INDIAN TITLE: UNRAVELING THE RACIAL CONTEXT OF PROPERTY RIGHTS, OR HOW TO STOP ENGAGING IN CONQUEST

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It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.[1]

Johnson v. M'Intosh (1823)

[The Indian] right of occupancy is considered as sacred as the fee simple of the whites.[2]

Mitchel v. United States (1835)

[T]he tribes . . . held claim to such lands . . . under what is sometimes termed original Indian title or permission from the whites to occupy. . . . This is not a property right . . . [3]

Tee-Hit-Ton Indians v. United States (1955)

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[1] Johnson v. M'Intosh, 21 U.S. 543, 603 (1823).

[2] Mitchel v. United States, 34 U.S. 711, 745 (1835) (citing Cherokee Nation v. Georgia, 30 U.S. 1, 48 (1831)).

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

Most property law students learn about Indian title by reading the 1823 case of *Johnson v. M'Intosh*[4] as part of their introductory property law course. While it is a good thing that they learn about the topic, most of them learn the law incorrectly. This is not their fault; they learn a distorted picture of Indian title because many property law teachers also misunderstand the case. Teachers misunderstand the case partly because Chief Justice John Marshall uses archaic terminology and partly because most casebook authors do not provide the historical and legal context necessary to interpret the holding correctly.[5] It is important to understand what Indian title really is—not only to appreciate the historical genesis of American property rights—but to ensure equal and adequate protection for the property rights of the hundreds of Indian nations that continue to own and govern their own property today.

To understand what *Johnson v. M'Intosh* tells us about Indian title, we must read the opinion in two different ways. Critical analysis of a judicial opinion requires both a backward-looking and a forward-looking perspective. A backward-looking view treats the case as an historical artifact that we can distance ourselves from while a forward-looking view is cognizant of the fact that the case may have consequences for current and future lawsuits.

If we focus backwards, we are free to engage in fundamental critique. That may include denunciation, repudiation, and condemnation; when we engage in critical analysis of this sort, we work to uncover spoken (or unspoken) assumptions, false or pernicious beliefs, misleading assertions, and unjust or racist premises underlying the court's arguments. We find and point out contradictions in the reasoning and analysis and

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[4] *See Johnson*, 21 U.S. at 543; STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 11–12 (2005) (explaining that *Johnson* is taught to first year law students and is considered a cornerstone of American law).

[5] For a previous attempt of mine to explain *Johnson v. M'Intosh, see generally* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims,* 28 GA. L. REV. 481 (1994). For an explanation of the meaning of *Johnson v. M'Intosh* that is close to my own, *see generally* Milner S. Ball, *Constitution, Court, Tribes,* 1987 AM. B. FOUND. RES. J. 1 (1987).

inconsistencies with other rules and principles that the legal system recognizes and defends. Critique of this sort undermines the justifications for particular rules of law or applications of legal doctrine. It frees us to imagine how the case would have come out differently if the judges had used alternative assumptions, arguments, or comparisons. Critique allows us to escape a legal construct so that we are not trapped by doctrine. It liberates us from the sense that the law has to be that way.

If we engage in this form of backward-looking critique, we may find troubling or even racist views in a legal opinion. When that happens, we may be led to reject a case entirely. We may imagine the far-reaching consequences of those racist views and be tempted to want to throw the case and its reasoning on the scrap heap. Some cases deserve this treatment. *Dred Scott* and *Plessy v. Ferguson* come to mind, as do some others.[6] *Johnson v. M'Intosh,* to many scholars, is such a case. It can be read to justify conquest, it provides a legal basis for colonialism, it denounces Indians as "fierce savages," and it undermines the property rights of Indian nations by subjecting them to overriding federal power while presenting false depictions of the way Indian nations lived on the land.[7] It is understandable that one might focus on all these pernicious aspects of the case and find nothing redeeming about it. It is understandable that we might want to sweep the opinion away entirely.[8]

But this way of reading cases has costs, especially when an opinion is still the law of the land and when it is unlikely to be formally overruled.[9] To a large extent, *Johnson* is still "good law"; it has not been overruled, at least not entirely. To be sure, it has been interpreted and altered by both case law and statutes, but it remains a foundational case in the field of federal Indian law.[10] Interpreting the case as relentlessly racist and as denying all property rights to Indian nations deprives Indian nations today of resources they might use to protect themselves and their property rights. A reading of *Johnson* that is relentlessly critical

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[6] *See* BANNER, *supra* note 4, at 11 (explaining that *Dred Scott*, *Johnson*, and others make up a body of cases law students are often taught to criticize).

[7] Johnson, 21 U.S. at 590.

[8] *See* BANNER, *supra* note 4, at 11–12 (explaining that many law professors view *Johnson* with disfavor).

[9] *See* Mathew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 604–05 (2008) (explaining the reduction in certiorari grants to Indian Law cases – showing that the potential for being overruled is low.).

[10] *Id.* at 593.

may lead us to overlook aspects of the opinion that may be helpful to those who are arguably being oppressed today by the unjust parts of the opinion.

If one wants to engage in public interest lawyering, if one wants to be a warrior for racial justice, if one wants to make the law better, one needs more than a broom to sweep away detritus. One needs weapons, ammunition, and armor. One needs construction tools, allies and materials with which to build. If a case is unlikely to be overruled and it can be read to support the interests of an oppressed group, then reading it as unrelentingly hostile to that group's interests throws a potential weapon away. If a case can be read narrowly so that interests we care about are harmed only a little rather than a lot, we have a choice about how to characterize the holding of the case. To ignore the positive aspects of a case — to ignore the potential of a narrow holding — is to disarm oneself in the battle for racial justice. It is to make your situation worse than it has to be; it amounts to capitulation rather than resistance. It promotes future injustices rather than stopping them.

There is sometimes an alternative way to read an unfavorable or unjust opinion. That is to *reconstruct* it in a forward-looking way that discards its unjust or racist aspects and keeps its helpful ones. Of course, one cannot pretend that racism is not there in the opinion. If it is there, it is there. But what one can *sometimes* do is to engage in the age-old lawyering task of generating a *narrow* holding rather than a *broad* one. Rather than interpreting *Johnson* to justify conquest, one can see if it is possible to read *Johnson* as a critique of conquest. If this is possible, then rather than interpreting *Johnson* as declaring that Indian nations have no property rights, or that Indian nations have been conquered and lost their sovereignty, we can read *Johnson* to defend those very rights. If this can be done, we can still criticize the parts of the opinion that are racist or which unjustly infringe on tribal rights and sovereign powers while recognizing the barriers that *Johnson* places to conquest and dispossession. When we try to read *Johnson* this way, it turns out that, despite its racist language and its limitations on tribal property rights, the *Johnson* opinion can be read as protective of both tribal property rights and sovereignty. Indeed, if read in this way, it is one of the most pro-Indian cases in Supreme Court history.

Dissenting judges often bemoan the horrible consequences the

majority has unleashed on the world. In so doing, they may exaggerate the scope of the holding and suggest that it is wider than it actually is. Such dissents can be valuable; they highlight the implications of rules and doctrines that the majority may not want to face. But such dissents can also "cut your nose to spite your face." If you are against a particular rule, an alternative way to write a dissent is to say what the majority opinion does *not* do. Dissents can limit the pernicious effects of an unfavorable ruling by carefully narrowing the circumstances in which the stated rule will apply in the future. This is a form of reconstruction because it reads the case so as to protect the interests one wants to protect to the extent one can.

The main reason to engage in forward-looking reconstruction as well as backward-looking critique is that Indian law is not merely of historical interest. The Indians did not vanish. They are here today. There are 567 federally recognized Indian nations in the United States, and *they are much in need of legal armor,* as they are in need of warriors for justice.[11] *If* we can read *Johnson* to protect tribal rights rather than to discard them, then Chief Justice Marshall's opinion can serve as a bulwark against property deprivations in the future. *Johnson* could be a dam that holds back the flood waters. *It could help prevent the continuation of conquest.* Protecting Indian nations from conquest is an urgent task of social justice. That is the main reason to read *Johnson* in a way that is careful rather than sloppy; that is why we must be exceedingly alert to what the case does — and does not — say.

When we read *Johnson* with an eye to minimizing the harm it causes and with the goal of stopping conquest, it becomes clear that Chief Justice John Marshall wrote an opinion that was both startlingly racist and startlingly critical of conquest.[12] He distinguished conquest from purchase and required tribal lands to be acquired in voluntary transactions rather than seized by force.[13] The mere assertion of military power over Indian nations was insufficient to end their property rights. The use of force, or the act of conquest, is the opposite of a voluntary purchase. He

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[11] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26,826–26,827 (May 4, 2016).

[12] *See Johnson*, 21 U.S. at 589–91 (Marshall speaks negatively on conquest, but refers to Indians as "fierce savages").

[13] *See id.* at 587, 593.

explained in the later case of *Worcester v. Georgia*[14] that conquest could only be justified if a war was defensive rather than offensive.[15] He noted in *Johnson* that "[t]he title by conquest is acquired and maintained by force."[16] While acknowledging that conquest had consequences that could not be undone,[17] he went on to explain *why conquest should not continue.*[18] Rather, future dealings with Indian nations should be accomplished through negotiation, treaties, mutually beneficial deals. He affirmed the right of Indian nations to refuse to sell their land if they did not want to give it up and to be protected from attack if they remained in peace. This was a formula, not for continued conquest, but for mutual respect and protection for tribal property rights. It was not a claim that tribes had no property rights at all. It is not Marshall's fault that the United States did not always comply with the rules he promulgated; but, it is our fault if we fail to recognize the legal barriers he sought to impose on the United States.

If we reconstruct *Johnson* as well as criticize it, we find something that will be quite surprising to many professors and students. The Supreme Court has written many opinions about tribal property rights, and some of them give Indian nations little protection or respect.[19] But while *Johnson v. M'Intosh* undermines tribal property rights in important ways, it is (in other ways) strikingly protective of them. *Johnson* threatens Indian title and sovereignty but it also defends them; *Johnson* limits tribal property rights and sovereignty but it also protects them from deprivation. *Johnson* is both a sword and a shield.[20] The sword is well-understood; the shield is not. It is time to right that wrong and reinstate the aspects of *Johnson* that protect Indian nations and Indian title. *Johnson* can be a weapon that helps stop conquest. Anything that can do that is something we should use rather than toss aside.

The most common misconception about Indian title is that it

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14 Worcester v. Georgia, 31 U.S. 515 (1832).

15 *Id.* at 546 ("The power of war is given only for defence, not for conquest.").

16 *Johnson*, 21 U.S. at 589.

17 *Id.* "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." *Johnson*, 21 U.S. at 588.

18 *See id.* at 592-93.

19 *See* Ball, *supra* note 5, at 12–13.

