

Tulsa Law Review

Volume 37
Number 2 *Native American Law Essays on
Integrating Indian Law into Law School
Curricula*

Volume 37 | Number 2

Winter 2001

Indian Law in Property: Johnson v. M'Intosh and Beyond

Kenneth H. Bobroff

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 Tulsa L. Rev. 521 (2001).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol37/iss2/4>

This Native American Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

INDIAN LAW IN PROPERTY: JOHNSON V. M'INTOSH AND BEYOND

Kenneth H. Bobroff*

First-year law students are most likely to encounter Indian law in their Property class.¹ Indeed, one of the foundational Indian law cases, *Johnson v. M'Intosh*,² is at the root of title for most real property in the United States.³ A good number of Property casebooks include this 178 year-old decision, often as the first case of the semester.⁴ Indian law, however, is a much richer source for the Property teacher than just *M'Intosh*. Using Indian law materials throughout the first-year Property class allows students to see in sharp relief how a society's values and principles are embedded in its property rules and how judges and lawmakers make policy and philosophical choices through the property rules they adopt and impose on others.⁵ This Article will discuss using

* Associate Professor of Law, University of New Mexico. A.B. 1986, Princeton University; M.Phil. 1988, Oxford University; J.D. 1994, Stanford Law School. Warm thanks to my colleagues Christian Fritz and Emlen S. Hall.

1. This Article uses the terms "Indian," "native," "Native American," and "indigenous" to refer to the indigenous peoples who have occupied the land that is now the United States since before European and United States colonization. My recent experience is that both "Indian" and "Native American" are widely used by native people themselves, with the former more common the closer one is to Indian Country and the latter more widespread in non-Indian institutions. Specific tribal names are preferred when appropriate and sufficient. The term "Native" (both capitalized and not) is increasingly used among native activists and intellectuals.

2. 21 U.S. 543 (1823).

3. Real property in Hawaii and lands in the southwestern United States acquired from Mexico do not trace title directly back to *Johnson v. M'Intosh*. On Hawaiian land titles, see generally Lilikala Kame'eleihiwa, *Native Land and Foreign Desires* (Bishop Museum Press 1992); Linda S. Parker, *Native American Estate: The Struggle over Indian and Hawaiian Lands* 87-131 (U. of Haw. Press 1989). On title to lands formerly held by Mexico, see Guadalupe T. Luna, *Chicana/Chicano Land Tenure In The Agrarian Domain: On The Edge Of A "Naked Knife,"* 4 Mich. J. Race & L. 39 (1998).

4. See e.g. Jesse Dukeminier & James E. Krier, *Property* 3 (4th ed., Aspen 1998); Joseph William Singer, *Property Law: Rules, Policies, and Practices* 25 (2d ed., Aspen 1997); Richard H. Chused, *Cases, Materials, and Problems in Property* 6 (2d ed., Matthew Bender 1999); Sheldon F. Kurtz & Herbert Hovenkamp, *Cases and Materials on American Property Law* 68 (3d ed., West Wadsworth 1999); John P. Dwyer & Peter S. Menell, *Property Law and Policy: A Comparative Institutional Perspective* (Found. Press 1998). Singer's casebook provides the most comprehensive treatment of *M'Intosh* and Native American property issues generally, both past and present. Its Teacher's Manual is especially helpful.

5. Professor Frank Pommersheim argues eloquently for teaching Indian law more broadly if we are to achieve justice and democracy in the United States' relations with Native Americans:

Indian law materials during a typical first semester Property course. First, it will discuss teaching *Johnson v. M'Intosh* in conjunction with two other cases: another nineteenth century property law opinion by Chief Justice Marshall, *United States v. Percheman*,⁶ and a 1955 decision on the taking of Alaska Indian land, *Tee-Hit-Ton Indians v. United States*.⁷ Second, the Article will suggest supplementing the fox case, *Pierson v. Post*,⁸ with a short reading about a Laguna Pueblo deer hunt from Leslie Marmon Silko's classic novel, *Ceremony*.⁹ Finally, the Article will advocate considering American Indian conceptions of property in land when other philosophical justifications for property are discussed.

Although a seminal case for Federal Indian law, the parties in *M'Intosh* included no Indians, at least not in the courtroom. Rather the case was a title dispute between non-Indian claimants, all of whom traced their title to purchase from the Illinois and Piankeshaw Indians.¹⁰ The plaintiffs, denominated Johnson and Graham's Lessee so the case could be heard as an ejectment action, traced title to two land speculation syndicates, the Illinois Company and the Wabash Company, which had each purchased large sections of the present-day State of Illinois directly from the Illinois and Piankeshaw Indians in 1773 and 1775 for expressed consideration totaling \$54,000.¹¹ The defendant,

You can only have democracy when you have informed citizens. We cannot have democracy in Indian law right now because we do not have Indian law literacy. It is foolhardy to say the democratic process can really work in the context of Indian law at this time because we do not have enough literate people on the courts, in Congress, and in state legislatures. I am not saying this to disparage people, but rather as an accurate assessment of where people are in their current Indian law understanding If we advance Indian law literacy, true democracy in the context of tribal-federal relations might actually flourish, might actually work for the first time in a way that is mutually respectful and agreeable to all involved. This then is the challenge and dream that confronts us.

