who possessed, occupied, used and enjoyed the claim area according to their traditional laws and customs); See also *Passi v. Queensland*, 2001 WL 665585 (June 14, 2001) (stating that claim to land and inland waters of the islands of Dauar and Waier settled upon proof of claimants long connection with the land, and their traditional laws and customs; The native title established including the right to live on the land, conserve, manage, use and enjoy the natural resources of it, including for social, cultural, economic, religious, spiritual, customary and traditional purposes and autonomy over the land); *Ngallametta v. Queensland*, 2000 Aust. Fed.Ct LEXIS 809 (3 Oct. 2000) (noting that the agreement for the settlement of a claim to unallocated Crown lands, which title conferred possession, occupation, use and enjoyment, but not minerals); *Anderson v. Western Australia*, 2000 Aust. Fed.Ct. LEXIS 1071 *8 (Nov. 28, 2000) (discussing an agreement between the state of Western Australia and the Spinifex people for the return of 55,000 square kilometres, which covered the southern portion of the Great Victoria Desert). *Id.*; The terms of the settlement recognized native title, including the right to possess, occupy, use and enjoy the land, the right to make decisions about the land, but not to minerals or petroleum or subterranean waters, except in the case of water taken in the exercise of certain specified native title rights. *Id.* The Spinifex established their claim by demonstrating their long connection with the land and their distinct customs and practices).

¹⁴⁶ The Native Title Act validated all prior acts where native title was under the sole ownership of non-natives and had thereby been effectively extinguished. However, aborigines whose native title was extinguished were entitled to compensation if their title was extinguished after the enactment of Commonwealth's Racial Discrimination Act of 1975, as long as they could demonstrate their connection with the land at the time of annexation. As a result of *Mabo II* and the Act, over three hundred native title claims were filed with the Tribunal by 1997. The Act also

In the United States where original Indian title has not been extinguished by the federal government, it theoretically can be recovered from current non-native occupiers, since by its definition it was incapable of alienation in the first place. For more than two centuries, the Indian Nonintercourse Acts¹⁴⁷ have made any purported conveyance of aboriginal lands void. The first such Act was passed in 1790 and has not changed materially since that time.¹⁴⁸ The original purposes stated were to prevent the “unfair, improvident or improper disposition” of tribal lands to parties other than the United States, without the consent of Congress, and to prevent Indian unrest over encroachment by settlers on Indian lands.¹⁴⁹ The original Act dealt with unauthorized alienation of Indian lands in two ways: it declared that any such conveyance made in violation of the Act’s provisions shall be of no validity in law or equity and also prescribed penalties—fines, imprisonment and forfeiture.¹⁵⁰

established the National Native Title Tribunal, a mediating body, to process and hear native title claims and fund programs to assist disputes over native title.

¹⁴⁷ 25 U.S.C. § 177.

¹⁴⁸ *Id.* The Act provides: “No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” *Id.*

¹⁴⁹ See Nonintercourse Act, 1 Stat. 329-32 (codified as amended at 25 U.S.C. § 177).

¹⁵⁰ The first Act established the framework for addressing contracts between the Indians and non-Indians, which the later Acts followed and expanded upon. *Id.* at 329. Section 3 required persons caught attempting to trade with the Indians or found in Indian country without a license to forfeit all the merchandise in their possession, and provided that such person could be fined or imprisoned. *Id.* at 329. Section 5 of the 1793 Act provided that “if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe . . . he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months” and gave the President the power to remove unlawful settlers. *Id.* at 329, 330. (codified as 25 U.S.C. § 180). The 1796 Act also included the forfeiture provisions, that any person settling on Indian land shall “forfeit all his right, title and claim, if any he has, of whatsoever nature or kind the same shall, or may be, to the lands aforesaid.” *Id.* Congress repealed the forfeiture provisions in 1802. The 1796, 1799 and 1802 Acts also contained a comprehensive remedial scheme for handling private disputes between Indians and non-Indians. Section 4 in all three versions required non-Indians to compensate Indians for property taken or destroyed by them [concerned with personal property] in an amount equal to twice the value of such property and if the offender was unable to pay a sum at least equal to the value of the property, the shortfall would be paid out of the Treasury, subject to the Indians’ obligation not to seek private revenge or satisfaction by force or violence. The 1834 version purported to strengthen the powers of the president the government to remove all persons found to be illegally in Indian Country, authorizing him to take whatever measures were necessary to remove persons making settlements on Indian lands. Nonintercourse Act, 4 Stat. 730. At the same time, Congress repealed the criminal penalties, but retained the provisions for fines. *Id.* Congress also added: “All penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, . . . the one half going to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.” *Id.*

The other available legal theory for the recovery of aboriginal lands is breach of treaty as to "recognized title," where that breach amounts to a taking of property. But that theory was not always available. Until 1871, the federal policy was to deal with Indian tribes by means of treaties. After that time, Congress determined to relate to Indians only by acts of Congress.¹⁵¹ But even treaty rights acquired before 1871 were precarious and subject to the politics in Congress. In *Lone Wolf v. Hitchcock*,¹⁵² the Supreme Court ruled that the same plenary power that allowed Congress to extinguish aboriginal title, also authorized it to abrogate the provisions of an Indian treaty under which recognized title arose.¹⁵³ That power, said the Court "ha[d] always been . . . a political one, not subject to be controlled by the judic[ia]ry."¹⁵⁴ Thus, where Congress purported to give the Indians adequate consideration for their lands affected by the abrogation of a treaty, the court would presume that Congress acted in perfect good faith in dealing with the Indians and exercised its best judgment in the matter.¹⁵⁵ The result of *Lone Wolf* was that if the Indians suffered injury by Congress' unilateral abrogation of treaty rights, the courts would offer no aid. Instead, relief would have to be sought by an appeal to Congress. In this sense, *Lone Wolf* seemed to render "recognized title" indistinguishable from "original Indian title." Although the case has never been expressly overruled, it has been

¹⁵¹ The Act provided:

No Indian nation or tribe, within the territories 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 no obligation of any treaty lawfully made and ratified with any such Indian Nation or tribe prior to March third, eighteen hundred and twenty-one, shall be hereby invalidated or impaired.

Act of March 3, 1871, 16 Stat. 566, *carried into* § 2079.

¹⁵² 187 U.S. 553, 565-66 (1903). There, an 1867 treaty with certain Indian tribes established a reservation and provided that no treaty for the cession of reservation lands would be "of any validity or force" unless executed and signed by three-quarters of the adult males. *Id.* at 564. In 1892, the Indians agreed to cede that reservation to the United States, in return for allotments out of those lands and the payment to and setting aside for the Indians of \$2 million. *Id.* at 555. The requisite three-quarters of the Indians did not sign the agreement. *Id.* at 556. But in 1900, Congress enacted a statute which in effect adopted the 1892 agreement. *Id.* at 559. The Indians filed suit seeking to enjoin the government from carrying out the statute because it violated the 1867 treaty requirement of consent by three-fourths of adult male Indians. *Id.* at 560.

¹⁵³ *Id.* at 565-66. The Court cautioned though that "presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and Indians themselves, that it should do so." *Id.* at 566.

¹⁵⁴ *Id.* at 565.

¹⁵⁵ *Id.* at 567-68. The Court explained that because Congress has the power to abrogate treaties, the Court may not specially consider contentions that the signatures of the Indians signing the agreement to cede land were obtained by fraud or that the requisite three-quarter signatures were not obtained. *Id.* at 567-68.

limited to its facts, such that where a court finds government conduct not evincing that degree of good faith required of a guardian to its ward, or the consideration offered in exchange for the abrogation of the treaty is inadequate, the Indians may be entitled to compensation.¹⁵⁶

B. Legal Forums

Indians were thwarted and relegated to pleas to Congress¹⁵⁷ regarding their aboriginal lands not solely because of the Supreme Court's judicial blind on the fact of original Indian title or the *sui generis* conception of aboriginal title, but in large part because the usual mechanisms for the protection of property were denied to Indians.¹⁵⁸ The United States could not be sued without its consent and while the Court of Claims permitted litigation of certain types of suits against the government,¹⁵⁹ claims based upon violation of Indian treaties were excluded from its jurisdiction in 1863.¹⁶⁰ Special congressional acts were commonly required before tribes could bring suit and on various occasions, Congress did pass such legislation.¹⁶¹ In other respects, while they were not aliens, Indians were not at the same time uniformly granted citizenship.¹⁶² As Indian Tribes could not maintain actions in the

¹⁵⁶ See *United States v. Sioux Nation*, 448 U.S. 371 (1980), discussed *supra*, note 11 finding the United States liable for failing to fulfill its obligations under treaty. Also, the Court stated that "[m]ore significantly, *Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here. . . ." *Id.* at 414-15. See also *United States v. Creek Nation*, 295 U.S. 103 (1935) (stating that although an abrogation of treaty is effective, the Indian Tribe will be entitled to compensation for a taking under the Fifth Amendment); *Sioux Nation v. United States*, 601 F.2d 1157, 1175-76 (Claims 1979) (refusing to read *Lone Wolf* as sanctioning any arbitrary move Congress may choose to make with respect to property rights of Indians created by treaty). *Id.* Instead, only such moves as are purported (*i.e.*, shown by the published record) to provide an "adequate consideration" in any exchange of lands for anything else [would be found as coming within *Lone Wolf*].

¹⁵⁷ See also Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 (2002); Maine Indian Claims Settlement Act, 25 U.S.C. § 1711 (2002).

¹⁵⁸ *Jaeger v. United States*, 27 Ct. Cl. 278, 282 (1892) (stating that "The civil rights incident to States and individuals . . . have not been accorded either to Indian nations, tribes, or Indians"); see *Felix v. Patrick*, 145 U.S. 317, 332 (1892) (showing that until the Sioux became citizens of the United States in 1887, they were incapable of suing in any of the courts of the United States).

¹⁵⁹ While white citizens were permitted to sue the federal government under the Tucker Act, Indian tribes were not. 24 Stat. 505.

¹⁶⁰ Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767.

¹⁶¹ See discussion in *Sioux Nation, infra*; *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

¹⁶² The Supreme Court first closed the courthouse doors to Indian tribes in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), where it ruled that Indian tribes were not foreign states so as not to give the federal courts jurisdiction.

federal courts,¹⁶³ they were relegated to often hostile state courts.¹⁶⁴

It took nearly a century of effort by the Sioux Nation to win a federal judicial forum for the resolution of their land claims under treaty. They had maintained all this time that the United States had breached the Fort Laramie Treaty of 1868 under which the United States pledged that the Great Sioux Reservation that included the Black Hills of South Dakota, would be "set apart for the absolute and undisturbed use and occupation" of the Sioux.¹⁶⁵ Although the government had wind of the news of the discovery of gold in the Black Hills and knew that white prospectors were invading the reservation land, it did nothing to secure the reservation borders.¹⁶⁶ Indeed, as the influx of miners increased, the government decided to obtain for all citizens the right to mine the Black Hills for gold in total abrogation of the Treaty. Toward that end, the Secretary of Interior appointed a commission to negotiate with the Sioux for the purchase of the Black Hills. The Sioux refused to sell for less

¹⁶³ In 1966, a federal court jurisdictional act, 28 U.S.C. § 1362, granted district courts original jurisdiction in all civil actions arising under federal law and brought by any federally recognized Indian tribe or land, and removed all jurisdictional barriers to federal court. When read in conjunction with the Indian commerce clause, it effected a waiver of state sovereign immunity in suits brought by Indian tribes.

