American Indian Law Review

Volume 29 | Number 1

1-1-2004

Colonizing the Last Frontier

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Three degrees of latitude reverses the whole of jurisprudence.
— Blaise Pascal

In recent years, federal Indian law has seen the emergence of a new colonial program. Originating not in Congress, the traditional seat of plenary power over the Indian nations,[1] but in a judiciary willing to disregard the legislative mandate to which it once deferred, this program has altered the political relationship between the United States and Indian nations largely in existence since 1789.

The sovereignty of Native American tribes, articulated in early nineteenth-century precedents and usually respected by Supreme Courts prior to the present one, has been eroded in favor of a jurisprudence unfamiliar to Indian law, which curiously coincides "with a majority of the Justices' attitudes about federalism, minority rights, and protection of mainstream values."[2] Since 1978, and especially after Rehnquist became its Chief Justice, the Court has diminished the inherent powers tribes possessed as domestic dependent nations and transferred them to the states at the federal government's expense but without its consent, indeed to the contrary of congressional and executive policy favoring tribal self-determination.[3]

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1. *See* U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause), art. II, § 2, cl. 2 (Treaty Clause), art. IV, § 3, cl. 2 (Property Clause), art. VI, cl. 2 (Supremacy Clause); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); *see also* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1059-63 (1995).

2. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001).

3. *See, e.g.*, Joseph William Singer, *The Role of Jurisdiction in the Quest for Sovereignty: Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 644 (2003). On the pre-Rehnquist era, see CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 46-52 (1987); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that tribes lack jurisdiction to try and punish non-Indian criminal defendants who commit crimes on the reservation); Montana v. United States, 450 U.S. 544 (1981) (holding that tribes may not regulate non-members' fishing and hunting on reservation land owned by non-

At the same time the Court has brought to bear a judicial methodology alien to Indian law, for many of these cases have been characterized by a confused common law mode of legal reasoning unsuited to what was the constitutional provenance of Indian claims, in which the political powers of a tribe were determined by congressional fiat and, in case of legislative ambiguity, a presumption of survival.[4] This shift in interpretative procedure has come at the expense of once honored canons of construction that had

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Indians except in limited circumstances); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989) (holding that tribes may not zone non-member land in non-Indian communities on a reservation); Duro v. Reina, 495 U.S. 676 (1990) (holding that Indian tribes lack criminal jurisdiction over non-member Indians); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994) (upholding New York law requiring tribal record keeping of cigarette sales to non-Indians); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (holding that tribes lack civil jurisdiction over non-members on most roads within reservations); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) (holding that tribes lack jurisdiction over hundreds of native villages even where there is virtually no federal policing or regulation); Nevada v. Hicks, 533 U.S. 353 (2001) (holding that state officials are immune to tribal jurisdiction even when they tortiously invade a member's home on tribal land); Atkinson Trading Co., Inc. v. Shirley, Jr., 532 U.S. 645 (2001) (holding that non-Indian hotel guests may not be taxed for staying in a hotel on a reservation on non-Indian land). By way of contrast, *see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) (denying state jurisdiction to tax income earned by an Indian on the reservation in a bank); United States v. Wheeler, 435 U.S. 313 (1977) (insulating tribes from double jeopardy defense when prosecuting defendant for the same offense for which the federal government did); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (permitting tribes to place more onerous membership requirements on children of female members who marry extramurally than on children of male members who do so); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (upholding tribal taxes on non-tribal oil development on reservation); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (allowing tribes to regulate non-Indian hunting and fishing on reservations to the exclusion of state regulation); United States v. Lara, No. 03-107 (U.S. Apr. 19, 2004) (holding that when Congress lifts restrictions on a tribe's criminal jurisdiction over nonmember Indians, a tribe acts in its sovereign capacity when it prosecutes nonmember Indians and the Double Jeopardy Clause does not prohibit federal prosecution for a federal offense).

4. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 439 (1999); Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 275 (1997); Philip P. Frickey, *Commentary: Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 360 (1997); Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, *in* RETHINKING INDIAN LAW *passim* (Nat'l Lawyers Guild Comm. on Native Am. Indian Struggles ed., 1982).

been devised to protect Indian nations from the casual extinguishment of their rights and sovereignty by Leviathan's awesome power in respect of them.[5] The effect of this alteration is not a hermeneutic trifle: it has rather diminished the legal distinctiveness of aboriginal peoples as unique constituents in the constitutional order created by the Framers and at the same time made their claims more like any other minority's in America. By removing Indian law from the unique juridical space it has occupied as a matter of legal doctrine, history, and political determination, the Court has created a state of affairs pernicious to the vitality of Indian nations insofar as it perpetuates the colonial evil of assimilation in the name of color-blind liberalism.[6]

In this era of judicial divestiture of tribal sovereignty, another case has emerged that strikes at the heart of federal Indian law and betrays the primal compromise in our nation's colonization. *Native Village of Eyak v. Trawler Diane Marie, Inc.* (*Eyak*) repudiates the underlying principle of federal Indian law — that the federal government's sovereignty is subject to a tribe's right of occupancy of land to which it holds aboriginal title and that such title survives unless Congress extinguishes it clearly — in favor of a view of aboriginal title never before countenanced in the United States and long discredited in common law jurisdictions which once entertained it — that pre-existing rights will be deemed extinguished by the mere assertion of sovereignty over the area to which they pertain until their formal recognition by an act of state.[7] Indeed, an author of a recent article even referred to *Eyak*

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5. *See* Frickey, *supra* note 4, at 27, 58.

6. *See, e.g.*, Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. REV. 943 (2002); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 424-25 (1993); Milner S. Ball, *Legal Storytelling: Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2296-2318 (1989); *cf.* JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 131-32 (1995); Will Kymlicka, *American Multiculturalism and the "Nations Within"*, *in* POLITICAL THEORY AND THE RIGHTS OF INDIGENOUS PEOPLES, 216-36 (Duncan Ivison et al. eds., 2000) [hereinafter POLITICAL THEORY]; WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS *passim* (1995) [hereinafter MULTICULTURAL CITIZENSHIP]. In *Multicultural Citizenship*, perhaps the single most important contemporary work on Rawlsian liberalism and diversity, Kymlicka argues that recognizing group rights based on ethnic criteria is essential to achieving the equal liberty for individuals that classical liberals prize. *Id.* at 126. He also makes a case for distinguishing between the special rights of "national minorities" (such as Native Americans, Maori, etc.) and the special rights of ethnic groups (like immigrant populations). *Id.* at 10.

7. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998), *cert. denied*, Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999). As will be seen, aboriginal title

as a "modern version of the aboriginal title doctrine," either in misapprehension of aboriginal title itself or with ominous perspicacity of recent developments.[8]

This Article analyzes *Eyak*, in which the claims of several native Alaskan villages to aboriginal title to the seabed were deemed to be legally inconsistent with federal sovereignty. In Part I it considers the background to the case and the circumstances which led the villages to commence it. In Part II the Article discusses the nature of common law aboriginal title in the

