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GOVERNING PRIVATE PROPERTY IN INDIAN COUNTRY: THE DOUBLE-EDGED SWORD OF THE TRUST RELATIONSHIP AND TRUST RESPONSIBILITY ARISING OUT OF EARLY SUPREME COURT OPINIONS AND THE GENERAL ALLOTMENT ACT

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"You own the stars?"
"Yes."
"But I have seen a king who—"
"Kings do not *own*, they *reign over*. It is a very different matter."**

INTRODUCTION

Indian Tribes should not own title to property. Why not? Because individuals own title to property; sovereigns hold dominion over territory. Individuals are subject to sovereigns; property is a subset of territory. Sovereigns issue patents to title; individuals merely convey title by deed. Sovereigns "take" title by eminent domain; individuals can do no such thing. Should Indian Tribes own title to property? Or should they hold territorial dominion over it?

Quite likely the reader's reaction to this article's first sentence was that an anti-Indian polemic was sure to follow. However, the prevailing perception that Tribes "own title" does more harm than good to their cause. United States jurisprudence treats Indian Tribes more like individual landowners under an existing property system rather than as sovereigns with dominion to create and control their own property systems. Many, if not most, of the Tribes' practical problems today arise where sovereignty, territory, and property intersect.

Part I of this article will provide the relevant background of territory and property in the U.S. law and politics. Part II will provide the relevant federal Indian law background. Part III will examine several current scenarios which illustrate the confusion between ownership and control of property in Indian law and the tension between the political-based "Trust Relationship" and property-based "Trust Responsibility."

PART I: OF POLITICS, TERRITORY, AND PROPERTY

The interplay of political theory with notions of territory and property plays a peculiar role in the relationship between the United States and

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** ANTOINE DE SAINT-EXUPÉRY, THE LITTLE PRINCE 55 (Katherine Woods trans., 1943).

Indian Tribes. This section will study these ideas as they relate to the development of federal Indian law. It will conclude with a preliminary explanation of the problems that arise when American political theory and laws are inconsistently imposed on unsuspecting Indian Tribes.

A. Of Politics

In *The Morality of Consent*, Professor Alexander Bickel wrote, "Two divergent traditions in the mainstream of Western political thought—one 'liberal,' the other 'conservative'—have competed, and still compete, for control of the democratic process and of the American constitutional system; both have controlled the direction of our judicial policy at one time or another."[1] Bickel's thesis has been amply illustrated throughout American history in debates between Federalist and Anti-Federalist, liberal and conservative, Democrat and Republican.[2] Indeed, the idea has had a profound impact on the development of federal Indian law and scholarship.

America's founding debates best exemplify these divergent political theories. Thomas Paine, among others, argued that logically people must have preceded government and therefore are the source of all its authority; thus, if the people have not authorized their government to act, it may not act.[3] Conversely, Charles Pinckney and others argued that government was necessarily formed out of evolving and shifting exigencies of geography, economy, and culture so that the state must precede its citizenry. They argued that the state has inherent powers to act first without its subjects' prior authority, justifying the act morally and politically upon their subsequent consent.[4] These notions have evolved into ideas of individual libertarianism versus state police powers, both of which play a critical role in the relationship of governments to their subjects when it comes to private property.[5] They have also come to reveal the greatest legal and political questions facing Tribes today.[6]

The founders of the Union realized that two sovereign spheres could not overlap or one would certainly destroy the other. They knew that if two overlapped, "contests respecting power must arise."[7] How then to ensure that one sovereign was not entirely usurped by the supremacy of the other?

Their answer was relatively simple: they would limit the sphere of influence of the sovereign with supremacy. One sovereign would be the grantee and the other the grantor in the exchange of sovereign power.

1. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 3 (1975).
2. *See generally*, THE ANTI-FEDERALIST: WRITINGS BY OPPONENTS OF THE CONSTITUTION (Herbert Storing ed., 1985) [hereinafter ANTI-FEDERALIST].
3. THOMAS PAINE, THE RIGHTS OF MAN 81-82 (Citadel Press, Inc. 1974) (1794).
4. *See* BICKEL, *supra* note 1, at 4-25.
5. For example, witness the renewed national debate in the land-use context where the Union and States exercise regulatory police powers to the point of "taking" private property.
6. The Supreme Court set forth a "police powers" test in determining Tribal jurisdiction in many instances. Montana v. United States, 450 U.S. 544, 566 (1981).
7. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824).

The grantee's sovereignty would be supreme but its sovereign sphere would be limited, so that the grantor's sovereignty, while subordinate in certain areas, would be inherent and vastly broader. Thus, neither would "triumph in the fullness of dominion over the other."[8] Coupled with the principle that the source of governing power was the people, the government which was closer to the people, the States, would be the grantor with inherency in an unlimited sphere and the Union would be the grantee with supremacy in a limited sphere.[9] This logic became embodied in the Tenth Amendment as the cornerstone of the Union/ State relationship: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[10]

This divergence made its way into United States laws and politics dealing with Indian Tribes, particularly over the issue of which level of government would deal with Tribes. Conflicts between States and Tribes, just as between two States, are ultimately resolved by the federal government. As a result, States have a tendency to view their conflicts with Tribes as a conflict between themselves and the federal government. This viewpoint reflects a States-oriented perspective, which in turn serves to ultimately defeat the Tribes.[11] In actuality, Tribes are in a similar position to States in our federal system, giving rise to tensions between a central government and local sovereigns, with all the attendant social and political concerns.[12]

Exacerbating matters, Indian law matured under the liberal, pro-federal government Warren Court of the 1960s and 1970s. As a result, Tribes have tended to tailor their arguments to reflect those used effectively in an era featuring the expansion of big government and civil rights. Both of these areas of growth whittled away at the sovereignty of the States. Today, however, those same arguments have been less effective for Tribes before the more conservative, States-oriented Rehnquist Court. Consequently, the divergent political theories discussed above have recently reemerged to impact how American law treats Tribes. If Tribes are to emerge from the Rehnquist era with their sovereign integrity intact, they must re-configure their legal and political thinking to address the political theories of the Rehnquist Court. In particular, the term "States' rights" must be tantamount to "Tribes' rights," thus invoking the same notions of republican democracy and federalism.

B. *Of Territory*

Territory is a cornerstone of sovereignty. It is a prerequisite for political recognition as an independent and autonomous "state."[13] A hallmark of

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8. ANTI-FEDERALIST, *supra* note 2, at 211.

9. *See* U.S. CONST. art VI, § 2.

10. U.S. CONST. amend. X.

11. SYDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 25 (1994).

12. Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 TOL. L. REV. 617 (1994).

13. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 53 (6th ed. 1987).

American federalism, or at least of the more conservative of our divergent traditions, is that the original thirteen American States preceded the Union as independent states with inviolable spheres of territorial sovereignty. Thus, the Tenth Amendment's reserved rights logic protects the States' territorial integrity within the Union.

Nonetheless, State sovereignty has become "permeable" in certain regards where, by express grant in the Fourteenth Amendment, state governments have become constrained by the federal Bill of Rights and various federal statutes. Perhaps the greatest permeation of the States' sovereignty rests in the expansive reading of the grant of regulatory powers to the Union in the Commerce Clause, including States' inherent sovereign powers to regulate commerce with Indian Tribes.[14] Nevertheless, the Tenth Amendment ensures that States maintain a high degree of territorial integrity.

Like the original thirteen States of the Union, Tribes were once independent "states" with complete territorial sovereignty.[15] Today, as the U.S. Supreme Court recently declared, "[T]ribes can no longer be described as sovereigns in this sense."[16] However, "[t]he Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."[17] Of course, the Tribes' loss of some territorial sovereignty can be attributed to mutual agreements in treaties. Nevertheless, even when the Tribes ceded territory they reserved for themselves another degree of territorial sovereignty.[18] Indeed, in the criminal law context, the U.S. Congress has taken account of the territorial nature of the Tribes' existence through a statute defining "Indian Country."[19] The U.S. Supreme Court has used the criminal statute as a guide in civil matters.[20] The question, then, is whether Tribes have enough reserved territorial sovereignty to maintain their own property systems. If not, how does the United States justify such an epic change of circumstances for Tribes? More practically, what will be the long-term effects on Tribes and their peoples, economies, and cultures?

C. *Of Property*

The American property system is largely an outgrowth of the English property system. Early political debates on property queried whether all territory should be held communally or divided in severalty, giving life

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14. U.S. CONST. art. I, § 8 ("[Congress shall have power] to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes").

15. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) ("The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts.").

16. Duro v. Reina, 495 U.S. 676, 685 (1990) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

17. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980).

18. Tribes retain "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 556 (1975) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)). *See also* FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW, 256, nn.114 & 115 (Strickland ed., 1982).

19. 18 U.S.C. § 1151 (1988).

20. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

to such familiar notions as land barons, "levellers and diggers," and the "tragedy of the commons."[21] In the Fifth Amendment of the U.S. Constitution, private property became the subject of a basic civil right.[22] Today's debates tend to oscillate between varying degrees of rights and restrictions attaching to private property, pitting state "police power" against libertarian notions of governmental restraint. These same notions tend to pervade the evolution of Tribes, their territory, and their property law.[23]

Perhaps the greatest utility of the Anglo-American property system is its ability to generate revenue for government, usually in the form of taxes and fees. Property is taxed, transactions and transfers are taxed, uses are licensed, deeds and title searches are costly, the price of an abstract is high, and so on. Indeed, in such areas as land use, the property system is often used to manipulate economic activity according to geographics, demographics, and other factors. From the Statute of Uses[24] to the Rule Against Perpetuities,[25] the Anglo-American property system has provided the playing field for governments to impose various taxes and fees on property in the name of generating revenue for good government. Even though Indian Tribes are constitutionally recognized governments with a degree of political sovereignty over territory and a greater degree of popular sovereignty over their subjects who own property within that territory, they find it increasingly difficult to benefit from any of these revenue generating methods.