20 *See Johnson*, 21 U.S. at 589.

does not exist at all.[21] To see what I mean, all you need do is peruse the quote from the 1955 case of *Tee-Hit-Ton Indians v. United States* at the beginning of this article.[22] In explaining the meaning of Indian title, the Supreme Court said that it was "not a property right."[23] This is a statement usually made about licenses, which are defined as revocable permission to be on someone else's land.[24] A "license" is a technical property law term that denotes a right to be somewhere, but only with the owner's permission — permission that can be revoked at any moment for any reason.[25] The lack of permanence of such interests is what makes them seem not to be "property rights" despite the fact that they render the licensee a lawful entrant rather than a trespasser.[26]

This understanding of Indian title does not withstand scrutiny. In Part I below, I will explain why Indian title matters. Part II explicates the sources of the misconceptions about Indian title and why they are (mostly) misconceptions. Part III analyzes the real holding of *Johnson v. M'Intosh:* Indian title is full ownership by a sovereign Indian nation subject to a restraint on alienation and a right of first refusal in the United States. Indian title is an estate in land, but the package of rights it entails is different from the package associated with the typical fee simple.[27] Moreover, as the Supreme Court held in 1835, Indian title is "as

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21 LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS at *x* (2005). For example, in his excellent history of the case, Lindsay Robertson suggests that it holds that Indian nations had no title whatsoever. "Discovery," he says, "converted the indigenous owners of discovered lands into tenants on those lands. The underlying title belonged to the discovering sovereign. The indigenous occupants were free to sell their 'lease,' but only to the landlord, and they were subject to eviction at any time." *Id.* I believe this way of reading the case is misleading; it suggests that only one person can have title and it suggests that the discovery doctrine gave colonial powers the right to take possession of Indian lands without their consent and without compensation. When read in the context of other language in the opinion and later decisions of the Marshall Court, I read the case rather differently as I explain in this article.

22 *Tee-Hit-Ton Indians*, 348 U.S. at 279 ("[T]he tribes . . . held claim to such lands . . . under what is sometimes termed original Indian title or permission from the whites to occupy. . . . This is not a property right . . . ").

23 *Id.*

24 *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES § 8.2 (5th ed. 2010).

25 *See id.*

26 *See id.*

27 *See Johnson*, 21 U.S. at 592.

sacred as the fee simple of the whites."[28] If we view Indian title accurately, and in the appropriate context, perhaps we will have a new bulwark against conquest.

I. WHY INDIAN TITLE MATTERS

One might think that the topic of Indian title matters to American Indians alone, a group that comprises less than two percent of the population of the United States.[29] Or one might think that it is either of historical interest only, or a technicality like "privity of estate" with little practical significance. The truth is that Indian title is not a minor issue; it is neither a mere technicality nor an historical relic. To the contrary, Indian title is important, not only historically but today as well, and it is important both for Indians and for non-Indians for at least three reasons.

A. The Lessons of History

First, we cannot understand land titles in the United States without understanding where our titles come from and how we came to acquire them. Title cannot shift from one person to another unless the seller has the right to sell and the buyer has the right to buy.[30] On the seller side, we must remember that you can only convey what you own.[31] I could give you a deed to the Empire State Building and you would get exactly what I own — which is nothing. Similarly, a forger cannot convey good title.[32] Conversely, a buyer cannot acquire title if she has no right to do so or does so in an improper way.[33] One who acquires title by wrongful dispossession acquires nothing, unless the law mutates her unlawful occupation to lawful ownership through adverse possession or other such legal doctrines.[34] A peaceable possessor has the right to remain in possession unless someone can prove

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

[29] *Indian Country Demographics,* NAT'L CONGRESS OF AM. INDIANS (Aug. 31, 2016), http://www.ncai.org/about-tribes/demographics.

[30] *See* SINGER, *supra* note 24, at §3.6.2.

[31] Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 595–96 (2005).

[32] *See id*; SINGER *supra* note 24, at 890–891.

[33] *See id.*

[34] *See id.*

they have a better title to the land.[35] A bank that does not own the beneficial interest in a mortgage has no power to foreclose on the property even if the possessor has defaulted on the mortgage payments.[36]

Whether we own the land we claim to own depends on whether our seller had the right to pass title to us, whether we had the right to acquire title, and whether we used lawful procedures to transfer the title from grantor to grantee.[37] Indian title matters because *all land titles in the United States originate in Indian title.* It is of more than passing interest whether title was ever taken from Indian nations and acquired by non-Indians in a lawful manner. If an Indian nation had title to its land and that title never passed lawfully to anyone else, then non-Indians living on the land may be living on tribal property.[38] Lest you think this is a theoretical proposition, I can assure you it is not. It is the case for at least several counties in the state of New York.[39] This would not necessarily mean that the Indian title owner would have a right to evict the non-Indian possessors; it does mean that pretending the tribe does not have title wrongfully erases both history and current property rights in a manner that denies Indian nations equal respect and dignity as well as equal protection of the laws.

There is another way this matters. Even when "title" shifted from an Indian nation to the United States, it may be contingent on certain obligations. Many treaties included promises by the United States to provide housing, education, sustenance.[40] Those promises often had no time limits.[41] Federal Indian programs that provide for education and health care and other benefits for Indians and Indian nations are not simply gratuities or welfare

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[35] *See id.* at 595.

[36] Yvanova v. New Century Mortgage Corp., 365 P.3d 845, 856 (Cal. 2016); Sciarratta v. U.S. Bank Nat'l Ass'n, 247 Cal. App. 4th 552, 564 (2016); U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 53 (Mass. 2011).

[37] Lohmeyer v. Bower, 227 P.2d 102, 110 (1951).

[38] *See* John Edward Barry, *Oneida Indian Nation v. County of Oneida: A Tribal Rights Action and the Indian Trade and Intercorse Act*, 84 COLUM. L. REV. 1852, 1872 (1984).

[39] *See* Cty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985); Joseph William Singer, *Nine-Tenths of the Law; Title, Possession & Sacred Obligations,* 38 CONN. L. REV. 605, 629 (2006) (explaining that the Oneida Indian Nation never lost title to some of its property illegally seized by the state of New York in the 1790s).

[40] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (Nell Jessup Newton ed., 2012).

[41] *Id.* at § 1.06.

programs. They are mortgage payments that the United States makes for the right to continue to occupy tribal land. Indian nations sacrificed a great deal so that the United States could establish itself as a nation on this continent. If we think Indian nations had no property rights that were transferred to the United States, we look at things one way. If we recognize that Indian nations had title to the lands that comprise the United States today and if we honor the commitments that the United States made to Indian nations, we look at things in quite another way.

Prevailing justifications for property ownership focus on first possession as the origin of title.[42] If possession leads to ownership, then non-owners are not legally free to dispossess the first possessor. If our land titles originate in the *dispossession* of first possessors, that places subsequent titles in doubt.[43] It either means that land titles are illegitimate (because they originate in acts that violate the property rights of the true first owners) or it means that current property rights are legitimate *for reasons other than protection of first possession.*

If the former is the case, then land ownership today has a shaky foundation and uncertain legitimacy. If the latter is the case, we need to rethink the normative justifications for property rights. If we multiply the justifications for property rights, then we need more sophisticated ways to explain when one principle applies rather than another. We need to engage in normative argument and judgment to determine who owns a particular piece of land. While we may reach agreement on this question, we may not.

Understanding property rights as embodying multiple values and potentially conflicting norms means that it may be incumbent upon us today to determine whether a loss of property was justified. If it was not justified, we will feel moral pressure to do something about it — at the very least, to acknowledge the injustice. But we may do more than that. Understanding the injustice of current property distributions may undermine our confidence in the rights of current owners. We may uncover the need for restorative justice. Complicating the normative justifications for property rights and understanding the unjust origins of current distributions turns property rights into a

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[42] Gregory S. Alexander, *The Complexities of Land Reparations,* 39 LAW & SOC. INQUIRY 874, 887–88 (2014).

[43] *See id.*

political question and a question of justice. That may be a good thing or a bad thing but it is not a minor thing.

What is the current significance of the historical dispossession of Indian nations? While some land transfers can be understood as voluntary and mutually beneficial, many were not.[44] In such cases, one may believe that it is impossible to fully restore title to Indian nations given the occupation of Indian lands by millions of non-Indians. But that does not mean that we are morally free to ignore or suppress the recognition of the unjust transfer of American lands from one race of people to another. Nor does it mean that we have no current obligations to engage in appropriate reparations or restorative justice. Most important, it does not mean that we are free to continue to disregard Indian property rights by repeating the mistakes of the past. We are not free, for example, to ignore the sovereign status of Indian nations or their reserved powers over their own lands.[45]

B. The Needs of the Future

The second reason Indian title matters is that Indian nations did not vanish into the mists of history. Indian nations exist today and they hold property in various forms, one of which is "Indian title." Indian title is often taught by property law professors as if it were a thing of the past, as if it were an historical relic.[46] But if the only time Indian title is mentioned in a property law course is when the teacher considers the origins of property rights, students will get the impression that Indians used to own property, that they were dispossessed, that this was a terrible thing like slavery, but that *this is all in the past.* But American Indians did not vanish and Indian title is not a thing of the past. Indians are a significant portion of the population living within the geographic borders of the United States and Indian nations own a significant amount of the land in the United States.[47]

Misperceptions about the legal rules governing Indian title matter today because those misunderstandings can lead to *current and future failures to respect Indian property rights.*

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[44] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 40.

[45] *See id.* at § 1.07.

[46] Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L. J. 763, 767 (2011).

[47] *See Indian Country Demographics, supra* note 29.

Those failures are evident in court opinions from the Supreme Court on down.[48] They are evident in decisions of politicians; they are evident in attitudes of the general public across the country.[49] It is still the case today that the desire of non-Indians for access to tribal lands leads non-Indians to argue that Indian title has been completely extinguished. These arguments persist despite the fact that the traditional — and still subsisting — legal rules governing extinguishment of Indian title say nothing of the kind.

I do not mean to argue that Indian title is never respected by the United States courts, the Congress, or the President. There are striking instances of legal respect for and protection of tribal property rights.[50] At the same time, judges and politicians today sometimes treat tribal property as less worthy of legal protection than property owned by non-Indians.[51] *It is that persisting, current injustice that matters,* and it could not happen without the normative belief that Indian title does not matter. That belief is based on incorrect understandings of both law and history. It is that incorrect understanding that we must correct. The problem is not just widespread belief in a false history; nor is it just a problem of ignorance. The problem is that denigration of Indian title allows power holders to authorize dispossession or intrusion on Indian lands today. To be absolutely clear, *the problem is one of continuing conquest.*

An independent reason that Indian title matters is that it is a recognized estate in land. Property law professors often enjoy teaching future interests, servitudes, and other technical packages of property rights.[52] Distinguishing among the various

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[48] *See* Ball, *supra* note 5, at 11–12.

[49] *See* Joseph William Singer, *The Indian States of America: Parallel Universes & Overlapping Sovereignty,* 38 AM. INDIAN L. REV. 1, 4 (2014).

[50] *See, e.g.*, Lynda V. Mapes, *Tribes prevail, kill proposed coal terminal at Cherry Point,* SEATTLE TIMES, May 9, 2016 (updated May 10, 2016), http://www.seattletimes.com/seattle-news/environment/tribes-prevail-kill-proposed-coal-terminal-at-cherry-point/ (U.S. Army Corps of Engineers agrees not to grant a permit for a bulk-shipping coal port because it would infringe on the Lummi Nation's treaty-protected fishing rights); Phuong Le, *Feds deciding if coal-export project violates tribal rights,* AP, Apr. 24, 2016, http://www.bigstory.ap.org/article/70163a90103946efb7afdd8860ebbd41/feds-deciding-if-coal-export-project-violates-tribal-rights.

[51] *See* Singer, s*upra* note 46, at 768 (citing U.S. v. Navajo Nation, 129 S. Ct. 1547 (2009)).