¹⁶⁴ See, e.g., *Onondaga Nation v. Thacher*, 62 N.E. 1098 (N.Y. 1901) (per curiam); *Johnson v. Long Island R.R.*, 56 N.E. 992 (N.Y. 1900); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 923, n. 9 (2d Cir. 1972), *rev'd* on other grounds, 414 U.S. 661, 678 (1974).

¹⁶⁵ *Sioux Nation*, 448 U.S. 371, 374 (1980). "The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866-67," in which the Sioux fought to protect the integrity of earlier-recognized treaty lands (Treaty of September 17, 1851) and included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana. *Id.* The reservation also included a narrow strip of land west of the Missouri River and north of the border between North and South Dakota. *Id.* at 375 n.2. In the treaty, the United States "'solemnly [agreed]' that no unauthorized persons 'shall ever be permitted to pass over, settle upon, or reside in [this] territory.'" *Id.* at 375. In addition, the United States "permitted members of the Sioux tribes to select lands within the reservation for cultivation" and to assist them in becoming farmers, the United States "promised to provide necessary services and materials, and with subsistence rations for four years." *Id.* at 375. "The treaty called for the construction of schools, the provision of teachers for the education of Indian children, the provision of seeds, agricultural instruments . . . the provision of blacksmiths, carpenters, millers, and engineers" as well as "certain articles of clothing" to each Sioux once per year for thirty years and an annual stipend of \$10 per person for all members of the Sioux nation who continued to engage in hunting and \$20 to those who settled on the reservation to engage in farming. *Id.* at 375 n. 3. In exchange, the Sioux "agreed to relinquish their rights under [an earlier treaty], to occupy territories outside the reservation," while reserving their "right to hunt on any lands north of North Platte and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase." *Id.* at 375. They also agreed to withdraw "opposition to the building of railroads that did not pass over their reservation land, not to engage in attacks on settlers, and to withdraw their opposition to the military posts and roads that had been established south of the North Platte River." *Id.* at 375-76.

¹⁶⁶ *Id.* at 378.

than \$70 million. The commission offered an annual rental of \$400,000 or \$6 million for absolute relinquishment. As the negotiations broke down,¹⁶⁷ the United States employed the additional leverage of threatening to withhold appropriations for the subsistence provisions it was obligated to provide under the Treaty.¹⁶⁸ The Sioux succumbed. Although the original Treaty required that a cession of lands within the reservation be accomplished by the joinder of three-fourths of the adult male Sioux, the treaty of cession was presented only to Sioux chiefs and their leading men and was signed by only ten percent of the adult males.¹⁶⁹ In 1877, Congress ratified the agreement which formally abrogated the Fort Laramie Treaty.¹⁷⁰

Whatever the Sioux's desire to protest the irregularities in the cession of the Black Hills, at the time there was no avenue for judicial redress. Fifty-three years later, in 1920, Congress enacted a special jurisdictional act that provided a forum, a claims court, for the adjudication of claims by Native Americans against the United States under any treaties.¹⁷¹ In 1923, the Sioux filed a petition in that claims court seeking compensation for the taking of the Black Hills¹⁷² and alternatively for a breach of the government's fiduciary duty as trustee of their reservation lands. It was not until 1942 after many procedural maneuvers, that a unanimous court dismissed the claim on the ground that the 1920 Act did not authorize suit challenging the adequacy of the price paid for the Black Hills and that the Sioux' claim in that regard was but a "moral" claim.¹⁷³

In 1946, Congress reversed that ruling with the passage of the Indian Claims Commission Act,¹⁷⁴ which created a new forum to hear

¹⁶⁷ *Id.* at 378-79.

¹⁶⁸ *Id.* at 381. Historians have recounted that starvation and near starvation conditions existed among the Sioux because of the poor quality and insufficient amounts of rations. *Id.* at 381 n.11.

¹⁶⁹ *Sioux Nation*, 448 U.S. at 381-82. The agreement "altered the boundaries of the Great Sioux Reservation by adding some 900,000 acres of land to the north, while carving out virtually all that portion of the reservation . . . [that] include[d] the Black Hills, an area well over 7 million acres. [The Sioux] also relinquished their rights to hunt in the unceded lands recognized by the Fort Laramie Treaty, and agreed that three wagon roads could be cut through their reservation." *Id.* at 383.

¹⁷⁰ *Id.* at 382-83.

¹⁷¹ *Id.* at 384-85.

¹⁷² *Id.* at 385.

¹⁷³ *Id.* at 384. That ruling followed the reasoning of *Lone Wolf*, 187 U.S. 553.

¹⁷⁴ Act of Aug. 8, 1946, ch. 907, 60 Stat. 939. The intent of the Act was to settle once and for all the claims arising from the government's historical dealings with the Indians. The Act gave the Commission jurisdiction over five kinds of claims: 1) those in law or equity arising under the Constitution, laws, treaties of the United States; 2) all other claims in law and equity, including

and determine all tribal grievances that had previously arisen. The Sioux re-filed the Black Hills claim to that Commission.¹⁷⁵ It was not until 1974, after another long period of procedural wrangling, that the Commission ruled in favor of the Sioux. The Commission held the claim was not barred by *res judicata* by the 1942 decision, as the government had argued, and because Congress had acted pursuant to its power of eminent domain when it passed the 1877 Act abrogating the Fort Laramie Treaty, rather than as a trustee for the Sioux, the government was obligated to pay just compensation.¹⁷⁶ It was a taking and not a mere exercise of the power of a trustee to transmute the nature of the trust *res*, because Congress had made no effort to give the Sioux full value for the ceded reservation lands. The only new obligation assumed was a promise to provide the Sioux with subsistence rations, but that obligation was subject to several limiting conditions. Also the consideration given the Indians had no relationship to the value of the property acquired and "there was no indication in the record that Congress ever attempted to relate the value of the rations to the value of the Black Hills."¹⁷⁷

On appeal, the Court of Claims agreed with the government that the takings claim was barred by the *res judicata* effects of its 1942 decision and reversed the Commission's ruling on that point.¹⁷⁸ This still left for consideration the award due under the alternative claim, breach of fiduciary duty, the ruling on which the government failed to appeal. The Sioux would be entitled to damages, but no interest on those damages.¹⁷⁹

those sounding in tort; 3) claims which would result if the treaties, contracts and agreements between the Indians and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, and any other ground cognizable by a court of equity; 4) claims arising from a taking by the United States; and 5) claims based upon fair and honorable dealings that were not recognized by any existing rule of law or equity. The Commission was authorized to hear only those tribal claims that had accrued prior to the enactment of the Act. § 12, 60 Stat. 1052. Neither a statute of limitations nor the defense of laches was to apply to claims otherwise permissible under the Act. § 2, 60 Stat. 1050. Although the Act did not explicitly limit recoveries to monetary awards, courts read in such a limitation. *Seneca Nation v. New York*, 26 F. Supp. 2d 555, 573-74 (W.D. N.Y. 1998).

¹⁷⁵ "The Commission initially ruled that the Sioux had failed to prove their case" but that decision was vacated by the Court of Claims which directed the Commission to reopen the case for consideration of additional evidence. *Sioux Nation*, 448 U.S. at 385.

¹⁷⁶ *Id.* at 385-86.

¹⁷⁷ *Id.* at 386.

¹⁷⁸ *United States v. Sioux Nation*, 518 F.2d 1298 (Claims 1975).

¹⁷⁹ *Sioux Nation*, 448 U.S. at 387. The Court of Claims noted that by subsequent legislation, "the Government would no longer be entitled to an offset from any judgment eventually awarded the Sioux based on its appropriations for subsistence rations in the years following passage of the 1877 Act." *Id.* at 387 n.1.

(at least \$17.5 million for the lands surrendered and for the gold taken by trespassing prospectors prior to the 1877 Act).¹⁸⁰

In 1978, Congress passed yet more legislation, this one providing for Court of Claims' review of the merits of the Sioux' takings claim without regard to the defenses of *res judicata* and collateral estoppel allowing for review of the merits *de novo*.¹⁸¹ Sitting en banc, the Court of Claims, "affirmed the Commission's holding that the 1877 Act effected a taking of the Black Hills and of rights-of-way across the reservation" which gave the Sioux the right to compensation *with* interest.¹⁸² That award was five per cent, per annum, on the principal sum of \$17.1 million, dating from 1877.¹⁸³

V. LEGAL AND EQUITABLE TIME BARS TO SPECIFIC RELIEF

"The Sioux did not claim that Congress was without power to take the Black Hills . . . in contravention of the Fort Laramie Treaty, . . . [but] only that [it] could not do so inconsistently with the command of the Fifth Amendment to pay just compensation for the taking."¹⁸⁴ Still, the Sioux have refused to accept the monetary award, insisting upon the return of the land. This specific relief sought is impossible given the substantive claim of a taking.¹⁸⁵ In the case first mentioned in this paper,

¹⁸⁰ *Id.* at 388; *United States v. Sioux Nation* 518 F.2d at 1302. "The court also remarked upon President Grant's duplicity in breaching the Government's treaty obligation to keep trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills." *Id.* "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe." *Id.* The Sioux' petition for certiorari was denied. *Sioux Nation*, 448 U.S. at 388. The case went back to the Indian Claims Commission where the value of the rights of way obtained by the government through the 1877 Act was determined to be \$3,484. *Sioux Nation*, 448 U.S. at 388.

¹⁸¹ *Id.* at 389. Pub. L. 95-243, 92 Stat. 153 (1978).

¹⁸² *Id.* at 389. The court reversed the ruling by the Commission that the mining by prospectors prior to 1877 also constituted a taking, therefore "the value of gold [taken] could not be considered as part of the principal on which interest would be paid to the Sioux." *Id.* at 390 n.19.

¹⁸³ *Id.* at 390. The Supreme Court affirmed. *Id.* at 424. In so ruling, the Court approved the lower court's application of the good faith effort test: that in determining whether Congress has acted in the capacity of a trustee having paramount power over the Sioux property (which would not give rise to takings liability) or whether Congress was exercising its powers of eminent domain, would be based on whether Congress made a good faith effort to give the Sioux full value of their lands, thus merely transmuting the property from land to money, in which case, there would be no taking. *Id.* at 416-17.

¹⁸⁴ *Sioux Nation*, 448 U.S. at 411 n.27.

¹⁸⁵ *See generally*, *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926). There, the Supreme Court refused to order rescission of a cession of land by the Sioux to the United States where the United States had failed to perform as agreed. *Id.* Under a treaty, the Sioux ceded certain lands, but reserved the "free and unrestricted use of the Red Pipe-Stone quarry, or so much thereof

the Cayuga have alleged a wrongful dispossession by private parties in violation of federal law and are seeking specific relief, which is not only not impossible for the court to grant, but given the nature of the substantive right involved, is the required remedy.