D. *The Problem*

In the property arena, as in any area of Indian law, the overarching problem is that Tribes have been subsumed into the U.S. federal system in an unclear and disorderly fashion, arguably without their authority and certainly without a mechanism to ensure their continued consent.[26]

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21. *See generally*, ECONOMIC FOUNDATIONS OF PROPERTY LAW (Bruce A. Ackerman ed.) (1975).

22. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation").

23. *See e.g.*, a land-use dispute involving hazardous sludge in and around the Torres-Martinez Tribe reported in the *Los Angeles Times*. Tom Garmon, *Neighbors Blockade Sludge Mountain*, L.A. TIMES, Oct. 21, 1994, at B1, B4. A Tribe spokesperson reflected the essence of the "police power": "[I]ndividual freedom can only stretch so far before the tribe must step in." In response, one Tribe citizen reiterated the essential libertarian argument against police power: "[N]obody can interfere with our right to do with it [property] what we want. Some of us are worried that if the tribe can stop one individual from operating a business, what's to stop them from preventing others from doing the same? We treasure that freedom." Unfortunately, the citizen relied on the direct Trust Responsibility between the U.S. government and allotments, saying, "These allotments were given out by the (federal Bureau of Indian Affairs) to individual tribal members . . . ." In other words, the Tribe citizen would infringe her own Tribe's sovereignty by appealing to another sovereign rather than using her own sovereign's political processes. Federal courts, the Bureau of Indian Affairs, and other federal agencies are often all too happy to accommodate her.

24. *See* JAMES L. WINOKER, AMERICAN PROPERTY LAW 183-84 (1982).

25. *See id.* at 196-201.

26. Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 TOL. L. REV. 617,

The federal exercise over Indian property speaks volumes about the morality of imposing laws without authority or consent. But the problem is by no means solely an Indian issue. The federal government has spent countless hours, money, and energy attempting to deal with the problem. It is the American taxpayer who foots the bill.

In 1887, the U.S. government enacted the General Allotment Act (GAA),[27] setting the stage for legal battles over Tribes' territory and property that continues to the present. The first section of the GAA authorized the President to survey Tribe territories and divide them into "allotments" for individual Tribe citizens.[28] Section 4 authorized Indians not residing on a reservation to select an allotment upon the public domain.[29] The fifth section imposed restrictions on alienation by providing that title to allotments be held "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."[30] Section 5 also included a proviso applying the laws of the State to descent and partition of allotted lands.[31] Section 6 subjected allottees to the civil or criminal laws of the surrounding or adjacent State or territory, including, presumably, property laws.[32] However, in 1906, the Burke Act delayed application of State laws until expiration of the trust period.[33]

Significantly, the GAA merely provided for the application of State laws, not for State jurisdiction.[34] Certainly, the federal government, or perhaps the Tribe itself, has the jurisdiction to apply State laws.[35] Even

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628 (1994). *See also* Milner Ball, *Constitution, Courts, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 CHI L. REV. 671 (1989); Richard Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989).

27. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-42, 348-49, 354, 381 (1988)).

28. *See* Affiliated Ute Citizens v. United States, 406 U.S. 128, 142 (1972) ("Allotment is a term of art in Indian law . . . . It means a selection of specific land awarded to an individual allottee from a common holding" (citations omitted)).

29. General Allotment Act, *supra* note 27, at 389 (codified as amended at 25 U.S.C. § 334 (1988)).

30. *Id.* (codified as amended at 25 U.S.C. § 348 (1988)).

31. *Id.*

32. *Id.* (codified as amended at 25 U.S.C. § 349 (1988)).

33. Ch. 2348, 34 Stat. 325 (1906) (codified at 25 U.S.C. § 349 (1988)).

34. This conclusion finds precedent in the Assimilative Crimes Act (ACA), 18 U.S.C. § 13 (1988), which, as one court held, authorizes federal authorities to apply State law in Indian country. Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987). Although the Court's application of the ACA to Indian Country is questionable, its presumption of no state jurisdiction in the absence of express congressional delegation is accurate, even though State substantive law is applied. Comment, *Indian Country Jurisdiction and the Assimilative Crimes Act*, 69 OR. L. REV. 269 (1990). *See also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (finding that the state has no jurisdiction where Organized Crime Control Act adapts state law for federal jurisdiction). Unfortunately, some treatises seem to affirm some haphazard lower court decisions finding state jurisdiction. *See, e.g.*, COHEN, *supra* note 18, at 134.

35. This notion that jurisdiction over allotments were to remain under the federal government as opposed to the State also finds some support in Section 4 of the GAA which provides that

if the GAA did provide for application of State laws or State jurisdiction, the GAA did not expressly preempt the application of Tribe laws and Tribe jurisdiction. Because the federal government has never been in the business of maintaining property systems, and because individual Indians generally had no knowledge of State laws, federal administration of allotted lands became problematic. As a result, Congress has enacted various exceptions to the restrictions on alienation, such as shortening the trust period, allowing "competent" Indians to sell land, issuing fee patents to competent heirs of allottees who died during the trust period, authorizing the sale of a non-competent allottee's lands as long as the revenue benefitted the allottee,[36] and allowing leasing for mining and grazing.[37] The fallout has been immeasurable.

The Tribes' loss of land is itself unfathomable. Land within the territory and under the jurisdiction of Tribes decreased from approximately 156 million acres in 1881 to 78 million acres by 1900 and to 48 million acres by 1934.[38] An even more significant problem hovering heavily over Tribes today is the problem of fractionation of Indian trust lands. Although the federal government is statutorily authorized to lease lands for various reasons, the Tribe itself or an individual citizen of the Tribe, acting on entrepreneurial initiative, must first attain assent from every individual with an interest in the parcel (which may number in the hundreds), and then from the federal government. Even when the federal government administers the property, the problems are unwieldy at best.

The U.S. Department of the Interior (DOI) is charged with administering the trust, but, as its own internal communication reveals: "[f]ractionated Heirship has reached the point where a significant number of tracts are so highly fractionated that the land has become unusable or is of little value to the interest holder."[39] The DOI continued: "The fractionated ownership of Indian lands is taxing the ability of the government to administer and maintain ownership records on Indian lands and threatens the integrity and viability of the Department's Trust Fund Management System."[40] A magazine article similarly noted that "[t]he [DOI trust]

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allotments for on-reservation Indians were to be recorded in the federal "General Land Office," which remain to this day under federal control, while public domain allotments for off-reservation Indians were to be administered through and recorded in the "local land office," which subsequently were subsumed under State property systems. General Allotment Act, *supra* note 27.

36. The general rule seems to be that, as trustee, the United States may substitute one form of trust asset for another as long as their respective values is similar. *See, e.g.*, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968) (holding that Congress, where giving land to white settlers and giving Indians full money value, is exercising not eminent domain but trust duty).

37. *See, e.g.*, Act of June 25, 1910, Ch. 431, 36 Stat. 855 (codified as amended at 18 U.S.C. §§ 1853, 1856; 25 U.S.C. §§ 47, 151, 202, 312 (1988)).

38. COHEN, *supra* note 18, at 138 (citing D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed., 1973)).

39. Briefing Paper prepared by Larry Morrin, Bureau of Indian Affairs, for Bruce Babbitt, Secretary of the Interior. (Jan. 6, 1995) (on file with author).

40. *Id.* The question becomes one of "Trust Funds" because subsequent federal statutes essentially

fund records ownership of land parcels as small as seven inches by seven inches, monitors transactions in fractions of a penny and sends out dividend checks as small as $1.38."[41] In response, Congress has recently directed DOI to reform the accounting system for funds derived from allotted lands.[42] But neither branch seems inclined to get to the core of the problem: why is the Tribe not recognized as the governing authority over such matters?

Like any local sovereign, Tribes attempt to create and develop their own property systems but are increasingly thwarted. As a result of early case law and the General Allotment Act, property in the hands of Indians or Tribes tends to fall within the rubric of two property concepts in the Anglo-American system—"fee" or "trust." Questions regarding which sovereign possesses authority over each type of property have become paramount.

The "fee" concept derives from the Anglo-American property system.[43] In Indian Country, fee ownership of property is generally deemed to vest the owner with the same "bundle of rights" attaching to property in the Anglo-American system. These rights include the right of alienation by conveyance, devise or otherwise. The "trust" concept also derives from Anglo-American property concepts. In property law, a trust exists when one person possesses property in which another person holds a vested legal interest. One common scenario involves one capable person and one incapable person, the former being the guardian and the latter being the ward. The components necessary to comprise a "trust" include a "corpus" or "res," a "trustee" and a "beneficiary."[44]

The trust concept, however, is far more complicated because it also encompasses an abstract political concept in the American system. The political concept evolved to guide government-to-government relationships between political entities in the international arena, as nation-states became highly defined by territory, peoples, and interests. American federalism is an outgrowth of that development.[45] The political concept of "trust" crept into Indian law early in the nineteenth century, when the Supreme Court declared that treaties with Tribes made them into "domestic de-

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require the Secretary of the Interior to manage the forests, sell the timber, pay the proceeds of such sales to the allottees. *See e.g.*, 25 U.S.C. §§ 162a, 318a, 323-325, 406-407, 466 (1988). Because the fractionation of allotted lands through heirship is itself unmanageable, the resulting trust funds have become unmanageable as well. *See supra* note 39 and accompanying text.