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has been presumed to survive the sovereign succession of the United States to territory formerly controlled by Indian nations. *See infra* note 56. In the British Commonwealth, two lines of cases came to be, one following the traditional American approach to aboriginal title, the other holding that the customary rights of non-European peoples would only be vindicated following their formal recognition by the dominant sovereign. *See, e.g.*, The Queen v. Symonds [1847] N.Z.P.C.C. 387 (P.C.) (the former); Vajesingji Joravarsingji v. Sec'y of State for India, 51 I.A. 357 (P.C. 1924) (the latter). *See also* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 165-92 (1989); BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE 8-9 (1983). The latter tradition was repudiated in Canada in Calder v. Attorney-General of British Columbia, [1973] S.C.R. 313 (Can.); in Australia in Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1 (Austl.); in South Africa in Alexhor Ltd. and Government of South Africa v. Richtersveld Cmty. 2003 (12) B.C.L.R. 1301 (CC); and, to the extent it had purchase in New Zealand, in Nireaha Tamaki v. Baker, [1901] App. Cas. 561 (P.C.) (appeal taken from N.Z.) and Te Weehi v. Regional Fisheries Officer [1986] 1 N.Z.L.R. 680. Aside from common law tradition, indigenous peoples' right to land has been recognized as a matter of international law. *See, e.g.*, Advisory Opinion on Western Sahara, 1975 I.C.J. 12 (Oct. 16) (advising that the Western Sahara at the time of Spanish colonization was not terra nullius); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 27, G.A. Res. 2200(XXI), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976) (providing that ethnic, religious, or linguistic minorities shall not be denied the right, in community with members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language); Länsmann v. Finland, Comm. No. 671/1995, CCPR/C/58/D/671/1995, ¶¶ 2.1-2.4, 10.1-10.5 (holding that Sami reindeer herding on certain land is protected by article 27, despite that land's disputed ownership); Ominayak, Chief of the Lubicon Lake Band v. Canada, Comm. No. 167/1984, U.N. Hum. Rts. Comm., U.N. Doc. A/45/40, vol. II, annex IX.A, ¶ 32.2 (holding that economic and social activities linked with territory are a part of culture protected by article 27); Länsmann et al. v. Finland, Comm. No. 511/1992, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/52/D/ 511/1992 (1994) (holding that reindeer herding is a part of Sami culture protected by article 27); Kitok v. Sweden, Comm. No. 197/1985, U.N. Hum. Rts. Comm., U.N. Doc. A/43/40, annex VII.G (1988) (holding that article 27 extends to economic activity where that activity is an essential element in the culture of an ethnic community); *see also* U.N. Hum. Rts. Comm., General Comment No. 23 (50) (Art. 27), U.N. Doc. HRI/GEN/1/Rev.1 at 38, adopted Apr. 6, 1994; Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751 (2003).

8. *See* John W. Ragsdale, Jr., *The United Tribe of Shawnee Indians: Battle for Recognition*, 69 UMKC L. REV. 311, 319 n.45 (2000).

United States. In Part III it interrogates the judiciary's application of the "federal paramountcy doctrine" in a manner which extinguished the villages' exclusive title in contradiction of congressional pronouncements otherwise. In the light of this inquiry the Article argues in Part IV that the judiciary misapplied the doctrine by mistaking the nature of aboriginal title, deliberately disregarding precedent to this end, and refusing to employ properly the test for extinguishment of aboriginal title. The Article then posits that the Ninth Circuit vitiated the Constitution, whose separation of powers has always been understood to allocate plenary power over Indian nations to Congress, and consequently made a legislative decision to deploy a new colonial regime over the last frontier, the ocean. Part V probes the related issue of the survival of exclusive aboriginal rights in the territorial sea in the absence of a treaty or statute, which the Circuit incorrectly said in dicta could not exist. Finally, the Article concludes in Part VI with recommendations: it argues that *Eyak* be overturned as a doctrinally incorrect and politically indefensible intrusion into congressional prerogative and tribal autonomy; it urges that Congress alternatively fulfill its fiduciary duty to the villages by using its paramount powers to grant a title commensurate to their claim or providing compensation for the taking of their right of occupation.

I. Prior History of Eyak: The Villages' Appeal

Halibut. Black cod. Gray cod. Scallops. Red salmon. King salmon. Chum salmon. Silver salmon. Dungeness. Bairdi crab. Razor clams. Octopus. For more than 7000 years members of the Indian villages of Eyak, Tatitlek, Chanenga, Port Graham, and Nanwalek have subsisted on and sanctified such fruits of the sea. These federally recognized tribes are located on the Prince William Sound, the Gulf of Alaska, and the lower Cook Inlet regions of Alaska.[9] Throughout their history, the villages have depended on the resources of the coastal waters.[10] Indeed, their very occupancy of the shore and immemorial enjoyment of sea and seabed are testament to the variety and bounty of marine mammals, fish, and sea birds in that area. These resources ensured a more certain livelihood than the

9. *See* 51 Fed. Reg. 25,115 (July 10, 1986). More specifically, Eyak (near Cordova), Tatitlek (on the mainland just south of Valdez Arm), and Chenega (in Chenega Bay on Evans Island) are located in the Prince William Sound. Port Graham and Nanwalek occupy the southwestern tip of the Kenai Peninsula, south of Katchemak Bay in lower Cook Inlet.

10. *See, e.g.*, Donald W. Clark, *Prehistory of the Pacific Eskimo Region*, *in* SMITHSONIAN INSTITUTION HANDBOOK OF NORTH AMERICAN INDIANS (ARCTIC) 136 (David Damas ed., 1984).

inland hunt of moose and caribou could provide. The villages formed at the water's edge.