Frank Pommersheim, *What Must Be Done To Achieve The Vision Of The Twenty-First Century Tribal Judiciary*, 7-WTR Kan. J. L. & Pub. Poly. 8 (1997); Frank Pommersheim, *Democracy, Citizenship, And Indian Law Literacy: Some Initial Thoughts*, 14 T.M. Cooley L. Rev. 457 (1997) (concentrating instead on the narrower pedagogical advantages that Indian law cases and perspectives bring to the teaching of property law).

6. 39 U.S. 51 (1833).

7. 348 U.S. 272 (1955).

8. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805).

9. Leslie Marmon Silko, *Ceremony* (Penguin 1977).

10. *M'Intosh*, 21 U.S. at 550-62, 593-94. Teachers should be careful to make sure that the version of the case they assign includes the critical information that the United States had also purchased the land in question from the Indians. See e.g. Singer, *supra* n. 4, at 28. Authors of several popular casebooks have chosen to simplify the case by excising this point. See e.g. Dukeminier & Krier, *supra* n. 4, at 10. Professor Eric Kades has written the most complete and easily accessible account of the Illinois and Wabash companies, the land cessions and purchases, the litigation, and the Congressional lobbying efforts preceding the lawsuit. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 Law & Hist. Rev. 67, 81, 95 (2001). His article is essential reading for providing answers to questions that a "beginner's mind" asks but that Marshall's opinion does not answer. I would suggest making it available to students, at least as recommended reading.

11. See Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*,

William M'Intosh, traced his title to his purchase of 11,560 acres from the United States in 1818. The United States, in turn, had received the lands by treaties of cession from the same and other Indians, *after* the grants to the Illinois and Wabash companies.¹² The case was quite important in its day—Daniel Webster argued for the plaintiffs—and settled an important issue for the new nation, namely whether land speculators who had purchased land from Indian tribes held good (and immensely valuable) title to much of the new nation's western land.¹³ Stylistically, the opinion is fascinating, presenting Chief Justice Marshall knowingly defending the indefensible, and it encourages students to read cases critically and carefully.

Substantively, the case is extraordinarily rich for initiating discussion of many—if not most of the basic themes of the first year Property class. As the justification for the root of land titles in the United States, studying *M'Intosh* raises the issue of the initial creation of property rights, whether by "Discovery" or judicial fiat. It necessarily requires addressing the role of state power in defining property rights and whether that power resides in Indian tribes or Federal courts. It examines "possession" as a rationale for creating property rights and implicates various philosophical justifications and explanations for doing so. The case provides an ideal opportunity to discuss the classic Lockean justification for property rights and to introduce Legal Realist, Critical Legal Studies, Critical Race Theory, and Law and Economics perspectives on creating property rights in land. It introduces the concept of chain of title and thinking about property as a bundle of rights. Indeed, the challenge in teaching *M'Intosh* is often choosing among potential themes so as not to overwhelm beginning law students.

However, teaching *M'Intosh* in isolation allows students to dismiss the case as an interesting historic relic, with little to contribute to a modern understanding of Property. Teaching it alongside the case of *United States v. Percheman* encourages students to compare reasoning, rationales, and policy considerations used by judges in choosing among potential property rules just as they will see judges doing throughout their first semester Property course. In *Percheman*, a former Spanish subject sought to confirm title to 2000 acres granted him by Spain

19 Law & Hist. Rev. 67, 81-85, 100-01.

12. *M'Intosh*, 21 U.S. at 593-94. Interestingly, Marshall's opinion does not specify the treaties by which the U.S. obtained the land. See Kades, *supra* n. 11, at 54 (citing various treaties: 7 Stat. 81 (Delaware; 1804); 7 Stat. 83 (Piankashaws; 1804); 7 Stat. 91, 100 (Miamis; 1805); 7 Stat. 113 (Miamis including Eel Rivers, Delawares, and Potowatomis; 1809); 7 Stat. 116 (Weas; 1809); 7 Stat. 117 (Kickapoos; 1809)).

13. For the best critical analysis of *M'Intosh*, see generally Russell Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (U. of Calif. Press 1980); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: Discourses of Conquest* (Oxford U. Press); Milner S. Ball, *The Constitution, Courts, Indian Tribes*, 1987 A.B.F. Research J. 1 (1987).

before it ceded Florida to the United States by treaty in 1819.¹⁴ From the perspective of Property law, the specific question in each case was similar: whether title granted by a sovereign that subsequently ceded the lands to the United States could be confirmed in Federal courts? The key difference between the cases, of course, was that the sovereign in *Percheman* was a European state, not an Indian tribe, a distinction that likely explains Chief Justice Marshall's opinion which reached a conclusion opposite from (and without acknowledging) the one he had reached ten years earlier in *M'Intosh*.