A. Specific Relief and Substitutionary Relief

Remedies have the basic goal of putting the plaintiff in the position he would have been in had the injury not occurred. They are a means of carrying into effect the substantive right. As a general proposition, the remedy for a particular injury should reflect the right and the policy behind that right as precisely as possible. The proposition is said to apply to both the selection of a remedy and to its measurement and, if justice is to be done, a court in formulating the right remedy must understand the nature and scope of the substantive right as well as the substantive law and policy. The two broad choices lay before a court: specific relief and substitutionary relief.¹⁸⁶ While specific relief, in which the thing originally lost or bargained for is restored, may often be the preferred form, it may be impossible for the court to grant, say, if the thing sought to be recovered has been consumed or destroyed, is no longer under the defendant's control, or involved the performance of some act by the defendant. Substitutionary relief, in the form of

as they have been accustomed to frequent and use for the purpose of procuring stone for pipes, and the United States . . . keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." *Id.* at 353-54. Whether by these provisions the Sioux acquired full ownership of the tract was in question for some time, the United States collecting and awarding to the Sioux damages for a taking of the strip for railroad purposes and later constructing an Indian industrial school on it. *Id.* at 354. More than thirty years after the first treaty, the Sioux made a cession of an additional 150,000 acres of land. *Id.* at 354-55. In part consideration of the cession, the agreement provided that if the government questioned the ownership of the Pipestone Reservation by the Sioux under the earlier treaty, the Secretary of the Interior should as speedily as possible refer the matter to the Supreme Court to be decided and the Secretary's failure to do so within one year after the ratification of this later treaty, would be construed as a waiver by the United States of all rights to the ownership of the Pipestone Reservation. *Id.* at 355. The Secretary made no attempt to refer the matter and the Attorney General later advised that compliance would be impracticable. *Id.* A few years later, Congress believing that title had vested in the Sioux directed the Secretary to negotiate with the Sioux for the purchase of the land. *Id.* at 355. An agreement was negotiated but a congressional committee recommended against it. *Id.* at 356. The Sioux sued for compensation for the misappropriation. *Id.* The Supreme Court upheld the claim, rejecting the defense of impossibility (because the matter could not be referred to the Supreme Court) inasmuch as the agreement provided for an alternative consequence (vesting in fee in the Indians). *Id.* While the Sioux did not expressly seek recovery of the land, the court stated "[i]t is impossible, however, to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers. . . ." *Id.* at 357.

¹⁸⁶ 1 DAN B. DOBBS, LAW OF REMEDIES § 1 (2d ed. 1993).

damages, that is, monetary compensation, may be all that is within the court's practical power. This is often the case in breach of contract actions, where damages are awarded for loss of bargain and are calculated to make the injured party whole in an economic sense.¹⁸⁷

The loss to the injured party is considered a fungible thing in the sense that money is deemed capable of providing full relief by satisfying the economic objective of the contract or giving the injured party the resources deemed sufficient to go out into the marketplace to find a suitable replacement for the thing that was the object of the original contract. Where the loss is not a fungible thing, damages may be inadequate. This is often the case with a contract for the purchase of real property, where courts usually will grant specific performance rather than damages for breach, on the premise that every parcel of real property is unique.¹⁸⁸ In the same vein, one who already owns land, but who has been wrongfully dispossessed usually will seek and be granted the specific relief of being restored to possession and to have the court officially recognize and declare his title (as well as to recover damages for the use value of the land during the period of the dispossession). The traditional method for achieving these forms of relief is the action in ejectment.¹⁸⁹

The importance of the cause of action of ejectment and its predecessor causes¹⁹⁰ in the English common law property system cannot be overstated. It would not be out of line to say that it was required as the fulfillment of the idea of property. As the Supreme Court put it:

The common law of England was . . . as it still is . . . that a right to land, by that law, includes the right to enter on it, when the possession is withheld from the right owner; to recover possession by suit.*** [A] law which denies to the owner of land a remedy to recover possession of it, when withheld by any person, however innocently he may have obtained it . . . impairs his right to, and interest in, the property. If

¹⁸⁷ 11 CORBIN, CONTRACTS § 992 (Matthew Bender & Co., Inc. 1979) (2002).

¹⁸⁸ This premise has been questioned by courts. See, e.g., *Centex Homes Corp. v. Boag*, 320 A.2d 194 (N.J. Super. 1974).

¹⁸⁹ At one time, a plaintiff was required to bring a separate suit for damages which were traditionally called *mesne profits*. The second action is not now required and the damages claim can be asserted in the ejectment action.

¹⁹⁰ MILSOM, *supra* note 53, at 137. The action in ejectment made its first appearance in the 16th century as an action available to leaseholders, but later extended to freeholders, thereby replacing the ancient and cumbersome real actions of writ of right, assize of novel disseisin, writ of entry and assize of mort d'ancestor, which all gave possessory remedies. *Id.* at 124-49. See also F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* (A.H. Chaytor & W.J. Whittaker eds., Cambridge University Press, 1962) (1909).

there be no remedy to recover possession, the law necessarily presumes a want of right to it.¹⁹¹

Protecting possession, the law affirms ownership.¹⁹² As to aboriginal title, which is possession, the Supreme Court has recognized an unquestionable right by its holders to maintain an action in ejectment to recover lands covered by that title.¹⁹³

B. Time Bars

Though the law provides protection to possession, protection is only available when it is sought and is not precluded by defenses a defendant may set up, such as the running of the statute of limitations. Defenses, like causes of action, arise in forms that are either legal or equitable,¹⁹⁴ and while in a single civil action, legal and equitable defenses may be combined, the defining character of a defense still has significance in the law.¹⁹⁵ Equitable defenses, as the characterization suggests, exist solely by virtue of equitable principles, and originally were recognized only by courts of equity. Generally, in actions that are wholly legal, an equitable defense may not be set up to defeat a strictly legal cause.¹⁹⁶ The defendant's assertion of an equitable defense does not change the character of the action or abridge the plaintiff's rights.¹⁹⁷

¹⁹¹ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 74-76 (1823) (involving a writ of right).

¹⁹² Possession from ownership means the right to exclude. Blackstone grandly defined the right of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE COMMENTARIES 2. Two centuries later, the Supreme Court would describe the right to exclude as the essential feature of property. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

¹⁹³ *Marsh v. Brooks*, 49 U.S. (8 How.) 223 (1850); *see also* *Oneida Indian Nation v. Oneida*, 414 U.S. 661, 666 (1974). Incidental to that right to ejectment is the right to an accounting of all rents, issues and profits against trespassers and wrongful possessors. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856) (discussing an action for trespass based upon recognized title); *Creek Nation v. United States*, 318 U.S. 629, 640 (1943) (determining that Indian tribes have an extrastatutory, "general legal right . . . to bring actions on their own behalf to collect unpaid rents on tribal lands).

¹⁹⁴ JOHN N. POMEROY, 4 EQUITY JURISPRUDENCE § 1368, 1369 (4th ed. 1919).

¹⁹⁵ Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO STATE LAW J. 1201 (1990).

¹⁹⁶ *Oneida v. Oneida Indian Tribe*, 470 U.S. at 245; *United States v. Robbins*, 819 F. Supp. 672 (E.D. Mi. 1993) (stating that laches, as a general rule, remains inapplicable to legal claims for damages); *Golotrade Shipping & Chartering, Inc. v. Travelers Indem. Co.*, 706 F. Supp. 214, 220 (S.D.N.Y. 1989); DOBBS, REMEDIES at § 2.3(1).

¹⁹⁷ *Dunbar v. Green*, 198 U.S. 166, 170 (1905); *See also* *Sun Oil Co. v. Fleming*, 469 F.2d 211, 214 (2d Cir. 1972). The court stated: "[I]t is the rule that if the law affords a remedy and that remedy is adequate, the cause may not be made the basis of a suit in equity. The gravamen of . . . [the] claim is its demand for possession. . . . The legal action of ejectment is the proper remedy for the recovery of possession under such circumstances. . . . It follows that the equitable defense of

As it relates to the issues discussed here, despite a defendant's assertion of an equitable claim or defense, ejectment, an action at law brought by the plaintiff, must be tried at law. In actions at law, whether a right holder has delayed too long in asserting the claim is determined by the words of a statute of limitation. If an action is brought the day before the statutory time expires, it will be sustained; if a day after, it will be defeated. Thus laches, an equitable time bar, established by the "neglect to assert a right or claim which, taken together with lapse of time and other circumstances caus[es] prejudice to [the] adverse party,"¹⁹⁸ cannot defeat plaintiff's legal claim. Conversely, where a right holder seeks equitable relief, that relief may be barred because of delay depending upon the circumstances of each particular case.¹⁹⁹ Large conflicts of policy and pragmatism arise if laches, a judge-made defense, is allowed to operate without regard to the statute of limitations. One of the large policy conflicts is that a statute of limitation reflects the judgment of lawmakers as to what is a reasonable time within which to assert a right and the most desirable ends sought by the allowance of that prescribed period. The operative fiction is that because equity acts in personam, enjoining a party to do what in conscience is right, does not interfere with law, and hence does not disturb the underlying legislative judgments. But it is a fiction if a particular plaintiff otherwise within her rights, because of equity's injunction, is denied those rights and benefits of law.

Yet, to some, the question remains whether laches, where it cannot bar the legal action, can bar a request for specific legal relief. In other words, does the inapplicability of the statute of limitations and laches to a cause of action also mean that they cannot bar a particular relief? Alternatively, if no time bar applies to the right holder, so as to preclude the action in either law or equity, is the application of laches to bar

laches cannot prevail." *Id.* See further, *United States v. Nix*, 1995 U.S. Dist. LEXIS 1591 (N.D. Cal. 1995) (holding that non-Indian who had no right to occupy Indian land, subject to ejectment); *Banner v. United States*, 44 Fed. Cl. 568, 576 (1999) (involving 3000 individual lessees, whose 99 year leases on Indian land had expired, but not renewed, were unlawfully on the land and therefore subject to ejectment; the court rejecting the suggestion of a property right to renew the leases), *aff'd* *Banner v. United States* 238 F.3d 1348 (Fed. Cir. 2001) (concerning situations where lease amounts were nominal, between one and ten dollars annually and did not increase over the entire 99 year term).

¹⁹⁸ BLACK'S LAW DICTIONARY 875 (6th ed. 1990); see also *Noble v. Gallardo*, 223 U.S. 65, 66 (1912) (holding that change of position on the faith of other party's acquiescence along with lapse of time required for laches).

¹⁹⁹ *Patterson v. Hewitt*, 195 U.S. 309, 317 (1904) (affirming denial of equitable relief on the basis of laches, even though the limitations period, which by statute was applicable to actions in both law and equity, had not expired).

specific legal relief the same as barring the action? The answer to both questions should be yes. If the cause of action by its definition calls for one form of legal relief, denying that relief is the same as barring the action. If the action cannot be barred because the statute of limitations and laches do not apply, the claimants must be granted the specific legal relief demanded. In this respect, the *Cayuga* decision,²⁰⁰ denying the claimant's specific demands of ejectment, was wrong.