41. Michael Satchell & David Bowermaster, *The Worst Federal Agency: Critics Call the Bureau of Indian Affairs a National Disgrace*, U.S. NEWS & WORLD REPORT, Nov. 28, 1994, at 61, 64.

42. Pub. L. 1103-412, 108 Stat. 4239 (1994).

43. The fee or "fee simple" represents a "tenure" or "estate" in real property which determines who owns it now and perhaps in the future, for how long, what can be done with it, etc.

44. THOMAS L. WATERBURY, MATERIALS ON TRUSTS AND ESTATES 60 (West, 1986).

45. DANIEL J. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 415 (1965) ("When the men of 1787 spoke . . . 'federal' was still commonly used in a sense close to its Latin origin (*foedus*, treaty) to describe a relationship resting in good faith (*foedus* in Latin was a cognate of *fides*, faith).").

pendent nations" whose relationship with the United States "resembles that of a ward to its guardians."[46] This distinction was made by the Court in order to ensure the Tribes' self-governance while keeping the Tribe subject to the overriding power of the United States.[47] Thus, a political relationship of "trust" developed which has come to be called the Trust Relationship.[48]

The property concept of "trust" crept into Indian law early in the twentieth century when the United States invoked the Trust Relationship's nebulous powers and enacted the General Allotment Act of 1887.[49] Suddenly, in the context of the "guardian/ward" relationship, the allotted lands looked decidedly like the "res" of a property "trust," the Tribes' members resembled "beneficiaries," while the responsibilities and the attendant power inured to the United States as "trustee." Thus, as a subset of the political relationship, the property concept of "trust" emerging out of the General Allotment Act developed as the Trust Responsibility.[50]

As a result, an inherent tension has developed between the political concept of the Trust Relationship and the property concept of the Trust Responsibility.[51] As do all sovereigns, Tribes attempt to regulate private property uses within their territories, potentially limiting property values to the point of a "taking." Indeed, many Tribes have acquired authority to regulate private property from their own members via their own Tribal constitutions, including from those members who own allotments.[52] And of course, Anglo-American law presumes such power even without express

46. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975).

47. *Id.* Some scholars, in line with their more liberal, race-based analysis of Indian law, have attributed the trust concepts to less lofty ideals. *See*, Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 63. Note that even the Chambers article's title speaks only in terms of a responsibility owed to individual Indians rather than to Tribes, where the political trust relationship obtains. *See* Chambers, *supra* note 46, at 1213.

48. Although not the point of this article, I have written elsewhere that treaties created a federalism relationship between the Union and Tribes. Monette, *supra* note 26. As historian Samuel Beer wrote: "When [Madison] called this method *foederal*, his meaning in the context can only be understood in the then conventional sense of *foedus*, or treaty, given it by the concept of compact federalism." SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 315 (1993).

49. Act of February 8, 1887, ch. 119, 24 Stat. 388.

50. United States v. Mitchell, 445 U.S. 535 (1980).

51. "The trust relationship has been the source of two opposing visions, one emphasizing federal power, the other emphasizing federal responsibility." AMERICAN INDIAN LAW: CASES AND MATERIALS 249 (Robert Clinton et al. eds., 1991).

52. *See e.g.*, CONSTITUTION OF THE HO-CHUNK NATION, art. V, § 2, cl. (n)-(p). The Legislature shall have the power:

> (n) To purchase under condemnation proceedings any lands within the jurisdiction of the Ho-Chunk Nation;
>
> (o) To enact laws to regulate and zone any lands within the jurisdiction of the Ho-Chunk Nation;
>
> (p) To enact laws to create and regulate a system of property including but not limited to use, title, deed, estate inheritance, transfer, conveyance, and devise.

authority from the people as an exercise of valid police power.[53] Nevertheless, the Tribes' attempt to exercise these powers are met with great resistance.

Much of the resistance comes from the trustee, the U.S. government. The responsibility of a trustee is to protect the property, or at least to ensure that fair value is received for it.[54] Indeed, in the U.S./Indian context, the Supreme Court once declared that under certain statutes the United States must abide by the "most exacting fiduciary standards."[55]

A Tribe's own government may impact upon trust allotments and other trust lands. As a result, the United States' Trust Responsibility over allotments and other private property may come into apparent conflict with the Tribe's sovereign power over both the property and its members. Even though the Trust Relationship seems to recognize the Tribe's self-governing political integrity in such matters, the Trust Responsibility becomes a two-pronged wedge, one dividing the United States and the Tribes in their government-to-government relationship and the other dividing the Tribes and their own members. In the end, the Tribes' ability to exercise territorial governance over their property and their members is stifled and democratic notions of self-governance are subverted.

Many entities are responsible for the problems faced by today's Tribes in dealing with their own property. Congress initially caused the conflict and continues to play a role. Many different departments in the federal government handle property issues within Indian Country. The Bureau of Indian Affairs (BIA) manages the lands and the funds accrued from those lands, while the Bureau of Land Management (BLM) and Bureau of Reclamation (BR) attempt to apply their legal authorities and laws within a Tribe's territory. The DOI's Fish and Wildlife Service (FWS) attempts to apply all its conservation laws within the Tribes' territory, which raises some of the same questions litigated by States and their citizens regarding restrictions on private property. The Department of Justice (DOJ) attempts to resolve these internal conflicts between federal agencies, but often sides against the Tribes, leaving wide gaps in the understanding of the Trust Relationship and the federal government's Trust Responsibility.

Powerful environmental lobbies side with Tribes when non-Indians would exploit their property within a Tribes' territory, and yet side against Tribes when a Tribe or its members would try to exploit tribal property

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53. *See*, Fletcher v. Peck, 10 U.S. (6 Cranch) at 145, (Johnson, J., concurring). For further explanation of the pre-consent police powers of states, *see* California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905); Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

54. *See, e.g.*, Cheyenne-Arapaho Tribes v. United States, 512 F.2d 1390, 1394 (Ct. Cl. 1975) (noting that the fiduciary duty of United States includes the "obligation to maximize trust income by prudent investment"). *See also* Gila River Pima-Maricopa Indian Community v. United States, 9 Cl. Ct. 660 (1986).

55. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

for reasons of survival. Often Tribes and their own members are at odds over such matters. Buoyed by court decisions, non-Indian property owners within Tribe boundaries often refuse to abide by tribal laws. This blatant refusal comes even though American law recognizes in States and their subdivisions the inherent territorial nature of certain legal matters such as land-use planning.[56]

To make matters worse, because the States tend to see their conflicts with Tribes more as conflicts with the federal government,[57] when they argue against the federal government's authority over property in Indian Country they concomitantly argue that any such authority ought to accrue to them. Unfortunately, the courts have often agreed. The result: once a parcel of real property within a Tribe's territory vests in private hands, the legal system, from administrative agencies to the Supreme Court, has suggested that the property falls under State governance and may no longer be governed by the Tribe.[58] An indication of this trend is the changing discourse from the statutory Indian Country definition towards the recently fabricated misnomer "Indian lands."[59]

Therefore, when Tribe members hold property privately in trust, Tribes increasingly lose sovereignty to the federal government.[60] When they hold property in fee they lose sovereignty to the States which proceed to tax and otherwise attempt to regulate the property.[61] This phenomenon results from the persisting perception that Tribes and Indians cannot establish and control their own property systems.[62] Meanwhile, Tribes lose much

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56. *See generally*, Brendale v. Confederated Bands and Tribes of the Yakima Nation, 492 U.S. 408 (1989).

57. *See, e.g.*, AMERICAN INDIAN LAW DESKBOOK 13 (Spaeth et al. eds., 1993) [hereinafter DESKBOOK] ("Removal was deemed necessary . . . because of increasingly bitter federal-state jurisdiction conflicts related to Indian lands."). *See also*, FRANCIS PAUL PRUCHA, THE GREAT FATHER 195-200 (1984).

58. County of Yakima v. Confederated Tribes and Bands of the Yakama Nation, 502 U.S. 251 (1992); Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355 (9th Cir. 1993); Brendale v. Confederated Tribes and Bands of the Yakama Reservation, 492 U.S. 408 (1989).

59. *See e.g.*, Breslin, *Addressing Environmental Problems on Indian Lands: Issues of Tribal Sovereignty Versus State and EPA Regulatory Authority*, 19 Env't Rep. (BNA) 1920 (1989).

60. *See, e.g.*, cases and developments involving 25 U.S.C. § 410. The problem which the Act addressed arose when several States provided social assistance to elderly Tribe members. Upon the Tribe member's death those States requested and the Department of the Interior reimbursed the States out of moneys from the individual's trust account which had accrued from leasing their allotted lands, without attaining consent of heirs. Congress recognized the inequity and reinstated the deceased Tribe member's money, but the heirs have been difficult if not impossible to find. The issue becomes to which government should the unclaimed money escheat—the Tribe or the federal government? If the States were a party the money would certainly escheat to the citizen's State. *See* Texas v. New Jersey, 379 U.S. 674 (1965).

61. *See Brendale*, 492 U.S. 408. For an interesting twist, *see* Pease v. Yellowstone County, 21 Indian L. Rep. 6109 (Crow Ct. App., June 24, 1994) (Tribe court ruled that county lacks authority to tax Tribe citizen's land allotted under Crow Allotment Act, 41 Stat. 751, even the land is no longer in restricted trust status.).