[52] Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L. J. 1287, 1293 (2014).

estates is a staple of first year property classes.[53] Indian title is an estate in land that is different from the fee simple, the fee simple determinable, the life estate, etc. It has its own set of rules, norms, rights, and obligations. To spend significant time teaching the rule against perpetuities or mortgages or life estates while failing to teach students about the meaning of Indian title suggests that students have no reason to understand the property rights of Indian nations, despite the fact that they own a significant amount of land in the United States and that many non-Indians will come into contact with Indian nations and Indian lands.[54] Not only do non-Indians enter Indian lands for various reasons but many non-Indians own land within the borders of Indian country. And many non-Indian businesses have commercial relations and contracts with Indian nations that require knowledge of tribal property rights. Leading students to think that Indian title is the same as a fee simple leaves them ignorant of the legal rules governing such lands. Of course property law teachers cannot teach everything; much of the law school curriculum revolves around property rights regimes of various sorts. But failing to educate students about Indian title is problematic for an independent reason. As Chief Justice Marshall's harsh and racist language suggests, understanding the current status of Indian title is crucial if we want to shape U.S. law to promote racial justice, as the next section explains.

C. Racial Justice

A third reason Indian title matters is the thorny problem of race. We need to understand both the racial origins of property rights and the current significance of past racial injustices in the allocation of property titles. United States tradition holds that "all men are created equal," but of course we have not consistently held to that principle.[55] Instead, we have often discriminated on the basis of race, sex, national origin, and other factors.[56] Property and race are not two separate subjects; one cannot understand property or property law in the United States without talking about race.[57]

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[53] *Id.*
[54] *See* Singer, *supra* note 46, at 773–74.
[55] *See* Ball, *supra* note 45, at 121.
[56] *See* Singer, *supra* note 46, at 776–77.
[57] *See* Brenna Bhandar, *Property, Law, and Race: Modes of Abstraction*, 4 UC

We lawyers often talk about property rights in a manner that is divorced from social context. "Normal" property rights are conceptualized as based on some abstract piece of land — sometimes called Blackacre — with owners who have no particular race or sex or national origin.[58] Ownership is treated as unproblematic. We generally talk about "owners" and "ownership" or "estates in land." Race and sex enter the picture, if at all, only later, when we ask whether someone has engaged in an individual act of discrimination. But this way of thinking about property rights distracts us from underlying truths. It prevents us from seeing the historical, social, and institutional forces and structures that allocated property rights in the past in ways that did not treat individuals with equal concern and respect. It is a kind of affirmative action for dominant, powerful social groups.

Most disrespect for Indian title comes, not from a conscious intent to discriminate on the basis of race, but from an honest belief that tribal rights have been extinguished.[59] Politicians and judges who ignore tribal property rights do so because they believe those rights were divested long ago. They are willing to acknowledge past injustices but do not see how they have any current significance.

The false belief that the United States "conquered the Indians" and extinguished their property rights causes decision makers to interpret the property rights of Indian nations today as an inferior type of property right or even as not a property right at all.[60] It allows non-Indians to disrespect tribal property rights without realizing they are interpreting the law so as to give less protection to property owned by tribes and tribal citizens than they would give to property owned by non-Indians. This attitude protects non-Indians from the realization that they are denying property rights on the basis of race. Non-Indians are willing and able to engage in racial discrimination partly because they do not understand that they are engaged in racial discrimination.[61] They do not understand this because they have a false picture of

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IRVINE L. REV. 203, 207–08 (2014).

[58] BLACK'S LAW DICTIONARY 162 (7th ed. 1999) (defining and identifying *Blackacre*).

[59] *See* Singer, *supra* note 49.

[60] *See id.*

[61] *See* Derald Wing Sue et. al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOLOGIST 271, 271 (2007).

the history and a false understanding of the legal basis for current tribal property rights. It is this *current*, often unconscious, failure to grant Indian nations equal rights to property that must be confronted and criticized. To do that, we need to understand how Indian title is viewed today and what is inaccurate or illegitimate about that understanding. We need to unravel the racial context of property rights so that we do not continue past injustices.

D. The Importance of Johnson v. M'Intosh

Johnson v. M'Intosh plays a key role in understanding current tribal property rights. To be precise, the current *mis*-understanding of *Johnson* is part of what enables current judges and citizens to disrespect Indian title. *Johnson* has come to mean something other than what Chief Justice John Marshall meant it to mean. The opinion has been read to say something other than what it actually says. *Johnson* has come to stand for the proposition that Indian nations had no property rights that the white man was bound to respect.[62] But this is emphatically *not* what Marshall wrote in his opinion.[63] Indeed, Marshall wrote — and meant — the precise opposite.[64]

While chock-full of racist language and justifications for conquest, the *Johnson* opinion is also strongly critical of that very conquest.[65] Marshall acknowledged past conquest and the injustices associated with it. The point of his opinion was to stop it from happening in the future. We the citizens of the United States, he argued, have acted unjustly in the past; because we hold the truth that all human beings are created equal, we should no longer disrespect the property rights of the first Americans. That is the true holding of *Johnson v. M'Intosh*. Far from justifying conquest, Marshall sought to stop it from happening

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[62] JESSE DUKEMINIER ET. AL., PROPERTY, 16 (Vicki Been et al. eds., 7th ed. 2010) ("But by the time of the decision in *Johnson* some 30 years later, conventional wisdom was to the opposite effect: The Indians were not owners but merely had a right of occupancy.").

[63] Johnson v. M'Intosh, 21 U.S. 543, 574 (1823) ("[T]he rights of the original inhabitants were, in no instance, entirely disregarded . . . They were admitted to the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . [D]ifferent nations of Europe respected the right of the natives.").

[64] *Id.*

[65] *Id.* at 589–90. ("[W]e do not mean to engage in the defense of those principles which Europeans have applied to Indian title").

anymore.

So Indian title is not a topic that is of minor interest to a few people. Nor is it of merely technical or historical interest. *Indian title matters.* If we as a nation are committed to treating each person equally under the law, then discriminatory failures to respect tribal property rights betray our most fundamental constitutional values.[66] If we believe in democracy and self-determination for all peoples, then we should care about current failures to respect Indian title. And if it is the case that we are currently engaged in actions that fail to honor tribal property rights, then conquest is not merely a thing of our distant history. *Conquest is happening today*. The point is not only to have a technically correct understanding of property law; *the point is to stop engaging in conquest.* That is why we need to understand what Indian title is.

II. HOW THE LANGUAGES OF CONQUEST AND TITLE MISLEAD US

A. Conquest and Racial Hierarchy

It is easy to see how one can read Chief Justice John Marshall's opinion in *Johnson v. M'Intosh* and conclude that Indian title is a nullity. The opinion is replete with language that justifies colonialism and racial superiority. All one has to do is to focus on language in the opinion that suggests that "conquest" gave "title" to the United States,[67] along with the notion that tribal transfers of property to anyone other than the United States cannot be "recognized in the Courts of the United States[.]"[68] Add to that a description of the tribes' property as a "right of occupancy"[69] — a right that does not correspond to any recognized estate in land and which pointedly lacks reference to "title" — and the picture is complete.[70]

We must understand that each of these words (conquest, title, right of occupancy) has a meaning that can only be gleaned

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66 U.S. CONST. amend. XIV, § 1.

67 *Johnson*, 21 U.S. at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").

68 *Id.* at 572.

69 *Id.* at 574 ("They were admitted to be the rightful occupants of the soil . . . ").

70 *See id.* at 572–74.

from context — both the context of other language in the opinion and the historical context, including doctrines of international law. Another problem is that this reading of *Johnson* omits other language in the opinion, especially several references to the "Indian title of occupancy" and a short but important paragraph that substantially limits the meaning of the words that seem to deny Indian title, as well as language that clearly recognizes that conquest was incomplete.

The first problem is the association of conquest with transfer of title. The word "conquest" appears more than two dozen times in the *Johnson* opinion. One could be forgiven for thinking it means what it says, that conquest is an historical fact and that it entails a complete loss of control over a nation's land, its people, and its laws. If "the Indians" were "conquered," then they have lost the power to control their territory. While one might imagine that this loss entails a loss of sovereignty only, the language in the opinion suggests that conquest led to a loss of "title" as well as sovereignty. That is because conquest gave "title" to the United States and we are used to thinking that, at any point in time, only one person can have title to land (unless they hold title concurrently through a tenancy in common or the like).[71] For these reasons, many professors and students read the decision as holding that "conquest" extinguished the Indian "title" and transferred that title to the colonial powers — including the United States.[72]

Marshall explains that the colonial powers all adopted the "discovery doctrine" which held that "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[73] This might be read to suggest, not only that a conqueror may choose to extinguish Indian title but that extinguishment is a necessary result of conquest. More importantly, the opinion famously asserts that "[c]onquest gives a title which the Courts of the conqueror cannot deny . . . "[74] This phrasing suggests that the conqueror acquires title from the conquered nation. And if only one person can have title at a time — a natural assumption — then conquest transfers title from the conquered nation to the conquering nation.[75]

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[71] *See* DUKEMINIER ET. AL., *supra* note 62, at 319.
[72] *Johnson*, 21 U.S. at 589–91.
[73] *Id.* at 587.
[74] *Id.* at 588.
[75] DUKEMINIER ET. AL., *supra* note 62, at 11 ("Conquest is the taking of

In observing that "[t]he title by conquest is acquired and maintained by force,"[76] we are led to believe that conquest inevitably leads to loss of title.

The second problem is that, even if one might think that a loss of sovereignty does not necessarily mean a loss of title to land, the language in the opinion suggests that Indians are racially or culturally inferior to other conquered peoples and thus cannot retain title after conquest even if other conquered peoples might be allowed to do so.[77] Ordinarily, Marshall writes, "[h]umanity . . . has established . . . a general rule[] that the conquered shall not be wantonly oppressed. . . ."[78] This usually means that the conquered people are absorbed into the conquering nation and *allowed to keep their property*.[79]

"The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people."[80] "Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired. . . ."[81]

But this was not the case with the Indians. According to Marshall, Indians were "fierce savages, whose occupation was war. . . ."[82] The message here is one of racial inferiority. Indians are the opposite of "civilized"; they are "savages." Indians seem not to have the intelligence to cultivate the land and promote the comforts of civilized society. Their "subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness. . . ."[83]

According to Marshall, civilized nations live in peace and cultivate the land, but the Indians were savages who lived in a state of war and were limited to scavenging in the wilderness.[84] At the same time, Indians can be admired for some of these savage qualities; "they were as brave and as high spirited as they were fierce."[85] The result of their bravery and savagery was

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possession of enemy territory through force, followed by formal annexation of the defeated territory by the conqueror.").

76 *Johnson*, 21 U.S. at 589.

77 *See id.* at 590.

78 *Id.* at 589.

79 *See id.*

80 *Id.*

81 *Id.*

82 *Johnson*, 21 U.S. at 590.

83 *Id.*

84 *Id.*

85 *Id.*

"[f]requent and bloody wars"[86] which led to the advance of the white population, reducing the Indians' hunting grounds, leaving them no game to live on. Unable to learn to cultivate the land or live in peace, they fled from civilized society. "The game fled into thicker and more unbroken forests, and the Indians followed."[87] Unlike civilized men whose cultivation means "possession" which leads to ownership, the Indians left no imprint on the land, living off its wild creatures, and remaining wild themselves.

Marshall concluded: "That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances."[88] Unlike the Spanish occupants of Florida or the French occupants of Louisiana, the Indians could not be trusted with title to land.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.[89]

If we follow this language to its conclusion, it means that the Indians never had full title to the land because they did not cultivate it, and even if they had title, they refused to assimilate to the new culture or live in peace and adopt civilized ways. They either engaged in constant war, thereby sacrificing the benefits of civilization, or they fled because they would not learn to till the soil.

This interpretation of *Johnson* is consistent with the arguments made by the defendants. According to the defendants, this line of reasoning means that the Indians never had title to the land at all.