These conclusions are particularly compelling when the right holder is a sovereign. The basis for this position begins with a consideration of the common law principle "*nullum tempus occurrit regi*,"²⁰¹ that neither laches nor statutes of limitations will bar the sovereign.²⁰² Courts adopted the rule, not on the theory that an "impeccable" sovereign could not be guilty of laches, but because of the public policies served by the doctrine, in particular, the public interest in preserving public rights and property from injury and loss attributable to the negligence of public officers and agents, through whom the public must act.²⁰³ The policy has particular meaning in the case of lands held in trust for the public, the interests of the sovereign are so widespread and varied, that the vigilance required in protecting rights of private parties is hindered. Yet the public must not lose its rights because of the constraints on the sovereign.

If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. . . . It is only necessary, therefore, to state the case, in order to show the wisdom and propriety of the rule that the statute never operates against the government.²⁰⁴

No matter how much time has passed, the federal government as well as state sovereigns cannot be precluded from recovering their lands from wrongful possessors.²⁰⁵ Similarly, in the case of aboriginal lands,

²⁰⁰ No. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 10579 (N.D.N.Y. 1999), at * 98-99.

²⁰¹ "No time runs against the King."

²⁰² *Block v. North Dakota*, 461 U.S. 273, 294 (1982) (O'Connor, J., dissenting).

²⁰³ *Id.*

²⁰⁴ *Lindsey v. Lessee of Miller*, 31 U.S. (6 Pet.) 666, 673 (1832); *accord*, *Guaranty Trust Co. v. United States*, 304 U.S. 126, 133 (1938); *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57 (1873); *United States v. Knight*, 39 U.S. (14 Pet.) 301, 314 (1840); *quoted in Block*, 461 U.S. at 295 (O'Connor, J., dissenting); *see also Texas v. Louisiana*, 410 U.S. 702 (1973); *Armstrong v. Morrill*, 81 U.S. 120 (1871).

²⁰⁵ *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991) (noting that laches defense is generally inapplicable against a state); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988). The

the centuries that have passed do not bar an assertion of a claim to ownership of lands wrongfully possessed by others. There is no statute of limitations to preclude actions initiated by Indian Tribes to establish title to, or the right of possession to, real or personal property. The federal statute that prescribes a limitations period for certain actions for money damages brought by the United States on behalf of recognized Indian tribes,²⁰⁶ expressly excludes from its coverage actions for title brought Indian tribes.²⁰⁷ Aboriginal land rights are founded in federal common law. Thus, under principles of constitutional supremacy state law time bars, adverse possession rules and equitable principles of laches cannot apply of their own force to debar them.²⁰⁸ The normal rule of borrowing of an analogous state rule in the absence of a controlling federal limitations rule cannot apply either because that would be inconsistent with the federal policy that Indian land claims not be limited by time.²⁰⁹ In its freedom from time bars, aboriginal title corresponds to title held by a sovereign.²¹⁰

Court accepted the ruling by the state supreme court that “[t]he fact that petitioners have long been the record title holders, or long paid taxes on these lands does not change the outcome . . . [T]he State’s ownership of these lands could not be lost via adverse possession, laches, or any equitable doctrine.” *Id.* The case involved 42 acres underlying a river and 11 small drainage streams; the disputed tracts ranged from under one-half to almost ten acres. *Id.* at 472. *See generally*, Annotation, *Acquisition by adverse possession or use of public property held by municipal corporations or other governmental unit otherwise than for streets, alleys, parks, or common*, 55 A.L.R.2d 554 (1957).

²⁰⁶ 28 U.S.C. § 2415.

²⁰⁷ 28 U.S.C. § 2415(c).

²⁰⁸ *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985) (“*Oneida II*”); *Board of County Comm’rs v. United States*, 308 U.S. 343, 350-51 (1939) (defenses based on delay in bringing claims such as laches and estoppel are inapplicable to claims to enforce Indian rights); *Swim v. Bergland*, 696 F. 2d 712, 718 (9th Cir. 1983) (neither laches nor estoppel is available to defeat Indian treaty rights); *Oneida Nation v. Sherrill*, 145 F.Supp. 2d 226 (N.D.N.Y. 2001) (laches would not bar suit by Indians or by the United States on behalf of Indians to protect their rights to their lands and federal policy that preclude laches also precludes waiver and estoppel defenses); *Oneida Indian Nation v. Oneida*, 434 F. Supp. 527, 542 (N.D.N.Y. 1977) (laches would not bar the suit); *Seneca Nation v. New York*, 26 F. Supp. 2d 555, 572-73 (W.D.N.Y. 1998) (laches not a bar to Indian land claims, citing *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982), as rejecting all delay-based defenses founded on federal law).

²⁰⁹ *Oneida II*, 470 U.S. at 240. Indeed, “[i]n adopting the statute that gave jurisdiction over civil actions involving Indians to the New York courts, Congress included” a proviso that the act should not be “construed as conferring jurisdiction on the Courts of the State of New York or making applicable the laws of the state of New York” on actions “involving Indian lands or claims with respect thereto.” *Id.* at 241. That proviso was “added specifically to ensure that the New York statute of limitations would not apply to pre-1952 land claims.” *Id.*

²¹⁰ In fact, Indian Tribes from our earliest history, have been regarded as “domestic dependent nations” that exercise inherent sovereign authority over their members and territories.” *Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (*quoting* *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet. 1) (1831)). “Suits against Indian are thus

While the general rule is that time bars do not apply to a sovereign. Some cases, though, make a distinction between lands held by a sovereign in a proprietary capacity and as trustee. In the former, time may run against the sovereign.²¹¹ As to the Indians' right of occupancy, the national sovereign is said to hold the fee simple title,²¹² holding Indian lands in trust for them.²¹³ Yet, as a kind of paradox, that trustee has the power to extinguish the Indians' right in those lands without consequent liability for compensation.²¹⁴ Although if the sovereign fails

barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Id.* at 509 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). There was a longstanding history of treaty making with the Indians and treaties entered into with the Indians were on the same level as treaties entered into with other foreign nations. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). See Kristen A. Carpenter, *Symposium: Native American Sovereignty Issues: Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 96 (1999). For some time, the federal trust responsibility was used to justify Congressional power over Indians. In *United States v. Kagama*, 118 U.S. 375 (1886), on the basis of the guardianship theory, the Court confirmed Congress' "plenary" power over Indians. *Id.* Later it established and protected rights of Indian tribes and individuals, to the extent it requires the fulfillment by Congress of obligations to Indians, the application of the Indian canons in interpreting treaties, statutes and other lawmaking affecting Indians, and the evaluation of the conduct of executive agencies under strict fiduciary standards. Cohen, *supra* note 111, at 49; *United States v. Mason*, 412 U.S. 391 (1973); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *Navajo Nation v. United States*, 263 F.3d 1325, 1329-41 (Fed Cir. 2001), discussing *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*); *Brown v. United States*, 86 F.3d 1554 (Fed Cir. 1996); See also Cohen, *supra* note 55, at 49. Carpenter, *supra* at 127, asserts that this conception of Indians as dependent and as wards was entirely Eurocentric and a handy tool for subjugation. It cast Indians as non-actors, incapable of managing their own affairs, which thus determined the federal government's approach to Indian affairs, despite real evidence of economic enterprise, vital governments, and thriving cultural practices. *Id.* . . . In fact, "'wardship' is not now, and may have never been, an accurate description of Indians' status in relation to the federal government." *Id.* It may be understood "as an example of the 'patriarchal terminology that white Americans [of Chief Justice Marshall's] generation typically used in translating the language of Indian forest diplomacy.'" *Id.* "[D]uring the past several centuries, the tribes and the federal government have been dependent on one another in ways that 'ward' and 'guardian' do not capture." *Id.* Carpenter argues for "Indigenous Indian Law," as an "attempt to identify existing and developing theories and practices which indigenous peoples can use to address their legal problems. . . . '[A] sound contemporary Indian policy must recognize that the Indian way is very much alive and well.'" *Id.* at 115-16.

²¹¹ See *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. 57, 68 (1873) ("Where lands are held by the State simply for sale or other disposition, and not as sovereign in trust for the public, there is some reasons in requiring the assertion of her rights within a limited period"); *American Trading Real Estate Prop., Inc. v. Trumbull*, 574 A.2d 796 (Conn. 1990); *Devins v. Bogota*, 592 A.2d 199 (N.J. 1991); *Siejack v. Baltimore*, 313 A.2d 843 (Md. 1974).

²¹² Cohen, *supra*, note 55.

²¹³ *United States v. Kagama*, 118 U.S. 375, 384 (1886). The federal government-Indian relationship in respect of their lands is regarded as that of "trustee-ward." Although the philosophical foundations of this relationship is somewhat unclear, the first judicial expression of it appears in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) (1831).

²¹⁴ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

to carry out its obligations as trustee, it can be liable to damages.²¹⁵ Because the sovereign is not free to deal in aboriginal lands without accountability, but is obligated, at least until aboriginal title is extinguished, to hold those lands in good faith in the Indians' interest, the exception to the principle of *nullum tempus occurrit regi* (regarding lands held by the sovereign in a proprietary capacity) should not apply.²¹⁶ Accordingly, that radical fee simple title held by the national sovereign, subject to the Indians' right of occupancy, must to the same extent and for the same reasons be exempt from time bars.

The Supreme Court said as much in *Heckman v. United States*,²¹⁷ where as to lands that had been allotted to individual tribal members, the Court ruled that the protection of Indian lands involved public, not merely private, rights. The government had sought and was permitted to seek the cancellation of some 30,000 conveyances, affecting some 16,000 defendants because they were of Cherokee lands that by statute were inalienable. As guardians for the Indians, it was the duty of the government to enforce by all appropriate means the restrictions designed for the security of the Indians.²¹⁸ The Court explained that a transfer of the allotments was not simply a violation of the proprietary rights of the Indians, but also a "violation of the rights of the United States. . . . Indeed, the essence of the right of the United States to interfere in the . . . case [was] its obligation to protect the public from the monopoly of the patent which was procured by fraud."²¹⁹

In *Board of County Commr's v. United States*,²²⁰ the Court also described Indians' land rights as federal rights, which a state would not

²¹⁵ *Sioux Nation v. United States*, 448 U.S. 371 (1980).

²¹⁶ It is also the largely held view that lands held by a sovereign, e.g., state, which by its constitution or a statute, is precluded from alienating state lands, cannot be acquired by adverse possession while the state holds title to them. See e.g., *Smith v. People*, 193 N.Y.S.2d 127 (N.Y. App. Div. 1959); *Binghamton v. Monserrate*, 419 N.Y.S.2d 253 (N.Y. App. Div. 1979); *Tonawanda v. Ellicott Creek Homeowners Ass'n, Inc.*, 449 N.Y.S.2d 116 (N.Y. App. Div. 1982); *Hinkley v. State*, 137 N.E. 599 (N.Y. 1922); *People v. Douglass*, 216 N.Y.S. 785 (N.Y. App. Div. 1926); *People v. Southern Pac. R.R. Co.*, 179 Cal. 537, 147 P. 274 (Cal. 1915).

²¹⁷ 224 U.S. 413 (1912).

²¹⁸ *Id.* at 437.