62. In a rather biased "treatise," the Conference of Western Attorneys General (CWAG) exemplifies the propagation of this notion: "The 1790 Act prohibited . . . tribal members from selling their lands . . . ." Farther down the page the CWAG again writes: "The Act of June 30, 1834 . . . prohibited alienation of lands by tribes . . . ." In fact, the Act prohibited States and their citizens from governing or buying it. DESKBOOK, *supra* note 57 at 10-11.

needed revenue. Tribes lose territory when courts construe the heavy loss of land on reservations as a diminishment of the reservation boundaries or an extinguishment of tribal property rights altogether. Environmental degradation goes unchecked. The Tribes' cultural patrimony is lost. Their democratic political processes and relationships regarding their citizens and their governments go unexercised. Economic development is stifled. From intestate death to intestate death, child by child, acre by acre, blood degree by blood degree, the current system ensures that Tribes, their members, and their sovereignty spiral toward a slow but sure death. Not surprisingly, then, the Anglo-American property system is perceived as the mortal enemy of Tribes, rather than as a tool to be borrowed by Tribes and used to maintain their sovereignty as other sovereigns do.

PART II: FOUNDATIONS OF THE UNITED STATES/TRIBE RELATIONSHIP AND A SUMMARY BACKGROUND OF "FEDERAL INDIAN LAW"

A. *The Quest for Territory: Monopolizing the Preemptive Right of Discovery*

The history of America in regard to territory and property is one of monopolization of control over the process of acquiring and redistributing tribal territory. The Spanish conducted the first debates on the legal and political integrity of the Tribe's territory, and first recognized that controlling the acquisition of land required control of the parties involved.[63] This notion became embodied in the concept of "discovery," whereby the European state first making a claim to a particular territory held the preemptive right of acquisition against all other European states.[64] As Thomas Jefferson wrote:

> I considered our right of preemption of the Indian lands not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy.[65]

Typically, the colonies implemented their mother countries' discovery rights. As the Cohen *Handbook* explains:

> In 1633 the Massachusetts Bay Colony centralized land acquisition. Individuals were prohibited from treating with Indians for the purchase

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63. FRANCISCI DE VICTORIA, DE INDIS ET DE IVRE BELLI REFLECTIONES (1557) (Ernest Nys, ed. & J. Bate, trans., Carnegie Institute of Washington 1917) ("Another possible title is by true and voluntary choice, as if the Indians, aware alike of the prudent administration and the humanity of the Spaniards, were of their own motion, both rulers and ruled, to accept the King of Spain as their sovereign.").

64. *See generally*, Friedrich August Freihen Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, 29 AM. J. INT'L L. 448 (1935).

65. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, 140-41 (1962).

> of land without prior government authorization. By the middle of the eighteenth century ten colonies had enacted similar laws. From an early date, then, colonial governments exercised a virtual monopoly in treating with the Indians.[66]

After the French and Indian War, the British issued King George III's Proclamation of 1763, which was an attempt to demarcate European territory and monopolize discovery rights to acquire territory.[67] This act helped precipitate the American Revolution.[68] After the American colonies emerged victorious from the Revolution, they proceeded to acquire land as successors in interest to England's discovery rights.[69] In the Articles of Confederation, the new independent States authorized their new union to acquire territory, but refused to relinquish their own power to do so. This non-relinquishment led to disputes between States and their citizens over the disorderly acquisition of territory.[70] As a result, when the U.S. Constitution was ordained in 1789, the Commerce Clause expressly granted governing authority to the Union over dealings with Tribes, without expressly reserving the same authority concurrently in the States.

Pursuant to its express grant of authority, the 1st Congress enacted the Trade and Intercourse Act of 1790 (the "Act"). The Act prohibited States and their citizens from acquiring territory from Tribes, following the well-established trend of invoking governmental powers to monopolize the acquisition of territory.[71] The intent was to allow the federal government to effectuate an orderly acquisition of tribal territory. Therefore, history reveals that all interested sovereigns—the Spanish, the British Crown, the colonies, the original thirteen States, and the Union—were concerned with not merely the acquisition itself, but also with the monopolization of the acquisition and redistribution of territory.

As the divergent political traditions of western thought came to roost in the conflict between the Union and the States, the U.S. Supreme Court oscillated with the prevailing political winds until the issues of acquisition and redistribution came to a head. As a result, the term "discovery" itself began to assume divergent meanings in the early caselaw. While one version reiterated the mere preemptive right, the other expanded the right so vastly as to amount to "ultimate dominion" over the discovered territory. This latter meaning germinated the notion that Tribes have no power to establish their own property systems and control conveyances

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66. COHEN, *supra* note 18, at 57 (citations omitted).
67. *See* PRUCHA, *supra* note 65, at 13-20.
68. *Id.*
69. Goodell v. Jackson, 20 Johns. 693 (N.Y. Ct. of Errs. 1823).
70. *See generally* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 36 (1979); Comment, *Indian Land Claims Under the Non-Intercourse Act*, 44 ALB. L. REV. 110, 115-16 (1979).
71. Act of July 22, 1790, ch. 33, 1 Stat. 137.

of land in their territories.[72] The former comports with notions of a republican democracy while recognizing both territorial and popular sovereignty; the latter smacks of pure brute power and tyranny. In an opinion written near his death, Justice Marshall finally chose the former, but the latter apparently has found a permanent home in American jurisprudence.

B. *Early Cases in Federal Indian Law*

Four Supreme Court cases decided in the first fifty years of the nation's history provide a cornerstone for any study of Indian law. These cases illustrate how this nation's divergent traditions affected the Supreme Court's Indian law jurisprudence. They also illustrate how subsequent courts and academicians have interpreted these cases most conveniently to suit their needs, most often to the Tribes' detriment. Consequently, the early cases also illustrate how subsequent case law and the academic community has often mischaracterized the law. Ironically, while three cases widely known in the field as the "Marshall Trilogy" have received most of the attention in cases, textbooks, and treatises, another case, *Fletcher v. Peck*,[73] is perhaps the most significant to the property context.

1. *Fletcher v. Peck*

In 1810, the U.S. Supreme Court, speaking through Chief Justice Marshall, had an opportunity to address the relative rights of the Union, States, and Tribes to territory and property. Up until that point the colonists' appetites for land were stimulated by acquisitions of formerly English-acquired territory. Before long, however, they were venturing into territory that had never been acquired by England, the colonies, the new States, or the new United States. In some instances the discovery rights remained uncertain. Many States held firm to the position that they were successors to England's discovery rights and thus could deal with Tribes directly. However, the Union was short on revenue, and land acquisition and resale was a prosperous venture.

In *Fletcher v. Peck*, the Georgia Legislature had granted property to individuals in the western fringes of territory claimed by Georgia (now comprising the states of Alabama and Mississippi) giving rise to the infamous Yazzou land frauds. After state elections, the succeeding Georgia Legislature rescinded those grants. The grantees sued, raising the "Union versus State" discovery issue, "which, at one time, threatened to shake the American confederacy to its foundation."[74] The Justice's opinions would leave the Union with some measurable aftershocks.[75]

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72. DESKBOOK, *supra* note 57, at 3 ("The right to occupy was therefore deemed usufructuary in nature and vested no ownership interest in a tribe that the tribe could alienate.")

73. 10 U.S. 87 (1810).

74. *Id.* at 142.

75. Primarily, the opinion gained notoriety because the Supreme Court, not wanting for creativity,

While Marshall ruled that the grantees rightfully owned what the Georgia legislature had originally granted to them, he failed to elaborate on exactly what it was that they owned. If Georgia held discovery rights, at least two possibilities emerged. First, if discovery rights amounted merely to preemptive rights to acquire, what was granted to them would have been minimal but with great potential. Conversely, if discovery itself amounted to de facto dominion over the territory regardless of acquisition, then the value of the grants was indeed incalculable. If, on the other hand, the Union held discovery rights, then the grants were nearly worthless. In typical fashion, Chief Justice Marshall donned his tap-dancing shoes.

Marshall ruled that Tribes had a right to exclusive use and occupancy of unacquired territory and that neither the State nor its grantees could maintain an action for ejectment against them.[76] However, Marshall cryptically concluded his opinion by reopening the primary question. "Indian title," he concluded, "which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State."[77] In other words, Georgia had granted an ostensible fee title subject to the perhaps perpetual exclusive use and occupancy of the Tribes, amounting to very little until the territory was actually acquired. As a result, the original and most fundamental questions in Indian law were left to fester. Which entity, Union or State, held the discovery right? What exactly did that discovery right amount to?[78]

In a separate opinion, Justice Johnson more directly addressed these critical issues. He declared, "To me it appears that the interests of Georgia in that land amounted to nothing more than a mere possessibility, and that her conveyance thereof could operate only as a covenant."[79] Nonetheless, Johnson seemed to suggest that the discovery right vested in the State of Georgia rather than the Union. Encouraged by the

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analyzed the legislatures' actions under the Contracts Clause of the U.S. Constitution. *Id.* at 137. The Court determined that the Contracts Clause not only affected executory contracts but also executed contracts and that an executed contract was tantamount to a grant. *Id.* at 123. Therefore, the legislature's rescission of the grant amounted to an impairment of a contract. *Id.* at 124. Marshall should have analyzed the case under the Takings Clause since the original state action vested property rights and the subsequent state action took them away. *See id.* However, Marshall may then have been forced to determine the value of a mere discovery right, whether it amounted to a preemptive option or actual ownership, an issue he refused to decide in the case. *See generally id.*

76. *Fletcher*, 10 U.S. at 142.

77. *Id.* at 142-43.

78. The difference in results illustrates the importance of determining what the discovery right entails. If the State held discovery rights and if discovery was tantamount to dominion, then the grantees held full value. If the State held discovery rights but discovery was a mere preemptive right, then the grantees had to wait until the State acquired the territory so they could vest their grants. If the Union held discovery rights the grantees would have to wait until a State was established out of the territory before their State-granted rights could vest. The successor legislature's "taking" would give rise to widely varying amounts of just compensation. To avoid the question, the Court ruled that the successor legislature's act amounted to an impairment of a contract.