Marshall framed his opinion in *M'Intosh* as an inquiry into "the power of the Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country."¹⁵ He began by stating that because a society's right to prescribe property rules is unquestionable, his judicial inquiry must go beyond "principles of abstract justice" to consider the government's actual practice with regard to Indian lands.¹⁶ After a self-consciously ironic defense of the "potentates of the old world" appropriating to themselves the New World,¹⁷ Marshall articulated the "Discovery" principle to justify voiding the Indian tribes' land transfers to Johnson and Graham's predecessors.¹⁸

European discovery, Marshall wrote, "gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."¹⁹ According to Marshall, this title "necessarily" gave the discovering nation the exclusive right of acquiring the lands from the Indians, *vis-a-vis* other European nations.²⁰ Relations resulting between the natives and the discovering nation were matters to be regulated only among themselves.²¹ In these relations, the Indians' rights were not "entirely disregarded," but were, again "necessarily," "to a considerable extent, impaired."²² Indians could legally and equitably occupy the land and use it as they wished, but "their rights to complete sovereignty, as independent nations, were necessarily diminished."²³ With European discovery, Indians lost the property right to alienate their land to whomever they wished; such right was inconsistent with the "fundamental principle, that discovery gave exclusive title to those who

14. I am indebted to my colleague and fellow Property teacher Emlen Hall for bringing this case to my attention.

15. *M'Intosh*, 21 U.S. at 572.

16. *Id.*

17. *Id.* at 573.

18. *Id.*

19. *Id.*

20. *Id.*

21. *M'Intosh*, 21 U.S. at 573.

22. *Id.* at 574.

23. *Id.*

made it."²⁴

Marshall's ultimate rationale for holding European title superior to Indian title began with historical practice and ended in tautology:

The validity of the titles given by [the crown or its grantees while the states were colonies] has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which my conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute title, must be exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute right of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.²⁵

After a long historical description asserting that the Discovery principle had long been universally recognized—the universe apparently not including Indian tribes—Marshall considered the justice of the claim he asserted. He found “some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.”²⁶ The “savages,” Marshall concluded, were too fierce to be incorporated into the conquering nation like civilized peoples.²⁷ The Europeans had to adopt property rules adapted to “the actual state of things” and recognizing “absolute” title in the Indians, according to Marshall, would have meant abandoning the country.²⁸ In the case at hand, this meant that the Indians’ right to transfer title to their lands had to be denied. Marshall concluded that there was no other choice:²⁹

However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps be supported by reason, and certainly cannot be rejected by Courts of justice.³⁰

Unraveling Marshall's argument is not easy and helping students figure it out is even harder. Recent scholarship has provided some insights that make the opinion more intelligible and are particularly

24. *Id.*

25. *Id.* at 587-88. For the view that the fictions of “discovery” and “absolute title” had (and have) no legal effect on the tribes’ title, see Ball, *supra* n. 13, at 23-28, 24 n. 132, 29.

26. *M'Intosh*, 21 U.S. at 589.

27. *Id.* As David Wilkins notes, the use of the doctrine of conquest is particularly problematic since Indian nations lost very little of their land by conquest, at least in the legal sense. See David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 Okla. City L. Rev. 277, 280-81 (1988); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215 (1980).

28. *M'Intosh*, 21 U.S. at 591.

29. See Williams, *supra* n. 13.

30. *M'Intosh*, 21 U.S. at 591-92.

useful for the Property teacher using the case. Milner Ball has focused attention away from what was long the conventional understanding of the case to what Marshall called “another view . . . of this question, which deserves to be considered.”³¹ This view acknowledged the Indian tribes’ right to make and alter their property laws and, specifically, the right to make grants under those laws. If, however, tribes revoked such grants and made a different disposition of the land, the spurned purchaser had no recourse to any tribunal but an Indian one: “a person who purchases land from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under protection, and subject to their laws.”³² The courts of the United States were unavailable. The tribes’ subsequent cessions of the same land to the United States extinguished the initial transfer and the purchaser was left, legally, with nothing.

Similarly helpful in understanding the strands of the opinion is David Wilkins’ work inquiring into what Marshall called “the actual state of things.” In Marshall’s view, the discovery doctrine somehow deprived the Indians of absolute title to their lands, giving absolute title to the discovering nation or its successors. Wilkins emphasizes what Marshall merely mentions that the discovery doctrine applied only among European nations themselves. In their treaty relations with Indian nations, all the Europeans recognized that the Indians had the complete right—absent conquest in a just war—to decide whether or not to part with their land.³³ In Wilkin’s view, the historical record does not support Marshall’s transformation of discovery into ownership.

Eric Kades argues that Marshall was making a two-level analysis.³⁴ First, discovery gave the United States the right of purchase, exclusive of all other European nations.³⁵ Second, the discovering nations established their own rules governing how that right or purchase would be exercised and by long-held custom and innumerable statutes, only the sovereign could purchase land from the Indians.³⁶ In recognizing this custom, Marshall assured that no one would compete for land purchase, meaning the sovereign would be protected from bidding and guaranteed the lowest price possible.³⁷

But the result Marshall reached in *Percheman* ten years later suggests that there may well have been a choice, at least a legal one.³⁸

31. *Id.* at 593-94.

32. Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 *John Marshall L. Rev.* 1183, 1188 (2000) (citing *Johnson v. M’Intosh*, 21 U.S. at 593).

33. Wilkins, *supra* n. 27, at 298-312.

34. Kades, *supra* n. 11, at 70-71.

35. *Id.*

36. *Id.* at 106-12. *But see Mitchel v. U.S.*, 34 U.S. 711 (1835) (upholding transfer of land by the Seminole Nation to a private company that was subsequently confirmed by Spain).