²¹⁹ *Id.* at 438-39. The Court discussed, among others, in support of its ruling *United States v. Rickert*, 188 U.S. 432, 444 (1903), where it was pointed out that in a suit by the government to restrain the collection of certain county taxes on structures on Indian lands, "the decision [finding a sufficient governmental interest to maintain the suit] rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection. *Heckman*, 224 U.S. at 441. The United States was entitled to recover without compensation to the displaced landowners. *Id.*

²²⁰ 308 U.S. 343.

be allowed to infringe. In protecting these rights, "federal courts [were] not restricted to the remedies available in state courts in enforcing such federal rights . . . and [s]tate [law] notions of laches and state statutes of limitations [had] no applicability to suits by the Government, whether on behalf of Indians or otherwise."²²¹

Speaking on the applicability of laches to a claim brought directly by the Oneida where there was a 175 year delay in asserting the claim, the Supreme Court said in *Oneida II*:²²²

[The] application of the equitable defense of laches in an action at law would be novel indeed. . . . [T]he equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in land subject to statutory restrictions.²²³

To bar ejectment and hence specific relief, on the basis of laches would be tantamount to an extinguishment of aboriginal title, and thus contrary to the requirement that an extinguishment of Indian title reflect a clear and intentional sovereign act.²²⁴ The Court concluded: "it is

²²¹ *Id.* at 350-51.

²²² 470 U.S. 226 (1985). There, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council sued the Counties of Oneida and Madison, New York, for damages representing the fair rental value of the land when it was occupied by the defendants. *Id.* at 229. The plaintiffs' ancestors had conveyed 100,000 acres to the State of New York under a 1795 agreement that violated the Trade and Intercourse Act of 1793 (Non-Intercourse Act), such that the transaction was void. *Id.* In 1795, the State of New York entered into the agreement at issue with the Oneidas whereby they conveyed virtually all of their remaining land to the State for annual cash payments. *Id.* at 232. While there is a statute of limitations that applies to certain claims brought by the United States on behalf of Indians, that statute specifically excludes all actions "to establish the title to, or right of possession of, real or personal property." *Id.* at 242, citing 28 U.S.C. § 2415(c).

²²³ *Oneida II*, 470 U.S. at 245 n.16, quoting *Ewert v. Bluejacket*, 259 U.S. 129 (1922). In *Ewert*, the Court upheld the granting of specific relief for the recovery of aboriginal lands despite the passage of decades and despite the transfer of title to otherwise good faith purchasers where the possessors' claim rested upon a deed that was void because it purported to convey Indian land to a government official in violation of a statute that made it unlawful for him to become a purchaser of Indian lands while holding that position. *Id.* In general, where Congress declares certain contracts void, it intends that the customary legal incidence of voidness will follow, including possible specific relief. See, e.g., *Bunch v. Cole*, 264 U.S. 250, 254 (1923) ("[L]eases made in violation of a congressional prohibition . . . [and are] not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification"); *Danforth v. Wear*, 22 U.S. (9 Wheat.) 673, 675-76 (1824) ("As to lands surveyed within the Indian boundary, this Court has never hesitated to consider all such surveys and grants as wholly void. . . ."); *United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 698 (9th Cir. 1976) ("To give effect to an invalid attempt to convey an interest in tribal lands in violation of the statute . . . would undermine [the] [statute's] purpose.").

²²⁴ *Oneida II*, 470 U.S. at 245, citing *United States v. Candelaria*, 271 U.S. 432, 439 (1926),

[therefore] questionable whether laches properly could be applied.”²²⁵ The Court continued, where the basis for the wrongfulness of the dispossession continued, such as where it is in violation of a statutory restraint on alienation (there and in *Cayuga*), the application of laches would appear to be inconsistent with the established federal policy, as much as the borrowing of state statutes of limitation would be.²²⁶

To return then to the question originally posed, although stated slightly different, can laches apply to bar a demand for specific legal relief when there is no statute of limitations to bar the action? In the case of property held by a sovereign in trust for the public, the answer is clearly no. This should also be the answer in the case of aboriginal title, whose radical title is held by the sovereign in trust for Indian nations.

quoting *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913).

²²⁵ *Oneida II*, 470 U.S. at 245 n.16.

²²⁶ *Id.* Justice Stevens dissented in *Oneida II*, believing that laches could bar the Indians’ claim to recover their land. *Id.* at 255. He pointed out that inasmuch as the President of the United States assured the Chief of the Senecas that “federal law would securely protect Seneca lands from acquisition by any State or person,” a 175 year delay in bringing suit to avoid a 1795 conveyance was inexcusable. *Id.* To Justice Stevens, in the “absence of any evidence of deception, concealment, or interference with the Tribe’s right to assert a claim.” *Id.* Societal interests that always underlie statutes of repose—particularly when title to real property were at stake and should have barred the claim. *Id.* at 255-56. In disagreement with the rule applied, he thought that a state statute of limitations could not be considered “inconsistent” with federal policy “merely because the statute causes the plaintiff to lose the litigation.” *Id.* at 258. But, this is a difficult proposition if the effect of a state law is to preclude the right guaranteed by federal law. *Oneida II*, 470 U.S. at 258. While he thought “that the equitable doctrine of laches, with its focus on legitimate reliance and inexcusable delay, best reflect[ed] the limitations principles that would have governed this ancient claim at common law—without requiring a historian’s inquiry into archaic limitation doctrines that would have governed the—claims at any specific time in the preceding two centuries.” *Id.* at 261. He also recognized “the application of a traditional equitable defense in an action at law [was] something of a novelty.” *Id.* at 261-62. Believing some sort of time bar should apply, Justice Stevens pointed out that an equitable defense was less harsh than a straightforward application of a statute of limitations. *Id.* at 262. Justice Stevens stated because the claim was based in federal common law, not statute, there was no risk of frustrating the will of the legislature. *Id.* at 262. But, here too, Justice Stevens ignores congressional judgment in exempting such claims from the statute of limitations applicable to the government. Justice Stevens was highly critical of the Indians, making much of the fact that they “plainly knew or should have known that they had conveyed their lands . . . in violation of federal law,” yet did nothing for 175 years.” *Id.* at 269. That they had had enough time to grow up and indeed had having learned English, developed a sophisticated system of tribal government, having petitioned to government for the redress of grievances. The difficulty with this position is determining that point between 1795 and 1980 at which that they should have brought suit and beyond which they would be barred. 1820? 1920? The lower courts have found as “a special reason why the Indians’ property may not be lost through adverse possession, laches or delay,” the Nonintercourse Act, “which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.” *United States v. Ahtanum Irrigation*, 236 F.2d 321, 334 (9th Cir. 1956). In general, federal government is not subject to defenses of laches or estoppel. See also *Oneida Nation v. Sherrill*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001).

Because the statute of limitations and laches do not apply, specific relief must be granted.²²⁷ The reasons for these conclusions are plain. Barring the demand for specific legal relief would wholly nullify aboriginal title, thus defeating public policy. This would also create a truly anomalous result. The federal government, on its own seeking to vindicate the Indian Tribes' interest in exclusive possession of their lands, could at any time obtain specific legal relief through ejectment, but the Indian Tribes, in a suit on their own seeking to vindicate the exact interest, could be denied the same relief on the basis of laches. If the sovereign could not be barred, to debar the holders of the possessory title seeking to vindicate the identical interest would mean denying a remedy solely on the basis of who the plaintiff is. It is no answer that Indians might still have available a declaration of their title at any time, unaffected by laches, as the federal statute²²⁸ permits. Because that declaration would be meaningless if the land covered by the title cannot be recovered and that title is only about possession in the first place.

VI. A FLAWED ANALYSIS AND RESULT

The *Cayuga* court, in formulating the appropriate remedy for the wrongful taking of possession of aboriginal lands, chose to apply the Restatement of Torts factors for redressing *trespass*, and not rules for ejectment. In its effort to find the right course, the district court seemed to labor in the dark, although it need not have, as the cases just discussed would have been illuminating. In its search, the court found only one useful decision, *United States v. Imperial Irrigation*,²²⁹ from the Central District of California, which also denied the plaintiff the specific relief of ejectment. But the reason ejectment was denied in *Imperial Irrigation* was because the plaintiff there did not plead it.²³⁰ That court explained

²²⁷ *Brooks v. Nez Perce County*, 670 F.2d 835, 837 (9th Cir. 1982) (granting specific relief despite a 35 year delay). Another court in the same district relied on *Oneida II* to reject a laches defense by the government in the Seneca's action in ejectment against the current possessors of land the Senecas alleged was taken from them by the state in violation of the Nonintercourse Act. *Seneca Nation v. New York*, 26 F. Supp. 2d 555, 573 (1998). That court also relied on a Second Circuit opinion, *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982), which also rejected all "delay-based defenses" founded on federal law." (This case was not directly related to the *Oneida II* line of cases.)

²²⁸ 28 U.S.C. § 2415.

²²⁹ 799 F. Supp. 1052 (S.D. Cal. 1992).

²³⁰ 799 F. Supp. at 1068. There, on its own behalf and on behalf of the Torres-Martinez Band of Mission Indians, the government sued two water districts for continuing trespass, occurring over the course of 68 years when irrigation water that drained from defendant's water project flowed into an inland salt water lake, raising the water level of that lake and flooding tribal lands. *Id.* at 1056. While the complaint alleged trespass and sought an injunction, at trial, plaintiffs asked for

that when properly pleaded, ejectment is a cause of action available to a plaintiff who could not sue for trespass because he had been wrongfully dispossessed. In *Imperial Irrigation*, the cause of action was not available to the tribe because they were still in possession. What *Imperial Irrigation* was saying was that ejectment is not the remedy for trespass, which was what the pleadings and facts there had established. In contrast, in *Cayuga*, the plaintiffs have been dispossessed and have stated a cause of action in ejectment. Thus, while *Imperial Irrigation* correctly denied ejectment on the grounds and facts recited, it was not correct for *Cayuga*, to deny ejectment on the basis of *Imperial Irrigation* when the facts of the two cases were opposition.

The *Imperial Irrigation* court went on to treat the plaintiffs' claim as a request for a permanent injunction against trespass and analyzed the cause under factors suggested by the Restatement (Second) of Torts, for determining the appropriateness of an injunction against trespass.²³¹ As a predicate for that position, the court stated that "there [was] precedent for applying equitable factors and thereby limiting relief otherwise available for Indian claims."²³² The court cited two cases in support. First, there was *Brooks v. Nez Perce County*, but the ruling there was not nearly so broad as *Imperial Irrigation* supposed.²³³ Rather, in *Brooks*, the Ninth Circuit held that laches could be weighed by a court in the calculation of *damages* to the extent that a portion of them could be said to have resulted from the government's fault where it delayed over 54 years in bringing a claim on behalf of the Indians. Nonetheless, the court in *Brooks* granted to the plaintiffs the specific relief they sought, quiet title, despite the delay.²³⁴ *Imperial Irrigation* also cited *Oneida II*, but only a dissenting opinion²³⁵ on an issue not decided by the Court.²³⁶ These analytical stretches by *Imperial Irrigation* make the *Cayuga* court's reliance on it unsound.

In *Cayuga*, the district court gave consideration to two other cases, *United States v. Boylan*,²³⁷ and *United States v. Brewer*.²³⁸ Although

ejectment. *Id.* That remedy was denied, the court said, because ejectment is "a discrete cause of action. . .," which the plaintiffs had not "pled, briefed or proven." *Id.* at 1068.