> On the part of the defendants, it was insisted, that the uniform understanding and practice of European nations, and the settled

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[86] *Id.*
[87] *Id.* at 590–91.
[88] *Johnson*, 21 U.S. (8 Wheat.) at 591.
[89] *Id.*

law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals.[90]

If this is true, the Indians were, as John Locke would say, in a "state of nature." Locke argued in 1690 that hunters may acquire property in the game they subdue but they do not acquire property rights in the land.[91] Gathering and hunting do not amount to "possession" in Locke's view because they do not include cultivation or improvement.[92] The defendants in *Johnson* saw this state of affairs in the Indian way of life, which exhibited "a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property [in the land] capable of being transferred."[93] Discovery of the New World gave colonists powers to claim title to land because the Indians had not yet done so. According to the defendants, "[d]iscovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."[94]

With all this talk of conquest and all this association of conquest with title, readers may be forgiven if they think that the holding of *Johnson v. M'Intosh* is that the Indians never had title, or if they had title, they lost it because of conquest. Indian title arguably does not exist either because the Indians never acted so as to possess the land in the first place or because they wandered away or because they refused to live a civilized life claiming and improving the land. The Indians' racial inferiority and lack of sophistication doomed any claims they might make to ownership of the land.

B. The Concept of Split Title

What is wrong with this way of reading the opinion? First, while Marshall talks about the effects that "conquest" had on "title," he never says that the Indian nations had no title to land.[95] Indeed, *he says exactly the opposite.* The opinion refers

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[90] *Id.* at 567.

[91] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 30–32, 37, at 307–09, 312–13 (Peter Laslett ed., 2d ed., Cambridge University Press 1967) (1690) (explaining Locke's theory of the origins of property rights in land).

[92] *Id.*

[93] *Johnson*, 21 U.S. (8 Wheat.) at 569.

[94] *Id.* at 567.

[95] *Id.* at 571–74.

twice to the "Indian title of occupancy"[96]; once to the "title which occupancy gave to them"[97]; six times to "Indian title"[98]; and once to "the title of his tribe."[99] The opinion is replete with references to Indian title. This "Indian title" coexists with the title held by the colonial powers, including the United States.[100] Focusing on the idea that conquest gave "title" to the United States while ignoring the many references to "Indian title" is certain to be misleading. It overlooks the obvious fact that title has been split between the colonial powers and the Indian nations.

The colonial (or federal) title is called by many names. Only rarely is it referred to an unqualified "title." Marshall variously refers to the United States title as the "absolute ultimate title,"[101] the "exclusive title,"[102] the "title of discovery,"[103] the "title given by discovery,"[104] the "title of any Christian people,"[105] the "title of their respective sovereigns,"[106] "title to lands occupied by the Indians,"[107] "absolute title,"[108] the "title by conquest,"[109] the "title of the whole land,"[110] the "complete title,"[111] the "complete ultimate title,"[112] and "the title of the crown."[113] This bewildering variety of names is a clue. It implies that the rights owned by the United States are something other than unitary "title"; *the U.S. title needs a modifier* and that means that its title is qualified. The U.S. title is qualified *because it coexists with Indian title.*

If *both* the Indian nations *and* the colonial powers had "title," then this means that *title was split between them.* It was not the case that the conqueror denied Indian title; the conqueror claimed certain rights with respect to Indian lands such as the power to limit Indian title and even to extinguish it. What the

96 *Id.* at 587, 592.
97 *Id.* at 588.
98 *Id.* at 589, 592–93, 600, 602–03.
99 *Johnson*, 21 U.S. (8 Wheat.) at 593.
100 *See id.* at 592.
101 *Id.* at 592.
102 *Id.* at 574, 603.
103 *Id.* at 575.
104 *Id.* at 576.
105 *Id.* at 577.
106 *Johnson*, 21 U.S. (8 Wheat.) at 581–82.
107 *Id.* at 583.
108 *Id.* at 587–88, 591.
109 *Id.* at 589.
110 *Johnson*, 21 U.S. (8 Wheat.) at 595.
111 *Id.* at 588, 596, 603.
112 *Id.* at 603.
113 *Id.*

colonial powers did *not* claim was that Indian nations had no title of their own.[114]

Chief Justice Marshall recognizes explicitly that property rights can be split between two parties and that the claim of title in the United States can coexist with a claim of title in Indian nations.

The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.[115]

In other words, both the Indian nations and the United States have some sort of "title" and this arrangement is no different than the familiar split between the rights of landlords and tenants.[116] A landlord may have "seisin in fee" while the tenant has a "lease for years."[117] In modern language we say the tenant owns the lease, or has the right of possession under a term of years, or a periodic tenancy while the landlord has a future interest called a reversion combined with contractual rights and covenants.[118] Asking who "really has title" is beside the point; the property rights in a leasehold are split between landlord and tenant.[119] Indian title is exactly the same. The fact that discovery gives "title" to the colonial power does not mean that "Indian title" is not a property right or that Indian nations do not have "title to land." The question is not who has title, but *what rights are retained by tribes and which are asserted by the conquering nation.* While the *Johnson* opinion clearly has more

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114 *See* BALL, *supra* note 5, at 25–26

> (A close look at the opinion reveals that Marshall's version of the doctrine of discovery has small consequences for the tribes. The Indian property interest . . . has all the indicia of fee simple except this: unless a non-Indian purchaser is licensed by the discovering sovereign or that sovereign's successor, the non-Indian purchaser takes only the Indian's interest. . . . The plaintiff's claim to the land [in *Johnson]* was defeated principally because the Indians themselves had extinguished plaintiffs' interest.).

115 *Johnson*, 21 U.S. (8 Wheat.) at 592.

116 *Id.*

117 *Id.*

118 *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 756 (1835) (referring to the colonial title as an "ultimate reversion in fee").

119 JAMES H. BACKMAN, *Overview of Leasehold Estates*, *in* 4 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 39.01 (David A. Thomas ed., 2016).

than its share of racist language, and offensive and inaccurate depictions of Indian peoples, it is easy to lose sight of the fact that Chief Justice Marshall *does not adopt the argument proposed by defendants.*[120] If Indians were mere wanderers who did not have "title" to land because they did not cultivate it, there would have been no talk of Indian title. Yet, as I have documented, the opinion refers to "Indian title" many times. Moreover, Chief Justice Marshall repeatedly asserts that the tribes involved in the case "were in rightful possession of the land they sold."[121] Possession is a technical word in property law, and it is not a word we use for licensees.[122] Dinner guests have licenses, but they do not have possession. Tenants have possession, and their rights comprise a recognized estate in land.[123] This means that we need to read very carefully the language of "title," "occupancy," "possession," and "conquest" to determine what rights were asserted by the United States and other colonial powers and what rights were retained by the Indian nations under federal and international law. If one reads the opinion the way common law lawyers read opinions, one can see that the rhetoric in the opinion needs to be interpreted in light of the *facts* of the case and its specific *holding*. When we do this it will become evident that it is simply not true that the United States had "title" to the land and the Indian nations had no property rights at all. Indeed, the precise opposite is true.

The Indian nations had "title" to the land while the United States possessed nothing but a contingent future interest that would never become possessory without the voluntary assent of the Indian nations. Contrary to popular belief, *Johnson* recognizes and protects Indian title and limits the powers of the United States to expropriate it. This truth has been obscured because of the confusing language of conquest and title peppered throughout the *Johnson* decision. It is time to focus on what the holding of *Johnson* really is.

III. WHAT INDIAN TITLE REALLY IS

Indian title is an estate in land like a life estate or a fee simple

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120 *Johnson*, 21 U.S. (8 Wheat.) at 572–74, 605.

121 *Id.* at 572.

122 21 Frumer & Friedman, *Personal Injury Actions, Defenses, and Damages* § 105.06 (Matthew Bender, Rev. Ed., 2016).

123 *See* BACKMAN, *supra* note 119, at § 39.03.

determinable. That means that it represents a particular bundle of rights defined by statute and common law—in this case federal (not state) statutes and federal (not state) common law.[124] While many Indian nations today own some of their lands in fee simple, many also own land held in the form of "Indian title," one version of which is today referred to as land held in "trust status."[125] Contrary to what many property professors and law students think, Indian title is not a mere license. Licenses are revocable permission by the owner to come onto the owner's land.[126] Indian title is not a license; Indian title is *full ownership of land by a sovereign Indian nation.* While it is true that the exact rights that go along with Indian title have changed over time, it has never been the case that United States law treated tribal owners as mere licensees. More importantly, Chief Justice Marshall's opinion in *Johnson v. M'Intosh* cannot plausibly be read as denying Indian nations property rights in their lands.

A. Full Ownership by a Sovereign Subject to a Restraint on Alienation

According to *Johnson v. M'Intosh,* Indian title gives the tribe full control of its land. Indian title is subject to one *and only one* limitation. Indian title is subject to a *restraint on alienation*.[127] Indian title lands cannot be transferred *in fee simple* to any person or entity other than the United States.[128] That does not mean tribal lands cannot be transferred at all; it means they cannot be transferred "in fee simple" to another sovereign, such as France or Great Britain or the state of New York, or to an individual like George Washington, *unless the United States approves the transfer.* This restraint on alienation has its origins in international law and colonial practice.[129] It was formalized by Great Britain in the Proclamation of 1763[130] and it was adopted by the United States in both the Northwest Ordinance of 1787[131] and the Trade and Intercourse Act of 1790 (the "Non-Intercourse

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124 COHEN, *supra* note 40, at § 15.04, at 1008.
125 *See id.* §15.03, at 997–99.
126 Frumer & Friedman, *supra* note 122.
127 *Johnson*, 21 U.S. (8 Wheat.) at 592.
128 *Johnson*, 21 U.S. (8 Wheat.), at 587–88.
129 *Id.* at 573–74.
130 King George III, *By the King, A Proclamation*, THE LONDON GAZETTE (Oct. 4, 1763), https://www.thegazette.co.uk/London/issue/10354/page/1.
131 Northwest Territory Ordinance of 1789, ch. 8, 1 STAT. 50, 51-52.

Act")[132] as well as in the federal common law doctrine described and adopted by the *Johnson v. M'Intosh* opinion itself.[133]

What does it mean to say that Indian title can be transferred without the consent of the United States but it cannot be transferred *in fee simple* without the consent of the United States?

First, it is important to know that federal law prohibited non-Indians from entering Indian country without the consent of the United States. This prohibition on entry was codified in both the Northwest Ordinance and the Non-Intercourse Act.[134] Those prohibitions were designed to protect Indian nations from invasion by non-Indian settlers, partly to ensure that tribes could control their own territories, and partly to prevent war.[135] Settlement by non-Indians without the consent of the tribe was a source of friction, and often led to violent confrontation which sometimes resulted in settlers seeking protection from the United States.[136] To stop these conflicts from arising, both Great Britain and the United States sought to control entry into Indian country by non-Indians.

In regulating entry to Indian country, the United States also recognized the rights of the tribes to exclude others from tribal lands. To enter Indian lands, non-Indians needed the consent of *both* the United States and the Indian nation itself.[137] These twin regulations enabled tribes to exercise the right to exclude non-owners, one of the core rights associated with ownership of property and *a right that a licensee does not have.*[138] Indian title includes the right to exclude others from the land and that remains true today.[139]

Second, how can a tribe transfer property but not transfer "fee simple" title? The answer is that a tribe is a sovereign governed by its own law. Tribes had, and currently have, political and legal processes to regulate land owned by the tribe.[140] Indian

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132 COHEN, *supra* note 40, at §1.03[2], at 35.