79. *Fletcher*, 10 U.S. at 146.

ambiguous conclusion of Chief Justice Marshall's opinion and Justice Johnson's analysis, it would not be long before Georgia would exercise her discovery rights again.

In the property context, perhaps the greatest significance of *Fletcher v. Peck* rests with a argument rendered by the grantees' attorney. In a statement reflecting a misconception that, unfortunately, has been often repeated, counsel stated:

> A doubt has been suggested whether this power [in a State to issue title] extends to lands to which the Indian title has not been extinguished. What is the Indian title? . . . It is not like our tenures; they have no idea of a title to the soil itself . . . It is not a true and legal possession . . . It is a right not to be transferred but extinguished.[80]

This mistaken notion that Indians had no concept of property has been embraced among modern scholars in Indian law, even among those advocating for Tribes.[81] Obviously, as the above quote illustrates, this false notion has made friends among the Tribes' many adversaries.[82] Why many tribal advocates have bought into the idea is uncertain; perhaps the esoterics of cross-cultural clashes in an anthropological context is sexier than the banalities of inter-sovereign relationships in a political and legal context.[83]

Unfortunately, while courts generally recognize the imposition of traditional property concepts upon the property of Tribes and their members, they tend to allow the Union and the States to do the imposing, rather than recognizing Tribes' rights to maintain their own property systems. As a result, the notion that Indians had no concept of private property has been transformed into a perception that Tribes also had no concept of dominion over territory. But *Fletcher's* significance goes still further.

The arguments of Georgia's own attorneys reveal that they recognized the fact that sovereigns deal in territory, and that, accordingly, dealings with Tribes involved territory and not private property. Georgia's attorney argued, "[Indian title] is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right."[84] This statement refutes the conclusion that Tribes had no rec-

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80. *Id.* at 121.

81. *See* Robert Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

82. *See e.g.*, United States v. Cook, 86 U.S. (19 Wall.) 591, 592 (1873) (finding that the tribe may use and occupy its reservation, which includes clearing timber for that purpose, but does not include cutting and selling timber for market purposes). Treaty negotiators used the idea to avoid having to achieve full consent of all interested parties. *See, e.g.*, a recital of a treaty negotiation in Ronald N. Satz, *Chippewa Treaty Rights*, 79 TRANSACTIONS 1, 37 (1991) ("'Your Great Father will not treat with you as bands, but as a nation' Stuart commented, adding very shrewdly, 'treaties are often made when whole bands are absent, which could not be but on the principle that all your lands are common property . . . .'").

83. This development is a prime candidate for Professor Pommersheim's "Indian law liberalism" label. *See* Frank Pommersheim, *Making All the Difference: Native American Testimony and the Black Hills*, 69 N.D. L. REV. 337, 338 (1993).

84. *Fletcher*, 10 U.S. at 121.

ognized territory nor the requisite sovereignty to deal with it. Nevertheless, *Fletcher* continues to exemplify how the perpetual false myth has been used against Tribes. Because the Court refused to resolve this ultimate dilemma in the case, the confusion between territory and property, dominion and ownership, would lie in waiting for the next Indian law case.

2. *Johnson v. McIntosh*

In 1823, the Court, again through Chief Justice Marshall, rendered *Johnson v. McIntosh*,[85] an Indian law case holding the rare distinction of being included in standard property textbooks for its federalism principles. Coincidentally, this case is where most law students and lawyers get their first and only glimpse into Indian law. There the case stands proudly for the proposition that all title stems from the sovereign, in this case the Union.[86]

The case involved two men of Euro-American descent, Mr. Johnson and Mr. McIntosh, and an Indian Tribe with which the United States had no prior dealings. In 1773 and 1775, the Tribe received money directly from Johnson for rights in a parcel of land. Later, the United States purchased from the same Tribe a large territory which happened to include Johnson's parcel. The United States then issued a patent to McIntosh for a parcel which included Johnson's parcel. As a result, both Johnson and McIntosh believed they owned the same parcel. The Supreme Court ruled for McIntosh, whose ownership stemmed from the Union, and against Johnson, whose ownership stemmed from the Tribe.[87] Marshall held that, vis-a-vis an individual citizen, only the Union could make such an acquisition from a Tribe.

The decision, however, went beyond the question of which entity possessed the right of acquisition by discovery in the government-versus-citizen context.[88] Marshall also attempted to address the issue of the extent and value of the unexercised discovery right. He did so in a manner widely divergent from that of de Victoria, the early colonies, the British Crown, and Thomas Jefferson. Rather than satisfying itself with vesting in the Union a monopoly in the right of preemption, the opinion germinated the idea that discovery itself amounted to some sort of dominion over the discovered territory.[89] The Court wrote:

> [Though the Tribes are] the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion . . . their rights to complete sov-

85. 21 U.S. (8 Wheat.) 543 (1823).

86. *See id.* at 567. *See also* CHARLES M. HARR & LANCE LIEBMAN, PROPERTY AND LAW 3-16 (1977).

87. *Johnson*, 21 U.S. at 605.

88. The question would remain unanswered in the Union versus State context only to arise again in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), where Marshall again would dodge the bullet, and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), where he finally squarely addressed the issue.

89. For an excellent study of the development of this particular rendition of discovery, *see* Williams, *supra* note 81, at 224.

> ereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those that made it.[90]

Because of such rhetoric, the case has been sorely mischaracterized as standing for the proposition that Tribes cannot issue title and that Indians cannot sell it.[91] Granted, its reasoning flows logically from the sentiment in *Fletcher* that Tribes and Indians have no concept of private property. Indeed, if discovery gives one sovereign the "exclusive right to extinguish the Indian title,"[92] a necessary conclusion is the diminishment of the other sovereign's right to sell.[93] However, the mischaracterization entirely misses Chief Justice Marshall's point.

The issue in the case was not whether Tribes could issue title, and the opinion does not say that they cannot. Rather, it says that Tribes cannot "dispose of the soil" except to those who made the discovery. An accurate characterization of the case requires accurate reading of the specific issue and holding. The issue as stated by Chief Justice Marshall was "whether this title [issued by a Tribe] can be *recognized in the Courts of the United States*?"[94] To this he concluded emphatically, ". . . the Court is decidedly of opinion that the plaintiffs do not exhibit a title *which can be sustained in the Courts of the United States*."[95]

Perhaps an example will be illustrative. In an otherwise remarkable work of research, Professor Rob Williams exemplifies how modern scholarship has contributed to the mischaracterization. After accurately recognizing that Marshall's framing of the issue confined the analysis of the rights to "courts of this United States," Williams concluded, "Thus, *Johnson* . . . effectively denied American Indian tribes recognizable title to their ancestral homelands under the domestic law of the United States."[96] Williams' conclusion is inaccurate. In actuality, Marshall recognized that the Tribe, being sovereign, can hold and issue title; however, that title cannot be sustained in the courts of another sovereign with whom it had no political or legal relationship. These are two entirely different creatures. To illustrate his point, Marshall explained perhaps the single most important concept in the Indian law property context by stating "[t]he person who purchases lands from the Indians, within their *territory*,

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90. *Johnson*, 21 U.S. at 574.
91. *See, e.g.*, DESKBOOK, *supra* note 57, at 40.
92. *Johnson*, 21 U.S. at 587.
93. Of course, this quote, taken out of the context of preceding paragraphs, also misses Marshall's point that a discovery right carries weight only against other European sovereigns, not against the Tribes themselves. *Johnson*, 21 U.S. at 573 ("This principle was, that discovery 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. *The exclusion of all other Europeans*, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives.") (emphasis added).
94. *Johnson*, 21 U.S. at 572 (emphasis added). Justice Marshall repeated, "The inquiry, therefore, is, in a great measure, confined to the power of the Indian to give, and of private individuals to receive, a title *which can be sustained in the Courts of this country*." *Id.* (emphasis added).
95. *Id.* at 604-05 (emphasis added).
96. Williams, *supra* note 81, at 254.

incorporates himself with them, so far as respects the *property* purchased; *holds their title under their protection, and subject to their laws.*[97]

To support his position Marshall wrote, "[w]e 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 of severalty."[98] In other words, Marshall recognized that tribes hold dominion over territory. He recognized that tribes possess the sovereign power to issue title in their territory to their own citizens, and even to non-Indians. Marshall simply concluded that if a person held property under a tribe's authority and the tribe subsequently gave away the encompassing territory to the United States via treaty, that person's recourse lay with the tribe, not the United States.[99] Simply, a case between two sovereigns with no political or legal recognition of each other should be read in light of the statements on territorial sovereignty raised by Justice Johnson in *Fletcher*, which recognized that such a transaction "depends upon the law of nations."[100]

Bear in mind a crucial fact in *Johnson* as distinguished from a corresponding fact in the next two cases: when Mr. Johnson made his purchase, the United States and the tribe had not yet entered into a treaty relationship. The next two cases illustrate that treaties are the basis of the political and legal relationship between the Tribes and the United States. Therefore, without a treaty, upon what basis would the United States recognize such a title? The conclusion that tribes cannot give recognized title in U.S. courts accurately assesses the Court's opinion regarding unrecognized tribes, which have no political or legal relationship with the United States. Their issuance of title cannot be sustained in the courts of the United States because, under the law of Nations, the United States deals with tribes in terms of territory.

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97. *Johnson*, 21 U.S. at 593 (emphasis added). Marshall also reiterated the point that discovery attached to political entities, not individuals. *Id.* at 595.

98. *Id.* at 593.

99. *Id.* at 593-94. As Marshall stated, "[t]hese nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens." *Id.* at 594.

