Well Settled?: The Increasing Weight of History in American Indian Land Claims

Joseph William Singer

28 Georgia Law Review 481 (1994)

The Vermont Supreme Court acknowledged that extinguishment of Indian title requires an unequivocal act of Congress.[287] How then could the court conclude that the Abenaki title had been extinguished in the absence of any congressional action that even mentioned the Abenaki claims? How could the court conclude that the property rights of its citizens were casually lost when Vermont was admitted to the Union[288] when the Abenakis had previously waged war against Great Britain five times, and the United States in 1791 was greatly concerned about preventing future wars with its Indian neighbors? How could the court conclude that the Abenaki title was lost when the Abenakis were never conquered and Congress failed to negotiate a treaty or otherwise deal with their property rights in any explicit way? How could the court, in good conscience, tell its Abenaki citizens that the Republic of Vermont was established for the sole purpose of protecting the property rights of all Vermonters except themselves?

I offer two hypotheses to answer these questions. First, just as it was difficult in the Bicentennial Year of 1989 for many public figures to recognize the core injustices built into the original Constitution on the issue of slavery,[289] it is hard for judges to recognize and deal with the consequences of the tragic history of relations between the United States and American Indian nations.

[286] Felix Cohen, Field Theory and Judicial Logic, *in* THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 150 (1950), *quoted in* DIPPIE, *supra* note 50, at 339.

[287] *Elliott*, 616 A.2d at 213. The court found extinguishment of Indian property rights to be the exclusive right of the federal government. *Id. See also* Oneida Nation of New York v. New York, 860 F.2d 1150 (2d Cir. 1988) (finding sovereign's intent does not have to be express but must be "plain and unambiguous").

[288] *Elliott*, 616 A.2d at 218.

[289] Justice Thurgood Marshall was a notable exception. *See* Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987) (noting that the Constitution began with "We the People" while denying slaves and women the right to vote).

The strategy of choice is inoculation. The "original sins" of both slavery and conquest are recognized and deplored; yet they are relegated to the past with the pretense that we have gotten beyond them.

This denial of history[290] has profound consequences. In the case of the law governing the relations between Indian nations and the United States, the distancing of past injustice allows the courts to rewrite both history and legal precedent. The courts rewrite history by pretending that conquest happened long ago in the past rather than recently—or even in 1992 as a consequence of their own actions. The courts rewrite precedent by relying on cases which misstate or distort the meaning of earlier cases and by failing to recognize conflicting lines of precedent and competing and contradictory policies.

At the same time, the courts continue to cite, or rather to miscite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions[291] contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights. To the extent they are read to authorize unjust expropriation of Indian lands, they provide a convenient scapegoat. They shift responsibility from current judges to a Court led by perhaps the most respected of all Chief Justices. If a proposition is compelled by a case decided in 1823, it not only has the backing of Chief Justice John Marshall, but also appears to be so long-standing that current courts have no choice but to submit to the principles upon which the country was established and which form the basis of current expectations of non-Indians. To the extent that process entails injustice, it is safely relegated to the past. Yet the past intrudes on the present; the old Indian law opinions are given current force.[292] To the extent that courts currently define Indian rights by reference to doctrines designed to

[290] *See* Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 WASH. & LEE L. REV. 381 (1991) (arguing that "history is crucial in identifying groups that warrant particular legal protection," yet finding that the courts often use false historical claims to justify failing to respond to injustice).

[291] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (dividing the title to Indian lands between Indian nations and the United States).