37. Kades, *supra* n. 11, at 111-13.

38. *U.S. v. Percheman*, 32 U.S. 51 (1833).

The relevant facts in this later case were similar to those in *M'Intosh*, with two important exceptions. The first difference is that the sovereign that had transferred title to the land in question was a European nation, not an Indian tribe. In 1815, Spain, through its governor, had granted Spanish military officer Juan Percheman 2000 acres of land at a place called Ockliwaha in East Florida.³⁹ Three years later, Spain ceded its Florida colony to the United States by treaty.⁴⁰ In 1830, Percheman had sought to confirm his title in a Federal court.

The second difference—and one which makes the case particularly interesting and somewhat challenging for first year students—is that the Court's determination of title in *Percheman* ultimately turned as much upon jurisdiction, sovereign immunity, and Congressional intent as it did upon any aspect of property law. Because federal court jurisdiction did not extend to suits against the sovereign, the only way Percheman could bring his claim was if Congress had conferred jurisdiction by specific statute.⁴¹ Following the treaty cession from Spain, the United States Congress had passed several acts to address private land claims in the acquired territories.⁴² Specifically, the act of May 23, 1828 provided for private land claims to be presented to a board of commissioners for ascertainment and confirmation,⁴³ the act of May 26, 1830 submitted to federal court any claims that had not been "finally acted upon" at the time of passage of the act.⁴⁴ Since Percheman's claim had been rejected by the board of commissioners, the Federal court only had jurisdiction to hear his claim if the board's rejection of his title was not what Congress had meant in the latter act by the words "finally acted upon."⁴⁵

In deciding whether Congress had intended the board of commissioners to be an investigatory panel recommending confirmation of titles or an adjudicatory court making determinations of title,⁴⁶ Chief Justice Marshall first considered the effect of Spain's cession of Florida upon the titles to land the King had already granted. His analysis is worth quoting extensively:

The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change

39. *Id.* at 82 (the Court made no inquiry into how Spain acquired title).

40. *Id.* at 86.

41. *Id.* at 85-86.

42. *Id.*

43. *Percheman*, 32 U.S. at 85-86. Note the act of May 8, 1822, which established the process for confirming Florida land claims. *Percheman*, 32 U.S. at 89-90.

44. *Id.* at 86.

45. *Id.*

46. *Id.* at 90.

their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? . . . A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; lands he previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.⁴⁷

This clear rule, that a sovereign's cession did not affect private land title, argued, according to Marshall, that neither the diplomats negotiating the treaty of cession⁴⁸ nor Congress in passing the various title confirmation acts could have intended for "real titles" to be subject to invalidation upon cursory examination by a board of commissioners.⁴⁹ Thus, he concluded, no determination of title was "finally acted upon" until it was confirmed or rejected by Congress.⁵⁰ Percheman's title, granted by the King of Spain and confirmed by the District Court, was valid.

Reading *M'Intosh* and *Percheman* early in the first year Property course exposes students to how government institutions—executive, legislative, and judicial—determine the character and extent of property rights. Reading the cases side-by-side, or at least serially, shows starkly how Marshall applied assumptions about race and culture to establish and secure rights in land. Moreover, studying the cases together deprives students of the facile dismissal of them as irrelevant products of a different historic age. Rather, it encourages them to make a close reading of the cases to determine how Marshall reached his opposite conclusions.

Adding a more recent decision on Indian property rights, *Tee-Hit-Ton Indians v. United States*,⁵¹ to the Property I syllabus accomplishes two objectives. First, it offers students an introduction to Fifth Amendment "takings" issues that illustrates the preliminary question in

47. *Id.* at 86-87.

48. *Percheman*, 32 U.S. at 88-89. In holding the treaty language, which expressly protected grants from the Spanish Crown, self-executing, Marshall relied upon the Spanish language version of the treaty. See *Percheman* argument, *id.* at 69 (noting that the Spanish version, *quedaron artificados* means that the titles were to continue acknowledged and confirmed). *Percheman*'s counsel argued for an interpretation based on the treaty's use of the feminine pronoun.

49. *Id.* at 91-92.

50. *Id.*

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

takings jurisprudence of whether a particular interest is sufficiently "property" to require compensation for its confiscation by the government. Second, it shows students how judges apply (and misapply) precedent and consider policy implications in reaching decisions about property law.⁵²

In *Tee-Hit-Ton Indians*, decided in 1955 and prefiguring the current Supreme Court's Indian law jurisprudence, a clan of Tlingit Indians claimed compensation under the Fifth Amendment to the Constitution for the cutting of timber on their ancestral lands in and around the Tongass National Forest in Alaska.⁵³ The Court held that Indian title not explicitly recognized by treaty or legislation was not a sufficient property interest to merit compensation for government taking under the Fifth Amendment.⁵⁴ The Court described Indian title as follows:

It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.⁵⁵

Justice Reed, writing for the majority,⁵⁶ justified this description of Indian title upon the theories of discovery and conquest and, especially, the "great case of *Johnson v. M'Intosh*."⁵⁷ According to Reed, the inferior Indian title had "long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained."⁵⁸ *M'Intosh*, he argued, had "confirmed the practice of two hundred years of American history 'that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.'"⁵⁹ Reed then quoted extensively from

52. The two most useful sources for background and critical analysis of *Tee-Hit-Ton Indians* are Newton, *supra* n. 27 and Joseph William Singer, *Property and Sovereignty*, 86 Nw. U. L. Rev. 1 (1991).