100. *Fletcher*, 10 U.S. at 121. Of course, around the time that *Johnson* was brewing, while John Marshall was deciding whether a foreign sovereign could issue a title sustainable in American courts, and while he was concluding that discovery alone gave the ultimate dominion necessary to issue such title, Marshall's personal and family fortunes were at stake. Marshall was struggling to purchase and hold onto legal title to the Fairfax Estate, which the King had chartered to Lord Fairfax and which neither the King nor Lord Fairfax had purchased from any tribe. In other words, while Marshall was deciding in favor of McIntosh and against Johnson, he found himself more similarly situated to Johnson than McIntosh. He was confronted by the perplexing question why a title from one foreign sovereign, namely England, was sustainable in the courts of this country while a title from another foreign sovereign, namely the Piankeshaw Tribe, was not. Since Marshall ruled that discovery gave the discoverer the right to acquire territory by purchase or conquest, he expounded lengthily on conquest in *Johnson* more to justify his ownership of the Fairfax Estate than McIntosh's ownership. Indeed, McIntosh's title was sustainable precisely because the United States had in fact purchased the territory before issuing his title. Unfortunately the cant of conquest has persisted to the absolute detriment of tribes and democracy. *See* LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 293-95 (1974). *See also* Williams, supra note 81, at 253-55.

But a recognized Tribe stands on decidedly different ground. Although the discovery doctrine and its progeny have been contorted to mean that Tribes can not issue title or establish and maintain their own property systems, a careful examination of the record reveals exactly the opposite. Therefore, *Johnson* stands for two propositions. First, any tribe, recognized or not, can give title that is sustainable in its own system or its own courts. Second, the courts of this country cannot sustain a title issued by a tribe with no recognized political relationship with the United States. But can the United States recognize the laws (including property laws) of a Tribe with which it has a treaty?

3. *Cherokee Nation v. Georgia*

In *Cherokee Nation v. Georgia*,[101] decided in 1831, Georgia again tested whether the discovery right to acquire a Tribe's territory rested with the Union or the individual States. Particularly, Georgia was attempting to nullify the laws of the Cherokee Nation, presumably including its property laws. Georgia invoked Marshall's discussion of conquest in *Johnson* by attempting to extinguish Cherokee sovereignty and impose Georgia laws on all Cherokee people and territory. The legal proceedings began in the Supreme Court with the Cherokee Nation seeking to enjoin Georgia's actions.[102] Once again Chief Justice Marshall dodged the issue. Because Article III granted federal courts the jurisdiction to entertain a suit by a foreign state against a State, Marshall ruled that the Cherokee Nation did not constitute a foreign state.[103] Rather, Marshall declared, "They [Tribes] may, more correctly, perhaps, be denominated domestic dependent nations."[104] Consequently, federal courts could not entertain the suit.[105]

In the property law context, the most significant portion of the opinion rests in one sentence. Marshall declared, "[The tribes'] relation to the United States resembles that of a ward to his guardian." The courts and the scholarship generally attribute the germination of the political Trust Relationship to this sentence.[106] Moreover, reflective of the attributes of the usual guardian/ward relationship, the sentence also evokes the property concept of a fiduciary trust responsibility, even though in 1831 no allotments or trust funds existed. Nevertheless, as a result of this wording

101. 30 U.S. (5 Pet.) 1 (1831).
102. *Id.*
103. *Id.* at 14.
104. *Id.* at 17.
105. *Id.* at 18. Marshall did not decide whether a Tribe could sue a state as a "sister State," a question only decided in the negative in 1991. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991). Questions remain whether Article III jurisdiction contemplates a suit between a Tribe as a Tribe against a State; whether Congress can grant federal courts the jurisdiction to entertain such suit; whether Article III may be read to allow States to subject themselves to federal court jurisdiction; and several variations regarding sovereign immunity of the States. These issues are discussed in Richard A. Monette, *When Tribes Sue States: How Federal Indian Law Offers an Opportunity to Clarify Sovereign Immunity Jurisprudence*, 14 QUINNEPAC L. REV. 401 (1994).
106. *See e.g.*, AMERICAN INDIAN LAW: CASES AND MATERIALS 234 (Robert Clinton et al., eds., 1991); DESKBOOK, *supra* note 57, at 9.

in *Cherokee Nation* it seems the terms "Trust Relationship" and "Trust Responsibility" have become hopelessly intertwined.[107] It would not be long before the questions of who held a discovery right, what was its extent, and how Tribes became domestic, would again come before the Court.

4. *Worcester v. Georgia*

In the early 1830s, Georgia continued its attempt to impose State laws on Cherokee and those doing business with them. In *Worcester v. Georgia*, the Supreme Court ruled that, via the Commerce Clause, the States granted the Union the exclusive power to deal with Tribes.[108] In explaining the extent of that right Chief Justice Marshall wrote:

> It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[109]

In doing so, the Court made clear that "discovery," as a creature of Euro-American law was a tool by which the European powers restricted their own peoples' right to buy, not the Tribes' rights to sell. This decision came after the holding in *Johnson* that even if an individual purchased property from a Tribe, the title could not be sustained in this country's courts. Moreover, *Johnson* also offered the proposition that a Tribe could sell to another Tribe, or issue title to its own citizens, or even to a non-citizen, or that one citizen could sell that title to another, or to a non-citizen. The result is that the discovery doctrine was not a wedge between two Tribes, or between a Tribe and its citizens, or between two fellow citizens of the same Tribe, or even between a Tribe and non-Indians, except in U.S. courts.

In reaching its conclusion in *Worcester*, the Court relied heavily on the treaty between the United States and the Tribe, with two lasting effects—one being perhaps the most positive development in all of Indian law and the other perhaps the most negative. First, the court's characterization of the relationship emerging from the treaty reflected the federalism relationship between the Union and the States.[110] Second, and more unfortunate, the Court invoked words of protection and forced

107. *See, e.g.*, DESKBOOK, *supra* note 57, at 9.

> Finally, implementation of such treaties or statutes by federal officials must be consonant with the guardian-ward relationship referred to in *Cherokee Nation, i.e.*, the federal government is charged with a trust responsibility in administering the affairs of tribes and their members. Breach of that responsibility may be remedied through injunctive relief or monetary damages.

Id.

108. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) ("Under the Constitution, no State can enter into any treaty; and it is believed that, since its adoption, no state, under its own authority, has held a treaty with the Indians.").

109. *Id.* at 544.

110. *Id.* at 538, 540, 553, 581.

allegiance owed between the Union and Tribes pursuant to the treaty.[111] Simply put, Union/State federalism would never sustain what has since transpired under the rhetoric of protection and forced allegiance.

Despite *Worcester*'s clarification of the confusion brought about by *Fletcher* and *Johnson*, their combined mistaken rendition of discovery that Tribes could not sell land and issue title, coupled with the myth that Tribes had no concept of private property, has evolved today into a persistent notion that Tribes cannot exercise governance over the private property of their own citizens, let alone lands of non-citizens in their territories. Today, shades of both doctrines of discovery survive: first, that the United States holds unmitigated power over Tribes;[112] and second, that the United States is the successor in interests to all rights to deal with the Tribes, and that it duly exercised those interests in treaties legally valid to this day. The former smacks of tyranny; the latter of democracy.

C. The Allotment Era: The Wayward Doctrines of Discovery, Trust, and So-Called "Plenary Power" Justifying the General Allotment Act

After *Worcester v. Georgia,* Indian law went through a period of slow development. The Union's attention turned to issues of slavery, industrialization, and commerce. However, after the Civil War, the Nation's attention once again turned to westward expansion and Indian tribes. In 1883, the Court handed down *Ex Parte Crow Dog*, holding that a recognized Tribe had inherent and exclusive jurisdiction over a murder committed by one of the Tribe's citizens against another.[113] The Tribe sentenced the murderer to pay compensation and community service.[114] In response to this sentence, the United States Congress enacted the Indian Major Crimes Act (IMCA), asserting federal court jurisdiction over such crimes.[115]

After the IMCA was enacted in 1886, an incident similar to that underlying *Crow Dog* occurred and the federal government prosecuted the crime under the new statute. In *United States v. Kagama*, the Supreme Court upheld the IMCA, holding that California had no jurisdiction in such matters.[116] However, the Court's reasoning invoked the protection and forced allegiance rhetoric of *Worcester*. In what appears to be an effort to sustain the Union's power over the Tribe (whose jurisdiction was not at issue), the Court wrote:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power . . . The power of the General Government . . . is necessary to their protection . . . .[117]

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111. *Id.* at 547-48, 581.
112. Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L. J. 1215, 1241-53 (1980).
113. 109 U.S. 556, 572 (1883).
114. *Id.*
115. Ch. 341, § 9, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (1988)).
116. 118 U.S. 375, 385 (1886).
117. *Id.* at 384.

Therefore, invoking what has become known as the "plenary power doctrine," the Court seemed to suggest that the United States possessed unmitigated power to govern the internal affairs of Tribes.[118] Although the Court accurately invoked the early Marshall holdings that the Union held exclusive power to deal *with* Tribes, the IMCA embodied the first real assertion of United States power *over* Tribes and their internal affairs. In other words, the Court resurrected the discovery-as-conquest mentality of *Johnson v. McIntosh* rather than the democratic processes heralded in *Worcester v. Georgia* which would have recognized the blatant infringement on the Tribes' inherent sovereignty over its internal affairs. Shortly after *Kagama*, the United States, buoyed by a new and judicially licensed power, imposed the General Allotment Act upon Tribes. The result was an astounding loss of land by Tribes, an incomprehensible system of private property in Indian Country, an almost insurmountable mish-mash of ownership interest in any given parcel, a costly boondoggle to the American taxpayer and a legacy of inconsistent law that continues to the present.