Historically, whales were prized by the tribal members for their blubber, meat, and oil. Sea lions, porpoises, smaller whales, and seals would be harpooned in open water from skin-covered kayaks. Seal hunting additionally required the use of decoys, nets, and ambuscade. The furs of sea otters were highly valued. Bottom fish like cod, halibut, and rockfish, harvested from deep water with baited hooks and lures, were a staple of subsistence commensurate to the mammals. As travel between the villages was frequent and typically by water (in umiaks[11] as well as kayaks), extensive trade and ceremonial exchange of the sea's riches developed. Many cultural traits are consequently shared by otherwise distinct coastal tribes. In all cases, the traditions associated with life, love, religion, and death came to depend on the ocean and its resources.

A majority of village members today continue the subsistence lifestyle of their forbears: they pursue a livelihood that relies on the fish and wildlife of the territorial sea, and their continued social, cultural, and economic well-being depends on their continued ability to hunt and fish in their traditional domain. The villages are small and isolated, often unconnected to roads. The waters of the sea are their blood.

In 1995, the villages brought suit in federal district court against the Secretary of Commerce, the Secretary of the Interior, and the Trawler Diane Marie corporation.[12] The villages sought a declaratory judgment confirming their aboriginal title to their traditional fishing grounds in the outer continental shelf (OCS) in the Gulf of Alaska.[13] Such title would include the exclusive aboriginal rights to use, occupy, possess, hunt, fish in, and otherwise exploit the waters and seabed beneath them. The villages also sought three injunctions: one to prohibit the Secretary of Commerce from implementing commercial and noncommercial fishing regulations in the area

11. Like the kayak, the umiak is another kind of open Eskimo boat made of a wooden frame and covered with hide.

12. The district court's final unreported judgment is Native Vill. of Eyak v. Trawler Diane Marie, Inc., No. CV-95-0063 (D. Alaska Oct. 9, 1997).

13. For purposes of U.S. law, the OCS includes submerged lands lying seaward and outside of the area of lands beneath navigable waters (as defined in § 1301 of the Submerged Lands Act), and whose subsoil and seabed connect to the United States and are within its jurisdiction and control. *See* Submerged Lands Act, 43 U.S.C. § 1331(a) (2000). The OCS thus includes submerged lands outside statutorily determined state territorial boundaries, i.e., beyond three miles, and extends seaward to the limit of federal jurisdiction and control, i.e., to the 200-mile boundary of the exclusive economic zone.

at issue; another to prevent the Trawler Diane Marie's vessel, "MISTER BIG," from scallop fishing within the territory (pursuant to the Secretary of Commerce's license); and a third enjoining the Secretary of the Interior from conducting an oil and gas lease sale in the lower Cook Inlet. The district court dismissed the villages' claims against the Secretary of the Interior for lack of ripeness. By separate order and at the parties' stipulation, the claims against Trawler Diane Marie were also dismissed.[14] In the end, the villages' remaining causes, and those which would become the subject of their subsequent appeal, were directed solely against William Daley, then the Secretary of Commerce.[15]

The villages lost their claims when the district court denied their motion for summary judgment and granted the defendants' on the basis that "federal paramountcy" (to be discussed in course) precluded, as a matter of law, aboriginal title to the OCS. The court alternatively held that there could in any case be no exclusive aboriginal right to fish in navigable waters based on aboriginal title in the absence of a treaty or federal statute guaranteeing otherwise (and here the court found no relevant treaty or statute).

When the villages appealed to the Ninth Circuit, they again sought injunctive and declaratory relief. More specifically, they argued that the regulations which the Secretary of Commerce made pursuant to the Magnuson Fishery Conservation Management Act (Magnuson Act) and Northern Pacific Halibut Act of 1982 (Halibut Act) improperly authorized non-tribal members to fish within the villages' exclusive aboriginal territories even as the regulations prohibited village members from doing so. Each Act has a complex regulatory scheme. It suffices for our purposes to note that they charge the Secretary of Commerce with regulating commercial and noncommercial fishing of halibut and black cod. Commercial fishing is administered through the issuance of Individual Fishing Quota permits.[16]

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14. In March 1995, the Department of Commerce issued an emergency order closing Alaskan federal waters to scallop fishing. *See* 60 Fed. Reg. 11,054 (Mar. 1, 1995). The villages consequently withdrew their Motion for Temporary Restraining Order and Preliminary Injunction against Trawler Diane Marie.