53. *Tee-Hit-Ton Indians*, 348 U.S. at 273.

54. *Id.* at 285.

55. *Id.* at 279.

56. Justice Douglas, joined by Chief Justice Warren and Justice Frankfurter dissented, but only as to whether Congress had recognized the Indians' title in the Organic Act for Alaska, 23 Stat. 24 (1884). *Tee-Hit-Ton Indians*, 348 U.S. at 294.

57. *Id.* at 279.

58. *Id.* (citing 1 Wheaton's International Law, ch. V.).

59. *Id.* at 280 (citing *Johnson v. M'Intosh*, 21 U.S. at 587).

Marshall's opinion denying the "Courts of the conqueror" authority to decide, "on abstract principles" the right of "agriculturalists, merchants, and manufacturers" to "expel hunters from the territory they possess."⁶⁰

In this series of rhetorical moves, Justice Reed stretched the holding in *M'Intosh* far beyond the facts in the case and deployed language from the opinion to justify a result that it never called for. In *M'Intosh*, the Court effectively split Indian title in two: discovery gave the United States "absolute" (also called "exclusive") title to Indian lands, leaving tribes with a right of occupancy, a right which could be acquired either by purchase or by conquest, but only by the United States. The specific issue before the Marshall Court—the validity of Indians' grants to the United States versus earlier grants to private individuals—required no judgment upon the nature of the Indians' right of occupancy, including whether it could be characterized as a property right. In fact, Marshall noted, that "Indian title of occupancy . . . is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment."⁶¹ In his mind, it would seem, the Indians' interest was substantial and subject to protection, even in "the courts of the conqueror."⁶²

Justice Reed relied upon language Marshall had used to justify Europeans' claim of "absolute title" in order to support his own claim that Conquest had deprived Indians of all property rights in their land. "Conquest," Reed quoted Marshall, "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."⁶³ While Marshall had used this language to justify taking "absolute" title from the Indians,⁶⁴ Reed's discussion concluded that it had left them no title at all, certainly no title that had to be respected by the United States:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.⁶⁵

60. *Id.*

61. *M'Intosh*, 21 U.S. at 592.

62. *Id.* at 590.

63. *Tee-Hit-Ton Indians*, 348 U.S. at 280 (citing *Johnson v. M'Intosh*, 21 U.S. at 590-91).

64. *M'Intosh*, 21 U.S. at 588-89.

65. *Tee-Hit-Ton Indians*, 348 U.S. at 290. Justice Reed's assertion that most aboriginal title was acquired by conquest has been hotly contested. See Felix Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 34-35 (1947) (arguing that what "[e]very American schoolboy is taught . . . the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian Owners") (quoted by Newton, *supra* n. 27, at 1215); Newton, *supra* n. 27, at 1241-44 ("The only sovereign act that can be said to have conquered the Alaska native

Lawyers for the Tee-Hit-Ton Indians tried to argue that their land use was not like that of “the nomadic tribes of the States Indians.”⁶⁶ They asserted that “their stage of civilization and their concept of ownership of property” made the rules for American Indian land inapplicable in Alaska.⁶⁷ Justice Reed, however, pointed to the small number of Tee-Hit-Tons (65 members),⁶⁸ the large territory they claimed (350,000 acres),⁶⁹ their tribal, not individual, land ownership,⁷⁰ and their use of the land, specifically their movement about the territory as game and fish became scarce.⁷¹ This, Reed concluded, showed that the Tee-Hit-Tons were in a hunting and fishing state of civilization and that their use of the land was like that of the nomadic Indians to the south.⁷² Accordingly, their title need not be respected.

The more convincing reasons for Justice Reed’s opinion are in his discussion of the policy implications of the decision. In footnote seventeen, Reed noted that the Tee-Hit-Tons’ claim would reach fourteen million dollars with interest and that other pending claims based upon the Fifth Amendment totaled nine billion dollars.⁷³ Even more fundamental, however, is Justice Reed’s conclusion:

In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.⁷⁴

In both *M’Intosh* and *Tee-Hit-Ton Indians*, the Court used fanciful descriptions of Indians’ use of land (and implicitly Indians’ property laws) to support its diminishment of tribal property rights.⁷⁵ Only a

was the *Tee-Hit-Ton* opinion itself.”).

66. *Tee-Hit-Ton Indians*, 348 U.S. at 285, 288.

67. *Id.*

68. *Id.* at 286.

69. *Id.*

70. *Id.* at 287.

71. *Tee-Hit-Ton Indians*, 348 U.S. at 287.

72. *Id.* at 286-87.

73. *Id.* at 285. Dean Newton has pointed out the exaggeration in the Federal government’s estimate. Newton, *supra* n. 27, at 1248-49. She argues that a more realistic estimate of the United States liability, including interest would have been slightly over \$1 billion dollars. *Id.*

74. *Tee-Hit-Ton Indians*, 348 U.S. at 290-91.