PART III: TRUST RELATIONSHIP VERSUS TRUST RESPONSIBILITY, OR DEMOCRACY MEETS PATERNALISM

To this day Indian law reflects the divergent doctrinal approaches emanating from the Marshall cases. They illustrate the discovery-by-conquest, plenary power approach often attributed to *Johnson v. McIntosh* which has led to the mistaken notion that Indian Tribes cannot give title and thus maintain their own property systems. However, today's discourse and jurisprudence also struggles to engender the more enlightened approach when the United States recognized the Tribes' inherent sovereignty and political processes reaching back to *Worcester v. Georgia*. Determining which approach will prevail is uncertain.

A. Development of Trust Doctrines in Indian Law

As might be expected, the GAA "trust" provision gave rise to a line of cases culminating in the federal government's monetary liability for mismanagement of individually-owned allotments.[119] In a somewhat strange twist, a parallel line of cases adapted the GAA's obligation to individual lands to lands held by the Tribe as a whole, imbuing the political-based trust relationship with characteristics of the property-based trust responsibility. In 1919, in *Lane v. Pueblo of Santa Rosa,* the U.S. Supreme Court enjoined the federal government's disposition of communal Pueblo lands on the basis of the "guardianship."[120] Shortly thereafter, in *Cramer v. United States*, the Court voided a federal land patent to a non-Indian

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118. I have opined elsewhere why I feel the "plenary power doctrine" is misunderstood in Indian law jurisprudence and discourse. *See* Monette, *supra* note 12, at 663-66. Nevertheless, however indefensible the plenary power doctrine was and is, in very real terms Tribes now confront a maze of territorial and property problems that test the deepest understandings of sovereignty and democracy.

119. *See, e.g.*, United States v. Mitchell, 463 U.S. 206, 228 (1983).

120. 249 U.S. 110, 113-14 (1919).

for lands within a Tribe's territory nineteen years after the patent.[121] In 1935, the Court upheld a damage award to the Creek Nation for missurveyed territorial boundaries that resulted in a loss of territory.[122] Thus, a cause of action for Tribes also emerged based on a breach of trust that did not necessarily or solely emanate from the General Allotment Act.

The strangest twist, however, emerged from a 1942 case which heightened the tension between the Trust Relationship and the Trust Responsibility. In *Seminole Nation v. United States,* the Supreme Court declared that a Tribe's members had a cause of action against the United States for distributing treaty annuity payments to the Tribe's own officals when federal officials believed the money was being misused.[123] Suddenly, this notion of trust created a fiduciary obligation between the United States and a Tribe's citizens, even in contravention of decisions made by the Tribe's government. As a necessary result, the Secretary of the Interior became responsible for overseeing and perhaps overturning decisions of the Tribes' own government. Also as a necessary result, the Tribe's own political processes and democratic government were stifled. This single notion would have a lasting and deleterious impact on the Tribes' governance and on the government-to-government political relationship between the United States and Tribes.[124] The next section provides a foreboding example of this impact.

B. *The American Indian Agriculture Resource Management Act*

The American Indian Agriculture Resource Management Act (AIARMA) was enacted in 1993 by the 103rd Congress.[125] Among its purposes was to make agriculture in Indian Country more responsive to the political processes of the Tribes.[126] The legislative history of the Act reaches back to the lasting divergence between the cant of conquest of *Johnson v. McIntosh* and the struggle for enlightenment in *Worcester v. Georgia,* illustrating the tension between the Trust Relationship and the Trust Responsibility.[127]

Two bills, S. 2977 and H.R. 5744, first introduced in the 102d Congress, proposed to force the Secretary of the Interior to abide by tribal law in administering agricultural lands within tribal territory. In a hearing before the Senate Indian Committee, the DOI restated the express policy of the bill in testimony: "Section 202, Indian Participation in Land

121. 261 U.S. 219, 224, 236 (1923).

122. United States v. Creek Nation, 295 U.S. 103, 106-08, 111 (1935).

123. 316 U.S. 286, 301-08 (1942).

124. Obviously not every aspect of the political-based trust relationship could provide a cause of action for monetary damages. For example, the federal government provides education and health benefits to Tribe citizens. Even if such benefits were attributable to treaty obligation, what would constitute a breach? What standard of education or health would apply? And what if they are not attributable to a specific treaty obligation?

125. 25 U.S.C. §§ 3701-3745 (1994).

126. *Id.* § 3702 (1994).

127. S. Rep. No. 102-442 (accompanying S. 2977 (Indian Agricultural Resources Management Act of 1992)), 102d Cong., 2d Sess. (1992).

Management Activities, provides that unless 'prohibited by Federal law, the Secretary shall comply with tribal laws pertaining to Indian agricultural lands.'"[128] In other words, Congress would invoke its government-to-government relationship with Tribes by recognizing their governance in this area. However, invoking its "trust responsibility," the Interior Department responded, "This section gives the tribes authority over the management of both tribal and 'individual allotted lands' and takes away the discretionary authority of the Secretary."[129] As the Department had explained earlier in its testimony, "[t]his would require allotted land be subject to community goals which would create a Fifth Amendment taking, and also violate the United States' trust responsibility to individual Indian landowners."[130] In short, the DOI would use the "trust responsibility" as a wedge between the United States and a Tribe in their government-to-government, political-based trust relationship and as a wedge between a Tribe and its own citizens in the Tribe's own democratic political processes. As the next section illustrates, Tribes are caught up in the confusion.

C. A Fossil Named "Sue"

The federal government is not alone in muddying the property area of Indian law; sometimes the Tribes share the blame. In 1990, a fossilized Tyrannosaurus Rex (nicknamed "Sue") was discovered by a member of an archeological team on a parcel of land situated within the Cheyenne River Sioux Tribe's boundaries and held in trust for an individual citizen of the Tribe pursuant to the GAA. Scientists paid the tribal citizen and excavated and removed the fossil. Some time later, the United States seized the fossil as evidence for a criminal investigation under federal law. A flurry of litigation maneuvers ensued to determine the proper custodian and owner of the fossil. The Eighth Circuit decided that the GAA trust status of the land imposed a trust responsibility on the U.S. Secretary of the Interior, the mechanics of which were spelled out in certain statutes.[131] Specifically, such a sale required prior approval by the Secretary.[132] Therefore, the sale was invalid and the United States' seizure of the fossil was lawful.

However, most fascinating was a memorandum opinion handed down by the Tribe's own court.[133] After the fossil's removal, the Tribe enacted a law providing for forfeiture of items gained in violation of Tribe law. The Tribe filed against its own citizen, the allottee-owner of the fossil, and the scientist who purchased it, seeking forfeiture of the fossil. How-

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128. *Id.* at 28.

129. *Id.*

130. *Id.* at 25.

131. *See*, Black Hills Institute of Geological Research v. United States, 12 F.3d 737, 742-43 (8th Cir. 1993).

132. *Id.* at 741.

133. Cheyenne River Sioux Tribe v. Williams, Memorandum Opinion issued by the Cheyenne River Sioux Tribe Court, July 5, 1994 (on file with author).

ever, the tribal court concluded that the forfeiture provision was without effect because the Tribe's ordinance was not in force at the time of the removal. But the court missed the real bone of contention within the case: governance, not ownership, over the fossil.[134]

The federal government seized the fossil not simply to assert ownership but also to assert control.[135] However, the Tribe's own court could find no common law or societal reasons to have exercised inherent "police powers," even in the absence of a written law, in order to preserve and protect the Tribe's cultural patrimony and heritage.[136] Rather than addressing the question that the Tribe's claim necessarily raised—governance and regulatory authority over the fossil—the Tribe court satisfied itself that, "as it pertains to ownership of the fossil, this case may have been mooted by the Eighth Circuit Court of Appeals decision . . . ." What did the Eighth Circuit's opinion on ownership have to do with the Tribe's assertion of governance over the fossil?

Therefore, the tribal courts themselves have become lost in the interplay between territorial sovereignty and popular sovereignty, between territory and property, between the concepts underlying a property-based trust responsibility and a political-based trust relationship. The tribal court should have found that the Tribe exercises governance over the individual tribal member who owned the trust land, over the land within its territory where the fossil was found, and over the fossil itself. It should have reached such conclusions with or without a written ordinance. It should have based it decision on the Tribe's inherent police power to preserve and protect the Tribe's cultural patrimony and heritage.[137]

D. *Southern Arizona Water Rights Settlement Act of 1982*

The Southern Arizona Water Rights Settlement Act of 1982 (SAWRSA) brings all the issues raised above into one scenario. Preliminary indications are that the federal government may return to *Worcester*'s enlightened approach of recognizing the sovereign power of Tribes in property matters. Among other issues, SAWRSA purports to resolve several claims to water within certain districts of the Tohono O'odham Nation, formerly the Papago Tribe.[138] However, a recent letter regarding SAWRSA from the Department of the Interior Office of the Solicitor to Senator John McCain

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134. Perhaps a case not in the Indian law context best illustrates the confusion between ownership and governing control. In Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 951 (1982), the Supreme Court wrote that "ownership" by a government is a "fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." Thus, regarding Indian Tribes, ownership should be construed as the greater right to govern.

135. If the federal government was so concerned that South Dakota would assert governance over the fossil, imagine what its response would have been if the Indian trust-land owner had sold it to scientist in Brazil or China for their governments to control.

136. *See supra* note 23.

137. Ironically, the case could be read to illustrate that Tribes and Indians not only have a concept of private property but also that they hold it in a very high regard.