²³¹ Those factors are discussed *infra* note 256 and accompanying text.

²³² *Imperial*, 799 F. Supp. at 1068.

²³³ 670 F.2d 835, 837 (9th Cir. 1982).

²³⁴ *Id.* at 837. Under 28 U.S.C. § 2415, a statute of limitations operates against the government seeking monetary damages.

²³⁵ See discussion of Justice Stevens' dissent *supra* note 226 and accompanying text.

²³⁶ 799 F. Supp. at 1068.

²³⁷ 265 F. 165 (2d Cir. 1920).

²³⁸ 184 F. Supp. 377 (D.N.M. 1960).

both of those courts granted the specific relief the plaintiffs sought, ejectment, the *Cayuga* court distinguished them, in ways that were not entirely credible.²³⁹ *Cayuga* first suggested that ejectment was granted in the other cases because the conveyances on which the defendants' possession was founded were declared void.²⁴⁰ However, this could not be a point of distinction. This is because the root of title acquired by the defendant state in *Cayuga* was in violation of federal law, making the titles in all the possessors there likewise void.²⁴¹ The court added that *Boylan* and *Brewer* did not involve land claim litigation. But as is apparent from what the plaintiffs in those cases sought, the recovery of land, the court's suggestion can only be described as a pretense.

In the end, the court found the difference to be in the amount of land involved—some 65,000 acres in *Cayuga*, compared to only 32 acres in *Boylan* and a mere .485 in *Brewer*, and in the amount of time the current possessors had been in possession, in *Brewer* and *Boylan*, “not . . . long.”²⁴² The court described these as “critical distinctions,”²⁴³ which could not be ignored,²⁴³ that “justice requires that “equitable factors . . . be carefully weighed before any relief [was] granted.”²⁴⁴ Applying the same logic, if these factors are not accepted as “critical distinctions,” as they are hard to perceive them as such, then the use of such factors as for determining whether to grant a permanent injunction against trespass to resolve a claim of ejectment, is false and unjust.

The court's reasoning regarding the application of the Restatement factors was otherwise skewed. In the first place, the expectations and innocence of the current possessors were valued, but the same in the *Cayuga* were not. While acknowledging the impact of the loss of homeland on the *Cayuga*'s culture and society, the court nonetheless pointed out that current possessors were blameless. At the same time, the court also did not identify equally weighty losses on the part of the current possessors as would countervail the innocence of the *Cayuga*.

²³⁹ They also cited *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941). The district court distinguished that case on the basis that it did not speak to the issue of ejectment, but an accounting for trespass. *Cayuga Indian Nation v. Cuomo*, No. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 10579, at *68.

²⁴⁰ *Id.* at *69-70.

²⁴¹ See discussion of Nonintercourse Act, *supra* note 147-50 and accompanying text.

²⁴² 1999 U.S. Dist. LEXIS 10579, at *71.

²⁴³ *Id.*

²⁴⁴ *Id.* at *72. The court stated that it “[did] not find convincing the Cayugas’ arguments opposing an equitable based analysis of ejectment” and pointed out that the “Cayugas [did] not offer an alternative way of analyzing the ejectment issue, other than to assert that they are entitled to that remedy.” *Id.* But, the *Cayuga* did, that is, with settled principles, particularly those expressed in the cases already. *Id.*

Although the court found the Cayuga's goal of reclaiming their homeland to be laudable, it thought a monetary award would accomplish this goal by enabling the Cayuga to purchase individual lots out of its original lands back from the wrongful possessors.²⁴⁵ But would that establish a homeland?

The court also resolved the issue of unreasonable delay against the Cayuga, even though the court found that some delay by the Cayugas in bringing suit excusable, due to the absence of a legal forum in which they could have asserted the claim for most of the period of their dispossession. At first, the court noted, there was no forum for lodging such a claim, and it was not cognizable until 1972, then there were settlement negotiations, then suit.²⁴⁶

The court determined that even though the Cayuga chose and argued for ejectment, monetary damages would produce results equally satisfactory. There was no consideration by the court whether monetary damages (from the state defendant) to the current possessors would be equally satisfactory to them (who in any case have no legal title that could be the basis for any claim against the Cayuga). Generally, in property law there is a presumption of uniqueness. Nevertheless, the court put the burden on the Cayuga to prove that their land was "so unique . . . that the objectives, . . . economic, political and cultural development, cannot be reached without ejecting thousands upon thousands of landowners."²⁴⁷ There was no parallel burden placed on the current possessors.

Because thousands of individuals and several public utilities could be displaced, the court reasoned that ejectment had to be denied, because "two wrongs don't make a right."²⁴⁸ In the legal sense, specific relief in ejectment is not a wrong, but a correction of one. Putting aside the question of whether the court was free to consider ejectment under the circumstances in the moral sense, it would be a hard case for a new purchaser (as many of the defendants likely are) to show that his entitlement is greater than the rights of the original possessor. Surely, the intentional wrongdoers (the state), who constructed the electrical and transportation infrastructure, do not occupy that higher plane.²⁴⁹

²⁴⁵ *Id.* at *75.

²⁴⁶ Under the fourth factor, related misconduct, the court found the only thing worthy of consideration was attributable to the State and federal governments not the individual defendants and none on the part of the Cayuga. *Id.* at *89.

²⁴⁷ *Id.* at *81.

²⁴⁸ *Id.* at *91.

²⁴⁹ Under prevailing principles, they would not even be entitled to an adjustment. The district court took note of testimony about the effect ejectment would have on the area's

The court was not confident of its power and ability to frame and enforce an ejectment order, noting that “[t]here is a very real possibility that if ejectment is ordered, many if not all of the defendants would refuse to comply with such an order.”²⁵⁰ Would this be the case if the current possessors received the monetary award the court offered the Cayuga? What happens when large numbers of landowners are displaced where the state takes property by eminent domain?

In the end, the court withheld specific relief because “[a]n ejectment order would . . . strike at the very heart of what many in this country (including no doubt the individual current possessors) strive for years to achieve—ownership of real property.”²⁵¹ Those concerns and more weighty ones, those about sovereignty and self-determination on the part of the Cayuga, loomed just as large by the denial of the order but were given no consideration.²⁵²

transportation systems, and disruptions to it, with resultant negative consequences for the economy, that the local banking industry would be especially hard-hit in terms of mortgage defaults. This factor weighed in favor of defendants, but it was not counterbalanced by the economic and cultural deprivation that the Cayuga have and will continue to experience. While current possessors with no right, have enjoyed economic stability and quiet possession as a result of their apparent ownership of the land, the Cayuga were without such economic stability and quiet enjoyment. *Cayuga*, 1999 U.S. Dist. LEXIS 10579 at *92-94.

²⁵⁰ 1999 U.S. Dist. LEXIS 10579 at *96.

²⁵¹ *Id.* at *96. The court also expressed some worry about “vexatious disputes in the form of satellite contempt proceedings—proceedings which could easily clog the federal courts well into the next century.” *Id.* at *97.

²⁵² In *Chippewas v. Attorney Gen.*, [2000] 195 D.L.R. (4th) 135 leave to appeal dismissed, (2001) 205 D.L.R. (4th) viii reconsideration dismissed, S.C.C.A. No. 63, 51 O.R. (3d) 641 (2001), a court of appeals denied a request for declaratory relief. The Chippewa claimed land they said they were the owners of despite what appeared as a sale of land to a businessman and developer with Crown approval in 1861, the land was never formally surrendered to the Crown. *Id.* at 179, 197. While the court agreed that the Chippewa’s aboriginal title to the lands in question did not pass in a transaction not sanctioned by the Crown as required by law, it nonetheless ruled that the relief sought did not require the return of the land from the current possessors. This was so even though the claim was not barred by any statutory limitation periods. *Id.* at 213-14. Because the Chippewa sought a declaration of rights, which is equitable and discretionary relief, it was subject to equitable defenses, including that the Chippewa did not assert a claim to the land for 150 years. *Id.* at 213-14, 215, 218, 226. The court of appeals’ ruling did not apply these equitable rules formally, but as they should have relevance given *sui generis* characterization of aboriginal rights. In such cases, the court explained, the rules of the common law must be applied by analogy only. *Id.* at 221. While the court was mindful of the principle of legality and the rule of law that required “a priori consideration be given to the party whose rights have been taken, especially where the rights . . . are as fundamental in nature as the right of aboriginal title.” *Id.* Nonetheless, the court stated “it is a basic principle of [the] legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party’s own conduct, including . . . any delay in asserting the claim.” [but what “rights” do holders of void title have and but how does this affect federal policy]” *Id.* at 221-22. But, the court pointed out, delay alone will not defeat aboriginal

1. Property Rules Converted

The ruling in *Cayuga* was that the passage of time precluded the granting of specific relief in ejectment, but not damages. The result of that ruling was that a liability rule would be applied to bar specific relief to aboriginal title holders. This result is against the generally accepted rule in every society that property rules, the right to be restored to possession, form the norm, and liability rules, the recovery of damages in lieu of possession, the critical exception.²⁵³ The nature of a liability rule, that an outsider can unilaterally reassign rights, runs counter to the reasons for protecting possession in the first place under general property law concepts, and as to aboriginal lands, defeats federal policy.

While both sides in the property rule—liability rule debate have made arguments that at least appeal to their respective adherents, the debate has not been about aboriginal title. The remedy of ejectment is

claims. Here, the equitable relief sought was denied because of the Chippewa's conduct, in particular, that they had knowledge of the facts necessary to assert a claim more than a century and a half earlier, but delayed. *Id.* at 221-22. Also, the current possessors were good faith purchasers without notice and had relied on the apparent validity of the original grant from the Chippewa. *Id.* at 224. Yet, it was still a void, not voidable, title. "They had no reason to believe the Chippewa had any claim to the land," and had developed the property at considerable expense. *Id.* at 235, 237. The court of appeals' ruling may be limited to its facts and the issue of the Chippewa's right to damages against the Crown for breach of its aboriginal rights by the same transaction was not before the court, so it made no ruling on that point. But what result if the Chippewa had sought the legal remedy of ejectment? *Delgamuukw* suggests that ejectment would be in order. It seems that aboriginals almost always must seek a declaration of rights as a predicate for any form of relief. The effect, then, of the court of appeals' decision would be to preclude ejectment in all cases, or at least subject such claims to equitable defenses, such as laches.

²⁵³ Richard A. Epstein, *Symposium: Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective: A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L. J. 2091, 2096 (1997). Professor Epstein states:

The simplest situation in the law of tort is one where A simply takes and keeps the property of B. The common remedy that is allowed by all legal systems is a simple recovery of the thing so taken, . . . in the English law by a real action for land. In some cases, a legal system does not appear to have resources to allow the specific recovery of the thing, so that the competence of the court is limited to an award of damages. Even when the line is blurred, courts can use the calculation of damages to reinstitute a de facto property rule. In the Roman law, for example, the defendant who had taken the plaintiff's property was given an option to keep the thing if he were prepared to pay its value, which looks like a liability rule. But what the law gave with one hand it took back with the other, for the value of the thing was determined by the plaintiff, who could set it above market value, "without straying over the line between optimism and perjury," [note omitted] under what we would call a self-assessment system. [note omitted]. This system is designed not to get an accurate measure of value, but rather to insure by indirection the specific recovery of the thing itself—an early preference for the property rules.