75. See *M’Intosh*, 21 U.S. at 590-91 (“[T]he tribes of Indians inhabiting this country were fierce savages . . . whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness. . . . As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them. The game fled into

limited understanding of the diversity of indigenous societies and their means of productions is needed to realize just how romantic and stereotypical the Court's descriptions were.⁷⁶ Exposing students to accurate descriptions of indigenous conceptions of property that they can compare with the Anglo-American common law decisions in their casebook highlights the role embedded values have in any given property rights system and foregrounds the extent to which any such system is the result societal and institutional values and choices.

The early nineteenth-century case of the fox-hunter and saucy interloper, familiar to generations of law students, offers an opportunity at the beginning of the Property course to consider an indigenous perspective on the values embedded in law of capture as applied to wild animals. At issue in *Pierson v. Post*, of course, was which of two pursuers owned a fleeing fox: the hunter, who chased the fox with dogs and hounds under his command, or the passer-by, who intervened, killed the fox, and carried it off.⁷⁷ Leslie Marmon Silko, in her classic novel, *Ceremony*, described the killing and butchering of a deer by four young Laguna Pueblo hunters around the Second World War.⁷⁸ In Silko's story, there is no mention of which hunter actually shot the deer. One guts it and cleans it, another takes the liver and heart. The two others sprinkle cornmeal on the dead animal's nose, feeding its spirit and demonstrating their love and respect in the belief that to do otherwise might offend the deer and risk its absence the following year. All understand that after they carry it back to the Pueblo, the deer will be laid out on a Navajo blanket, with turquoise around its neck and silver and turquoise on its antlers, with a bowl of cornmeal nearby. As the hunter carries the deer's liver and heart home in a clean cheesecloth, he reflects: "They said the deer gave itself to them because it loved them, and he could feel the love as the fading heat of the deer's body warmed his hands."⁷⁹

I assign my students Silko's piece after we've spent a class parsing and dissecting the four and a half pages of *Pierson v. Post*. I ask them to contrast the values reflected in her story with those in the judges' majority and dissenting opinions. I then ask them to suggest what they

thicker and more unbroken forests, and the Indians followed."); *Tee-Hit-Ton Indians*, 348 U.S. at 287-88 ("[T]he Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth. . . . [T]he petitioner's use of its lands was like the use of the nomadic tribes of the States Indians.").

76. For a description of Indian property laws based upon historical accounts and anthropological reports, see generally Kenneth Bobroff, *Re-telling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 Vand. L. Rev. 1559 (2001).

77. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805) (reprinted in Singer, *supra* n. 4, at 51).

78. Silko, *supra* n. 9, at 50-52. Silko, who attended law school at the University of New Mexico before publishing *Ceremony*, was almost certainly familiar with *Pierson v. Post*, which would have been routinely taught in the first year Property course.

79. *Id.* at 52.

think a property law system for hunting deer might look like for a society with values similar to those depicted by Silko. Finally, I ask them to propose a property law system that would reflect other values, perhaps those of a rancher, a conservationist, an ecofeminist, a deep ecologist, or an animal rights proponent. The exercise generates lively discussion and seems to result in a heightened awareness of how all property laws reflect value judgements by lawmakers, whether common law judges, legislators, or regulators.

Native American perspectives on property, particularly on property in land, provide valuable comparisons to the theoretical perspectives typically discussed in first-year Property classrooms. First year students typically read explanations of property ranging from classical writers like Locke, Bentham, and Blackstone; to modern proponents of Legal Realism, Critical Legal Studies, Critical Race Studies, and Law and Economics. Property teachers are likely to find indigenous perspectives on property less accessible and less familiar, but adding several to the first year syllabus challenges students to think more critically about all the perspectives they consider.

An obvious caveat is the explicit acknowledgement that there is no single American Indian perspective on property or even on property in land. Native societies in the Americas have enjoyed a broad range of theoretical positions on property and land and have created a wide variety of property systems.⁸⁰ These have varied across time, regions, languages, modes of production, and cultures. Almost all indigenous cultures here have recognized private property in personal goods, including, among many cultures, intellectual property such as songs, dances, stories, and curing rituals.⁸¹ Agricultural societies recognized the most extensive property rights in land, although most Native societies located those rights in families or clans and required maintenance of use for maintenance of ownership.⁸² Some Native peoples in the Americas recognized transfer of property rights, while others have not.⁸³ Of course, Indian property systems underwent tremendous change as a result of European and then United States colonialization, at least until Indian property laws were federalized, beginning in 1887.⁸⁴ The variety of indigenous property systems, time constraints and accessibility of sources requires focus on, at best, just a

80. Bobroff, *supra* n. 76, at 1571-1602 (arguing that an analogy exists for almost every doctrine of Anglo-American property law including interests similar to easements, licenses, *profits-a-pendre*, life estates, leases, timeshares, condominiums, corporate titles, cotenancies, and defeasible fees).

81. *Id.* at 1573 n. 51.

82. *Id.* at 1571-1602.

83. *Id.*

84. See e.g. Claudio Saunt, *A New Order of Things: Property, Power and the Transformation of the Creek Indians 1733-1816* (U. Chi. Press 1999).

few. Yet, inclusion of even two or three such perspectives will encourage students to think more critically about the other property perspectives they study.