138. Pub. L. No. 97-293, Title III, 96 Stat. 1274 (1982).

tells the complete story.[139] "The key issue requiring resolution," according to the letter, "is the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the Nation."[140] Shortly below, the letter states: "[T]he Department has determined that it should, as trustee for both the Nation and the allottees, provide some guidance on the nature and extent of the rights held by each."[141]

It is interesting to note how the Department's issue takes into account the distinction between owning ("rights in") and controlling ("authority over") the water. However, presaging yet another instance where the Department may wield the double-edged sword of the Trust Responsibility, note that the Department invokes both its political relationship to the Tribe and its obligations to the allottees.

Section 307(e) of SAWRSA exacerbates the matter by providing that the SAWRSA's benefits inure "to all members of the Papago Tribe that have a legal interest in lands of the [district]."[142] The Department nibbled at the bait, stating, "[a]lthough section 307(e) does not utilize the term 'allottees,' allottees are the only individuals having 'legal interest[s] in lands of the [district].'"[143] This excerpt, at first glance, seems to indicate that the Department would succumb to the slippery slope.

Instead, the Department went a long way in bucking the trend. After providing a factual and legal background, the Department explained, "a tribe has the sovereign power to, among other things, regulate and perhaps proscribe use of reservation resources, including allottee resources."[144] The letter first took note of the confusion between ownership and control, and then declared, "The Tribes' regulatory power is similar to that possessed by states over appropriations of state 'owned' water."[145] Unfortunately, the Solicitor could not completely relinquish his paternalistic hold, construing an ambiguity in the statute in the Secretary's favor instead of the Tribe's. He wrote, "But a tribe's regulatory authority is circumscribed by . . . the Act. While section 7 does not directly address tribal authority, it plainly makes the Secretary responsible for protecting the allottees' interest in agricultural water use. Therefore, the Secretary may . . . preempt tribal regulation that would thwart allottee interests."[146] Thus, the Secretary's ability to wield the Trust Responsibility as a double-edged sword to some uncertain degree survived.

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139. Letter from John D. Leshy, Solicitor of the Department of the Interior, to United States Senator John McCain (Dec. 22, 1994) (on file with author).

140. *Id.* at 1.

141. *Id.* at 2.

142. Pub. L. No. 97-293, 96 Stat. 1282 (1982).

143. Letter from John D. Leshy to John McCain, *supra* note 139, at 4-5. While the non-allottee citizens of the Tribe would beg to differ, fortunately the Department found the ambiguity to mean only that the legislative history was inconclusive. *Id.* at 5.

144. *Id.* at 6 (citing Brendale v. Confederated Tribes and Bands of the Yakama Indian Nation, 492 U.S. 408 (1989).

145. *Id.* at 8.

146. *Id.* Apparently this is so. As the Solicitor concedes, the section does not utilize the term "allotees." *Id.*

As a result, the confusion over territory and property, control and ownership, continues. The Trust Responsibility owed to individual tribal citizens may be wielded without warning against a Tribe attempting to govern its own citizens and its property. The Trust concept becomes a wedge between the United States and the Tribes in their government-to-government relationship. Consequently, it also becomes a wedge between a Tribe and its citizens in their democratic relationship. The Tribes themselves, in their own courts, could take the lead in clarifying the matter, but the confusion seems to have engulfed them as well.

PART IV: THE ARGUMENT

Resolution of these issues will require nothing less than a strict adherence to principles of federal republican democracy in a manner consistent with other areas of law. Whereas the Union/State relationship generally emerged from the Constitution, the Union/Tribe relationship generally emerged from treaties. In an often cited statement, remarkably similar to the Tenth Amendment in wording and logic, the Supreme Court once declared: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[147] Indeed, a federative type of relationship has evolved between the Union and the Tribes similar to that between the Union and States. In their relationship with the Union, both States and Tribes invoke the positive political theory of republican democracy; that is, their sovereignty begins with them, and that in any transfer of sovereignty they are the grantors and thus the reservers of sovereign powers.[148]

The Supreme Court once addressed the very idea of allotments in the context of the *Winans*/Tenth Amendment logic. The Court wrote,

> To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties.[149]

If in the treaty context "allotment" should be construed as an acknowledgement of the Tribes' existing territorial rights, why in this context should the word not be construed as acknowledging a right originating in the Tribes?[150] The very same ideas underlie both circumstances. This logic would support the notion that, although the United States directed that Indian Country be allotted in severalty, it does not mean that the

147. United States v. Winans, 198 U.S. 371, 381 (1905). *See* U.S. CONST. amend X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.")

148. *See* Monette, *supra* note 12.

149. *Worcester*, 31 U.S. at 582.

150. After all, the paragraph with that quote begins, "The language used in treaties with the Indian should never be construed to their prejudice." *Id.*

allotments themselves originated from the United States.[151] Rather, like the exchange of treaty territory, individual allotments were carved out of that treaty-recognized territory and thus originated from the Tribes. Therefore, the Tribes should be the primary governing authority over the property systems that have emerged within their own territories due to "allotments."

Nothing short of democracy is at stake. Democracy requires that the Tribes and their own citizens are the source of the Tribe's sovereignty, not Congress or the Secretary of the Interior.[152] Those individual Indians, including those with allotments in trust or fee lands from allotments, are citizens of a political entity. They may participate in its political processes. At the very least, they avail themselves of rights, privileges, and benefits incident to that polity. Along with those rights comes some responsibilities, some sacrifices and some burdens. Not least among those responsibilities, as in any democratic government, is to be informed, to participate, and to strive for good government.

What precludes the federal government from raising the Trust Responsibility every time it feels that an individual Indian's interest is subject to governance of the Tribe? Even if the federal government genuinely believes that the Tribe's actions are unwarranted, if the government precludes the action, when will the Tribe's political processes be exercised? When will individuals be compelled to participate if they rest assured that the federal government will inevitably intervene on their behalf? Every wayward action by the Tribe, every disgruntled tribal citizen, every little conflict that arises—plant the seeds that will bloom into the next majority in the Tribe. These seeds are to utilize the electoral and other participatory processes, to unite with other emerging majorities, to change the Tribe's leadership—in short, to exercise democracy.

For example, in Anglo-American eyes, the pursuit and ownership of property is a highly valued civil right, as demonstrated by DOI's reference to the Fifth Amendment. In the Department's defense, if the Department effected a taking, it could be compelled to provide just compensation. If the Tribe effected a taking, nothing seems to guarantee that the individual would be compensated. The federal Bill of Rights, including the Fifth Amendment, does not apply to Tribes.[153] The federal Indian Civil Rights Act includes a "just compensation" provision, but it is essentially unenforceable by federal courts.[154] However, the Tribe's own

151. To suggest that allotments of Indian Country originated in the United States is, at best, to invoke that tired mischaracterization of *Johnson v. McIntosh* that tribes cannot issue title and that "all title stems from the sovereign," the United States. *See supra* notes 85-100 and accompanying text.

152. The Solicitor's letter begins by stating that "[t]he rights *granted* under SAWRSA . . . ," (emphasis added) yet he acknowledges that the Act settles Indian reserved water rights. Letter from John D. Leshy to John McCain, *supra* note 139, at 1, 7. Thus, the Act had nothing to "grant." Rather, read in light of *Winans*, the Tribe is the grantor, and thus the reservoir, in this equation. This simple wording is critical to maintain the democratic logic that the Tribes and their are their source of sovereignty.

153. Talton v. Mayes, 163 U.S. 376 (1896).

154. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (construing 25 U.S.C. § 1301).

constitution may prohibit takings, or may require compensation for takings.[155] That is where the tribal citizen must seek primary recourse.[156] If no recourse rests there, the citizen should use the Tribe's political processes to place it there. That is the essence of democracy.

Finally, the Trust Responsibility was never intended to be a wedge between the United States and the Tribes in their political relationship. It should never be construed to interfere with the relationship between the Tribe and its own citizens in their own democratic political processes. President Bill Clinton, at a White House summit with Tribe leaders in 1994, recognized that the federal government was using it as such a wedge, instructing federal agencies to deal "directly and effectively with tribal governments on activities that affect the trust property and/or governmental rights of the tribes."[157]

Simply, the Trust Responsibility should be used as it originally developed in the law. The entire history of the Trust Responsibility—from Discovery and King George's Proclamation to the Commerce Clause and the Trade and Intercourse Acts—proves that its intent was to keep non-Tribe, non-Indian entities from acquiring the Tribes' territory. Today, trust lands or fractionated heirships resulting from the Allotment Acts continue to fall into non-Indian hands. The Trust Responsibility should be invoked to keep this diminishment from happening. Instead, the Trust Responsibility is invoked to keep Tribes themselves from accomplishing that very objective.

Americans would be surprised to learn that the federal government maintains a private property system just as their own States do. The federal government maintains a property system for territory that in the aggregate is almost the size of California. Maintaining such a system comes with substantial administrative and transaction costs. Who bears these costs? When tribal attempts to tax and regulate these lands are thwarted, they cannot pay the costs. Therefore, the American taxpayer bears these costs. An unaccountable federal bureaucracy does the work and the American citizen foots the bill. Instead, Tribes should maintain their own register of deeds. They should issue and record title. They should assume all responsibilities for maintaining such systems, with all the attendant recognized powers.

We must dispense with the myth that Tribes and Indians had no concept of territory and private property. Then we should recite the following three sentences. Tribes do not own property. *Individuals* own *property*. *Sovereigns* hold *dominion* over *territory*. Tribes are sovereigns.

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155. *See supra* note 55.

156. For example, the Constitution of the Ho-Chunk Nation requires that such cases be brought in the Tribe's courts before in any other court. CONSTITUTION OF THE HO-CHUNK NATION, art. VII, § 5, cl. (a).

157. Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951 (1994).