133 *Johnson*, 21 U.S. (8 Wheat.) at 573–74.

134 COHEN, *supra* note 40, at §1.02[3], at 22, §1.03[2], at 35–36.

135 *Id.* at §1.03[2], at 36; *Johnson*, 21 U.S. (8 Wheat.) at 590–92.

136 Northwest Ordinance, ch. 8, 1 STAT. 50, 51-52. *See Johnson*, 21 U.S. (8 Wheat.) at 589–91.

137 COHEN, *supra* note 40, at §4.01[1][b], at 211, §15.08[1], at 1046.

138 *See* BLACK'S LAW DICTIONARY 1061 (10th ed. 2014).

139 COHEN, *supra* note 40, at §4.01[2][e], at 220–21, §15.08[1], at 1045–46.

140 *Id.* at § 4.01[2][c], at 217, at § 4.01[2][e], at 221. *See Johnson*, 21 U.S. (8 Wheat.) at 593.

nations have their own tribal property law. One way to exercise power over tribal land is to allow others to use it in particular ways — for homes, for hunting and gathering, for agriculture, for spiritual life, for manufacturing, for extracting oil and gas, or for other purposes. Anyone who obtains property rights from a tribe holds those rights under tribal law.

One way to understand the ruling in *Johnson* is that the tribes transferred lands to purchasers, then lived through the War for Independence, and then agreed in negotiations with the United States to transfer those same lands to the United States.[141] How could the tribes transfer lands to the United States they had already transferred to individual purchasers? The answer is that those initial transfers were subject to tribal law and if the tribe chose to dispossess the original purchasers, and it had a right to do so under tribal law, then it had the right and the power to reclaim the land and transfer it to the United States.

Marshall explained it this way:

> Another view has been taken of this question, which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and *is held under them, by a title dependent on their laws.* The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. *The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection,*

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[141] *Johnson*, 21 U.S. (8 Wheat.) at 593–94. It has been documented however that the lands claimed by the plaintiffs in *Johnson* were not actually the same as the lands claimed by the defendants. *See* SINGER, *supra* note 24, at 91.

> *and subject to their laws.* If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.[142]

What made this procedure acceptable to the United States was the fact that both the Northwest Ordinance and the Trade and Intercourse Act, as well as international and federal common law, prohibited the tribe from transferring titles to individuals that would pass out of tribal control.[143] That was the restriction that prevented the tribe from transferring property *in fee simple.* Because of the restraint on alienation attached to Indian title, only the United States could acquire title that could then be transferred to non-Indians on the open (non-Indian) market *free from tribal law*.[144]

To understand what it means to say that Indian nations cannot transfer fee simple title to land to anyone other than the United States, we must focus on what fee simple title is. Fee simple title is *defined by state common law* and, under that law, fee simple title is both alienable and inheritable.[145] Its key feature is its *transferability* by the owner either during her lifetime or at her death.[146] Importantly, the owner has the power to transfer the property *to anyone at all, at any time, for any reason.*[147] The key to the fee simple is *alienability by the owner* on the open market to any buyer, or transferability as a gift to a person of one's choosing, and the power to designate future owners at one's death or to leave the property to one's heirs as defined by state statutes.[148]

Johnson denies these powers to Indian nations. The United States prohibited the tribe from granting non-Indians the power to transfer tribal land to other non-Indians in fee simple before the United States had arranged for the purchase of the tribal

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142 *Johnson*, 21 U.S. (8 Wheat.) at 592–93 (emphasis added).

143 *Id.* at 592–94: Northwest Ordinance, ch. 8, 1 STAT. 50, 51–52.

144 *See* Ball, *supra* note 5, at 26 (explaining that title purchased from tribes by non-Indians without the consent of the United States "would be held under the law of the tribe").

145 SINGER, *supra* note 24, at 607.

146 *See id.* at 78, 607–08.

147 *See id.*

148 *See id.*

lands from the tribe itself.[149] There is a precondition to making tribal land freely alienable on markets in which non-Indians participate without tribal consent. That precondition was the assent of the United States and, it turns out, the assent of the tribe as well. This means that *Johnson v. M'Intosh* was partly a conflict of laws decision. It is important to see why.

B. Johnson v. M'Intosh as a Conflict of Laws Decision

At the time that *Johnson* was decided, the United States had a political and legal practice of recognizing Indian nations as both sovereigns and owners of their land.[150] While non-Indians clearly wanted tribal lands, the United States followed the earlier practice of Great Britain in centralizing power over any transfers of land from Indian nations to the central colonial government.[151] The purpose of this policy was both to prevent war and to obtain tribal title in an orderly and peaceful fashion.[152] The practice was to enter a treaty with the Indian nation.[153] That treaty was an agreement between sovereigns and it would arrange a cession of land from the Indian nation to the United States.[154] Once in the hands of the United States, the land became federal land which the United States could transfer either to the states or directly to U.S. citizens or noncitizens. At that time in the early republic, the transfer of title altered the boundaries of Indian country—the territory over which the tribe had sovereign powers. Once the property left the hands of the tribe it was subject either to federal law (while it remained in the hands of the United States) or to state law (once it was transferred to non-Indian owners and assuming that the land was located within the borders of a state).[155]

All this means that, at the time the *Johnson* opinion was written, fee simple property rights were defined and regulated by state law. *Johnson* held that the only way property could be

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[149] *See Johnson*, 21 U.S. (8 Wheat.) at 589 ("The title by conquest is acquired and maintained by force. *The conqueror prescribes its limits*." (emphasis added)).

[150] COHEN, *supra* note 40, at §1.03[1]–[3], at 23–26.

[151] *Id.* at § 1.03[1], at 23.

[152] *See Johnson*, 21 U.S. (8 Wheat.) at 589–90. *See also* COHEN, *supra* note 5, at § 1.03[1], at 25–26.

[153] *See* COHEN, *supra* note 40, at § 1.03[1], at 23.

[154] *Id.* at 26.

[155] *Id.* § 1.03[1]–[3], at 23–41.

transferred from tribal to state jurisdiction was through an agreement between the tribal government and the government of the United States. The restraint on alienation that required a bargain between the tribe and the United States ensured that non-Indians would have no claim to be free from tribal jurisdiction if they lived on land in Indian country unless a treaty had been negotiated between the tribe and the federal government. Preventing the states from trying to regulate land inside Indian country was a task of exceeding importance. Meddling by states inside Indian country was a constant problem that often led to violent confrontation.[156] There is a reason the Bureau of Indian Affairs was in the War Department at the time *Johnson* was decided.[157] *Johnson* prohibited transfers of land that would lead to loss of a tribe's control over its territory unless the United States supervised the transaction. Tribal land could be transferred to non-Indians in fee simple, but only if the United States approved the arrangement.[158] While this may have limited one option the Indian nations might have sometimes wanted to choose, it also protected Indian nations from invasion by non-Indian settlers while protecting tribal sovereignty through denying application of state law inside Indian country.

It is important to recognize that after 1887, the United States sometimes arranged for the transfer of tribal lands to non-Indians *without* changing reservation borders.[159] When that happens, the tribe may sometimes retain the power to regulate what happens on the land. Current law beginning with the 1981 case of *Montana v. United States,*[160] limits (but does not completely eliminate) the power of Indian nations to regulate lands owned in fee simple by non-Indians within Indian country. By contrast, in the nineteenth century, fee simple lands were *outside* tribal jurisdiction.[161] The restraint on alienation of Indian title lands was designed to ensure that lands would not pass from tribal control to federal or state control without the consent of both the government of the Indian nation and the federal government of the United States. Far from a mechanism of

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156 *Id.* § 1.03[3], at 38–41.

157 *Id.* § 1.03[2], at 34.

158 *Johnson*, 21 U.S. (8 Wheat.) at 604–05.

159 Stacy L. Leeds, *Moving Towards Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 U. NM. NATURAL RESOURCES J. 439, 443 (2006).

160 Montana v. United States, 450 U.S. 544, 565–66 (1981).

161 *See Johnson*, 21 U.S. (8 Wheat.) at 585-91.

conquest, the restraint on alienation recognized in *Johnson* and based on a federal statute passed the year after the Constitution was adopted in 1789 was intended to prevent conquest.[162]

C. The Requirement of "Purchase" and a Right of First Refusal: Indian Title as a Limit on the Federal Eminent Domain Power

None of this means that the United States was not interested in obtaining tribal lands, or eventually removing the tribes from east of the Mississippi River.[163] The United States clearly wanted tribal lands.[164] *But the restraint on alienation embodied in the Non-Intercourse Act prevented this from happening without treaty negotiations.* While various presidents used force and coercion to induce tribes to part with their lands, Chief Justice Marshall abjured forced removal.[165] To the contrary, Marshall's opinion in *Johnson prohibits* taking tribal lands without tribal consent. In effect, Marshall *limited the eminent domain powers of the United States.* While the United States is free to take fee simple property for public use with just compensation under the Fifth Amendment, *Johnson* and the later Marshall court cases following it, allowed the United States to obtain tribal lands *only with tribal consent.*

This may be startling news to those who focus on the language of "discovery" and "conquest" in the opinion. But Marshall made clear that the discovery doctrine only regulates the relations among colonial powers; it determines which colonial power has the "sole right of acquiring the soil from the natives. . . ."[166] That means that other colonial powers agree not to attempt to acquire title from Indian nations within the bounds of the "discovered" territory. The discovery right "was a right which all [meaning the colonial powers] asserted for themselves, and to the assertion of which, by others, all assented."[167] The discovery doctrine regulated the relations *among the colonial powers.* It says nothing — let me repeat, *nothing* — about the legal or property relationships between the colonial powers themselves and the

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162 William E. Dwyer, Jr. *Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177*, 7 B.C. ENVTL. AFF. L. REV. 259, 259, 264 (1978).

163 Indian Removal Act, ch. 148, 411–12 (Sess. I 1830).

164 *Id.*

165 *Johnson*, 21 U.S. (8 Wheat.) at 591.

166 *Id.* at 573.

167 *Id.*

Indian nations: "Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves."[168]

And how was the United States to "acquire" tribal title? The *Johnson* opinion says "by purchase or by conquest."[169] If "purchase" and "conquest" are alternatives, that means that the mere fact that the United States adopted the discovery doctrine and claimed sovereignty over Indian lands does not mean that Indian title was thereby extinguished. The discovery doctrine gave the United States exclusive powers to acquire tribal lands within territory recognized by other colonial powers, i.e., the international borders of the United States. The conquest doctrine gave the United States the power to engage in a defensive war against an Indian nation, to beat it in that war, to seek its surrender, and as part of that arrangement, to demand the forfeiture of Indian lands.[170] As Chief Justice Marshall explained in the 1832 case of *Worcester v. Georgia,* "The power of war is given only for defence, not for conquest."[171] He elaborated that "soil . . . taken by the laws of conquest [was] always . . . an indemnity for the expense of the war, *commenced by the Indians*."[172] Absent such a defensive military engagement, Indian title had to be acquired by "purchase."