A common misconception is that because Native peoples have viewed property rights in land differently from their colonizers, they have recognized no ownership of land at all.⁸⁵ As William Cronon wrote about Indians in early New England, "The difference between Indians and Europeans was not that one had property and the other had none; rather, it was that they loved property differently."⁸⁶ Archeological and mostly non-Indian accounts show that Indian families in southern New England held exclusive rights to their cultivated fields and the land where their homes stood.⁸⁷ Landholders had to use the lands to retain ownership and rights were subject to periodic abandonment as old fields were exhausted.⁸⁸ Any member of a village could use its common lands for wood and plant gathering, but fishing and trapping sites could be owned by one person or a family.⁸⁹ Indians in early New England sometimes divided property rights in quite complicated ways, recognizing an exclusive right to certain resources from a certain place at a certain time (e.g. taking deer in the winter), but not the right to prohibit others from taking more plentiful resources from the same place in more plentiful times (e.g. hunting migratory birds in the spring).⁹⁰ "Property rights," Cronon writes, "shifted with ecological use."⁹¹ Like many native societies in the Americas, Indians in early New England recognized exclusive rights in land. Like some, they "sliced" property rights more finely than the typical European bundle and like most, though not all, they rarely traded property rights in an internal market.⁹²

A late nineteenth-century petition to Congress from Hopi village leaders resisting the imposition of federal title in severalty offers a short, easily accessible description of a property system adapted to the challenges of desert agriculture.⁹³ It is worth quoting extensively:

85. Bobroff, *supra* n. 76, at 1573-74.

86. William Cronon, *Changes in the land: Indians, Colonists, and the Ecology of New England* 80 (Hill & Wang 1983). Cronon's study of land tenure and land use in early southern New England is readily available in a paperback edition. Dwyer's and Menell's casebook includes a "case study" that uses excerpts from Cronon's study and other secondary sources to compare native and colonial property systems in early New England. Dwyer & Menell, *supra* n. 4, at 21-56.

87. Cronon, *supra* n. 86, at 62-64.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 62-67.

92. Bobroff, *supra* n. 76, at 1574 (citing Cronon, *supra* n. 86, at 62-67).

93. Albert Yava, *We Want to Tell You Something*, in *Native American Testimony* 249-50 (Peter Nabakov ed., Viking 1991) (Describing a non-Indian, Tom Keam, who drew up the letter by hand and had it read to "all the important men in the village." One hundred and twenty three men, representing practically every clan and family signed the petition.).

The family, the dwelling house and the field are inseparable, because the woman is the heart of these, and they rest with her. Among us the family traces its kin from the mother, hence all its possessions are hers. The man builds the house but the woman is the owner, because she repairs and preserves it; the man cultivates the field, but he renders its harvest in the woman's keeping, because upon her it rests to prepare the food, and the surplus of stores for barter depends upon her thrift.

A man plants the fields of his wife, and the fields assigned to the children she bears, and informally he calls them his, although in fact they are not. Even of the field which he inherits from his mother, its harvests he may dispose of at will, but the field itself he may not. He may permit his son to occupy it and gather its produce, but at the father's death, the son may not own it, for then it passes to the father's sister's son or nearest mother's kin, and thus our and houses always remain with our mother's family.

According to the number of children a woman has, fields for them are assigned to her, from some of the lands of her family group, and her husband takes care of them. Hence our fields are numerous but small, and several belonging to the same family may be close together, or they may be miles apart, because arable localities are not continuous. There are other reasons for the irregularity in size and situation of our family lands, as interrupted sequence of inheritance caused by extinction of families, but chiefly owing to the following condition, and to which we especially invite your attention.

In the Spring and early Summer there usually comes from the Southwest a succession of gales, oftentimes strong enough to blow away the sandy soil from the face of some of our fields, and to expose the underlying clay, which is hard, and sour, and barren; as the sand is the only fertile land, when it moves, the planters must follow it, and other fields must be provided in place of those which have been devastated. Sometimes generations pass away and these barren spots remain, while in other instances, after a few years, the winds have again restored the desirable sand upon them. In such events its fertility is disclosed by the nature of the grass and shrubs that grow upon it. If these are promising, a number of us unite to clear off the land and make it again fit for planting, when it may be given back to its former owner, or if a long time has elapsed, to other heirs, or it may be given to some person of the same family group, more in need of a planting place.

These limited changes in land holding are effected by mutual discussion and concession among the elders, and among all the thinking men and women of the family groups interested. In effect, the same system of holding, and the same method of planting, obtain among the Tewa, and all the Hopi villages, and under them we provide ourselves with food in

abundance.⁹⁴

This description leaves no doubt that the Hopis have a legal system recognizing private property in land.⁹⁵ It offers a rich source for comparative discussion of the role of gender in property rights, dividing specific rights among different rights holders, and, especially, the readjustment of property rights as environmental circumstances change.

A second perspective, a Lakota view of the land, portrays radical differences with Anglo-American perspectives:

To the whitepeoples, land is *ground*; to the Lakota, land is *earth*. . . . To the Lakota land is the *mother of all that lives*, the source of life itself—a living, breathing entity—quite literally *a person*. What does any person call a living, breathing person who is the source of one's own life, but mother. In the whitepeoples view, the concept of mother extends only to a mother of the flesh. The Lakota view extends the concept to the mother of earth—the source of all flesh. This Lakota view is not merely fanciful, poetic, mystical, or mythical in the sense of false or untrue; the view can be established as factual by criteria acceptable to the most scientifically-minded non-native scholar. Any soil engineer knows that the earth breathes. And any scientist will acknowledge that the earth is the condition and source of life as we know it. . . .