Id. at 2096.

integral to that concept.²⁵⁴ Without the *in rem* protection that ejectment gives, some venture that there would be no property institution at all and surely no aboriginal title because aboriginal title is only possession. Ownership interests cannot exist without trespassory rules.²⁵⁵

Besides overlooking this essential distinction in the nature of aboriginal compared to fee simple title, the *Cayuga* court also failed to grasp the significance of the parallel enforcement regimes: as to aboriginal title and title held by a sovereign, there is no statute of limitations or other time bar that can operate to bar an action for the land's recovery, but as to fee simple title, there is. In the former, there is the idea that a right that is not burdened by time bars, can never be lost (unless of course in the case of aboriginal title, only with the federal government's permission). That a right holder may assert a claim based upon that right at any time should preclude a defense of innocent or reasonable reliance on the appearance of title by one who must respond to the right holder's claim. In the latter regime, there is a burden on the right holder to act within a prescribed period of time. The idea is that at some point the right may be lost, and largely by the passage of time. That is also the theory of laches, though a showing of some negligence to assert the right and harm to the other also is demanded by equity. The policy in the former is to preserve the right above all, because of the importance of that right or other large policy. In the latter, other specific societal ends such as security of title, judicial economy, and the productive use of land are said to justify barring the assertion of an ancient claim based upon a right. Thus, to deny ejectment and its call for specific legal relief is the same as applying a statute of limitations, which cannot be done against one who is exempt. Denying ejectment also permits alienation of property which federal policy has made inalienable in order to ensure to its holders possession in perpetuity. By the infirmity of inalienability, federal law is protecting the right of

²⁵⁴ Honoré describes ownership by a series of "standard incidents":

1) the right to possess; 2) the right to use; 3) the right to manage; 4) the right to the income; 5) the right to the capital; 6) the right to security; 7) the incident of transmissibility; 8) the incident of absence of term; 9) the duty to prevent harm; 10) liability to execution; 11) residuary character.

TONY HONORÉ, MAKING LAW BIND: ESSAYS LEGAL AND PHILOSOPHICAL 161-92 (1987).

²⁵⁵ See J.W. HARRIS, PROPERTY AND JUSTICE 126 (1996). "The outer boundary of the control-powers intrinsic to various kinds of ownership interests is reciprocally related to the trespassory rules which protect them. [note omitted] Nevertheless, the internal content of the ownership interests and the internal content of the trespassory rules are mutually independent. These twin pillars of property institutions cannot be collapsed either one into the other. The *prima facie* privileges and powers intrinsic to an ownership interest cannot be spelled out from the trespassory rules which protect it. *Id.* at 129.

possession, not its exchange or commodity value.²⁵⁶ The prohibition is against alienation, not alienation without compensation.²⁵⁷ It was the intent of Congress that for their sustenance and as a fitting aid to their progress, Indian Tribes should be secure in their possession and should actually hold and enjoy the lands.²⁵⁸ Because aboriginal title gives only a right of possession and is incapable of alienation, denial of ejectment operates to extinguish the title as effectively as an act by the sovereign. At the same time, recognizing rights in grantees under ancient, illegal conveyances, largely on the basis of the passage of time, vests in these wrongful possessors a better title, fully alienable, in fee simple.

Just as much as specific relief is compelled, substitutionary relief must be rejected, because it is inferior and unjust. Damages will not enable the right holders to go out into the market and purchase new aboriginal land.²⁵⁹ In *County of Yakima v. Confederated Tribes and*

²⁵⁶ Bryan, *supra* note 33, at 13; McNeil, *supra* note 94; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

²⁵⁷ See *Heckman v. United States*, 224 U.S. 413 (1912); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1985). There, a federal law authorized the disposal of tribal assets and terminated federal responsibility for the tribe and its members and it also provided that state laws would apply to members of the tribe in the same manner that such laws applied to non-Indians. *Id.* at 504. In 1980, the tribe filed an action for possession of a 225 square mile tract. *Id.* at 505. The state defended on the ground that the claim was barred by the state statute of limitations. *Id.* The Supreme Court ruled that the action was barred because the act removed the special federal services and statutory protections for Indians. *Id.* at 510-11. The court said,

We have long recognized that, when Congress removes restraints on alienation by Indians, state laws are fully applicable to subsequent claim. . . . These principles reflect an understanding that congressional action to remove restraints on alienation and other federal protections represents a fundamental change in federal policy with respect to the Indians who are the subject of the particular legislation.

Id. at 508-09. See also *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (deciding once lands held by Indians are freed by Congress of the burden of inalienability, it loses federal protection, such as from state taxation); *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993); *relying on County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

²⁵⁸ See *Heckman*, 224 U.S. at 413 (speaking about allotment lands).

²⁵⁹ *Cass County*, 524 U.S. at 103 (holding that once lands held by Indians are freed by Congress of the burden of inalienability, it loses federal protection, such as from state taxation); *Lummi Indian Tribe*, 5 F.3d 1355 (9th Cir. 1993); *relying on County of Yakima v. Yakima Indian Nation*, 502 U.S. 251. There, the Lummi Indian Tribe argued that certain fee-patented reservation land was exempt from state taxation because it was allotted to the Tribe under a treaty rather than under the General Allotment Act which permits such taxation. *Lummi Indian Tribe*, 5 F.3d at 1357. The Ninth Circuit rejected that argument. *Id.* The Ninth Circuit held that *County of Yakima* was not dispositive, finding that the Supreme Court expressly declined to decide whether parcels patented under an act other than the General Allotment Act were also taxable. *Id.* The Ninth Circuit concluded that because the Court focused on the Yakima's ability to alienate their land, rather than on how it was allotted, if the land is alienable, it is taxable. *Id.* The Ninth Circuit acknowledged the well-settled principle that a state may not tax reservation lands or reservation Indians unless Congress has "made its intention to [authorize state taxation] unmistakably clear." *Id.* The court

Bands of the Yakima Indian Nation,²⁶⁰ the Supreme Court spoke of the correlative relationship between the prohibition on alienation of aboriginal lands and its liability to state law burdens. While it is within Congress' power to grant Indian Tribes the power of voluntary sale, while at the same time giving immunity from taxation or "forced alienation," such an intent by Congress would not be presumed unless it was "clearly manifested." In the Court's view, "it would seem strange to withdraw [the] *protection* [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [sic] from taxation."²⁶¹ (italics added). Thus, while the protection of aboriginal title from "forced alienation," continues, lands covered by that title, are not liable to state law, because to do so would accomplish a forced alienation. Once alienated, aboriginal title is no longer aboriginal and no concepts of tracing apply. Thus, other property acquired with money received from a forced alienation cannot be regarded as aboriginal title. Aboriginal land alienated with the government's approval and then reacquired by a Tribe is forever alienable and so would be a Tribe's modern land purchases held in fee patent status, with the consequence in both cases being liability to state law.²⁶² The federal policy of maintaining Indian Tribes on their aboriginal lands, unless the government abandons it, therefore, means that no amount of monetary damages can be efficacious to remedy a dispossession of those lands.²⁶³

2. A Calculus Skewed and Equitable Rules Inverted

Can laches be applied first to relegate a plaintiff to substitutionary relief, then also to discount the amount of substitutionary relief awarded? If a court determines that substitutionary and not specific

therefore concluded that the land's alienability determined its taxability. *Id.* at 1358. In the Ninth Circuit's view, the Supreme Court held that no matter how land becomes patented, it is taxable once restraints against alienation expire. *Id.* at 1359.

See also 25 U.S.C. § 357 (stating that except where specifically provided for by Congress, aboriginal title is not subject to a state's eminent domain power).

²⁶⁰ 502 U.S. 251 (1992).

²⁶¹ *Id.* at 263; see also *Lummi Indian Tribe*, 5 F.3d at 1357 (relying on and distinguishing *County of Yakima*).

²⁶² *Lummi Indian Tribe*, 5 F.3d at 1358.

²⁶³ See *United States v. Rickert*, 188 U.S. 432, 444-45 (1903), where the Court ruled that "[i]t [was] manifest that no proceedings at law [could] be . . . efficacious for the protection of the rights of the government, . . . and thus give security against any action upon the part of the local authorities tending to interfere with the complete control, not only of the Indians by the government, but of the property supplied to them by the government and in use on the[ir] lands." *Id.*

relief is in order because equitable considerations preclude the latter, but not the former, do those same equitable considerations operate to limit the amount of substitutionary relief awarded? This occurred in *Cayuga*. The jury awarded damages for “loss of use and possession of the [land] from July 27, 1795 to date as measured by a fair rental value without improvements” of \$1.9 million.²⁶⁴ The court added \$35 million for the future loss of use and possession (permanent damages) and \$211 million as prejudgment interest.²⁶⁵ The fair rental value damages were computed for each of the 204 years in the year those damages were sustained and the jury did not, as instructed by the court, convert those damages to current values.²⁶⁶ The jury took \$3.5 million, or 10% of what it deemed to be the current value of the property (\$35 million) and divided that by each of the 204 years.²⁶⁷ That calculation seemed completely arbitrary and had the effect of overstating the compensation in the early years and understating it in the later years because rental values surely could not have remained constant for more than 200 years.²⁶⁸ The court accepted the verdict nonetheless, pointing out the difference between a verdict that is logical and one that might be economically consistent, the latter being an insufficient ground for overturning a verdict.

The court held that an award of prejudgment interest was clearly appropriate and necessary to fully compensate the Cayuga for the lost “opportunity” cost, or time value of money, resulting from not having the stream of rental income available to them from the property over the past two centuries.²⁶⁹ Such an award is also favored by general

²⁶⁴ *Cayuga*, 165 F. Supp. 2d at 274.

²⁶⁵ *Id.* at 292. The United States’ expert had suggested \$335 million as compensation and the State’s expert \$40 million to \$62 million. *Id.* at 288.

²⁶⁶ *Id.* at 283.

²⁶⁷ *Id.* at 283.

²⁶⁸ *Id.* at 284.