This means that the fact that the United States unilaterally placed Indian nations within the external, internationally-recognized borders of the United States did not mean that the United States had no obligation to purchase Indian lands if it wanted to transfer them to American citizens. If the mere assertion of superior military power over Indian nations was sufficient to constitute "conquest" and if "conquest" could divest tribes of their title, then purchase of their lands would never have been necessary. Conquest meant that the tribe was under the authority of the United States. That meant that the United States would consider an attack on tribal territory by a foreign nation to be an attack on the United States. It also meant that the United States claimed the power to make and enforce certain laws within the tribe's territory. One of those laws is the law that protects tribal title from invasion or seizure by non-Indians

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168 *Id.* at 573.
169 *Id.* at 587.
170 Worcester v. Georgia, 31 U.S. 515, 546 (1832).
171 *Id.*
172 *Id.* at 580 (emphasis added).

without the consent of the United States.[173] The other federal law that matters for our purposes here is the law that preserves tribal title unless extinguished in one of two approved ways. Conquest of the tribe would happen if the tribe attacked the United States, and the United States chose to treat the tribe's land as forfeited.[174] Purchase, on the other hand, means just what it says—a voluntary deal. Along with the restraint on alienation, *Johnson* holds that the United States has a *right of first refusal* to tribal lands. That means that the tribe cannot transfer fee simple title to anyone other than the United States *and that the United States cannot acquire tribal title without the voluntary consent of the tribe.*[175]

How do we know this? *Johnson* talks about the rights of the colonial powers (including the United States) as a right of "acquiring"[176] Indian title, or the "right to purchase."[177] Referring to analogous rights claimed by the colony of Virginia, the Court refers to the right as a right of "pre-emption"[178] defined as a right to "purchase"[179] Indian lands.[180] Preemptive rights are property rights recognized today; they are often called "rights of first refusal." These rights give the right holder the power to purchase lands at fair market value or an agreed-price if and when the current owner chooses to sell — an eventuality that may never happen.

While the language in *Johnson* is admittedly ambiguous, subsequent Supreme Court opinions clarify that the words "acquire" and "purchase" mean exactly what they seem to mean. These methods of acquisition of Indian title are to be distinguished from either forced taking of lands (eminent domain) or conquest. As Chief Justice Marshall wrote in his opinion in the 1832 case of *Worcester v. Georgia,* the right of discovery gave a colonial power "the sole right of acquiring the soil" as against other colonial powers and that right encompassed "the exclusive right to purchase" the land from the relevant Indian nation that owned it.[181] Purchase is not eminent domain; it involves a

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173 *Johnson*, 21 U.S. (8 Wheat.) at 587.
174 *Id.* at 590–91.
175 *See id.* at 581–83, 587–90.
176 *Id.* at 573.
177 *Id.* at 585.
178 *Id.*
179 *Johnson*, 21 U.S. (8 Wheat.) at 585.
180 *Id.*
181 *Worcester*, 31 U.S. at 544.

voluntary transaction. As Justice Baldwin explained in the 1835 Supreme Court case of *Mitchel v. United States,* land possessed by Indians "could not be taken [by the United States] without their consent."[182]

D. Indian Title and the Restraint on Alienation

Indian title, as defined by *Johnson v. M'Intosh,* includes the power of a tribe to own, control, and rule its land though tribal law and governmental procedures and to be protected from loss to the United States unless it voluntarily agrees to transfer title to the United States. If the United States allows its citizens to enter tribal lands, the tribe is free to grant those citizens rights in tribal lands under tribal law, but the tribe is not free to transfer irrevocable possession or fee simple title to non-Indians without the approval of the United States. Federal law protects tribal lands from trespass by non-Indians and grants Indian nations the power to exclude others from their lands, as well as the power to enforce tribal law on tribal lands along with exemption from state regulation.[183]

The restraint on alienation attached to Indian title matters. To the extent a tribe wants to alienate its lands in fee simple, the restraint prohibits the tribe from doing this without first obtaining the consent of the United States. It is not surprising that one might think this restraint substantially limits the property rights of the tribal owner. After all, the ability to alienate land is thought to be so significant that restraints on alienation of fee interests are void; they are, in old-fashioned terminology, "repugnant to the fee."[184]

Because of this, one might imagine this restraint on alienation to be a major incursion on tribal property rights. It prevents a tribe from mortgaging its land because the lender cannot attach a lien on the land and bring foreclosure proceedings to enforce the loan and get its money back.[185] The restraint prevents the tribe

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[182] Mitchel v. United States, 34 U.S. (8 Wheat.) 711, 745–46 (1835).

[183] *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation.").

[184] Northwest Real Estate v. Serio, 144 A. 245, 234 (Md. 1929).

[185] *See* United States v. Newmont USA Ltd., 504 F.Supp. 2d 1050, 1074 (2007) (A tribe whose reservation was created by Executive Order was not

from choosing to whom to transfer its land in fee simple. It prevents the sale of land the tribe does not need and movement to new lands that better serve tribal needs, unless the United States can be convinced to allow the transfer.

Why then does the restraint exist and why, more importantly does it *continue to exist* in Title 25 of the United States Code at section 465?[186] It continues to exist in part because most Indian nations want it to continue to exist. They support it because the restraint on alienation preserves the tribal land base. We have historical experience about what can happen when the restraint is lifted. During the Dawes Act era from 1887 to 1934 when the restraint on alienation was partially lifted, two-thirds of tribal lands were lost to non-Indians.[187] Because of Supreme Court rulings since 1981, that has also meant a loss of tribal sovereignty over many of those lands.[188] The ability to transfer title in fee simple has historically been a disaster for Indian nations. *Johnson v. M'Intosh* defines Indian title in a way that arguably protects Indian nations from precisely this disaster.

This does not mean that current approaches to Indian lands are perfect. Nor do they mean that the restraint on alienation does not operate in certain respects that are contrary to tribal interests. Indian title gives the United States part of the rights to property owned by Indian nations. Federal Indian law imposes a trust responsibility on the United States partly because of the U.S. title; it does not, however, give Indian nations any means to enforce that trust obligation.[189] The U.S. title to Indian lands has been used by the U.S. as an excuse to interfere with tribal self-determination and as a reason to exercise paternalistic power over Indian nations.[190] At the same time, there are powerful historical and public policy reasons for the restraint on alienation

protected from uncompensated takings. Additionally, the Tribe did not have interest in the property to sell, transfer, mortgage, divest by virtue of a will, or otherwise dispose of it without approval by the federal government.).

186 25 U.S.C. §465 (2016).

187 *See* COHEN, *supra* note 40, at 61.

188 *See* Ball, *supra* note 5, at 106–07.

189 *See* COHEN, *supra* note 40, §1.06 at 75 (The main purpose of the trust relationship between the United States and Indian tribes was to "subject Indians to state and federal laws on exactly the same terms as other citizens," it makes no mention of what the Indian nations enforce.).

190 *See* Ball, *supra* note 5, at 18 (When an Indian tribe levied a tax on private business activity, Congress sought to exercise its Court mandated power to put conditions on the taxing power the tribes had. They exercised this in the absence of any conflict with federal or state interests).

associated with Indian title. For the most part, it has served and continues to serve tribal interests, tribal rights, and tribal sovereignty.

The mere fact that restraints on alienation are thought inimical to American property rights and a violation of the freedoms of land owners does not mean that they necessarily violate the sovereignty or property rights of Indian nations. Indeed, although restraints on alienation were traditionally void, modern law enforces them if they are "reasonable."[191] For example, anticompetitive covenants in shopping center leases are often enforceable, as are restraints on leasing condominiums.[192] There may well be reasons of justice and policy to enforce certain restraints on alienation; such restraints have benefits as well as costs.

It is true that the restraint on alienation limits the prerogatives of Indian nations. It prevents tribes from transferring the land to Canada or Mexico. It prevents Indian nations from mortgaging or leasing their lands without the consent of the United States. It prevents Indian nations from selling property on the open market to buyers who will themselves have fee simple title with its concomitant powers to transfer, encumber, and devise the land. These limitations are in fact limitations even though they preserve all other tribal property rights and sovereign powers over tribal lands.[193] But they are *limited* incursions on tribal rights; they are not wholesale denial of ownership. The Supreme Court was absolutely wrong when it wrote in the 1955 case of *Tee-Hit-Ton Indians v. United States* that Indian title is "not a property right" but amounts to "permission from the whites to occupy."[194] That is a perversion of Marshall's language and inconsistent with the doctrine laid down in *Johnson v. M'Intosh*.[195]

Indian title is full ownership by a sovereign nation subject only to a restraint on alienation. It is this restraint, limited as it is,

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191 SINGER, *supra* note 24, at §6.7.2, at 281–86.

192 *Id.* at §6.7.3, at 286–87; §8.5.1, at 375.

193 *See* Ball, *supra* note 5, at 22.

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

195 *See id.* at 272 (reasoning that *Tee-Hit-Ton* is unsupportable). *But see* Joseph William Singer, 28 GA. L. REV. 481, 519–27 (1994) *(*The opinion misrepresents the holding of *Johnson v. M'Intosh* and has no coherent reason for finding tribal property rights protected by both tribal law and federal common law not to be "property" protected by the fifth amendment unless Congress formally recognizes tribal title to those lands.).

that caused Marshall to voice unease about the justice of the claim by the United States to share title and property rights with Indian nations. It is this limited restriction on tribal property rights that caused Marshall to write that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[196] This sentence about conquest does *not* mean that Indian nations have no title to their lands; quite the opposite. Nor does it mean that Indian title is a mere license. This interpretation of Indian title is contradicts the approach taken by the Supreme Court in 1823 in Chief Justice Marshall's opinion in *Johnson v. M'Intosh*.

Johnson protects Indian nations in owning and governing their lands. The only rights asserted by the United States were a right to regulate the transfer of tribal lands and a right of first refusal. According to Marshall, *any* limitation on the property rights owned by Indian nations without their consent is not only unjust but constitutes a form of conquest. At the same time, the restraint on alienation attached to Indian title was intended to protect Indian nations from invasion of their lands by the state governments and by settlers unless negotiations with the United States resulted in a treaty whereby the tribe ceded its land to the United States.

IV. INDIAN TITLE AND THE PROBLEM OF CONTINUING CONQUEST

A. Possession & Dispossession

Property professors and property law casebooks often suggest that property rights originate in first possession.[197] But we are inconsistent in our application of that principle. We imagine, for example, that an agreement with France in 1803 resulted in the United States gaining title to the Louisiana Purchase even though France had not come close to "possessing" that vast territory.[198] We imagine as well that the United States came to

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196 *Johnson*, 21 U.S. at 588.

197 *See, e.g.*, Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 82–113 (2d ed. 2012); SINGER, BERGER, DAVIDSON, & PEÑALVER, *supra* note 141, at 130–50.

198 *Johnson*, 21 U.S. at 587 ("The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes

"own" Alaska by signing a piece of paper with Russia in 1867.[199] We imagine these transactions to be sales of property by which the United States "purchased" territory. This language of "purchase" erases the Native inhabitants of those vast territories and suggests that the United States, rather than the Indian nations living on the land, possessed and owned those lands. But this way of talking about these colonial transfers is false and misleading. When the United States "purchased" Louisiana from France, *it obtained no property whatsoever*. All it obtained was an agreement by France (and by implication other colonial powers) not to interfere with the United States in its attempts to *later* acquire property from the Indian nations that possessed, owned, and governed the territory.

Johnson v. M'Intosh held that Indian nations had title to the lands they possessed and governed. But the colonial powers wanted Indian lands so they created a doctrine of international law that gave them the supposedly lawful and legitimate power to allocate among themselves the right to declare zones of influence to allocate colonial power to acquire Indian lands. *Johnson* recognizes this restraint on alienation and rests it on both international customary law and federal common law.[200] These principles were codified in the Trade and Intercourse Act of 1790, as it was amended from time to time.[201] *Johnson* recognizes this "discovery" principle and designates it a kind of property right, i.e., "ultimate title." *Johnson* also recognizes a distinct legal principle which limits the power of Indian nations to transfer fee simple title to land to anyone other than the United States.