Both whitepeoples and the Lakota claim to 'love' the land and each accuses the other of "wasting" it. Here are two peoples using the identical doctrine, but who are poles apart in their interpretations of the same idiom. Traditional Lakota disdain the whitepeoples' love—a love that 'wastes' the land by 'working' it: plowing, tilling digging, blasting, mining it—all ways that facilitate the destruction of the ecological balance of nature The key word in English regarding land is *yield*. Each acre must yield—crops, cattle, rent, etc. Any acre lying fallow or in a "state of nature" is going to waste, according to most western thinking. . . .

Land is reduced to an exploitable, fungible commodity, to be used up, worked out, in short, 'developed.'

Ancillary to this notion of land as object, is the concept of land exclusivity—a concept that the old plains peoples could not understand. The idea is that one person or group of people can actually 'own' a piece of land—now no longer called land, but 'property,' which that person or people can then 'fence in,' and from which they lawfully can exclude all others. This idea of exclusivity was as incomprehensible to the Lakota as the idea that patches of air could be owned by different peoples. Land ownership was as absurd a notion to the Lakota as the idea of paying someone for oxygen rights.

In contrast to the whitepeople's objective, detached, exclusive view of land,

94. *Id.* at 249-50.

95. See Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 Kan. J. L. & Pub. Poly. 761 (2000) (providing a current description of Hopi property law).

the traditional Lakota view is subjective, interpenetrating, and inclusive. It is subjective because land in our hearts simply is not substitutable or compensable. One landscape definitely is not as good for oneself as another landscape. One's land must be where the generations of the nation have sprung from the earth, have lived, loved, suffered, and died, and in which their bones rest. No other land can be so sweet, no other land can be so strengthening, nurturing or comforting. When land is taken from the Lakota, they lose the source of their eternal community, their source of life, and their very identity. The hoop of the *wico-ti* is broken, and the *tiospaye* scatter: the fabric of existence and identity is weakened anew.⁹⁶

From this Lakota view, land is far more than property. As Vine Deloria, Jr. and Clifford Lytle argue, land—specifically the “special place” revealed to the People by quasi-mythological figures in the primordial mists—was imbued with spiritual meaning.⁹⁷ For the Lakota, and for most indigenous peoples, land has been constitutive of the identity of the people who lived upon it. Accordingly, when Indians have denied that land could be alienated, they have done so in reference to cessions outside the tribe, transfers which they have seen threaten their very identities as peoples. This last view of property in land invites a natural comparison with Margaret Jane Radin's work on the relationship between property and the construction of personhood and regarding property and market inalienability.⁹⁸ Indeed, as United States judges and policymakers have struggled with developing a property system to govern questions of ownership and markets in body parts and in the resources and fruits of biomedical research,⁹⁹ so have Lakota leaders struggled with and consistently opposed the imposition of a property system for land in conflict with Lakota values.¹⁰⁰ Considering a Lakota view of the land and its relationship to property law can help students understand the connection between a society's values and the property law by which it governs itself.

96. Robert Bunge, Lecture, *Land is a feeling*, adapted by Rory Fausett and printed in Rory Fausett, *Indigenous Americans and United States Law* (unpublished class materials prepared for Stanford Law School, Spring 1993). See generally Robert Bunge, *An American Urphilosophie* (U. Press of Am. 1984).

97. Vine Deloria, Jr. & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* 8-12 (U. of Tex. Press 1984). Every indigenous culture with which I am at all familiar has some such place. For the Lakota, this place is Paha Sapa, known by non-Indians as the Black Hills. See John Lavelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 *Great Plains Nat. Resource J.* 40 (2001). For the Navajo, it is Dinetah, in the northwestern corner of New Mexico. See Claudeen Arthur et al., *Between Sacred Mountains: Navajo Stories and Lessons from the Land* (Sun Tracks and U. of Ariz. Press 1986).

98. See Margaret Jane Radin, *Property and Personhood*, 34 *Stan. L. Rev.* 957 (1982); Margaret Jane Radin, *Market-Inalienability*, 100 *Harv. L. Rev.* 1849 (1987).

99. See e.g. *Moore v. Regents of the U. of Cal.*, 793 P.2d 479 (Cal. 1990).

100. See generally Lavelle, *supra* n. 97.

Reasons to teach Indian law materials in the mainstream law school curriculum are myriad. Those of use who teach and write about Indian law want all our students to understand our nation's legal history, the continuing struggle to find a principled basis for the relationship among the federal government, states, and Indian tribes and how our nation's power and the law have been deployed to colonize Indian peoples. Yet even for the non-specialist and those less convinced of the importance of Indian law, the subject offers useful pedagogical benefits to teachers willing to include appropriate materials in their classes. The first year Property class may well be where the potential benefits are strongest. Incorporating Indian law materials encourages students to consider how societies structure the rules governing land and other property. Along the way, they cannot help but deepen their understanding of how property serves to reflect those societies' values and choices.