²⁶⁹ The court awarded pre-judgment interest even though the Cayuga’s did not expressly seek it. *Cayuga*, 165 F. Supp. 2d at 284. But under federal common law, that omission does not amount to a waiver of the right to such an award. *Id.* at 284. This position is “consistent with both Fed. R. Civ. P. 15(b), freely allowing amendment to complaints . . . and . . . Rule 54 (c), allowing for the granting of such relief in a default judgment as a party is entitled, even if the party has not demanded such relief in the party’s pleadings.” *Id.* The district court found the guiding legal principles for awarding pre-judgment interest in *Wickham Contracting v. Local Union No.3*, 955 F.2d 831, 834 (2d Cir. 1992): “(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or [for] (iv) such other general principles as are deemed relevant by the court,” which include the certainty of the damages due the plaintiff and whether the statute itself already provides for full compensation and punitive damages. In addition, the “speculative nature of the damages in question will always be relevant to a sound decision on a

considerations of fairness and the relative equities. But the amount of an award would be limited in the same way the available relief was limited. Even though the court could not fault the Cayuga for delay in bringing the action (as it did in deciding to preclude specific relief) because of the legal and political obstacles they faced,²⁷⁰ the court said it could not ignore the passage of more than 200 years in calculating prejudgment interest.²⁷¹ Though the accrual date was determined to be July 27, 1795, as the "date of injury or deprivation,"²⁷² Nevertheless the court held that considerations of fairness and equity to the state defendant, who the court could not find had acted in perfect good faith,²⁷³ required that interest not be computed from that date. Instead, the amount of interest otherwise accruing was *discounted* by some 90%.²⁷⁴

The original idea of equity was specific and *in personam* relief where none could be found at law. Examples of such relief include specific performance of a contract for the sale of land, rescission of a contract, injunctions against threatened injurious conduct. The *Cayuga* court stated that ejectment was "not an adequate remedy relative to other available remedies, most notably monetary damages,"²⁷⁵ thereby turning

consideration of whether prejudgment interest should be awarded." *Wickham Contracting*, 955 F.2d at 836. The district court found prejudgment interest can be awarded even when a federal statute is silent on the issue, as is the Nonintercourse Act, so long as such awards are "fair, equitable and necessary to compensate the wronged party fully." *Cayuga*, 165 F. Supp. 2d at 285. At the same time, where "the defendant acted innocently and had no reason to know of the wrongfulness of his action . . . when there is a good faith dispute between the parties as to the existence of any liability, or . . . when the plaintiff is responsible for the delay in recovery," prejudgment interest may be denied. *Id.* at 285. *See generally*, *Kansas v. Colorado*, 533 U.S. 1 (2001).

²⁷⁰ *Cayuga*, 165 F. Supp. 2d at 353.

²⁷¹ The court used compounded interest, due to the fact this furthered the primary goal of prejudgment interest, which is to make the plaintiff whole again and compounding the interest was the norm from a strictly economic perspective. *Id.* at 363. The court adopted a rate of one of the economists who testified (Berkman) who used "the 3-month Treasury Bill" rate for most of the century and during the 1800's, used various municipal, state, and federal bonds, and between 1795 and 1797, he used the rate "associated with a loan from Holland to the American Revolutionary government." *Id.* These rates took into account changing economic conditions and therefore best comported with the purpose of a prejudgment interest award. *Id.*

²⁷² *Id.* at 363.

²⁷³ The court found that considering the sales price set for Cayuga land, "the State's lack of good faith [to be] virtually self-evident. . . ." *Id.* at 347. The state purchased lands for "what was the equivalent of only 50 cents per acre, whereas those lands were to be sold by the state for no less than the equivalent of \$2.00 per acre." *Id.* While the court did not find that the state was motivated by a deliberate intent to cheat or defraud the Cayuga, "[t]here [was] more than enough proof in the record, . . . to support a finding . . . that the State . . . did exhibit a lack of good faith in its dealings with the Cayuga." *Id.* at 349.

²⁷⁴ *Id.* at 366.

²⁷⁵ *Cayuga Indian Nation v. Cuomo*, 1999 U.S. Dist. Lexis 10579 at *81 (N.D.N.Y. 1999), *citing* Restatement § 937, cmt. b ("For property rights . . . , a damage award may often provide

the analysis upside down (particularly where the Cayuga did not seek equitable relief). The first point to make about this is that substitutionary relief theoretically is inadequate, at least to the extent that damages are not equivalent to the thing lost. Additionally, the particular award is unjust because it reflects a double penalty as the right holders are denied possession because of delay, though their claim is not barred by law, but they are also denied a full substitute because of that same delay.

There is the further point that ejectment and damages serve different ends: the former, the interest in the land *per se*, and the latter, the interest in the economic value of the land. Where the thing for which relief is sought has no commodity or exchange value, such as land covered by aboriginal title, an award of monetary damages in substitution for specific relief cannot be accepted as just. Moreover, in the culture of indigenous peoples,

[T]he collective right to land means that land has a value beyond being a commodity that is to be purchased and exchanged. The broader value of land remains central to the lives and economies. Everything of consequence for indigenous peoples begins with their unique understanding of the ties between all life, the land and the seas. It is a 'symbiotic relationship,' a physical and spiritual unity, a seamless whole which [cannot] be divided into parts.²⁷⁶

It is the lack of any specific interchangeability among things within the indigenous peoples' culture that demonstrates a categorization of fungibility to goods that Westerners would not recognize, "which would also imply that the procurement of goods for consumption is not necessarily based on the technological production of them but is rather related to the specific tree or fish or river or moose that is in front of them, and for reasons that would not make sense to us. . . ."²⁷⁷ Only specific relief gives indigenous peoples their due of "legal protection to prior occupation in the present-day."²⁷⁸

VII. CONCLUSION

"Property" both confers and was born of power. It bestows on an owner a form of sovereignty over others, because the sovereign state

adequate substitutional relief.") [But this is entirely different—the opposite—from what the court found.]

²⁷⁶ VENNE, *supra* note 78, at 126.

²⁷⁷ Bryan, *supra* note 33, at 27-28.

²⁷⁸ *Delgamuukw*, [1997] 3 S.C.R. 1010, 1088.

stands behind the owner's assertion of right. Individual property rights thus depend on state power and when the state recognizes and enforces one person's property right, it simultaneously denies property rights in others. A property owner's security as to particular things thus comes at the expense of others being vulnerable to the owner's control over those things. "Ownership, therefore, is power over persons, not merely things."²⁷⁹ Conversely, where the state does not back ownership, there can be no property or individual sovereignty. Individual sovereignty both assures and rests upon self-determination, a human right and also a political one.²⁸⁰ Self-government is a vital political aspect of the right of self-determination.²⁸¹

The sovereignty of indigenous peoples as it rests upon aboriginal title, though, is not a true sovereignty, because the federal government holds the power to extinguish that title. But would the government move to do so in the case of the Cayuga, the Seneca, and the Miami where specific relief in ancient ejectment claims cannot fairly be denied? An honest assessment of the historical circumstances upon which indigenous peoples came to be dispossessed (as the High Court in Australia in particular has done) demands that the government not do so. Instead, any deprivation of that possession, even ancient ones, must be limited to a discussion of restoring indigenous peoples to their lands.

²⁷⁹ Gregory S. Alexander, *Time and Property In The American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 277 (1991).

²⁸⁰ See Paul Joffe, *Assessing the Delgamuukw Principles*, 45 MCGILL L.J. 155, 182-83, 203 (2000). The Supreme Court of Canada has confirmed in the *Quebec Secession Reference*, [1988] 2 S.C.R. 217, that the right of self-determination "has developed largely as a human right."

²⁸¹ The International Covenant on Civil and Political Rights provides:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

International Covenant on Civil and Political Rights, G.A. Res. 2200A (xxI), 999 U.N.T.S. 171, Art. 1, (Dec. 19, 1966) Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force March 23, 1976, accession by Canada May 19, 1976).

Part 1, Article 1. The Committee also recommended that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant. With particular reference to Canada in 1999, the Human Rights Committee of the United Nations has stated that it was particularly concerned that Canada had not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples, which concluded, among other things, that without a greater share of lands and resources, institutions of aboriginal self-government would fail. U. N. CCPR *International Covenant on Civil and Political Rights*, Human Rights Committee, 65th Canada, [Part] C, at ¶8. UN Committee on Human Rights, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, UN Doc. CCPR/C/79/Add. 105 at para. 8 (1999).

As land is restored to indigenous peoples and title is confirmed in these claimants, is it to be restored with the same burdens and limitations that in modern life affect non-aboriginal title? In some places, the land sought and restored are in areas thought by some to be ecologically sensitive, fragile.²⁸² But this concern cannot be grounds for refusing to restore aboriginal lands. Tribal lands may be subject to some state land use regulations,²⁸³ yet importantly, because aboriginal title's defining characteristic is the right of possession, in perpetuity, it provides the foundation for the preservation of the distinct culture on which that title is founded. But, if the specific relief of ejectment is to be denied, despite a compelling case under law for it, the only just and principled substitutionary relief for these ancient claims is substitute aboriginal *land*. That is to say, land denominated sovereign and free from the burdens of state.

²⁸² Dave Cunningham, "Race-based riches: A study finds the Nisga'a template will give Indians one-fifth of BC's timber," CANADIAN BUSINESS AND CURRENT AFFAIRS, BRITISH COLUMBIA REPORT, Oct. 5, 1998, available at <http://www.lexis.com>. Concerns about environmentally threatening uses were raised after the making of the Nisga'a treaty. *Id.* One journal reported on the results of a study showing that "if the Nisga'a treaty is used as a template for the 50 other treaties under negotiation, it would darken B.C.'s [British Columbia's] economic climate dramatically and give 3% of the province's population 20% of its timber." *Id.* Under the treaty, the Nisga'a have title to "1,930 square kilometres of . . . land[] including a timber base able to sustain an annual allowable cut (AAC) of 165,000 cubic metres for the first five years, dropping to 135,000 cubic metres thereafter." *Id.* In addition, Nisga'a have the "right to 'co-manage' the 1.6-million-hectare Nass Wildlife Area, roughly eight times the size of their settlement lands. This includes a 50% vote in all land-use decisions that may affect fish and wildlife—in particular, logging, mining and hunting." *Id.* An additional 165,000 cubic metres of timber in the Nass Timber Supply Area, means (according to one analyst), "[t]he total Nisga'a [annual allowable cut] could easily top 500,000 cubic metres, taken primarily from licences now held by government-owned Skeena Cellulose. Given a Nisga'a population of 5,500, 3.7% of B.C.'s Indian population, a quick calculation suggests that if the treaty is used as a template, B.C. Indians will have harvesting rights of 13.5 million cubic metres, 19% of the total provincial crown forest [annual allowable cut]." *Id.* "A similar extrapolation of Nisga'a wildlife management rights indicates B.C. Indians will control and co-manage 49 million hectares—one-half of the entire province." *Id.* "Every timber licence renewal, cut-block permit, access road, harvesting system, silviculture regime and habitat treatment in the Nass Wildlife Area will require the approval of Indian co-managers." *Id.*

²⁸³ *United States v. Winans*, 198 U.S. 371 (1905). The Court stated [in dicta] that a state could regulate Native American fishing rights for conservation purposes. *Id.* That dicta became the holding in *Tulee v. Washington*, 315 U.S. 681 (1942). There, the State of Washington charged and convicted a Yakima Indian of netting salmon off the reservation without a fishing license. *Id.* at 682. The defendant argued that the licensing requirement violated the Indians' fishing rights under treaty. *Id.* The Court ruled that the state could regulate the "time and manner of fishing outside the reservation as . . . necessary for the conservation of fish." *Id.* at 684. The state could not, however, charge a fee for the license, since it was "not indispensable to the effectiveness of a state conservation program," but it impermissibly limited a federal right. *Id.* at 685; see also *Puyallup Tribe v. Washington*, 391 U.S. 392 (1968); *Washington v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup v. Washington*, 433 U.S. 165 (1977) (all three decisions upholding state's reasonable regulations to the extent necessary for conservation).