This means that federal common law and federal statutes protect tribal property rights based on first possession unless those rights are lawfully transferred from an Indian nation to the United States.[202] According to Marshall, the only lawful way to transfer that title was through voluntary agreement or conquest. Conquest is justified if done in self-defense.[203] Because the United

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of Indians.").

[199] *See* COHEN, *supra* note 40, at §1.07 at 84 ("[A]fter the acquisition of Alaska from Russia the United States took no decisive steps regarding these aboriginal lands.").

[200] *Johnson*, 21 U.S. 543 at 603.

[201] Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 2 (1790).

[202] *See* Joseph W. Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L. J. 763, 763 (2011).

[203] Worcester v. Georgia, 31 U.S. 515, 546 (1832) ("The power of war is given only for defence, not for conquest."); *id.* at 580 ("Some cessions of territory may

States aspires to be a free and democratic society based on government of the people, by the people, and for the people, assertion of U.S. sovereignty over Indian nations is illegitimate unless those nations agree through treaty negotiations that are voluntary and fair. In other words, the principle of "We the People" in the U.S. Constitution rests on the idea that governments are instituted with the consent of the governed and subject to their control.[204] Both the federal Constitution and the state constitutions, as well as the political leaders of those sovereigns, are chosen by the people. Indian nations did not sign the Constitution and, according to Marshall, their assent is needed before their lands can be taken from their hands.[205]

The United States partially complied with Marshall's principles. For the most part, the United States obtained tribal lands by negotiating treaties with Indian nations to induce them to cede their lands to the United States. It deviated from Marshall's principles from time to time by often (but not always) coercing the tribes to do this either through the use of force or the threat of force.[206] But the fact that the United States took tribal lands when the tribes would rather have kept their lands does not mean that Marshall justified that process or gave it a legal imprimatur. The opposite is true. Forced seizure of Indian lands *violated* federal law as the Supreme Court defined it in *Johnson v. M'Intosh.*[207]

Once it had happened and the Indian nations became militarily weak and impoverished at the end of the nineteenth century, the Supreme Court held in the 1903 case of *Lone Wolf v. Hitchcock*[208] that there were no constitutional limits on the power of the United States to take Indian land.[209] According to *Lone Wolf,* Indian lands could be taken for any reason without tribal consent; such takings were political, not justiciable questions.[210] *Lone Wolf* has been called the *Dred Scott* of federal Indian law

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have been made by the Indians, in compliance with the terms on which peace was offered by the whites; but the soil, thus taken, was taken by the laws of conquest, and always as an indemnity for the expenses of the war, commenced by the Indians.").

204 U.S. CONST. pmbl.

205 Georgia, 31 U.S. 515 at 561.

206 *See Indian Removal*, PBS, http://www.pbs.org/wgbh/aia/part4/4p2959.html (last visited September 14, 2016).

207 *Johnson*, 21 U.S. (8 Wheat.) 543 at 603.

208 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

209 *Id.* at 568.

210 *Id.*

because it arguably held that Indians had no constitutional rights enforceable in court.[211] Thankfully, *Lone Wolf* has been limited in application, although not completely overruled. Later cases in the 1930s and in 1980 affirmed that tribal property cannot be taken by the United States without compensation *at least* where that title has been formally recognized by the United States.[212] However, the idea that tribal property can be taken by the U.S. without tribal consent has persisted. As I have explained, this violates the rules laid down in *Johnson v. M'Intosh*.

The Supreme Court ruled in the 1955 decision of *Tee-Hit-Ton Indians* that tribal property that is not "recognized" by treaty or statute can be taken without just compensation.[213] According to the *Tee-Hit-Ton* Court, Indian title is not a property right within the meaning of the Fifth Amendment's prohibition on taking "property" without just compensation.[214] This matters because a number of tribes live on reservations created by executive order of the President and thus possess lands not recognized by statute or treaty.[215] *It is currently the law of the United States that those tribes could be constitutionally divested of their lands without their consent and without compensation.* But that notion is *not* based on the law established in *Johnson v. M'Intosh*. Rather, that idea contradicts *Johnson,* which held, to the contrary, that the United States has no power to take tribal lands without their consent and without a negotiated "purchase." *Tee-Hit-Ton* contradicts the Marshall Court rulings that hold that Indian nations possess "Indian title" and that their property rights "are as sacred as the fee simple of the whites."[216]

Why should we care that Indian nations were wrongfully deprived of their property? Didn't it happen a long time ago? Isn't it an historical tragedy that has no contemporary significance? The answer to these questions is that it matters because we

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211 *See* Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 5 (2002).

212 United States v. Sioux Nation of Indians, 448 U.S. 371, 420–21 (1980); Shoshone Tribe v. United States, 299 U.S. 476, 496 (1937); United States v. Creek Nation, 295 U.S. 103, 109–10 (1935).

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

214 *Id.* at 285.

215 *See* U.S. DEPARTMENT OF THE INTERIOR: INDIAN AFFAIRS, www.bia.gov/FAQs/ (last visited Aug. 30, 2016).

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

justify property rights by reference to first possession.[217] The truth of our historical situation is that most of the property rights in the United States originate in the *unjust dispossession of first possessors*. More often than not, the United States violated rather than honored the principle of first possession.[218] This fact is painful to recognize, but unless we recognize it, we will be condemned to continue to engage in dispossession. Consider the following examples of continuing conquest.

B. United States Theft of Indian Royalties

The United States recently settled a longstanding lawsuit involving mismanagement of individual Indian trust accounts. The *Cobell* litigation involved a claim by individual Indian owners of lands leased to non-Indians that the United States failed to pay rents and royalties owed to the Indian landlords.[219] The United States was managing real property owned by individual Indians and not only did not make required payments but lost records so that it did not even know the names of the Indian land owners.[220] The United States collected the rents and royalties and did not turn them over to the Indian owners.[221] While the litigation settled for the huge amount of $3.4 billion, it is certain that this amount is substantially less than the actual amount of royalties in fact owed to the Indian property owners.[222] The settlement may well be in the interests of the plaintiffs but we cannot forget that the amount agreed upon is by definition unjust. The United States had a trust obligation to manage the Indians' property for their benefit; that at least meant to pay them the royalties their property earned.[223] *By not doing this, the United States stole their property.*

The *Cobell* case got a lot of publicity but not as much as it should have gotten. By forcibly taking control of Indian property

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217 *See* Singer, *supra* note 202, at 763.

218 Tee–Hit–Ton Indians v. United States, 348 U.S. 272, 285 (1955).

219 Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999), aff'd in part and remanded in part sub nom. Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001), later proceeding at 2003 U.S. Dist. LEXIS 16875 (D.D.C. Sept. 25, 2003).; SINGER, *supra* note 24, at §15.6.4, at 800–01.

220 Cobell v. Babbitt, 91 F. Supp. 2d 10 (1999).

221 *Id.* at 36.

222 Charlie Savage, *U.S. Will Settle Indian Lawsuit for $3.4 Billion,* N.Y. TIMES, Dec. 8, 2009, http://www.nytimes.com/2009/12/09/us/09tribes.html?_r=0.

223 *Cobell*, 91 F. Supp. at 6–7.

and then *mismanaging* it to deprive Indian owners of the rents and royalties the property earned, the United States took Indian property without just compensation. The amount the US paid to settle the case does not amount to payment of just compensation.[224] The settlement is pragmatic. It is as much as the United States believed it could afford to pay or was willing to pay. It is a large amount designed to mark the injustice of what happened, but *it is not what the United States would have paid had the owners been non-Indians.*

We are willing to live with this injustice because it seems like a practical way to end the conflict when records have been lost and the cost of reconstructing what is actually owed each owner would have been huge or even impractical. But we cannot forget that *the problem arose because the United States did not respect Indian property rights.* It was careless about the property rights of Indian owners. *Johnson v. M'Intosh* held that tribes have Indian title subject only to a restraint on alienation.[225] When tribal lands were taken and distributed to individual tribal citizens as allotments, those lands were subject to that same restraint on alienation. When the United States seized control of those lands and managed them (because ownership was fractionated), the United States had a moral *and a legal* obligation to protect the property rights of the Indian owners and pay them the earnings their property made. The United States failed abysmally at that task.

C. Land Claims of New York Indian Nations

This is not the only instance in which the United States has failed to protect Indian property rights in recent years. The lands of the Oneida Indian Nation and several other New York tribes were unlawfully taken by the state of New York in the 1790s and early 1800s.[226] Those seizures violated the clear language of the Non-Intercourse Act because they occurred without the assent of the United States.[227] The Supreme Court held in 1985 that those takings were a violation of federal law and that no statute of limitations prevented the tribes from suing to vindicate their

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[224] Savage, *supra* note 222.
[225] Johnson v. M'Intosh, 21 U.S. 543, 592 (1823).
[226] Cnty of Oneida v. Oneida Indian Nation, 470 U.S. 226, 232 (1985).
[227] *Id.* at 231–32.

property rights.[228] That means that title to these lands *never shifted to the State of New York*.

But then in the 2005 *Sherrill* decision, in a novel application of the equitable doctrine of *laches,* the Supreme Court held that the Oneida Nation had waited too long to vindicate its property rights.[229] According to the Court, nothing prevented the tribe from suing in the 1790s to invalidate the transfers from the tribe to the state of New York in violation of federal law.[230] I have elsewhere explained why this assumption is entirely false.[231] There were legal as well as practical barriers to suit for all of the nineteenth and twentieth centuries.[232] Indeed, *those barriers remain today*. Sovereign immunity may *still* bar any legal claim against the state of New York.[233]

Sherrill involved a question of sovereignty. Because the land transfer to the state of New York was never approved by the United States through treaty or statute, the transfer of title from the Oneida Indian Nation to the state of New York was *void.* The 1793 version of the Non-Intercourse Act provided that "no purchase or grant of lands . . . from any Indians or nation or tribe of Indians . . . shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution" with the United States.[234] When the tribe bought a parcel of its own land back from the non-Indian possessor, it united possession with Oneida title. Lands held in trust status (Indian title) are outside state control, so the Oneida Indian Nation claimed it had no obligation to pay state property taxes on the land.[235] It had never lost title; it now united title with possession in an area that was part of the original Oneida Country.[236] The Supreme Court rejected the claim, worrying that this would create checkerboard jurisdiction and that this would be "disruptive."[237] It is ironic that the Supreme Court is so concerned about checkerboard jurisdiction since the Court itself

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228 *Id.* at 253. The court did reserve the question of laches which might affect the ability to enforce the tribe's property rights. *Id.* at 244.

229 City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005).

230 *Id.* at 216.

231 *See* Singer, *supra* note 39.

232 *Id.* at 615–19.

233 *Id.* at 612, 618, 624–25.

234 Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 232 (1985).

235 *See* Singer, *supra* note 39*,* at 607.