[292] *See Elliott*, 616 A.2d at 210 (citing *Johnson*, 21 U.S. (8 Wheat.) 543; Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); and United States v. Cook, 86 U.S. (19 Wall.) 591 (1873)).

promote the invasion and unjust seizure of Indian lands, they participate in the current deprivation of property of Indian nations.[293]

Second, the denial of injustice in both *Tee-Hit-Ton* and *Elliott* rests on a particular form of "either/or" thinking which fails to recognize that various middle positions or accommodations are possible. The Vermont Supreme Court appeared to assume that, if it recognized the legitimate claims of the Abenakis, the logical corollary would be to deny the property rights of all the non-Indian residents of Vermont.[294] This result would be intolerable to the court. Identifying with the State of Vermont and its non-Indian inhabitants, the court assumed that it would be wrong to dispossess all Vermont's non-Indian residents because they had legitimately relied on grants by the State of Vermont and the public recording system in establishing homes and businesses in the state.[295] If it would be unjust to dispossess non-Indian claimants, it must follow that conquest happened at some point in the past. When is not important; what matters is that it happened. If no date can be identified, then it must be found in the "increasing weight of history."[296]

Even if one concludes that it would be unjust or unlawful to dispossess current non-Indian residents in Vermont, it is a logical error to conclude that the original inhabitants must, therefore, have been lawfully deprived of their property rights. One wrong does not make another wrong right. Two just claims may exist and conflict with each other; it may be unjust to dispossess current residents and also have been unjust to dispossess the Abenakis.

This "either/or" reasoning misunderstands the character of property rights. It presumes that the relevant question is "Who is the owner?" and that, once that owner is identified, others have no

[293] For explanations of the myriad ideological justifications for seizure of Indian lands, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

[294] *See Elliott*, 616 A.2d at 220.

[295] *Id.*

[296] *Id.* at 218.

legally cognizable claims.[297] Ruling that the Abenakis had never been lawfully divested of their title would not automatically entitle them to oust the current residents of Vermont or even to collect rent from them. Given the conflicting property rights in question, it would have been a matter for further discussion how to resolve the conflicting property rights.

The Vermont Supreme Court failed to recognize that the most likely and most appropriate resolution to the case would have been a negotiated and ultimately legislative one. If the court had recognized that the Abenakis had never been lawfully deprived of their title to the tribe's lands in the State of Vermont, the United States could have negotiated with the tribe to settle the matter by providing some land and compensation, as it did in the case of the Passamaquoddy and Penobscot nations in Maine and the natives in Alaska.[298] In other words, the United States could have negotiated a treaty with the Missisquoi Abenaki Nation.[299] This way of resolving the conflict would have recognized property rights and sovereignty on both sides.

It is "well settled" that Indian title is "as sacred as the fee simple of the whites."[300] Yet it also appears to be "well settled" that Indian nations who did not go to war with the United States, and are therefore not the beneficiaries of a treaty, must have been "conquered" at some time in the past and their land claims extinguished by the "increasing weight of history,"[301] whether or not they were paid compensation. These doctrines do not sit well

[297] For criticism of this model of property rights, see Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

[298] *See* CLINTON ET AL., *supra* note 40, at 737-40, 1073-75.

[299] Congress ended formal treaty-making with Indian nations in 1871. Yet, it has often engaged in informal treaty-like negotiations with Indian nations after 1871 by discussing pending legislation with the affected nation. Recent examples of such negotiations include settlement of the Alaska Native claims and the claims of the Passamaquoddy and Penobscot Nations geographically located within the borders of the State of Maine. In addition, Congress is perfectly free to pass legislation authorizing the resumption of treaty-making between the United States and American Indian nations. Such a course of action would represent both the best way to settle ongoing controversies over property rights, as well as constituting the best way to respect and give appropriate deference to tribal sovereignty. Such a process, however, can be effectively accomplished through the legislative process if it is conducted in conjunction with good faith negotiations with affected tribes.

[300] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 716 (1835).

[301] State v. Elliott, 616 A.2d 210, 218 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

together. If the land in the United States is to have been well settled by its inhabitants, Indian and non-Indian alike, then the courts must take more seriously the claim that Indian title is "as sacred as the fee simple of the whites."[302] If they do not, they will have to bear the weight of the increasing judgment of history that they participated in the continuing conquest of American Indian nations.

[302] *Mitchel*, 34 U.S. (9 Pet.) at 746.