236 *Id.*

237 City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217 (2005).

created such jurisdiction by its own federal common law rulings that transfers of land to non-Indians within reservation borders removed those lands from most regulation by Indian nations.[238]

Sherrill was not a case about land title but about legislative jurisdiction. It held that when New York tribes purchase their lands illegally taken from them, those lands remain subject to New York regulatory power and do not become "Indian country" subject to tribal jurisdiction. *Sherrill* did not address — and did not decide — whether the New York tribes have any property rights in the lands taken from them in violation of the Non-Intercourse Act. That would be hard to do, given the strict language of the Act which provided that such transfers would not be of "any validity in law or equity."[239] Moreover, the Supreme Court's 1985 decision in *County of Oneida v. Oneida Indian Nation* had held that the transfer of lands from the Oneida Indian Nation to the State of New York was unlawful and in violation of the Non-Intercourse Act.[240] While that 1985 decision reserved the issue of laches, it clearly meant that, at least at the time of the unlawful taking by New York, title to those lands remained with the New York tribes.[241] Laches refers to unexcused delay in asserting rights; it does not render an initially wrongful taking valid at the time of the taking.[242]

The reasoning in *Sherrill* focused on the disruption that would occur if a New York county or municipality would lose the power to govern its own lands.[243] The Second Circuit, however, has extended and broadened the holding in *Sherrill* to deny New York tribes *any remedy whatsoever* for the illegal taking of their lands, even if such remedies are not actually disruptive.[244] A claim by the Oneida Indian Nation for damages for the illegal taking of its

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238 *See* Atkinson Trading Col., Inc. v. Shirley, 532 U.S. 645, 658 (2001). *See also* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 432 (1989).

239 Act of July 22, 1790, § 4, 1 Stat. 137 (currently codified at 25 U.S.C. § 177 (2012)).

240 Cnty. of Oneida Indian Nation v. Oneida Indian Nation, 470 U.S. 226, 253 (1985).

241 *Id.* at 230 (1985) (citing Oneida Indian Nation v. Cty. of Oneida, 434 F. Supp. 527, 530 (1977)).

242 *See* Oneida Indian Nation v. Cty. of Oneida, 434 F. Supp. 527, 542 (1977).

243 *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 220 (2005).

244 Shinnecock Indian Nation v. State of N.Y., 628 Fed. Appx. 54, 55 (2d Cir. 2015) (aff'g Shinnecock Indian Nation v. New York, 2006 WL 3501099 (E.D.N.Y. 2006)); Oneida Indian Nation of New York v. Cty. of Oneida, 617 F.3d 114 (2d Cir. 2010); Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005).

lands would not create checkerboard jurisdiction. Nor would it necessarily interfere with the possessory rights of non-Indians living on those lands. It would be possible, for example, for a court to declare that land title remained with the Indian nations of New York to the lands illegally taken from them while protecting possessory rights of the non-Indians who have been living on the land for 200 years. Requiring New York or its counties or municipalities to compensate for the wrongful deprivation of tribal lands would partially vindicate tribal property rights without leading to ejection of current inhabitants. Further, *future* rent payments by the state of New York for the continued occupation of tribal lands would also not interfere with the rights of the current possessors. But the Second Circuit did not even consider the possibility of such a compromise.[245] Nor did it focus on the fact that the Supreme Court has held that Congress has plenary power over Indian nations and that Congress itself could effect a statutory compromise that would seek to protect the property rights of both the tribes and the non-Indian occupants.[246]

It is important to remember that the Supreme Court has held that Congress can extinguish Indian title without tribal consent.[247] Although this violates the clear language of *Johnson v. M'Intosh,* it is current law based on later cases, such as the 1903 case of *Lone Wolf v. Hitchcock.*[248] The chance that Congress would allow a tribe to evict everyone in a county is less than zero. Congress would extinguish tribal title before that could happen. Recognition of tribal title would therefore not necessarily violate any legitimate expectations that non-Indian possessors have. Moreover, the Indian nations themselves would likely not actually dispossess thousands of owners not only because they would be thwarted by Congress, but because it would be neither politically wise nor feasible, given Congress's plenary power to overturn the decision. Nor should it be an issue if the tribes retain title to their lands while non-Indian possessors have title or possessory rights subject to the tribal title. *Johnson v. M'Intosh* itself shows us the model of how title can be split between two parties with particular rights given to each owner.

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245 *See* Shinnecock Indian Nation v. State of N.Y., 628 Fed. Appx. 54, 55 (2d Cir. 2015).

246 *See* Seminole Tribe v. Fla., 517 U.S. 44, 61 (1996).

247 Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

248 *Id.*

That, after all, is the very essence of all estates in land other than the fee simple.[249]

The Second Circuit cut off all compromise by finding that the passage of time alone meant that the New York tribes somehow lost all property rights in their lands (except the bare title) despite the transfer being of no validity at law or equity under the Non-Intercourse Act.[250] What reason did the court give?[251] In its 2005 decision in *Cayuga Indian Nation of New York v. Pataki,*[252] the court argued that "any remedy flowing from [the tribe's] possessory land claim . . . would call into question title to over 60,000 acres of land in upstate New York."[253] That sentence only makes sense if you think that only one person or entity can have title to land at the same time. *But that is nonsense. Johnson* split Indian title between Indian nations and the United States by giving the U.S. a right of first refusal on Indian lands. Recognizing Indian title within the state of New York would not necessarily mean that longstanding non-Indian possessors would not own their homes or not be able to get mortgages. A court of equity could define the relative rights of Indian nations and non-Indian possessors in a way that protected the reliance interests of the non-Indian possessors while vindicating tribal title.

Consider what all this means. A federal statute passed in 1790 prohibited the State of New York from taking land from Indian nations without the consent of the United States.[254] That law provides that the transfer of title shall not "be of any validity in law or equity" — about as unambiguous a statute as one can imagine.[255] We have a Supreme Court case from 1985 saying that the statute means what it says and that title did not pass from Indian nations to the state of New York if their lands were taken without the consent of the United States.[256] The United States had — and continues to have — a trust obligation to Indian nations in New York to protect their property from invasion by

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249 Johnson v. M'Intosh, 21 U.S. 543, 591 (1823).

250 Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 275 (2d Cir. 2005).

251 Shinnecock Indian Nation v. State of N.Y., 628 Fed. Appx. 54, 55 (2d Cir. 2015)(aff'g Shinnecock Indian Nation v. New York, 2006 WL 3501099 (E.D.N.Y. 2006)); Oneida Indian Nation of New York v. Cnty. of Oneida, 617 F.3d 114 (2d Cir. 2010); Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005).

252 Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005).

253 *Id.* at 275.

254 Act of July 22, 1790, ch. 33, 1 Stat. 137 (currently codified at 25 U.S.C. § 177 (2012)).

255 25 U.S.C. § 177 (2012).

256 Cty. Of Oneida v. Oneida Indian Nation, 470 U.S. 226, 245 (1985).

the states.[257] *Johnson v. M'Intosh* holds that the tribes had "Indian title" that could not be transferred without the assent of the United States.[258] Procedural rules prevented Indian nations from bringing claims against the United States and the state of New York for all of the nineteenth century and most of the twentieth century.[259] The law may still deny the Indian nations in New York the power to hold the United States and the state of New York responsible for their combined failure to protect the tribes from deprivation of their property rights by the state of New York.

The result of all this is that the United States failed to enforce federal law, failed to protect the property rights of the Indian nations within the state of New York, failed to stop the state of New York from violating a federal statute, and failed to provide any remedy for these violations of federal law and tribal property rights. And now the federal courts are denying these Indian nations any legal means to obtain compensation for the illegal taking of their lands or any remedy for the *current, unlawful occupation of their lands*. All this is happening despite the fact that the Supreme Court held in 1985 that title to these lands never shifted from the Indian nations to the state of New York.[260] The upshot is that the tribes may have title to their lands occupied by non-Indians — title but no rights, not even a right to compensation for the unlawful occupation of their lands.

This means that *Tee-Hit-Ton* lives. The property of Indian nations has been taken without just compensation and, according to the federal courts, no constitutional violation has occurred.[261] A remedy in the form of compensation or restoration of some lands (especially those that are not currently occupied or which are repurchased) could occur without "disruption."[262] Yet the courts have relieved both the state of New York and the United States of any obligation to atone for their sins.[263] This protection is not needed to avoid disruption. Indeed, there is no good reason for it. Tribal property rights — rights held under Indian title — are extended fewer legal protections than those given to non-

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257 COHEN, *supra* note 40, at §5.04, at 412–16.
258 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 603 (1823).
259 Chouteau v. Molony, 57 U.S. 203 (16 How.) 203, 237–38 (1854)
260 Cty. Of Oneida, 470 U.S. at 232–33.
261 Tee-Hit-Ton Indians v. U.S., 348 U.S. 272, 291 (1955).
262 City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 211 (2005).
263 *See id.* at 221.

Indians. One can only conclude that property rights are being denied on the basis of race.

It is true that longstanding occupation of land by non-Indians means that any adjudication of property rights would have to balance the rights of Indian nations and non-Indians.[264] The Shinnecock Indian Nation, for example, has sought a right to eject non-Indian possessors of its wrongfully taken lands.[265] Ejection would indeed be disruptive to those owners who were led to believe, by the state of New York and the silence of the United States, that they had good title to their lands. Equitable principles would require the property rights of the Shinnecock Indian Nation to be balanced against the property rights of the non-Indian possessors of land.[266] Those possessors have viable "property rights" — as well as "title" — even if the Shinnecock Indian Nation continues to own the underlying "title." Their property rights come from longstanding reliance and possession.[267] *But that does not mean that the Shinnecock Indian Nation does not have property rights as well.*

A court might well choose to deny the remedy of ejectment while ordering a payment of damages, especially if the damages must be paid by the government entities responsible for the unlawful seizure of Indian lands. It is confused thinking to imagine that one must find one party or the other to be the "owner" and then deny the other party *any rights or remedies whatsoever.* A court of equity could easily reject an ejectment claim while requiring the municipality to answer in damages for its wrongful deprivation of tribal property rights. It could also require a transfer of lands owned by the state to the Indian nation that was wrongfully and illegally deprived of its property. Such a compromise would vindicate property rights on both sides. Various compromise solutions can be envisioned. What is astonishing is that the Second Circuit did not even consider that possibility; in so doing, it made negotiation unnecessary.[268] That happened because the court imagined that only one person can hold "title" to land at any one time. But that is a false

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[264] *See id.* at 214–15.

[265] Shinnecock Indian Nation v. New York, 2006 WL 3501099 (E.D.N.Y. 2006), *aff'd*, Shinnecock Indian Nation v. State of N.Y., 628 Fed. Appx. 54, 55 (2d Cir. 2015).

[266] Shinnecock, 2006 WL 3501099, at *15–16.

[267] JOSEPH WILLIAM SINGER, *The Reliance Interest in Property,* 40 STAN. L. REV. 611, 668–70 (1988).

[268] *See* City of Sherrill, 544 U.S. at 221.

assumption, as *Johnson v. M'Intosh* teaches us.

V. CONCLUSION

We participate in racial injustice if we act in ignorance of the ways land titles originated in the United States. Our ignorance of the past will lead us to repeat it. Land titles in the United States originate in Indian title, and the hundreds of Indian nations that continue to exist and exercise sovereignty in the United States own a substantial amount of land held in trust status. Indian title is not merely a memory but a living fact. Indian nations are not historical artifacts but current vibrant sovereigns and cultures.

If we are going to move beyond our past sins of conquest and racial oppression, we have to begin to give Indian title the same respect as "the fee simple of the whites." To do that, we should interpret the cases that define Indian title correctly. The foundational cases decided by the Supreme Court in the early nineteenth century hold that Indian nations owned the land they occupied before the coming of the colonial powers and continued to own it after they were brought unwillingly into the orbit of those powers.[269] Conquest continued to happen over the course of U.S. history, but that conquest was inconsistent with the legal protections for Indian title that Chief Justice John Marshall tried to construct in *Johnson v. M'Intosh*.[270] The idea that Indian title is not a "property right"[271] is false; if we hold to American ideals, it is "as sacred as the fee simple of the whites."[272]

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269 *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 593–94 (1823); Mitchel v. U.S., 34 U.S. 711, 749 (1835).

270 *Johnson*, 21 U.S. (8 Wheat.) at 589.

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

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