15. The appeal, to be discussed in course, is Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090 (9th Cir. 1998).

16. *See* Magnuson Act, 16 U.S.C. §§ 1801-1882 (2000) (extending U.S. control and jurisdiction to waters lying between three and 200 miles off the coast by establishing an exclusive fishery conservation zone and asserting "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone"). Congress also specified that the Magnuson Act "should not be construed, in any way, to affect or change" the fishing rights of Native Americans, whether

Although a few village members possess these, the majority of them do. Moreover, since the Secretary's sport-fishing regulations govern noncommercial halibut fishing, village members are restricted to harvesting halibut with a hook and line, the latter having no more than two hooks on it, and two fish per diem.[17] The regime set in place by the Acts consequently posed a two-fold threat to the villages' livelihood: not only were non-members encouraged to exploit traditional native areas at the Secretary's authorization, but villagers themselves were prevented from doing so in the absence of the same grant. For this reason the injunctions were sought.

The villages also requested a declaration that they held unextinguished aboriginal title to the land at issue, i.e., the seabed. Success on this point would be even more meaningful than winning the injunction. For if the villages could prove that they held title to the seabed, an explicit congressional mandate would be necessary (rather than the indirect implications of generally applicable statutes like the Magnuson and Halibut Acts) to extinguish the villages' exclusive use of their property.[18] Whether

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established by "treaty" or "any other applicable decision." S. REP. NO. 94-416, at 692 (1975). For the Halibut Act, see 16 U.S.C. §§ 773-773k (2000), which implements the Convention Between the United States and Canada for the Preservation of the Halibut Fishery in the Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, U.S.-Can., 5 U.S.T. 5. Under the Halibut Act, the Northern Pacific Fishery Management Council (NPFMC) allocates fishing privileges among U.S. fishermen; the Secretary then promulgates regulations. The NPFMC's mandate, however, requires that "such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law . . . ." 16 U.S.C. § 773c(c). Aboriginal rights protected by federal law are thus left unaffected by the Halibut Act, which must operate around them.

17. *Cf.* Andrew P. Richards, Note, *Aboriginal Title or the Paramountcy Doctrine?* Johnson v. McIntosh *Flounders in Federal Waters Off Alaska in* Native Village of Eyak v. Trawler Diane Marie, Inc., 78 WASH. L. REV. 939, 960 (2003).

18. Although an uncertain area of Federal Indian law, generally applicable statutes will usually not apply to Indian tribes if

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985), *citing* United States v. Farris, 624 F.2d 890, 893-94 (9th Cir. 1980); *see also* F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (holding that general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary). On the other hand, generally applicable statutes cannot extinguish aboriginal title and rights; for such action, Congressional intent must be "clear and plain." *See* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353 (1941). *Tuscarora* remains a controversial case. Indeed, the majority's reasoning provoked the

or not the villages held such title to the seabed would need to be litigated on remand in a district court: this question of fact was not raised in the Ninth Circuit. The importance of the villages' appeal, therefore, was to win the critical point of law, namely to overturn the district court's holding that there could be no aboriginal title to the OCS and that, even were that not the case, such title could not include an exclusive right to fish in navigable waters outside of the provision of a treaty or federal statute.

II. Common Law Aboriginal Title

Before we review the Ninth Circuit's decision we should generally consider the nature of the villages' claim. This Part will outline the implications of what it meant for the villages to claim "aboriginal title" to the OCS.

In the American scheme, Indians are the native inhabitants of lands colonized first by European powers and then by the United States; these inhabitants were recognized long ago, in Chief Justice Marshall's words, as the "rightful occupants of the soil."[19] At the same time, in the United States their right to self-determination as sovereign nations has been "necessarily diminished" by the juristic doctrine of "discovery."[20] The factitious imprimatur of discovery permitted European potentates to assert in

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strident dissent of Justice Black that ends with one of the most frequently quoted statements in Indian law: "Great nations, like great men, should keep their word." *Tuscarora*, 362 U.S. at 142.

19. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

20. *Id.* The particular diminishments Marshall had in mind were the tribes' inability to alienate their lands to parties other than the federal government and to treat with nations other than the United States. The Chief Justice would later explain in *Cherokee Nation v. Georgia* that Indians tribes are "domestic dependent nations" possessed of their own limited sovereignty, but in a state of "pupilage" to the United States. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). He then clarified in *Worcester v. Georgia* that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power . . . ." Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). Chief Justice Marshall also analogized the Indians' status to that of Vatelian "tributary" or "feudal" states in Europe in his comment that a "weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state." *Id.* at 561; *see also* WILKINSON, *supra* note 3, at 53-86. For an earlier characterization of Indians as a "feudatory people," *see* R. v. Phelps, [1823] 1 Taylor 47, 52-53, where the Upper Canada King's Bench heard arguments to this effect by Robert Baldwin, the distinguished lawyer who would one day be Attorney-General for Canada West and a prime minister of the country.

themselves and recognize in their peers an underlying title to the discovered land.[21] To be sure, the "extravagant" claim of discovery, as Marshall had it, was only plausible within the parameters of a self-consciously racist system, one which used the "character and religion" of indigenous inhabitants as "an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[22] The radical title gained by this legal fiction allowed a European sovereign the sole privilege of appropriating the lands occupied by indigenous peoples in the area of his discovery.[23] His was an exclusive right of preemption as against all others to acquire the possessory rights of the native people by conquest or cession, but was not in itself a *plenum dominium*.[24] So the indigenous peoples' pre-existing rights were thus retained by virtue of their immemorial use and occupancy of the land at issue — discovery as such did not extinguish them[25] — and they acted as a burden on the sovereign's naked fee and were held to be

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21. *See* MCNEIL, *supra* note 7, at 245. On the intellectual, theological, and ideological origins of the doctrine of discovery, see RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 78-108 (1999); DAVID GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 41-72 (4th ed. 1998) [hereinafter FEDERAL INDIAN LAW]; JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 137-75 (1993); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983); ANTHONY PAGDEN, THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY (1982); JAMES MULDOON, POPES, LAWYERS, AND INFIDELS: THE CHURCH AND THE NON-CHRISTIAN WORLD, 1250-1550 (1979).

22. *Johnson*, 21 U.S. at 573.

23. One is reminded of Paul Auster's observation, made in an altogether different context, that "[n]o one wants to be part of a fiction, and even less so if that fiction is real." PAUL AUSTER, THE NEW YORK TRILOGY 225 (1986).

24. To the extent that discovery does seem analogous to settlement, the confiscations it allowed should have amounted to acts of state against a subject. MCNEIL, *supra* note 7, at 246. In response to this consideration, Marshall let pragmatism rule and deemed the fact of colonization non-justiciable:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Johnson, 21 U.S. at 591.

25. *See Johnson*, 21 U.S. at 572-73; *Worcester*, 31 U.S. at 543-44. *But cf.* Joseph William Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 490 (1994).

inalienable save to the sovereign himself.[26] In this way the federal government could acquire land cheaply as a monopsonist and control colonization, since all valid titles had to issue from it rather than a tribe directly.[27] At the same time, the pre-existing natural law property rights of Indians could be nominally respected.[28] It is these possessory rights which have been called "original title," "Indian title," "native title," and "aboriginal title."[29]

As to the nature of the Indians' title, the Marshall court said in its final Indian law decision that it

> was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as

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26. Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835); *Johnson*, 21 U.S. at 574.

27. *See* Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67, 111-13 (2001); *see also* David V. Williams, The Queen v. Symonds *Reconsidered*, 19 VUW L. REV. 385, 395-98 (1989) (making a similar point about *Symonds*, New Zealand's 1847 analogue to *Johnson*) and Mark Hickford, *"Settling Some Very Important Principles of Colonial Law": Three "Forgotten" Cases of the 1840s*, 35 VUW L. REV. 1 (2004) (discussing historical use of *Johnson* in New Zealand).

28. Alexis de Tocqueville famously articulated this exquisite hypocrisy soon after *Johnson*'s holding:

> The conduct of the Americans of the United States towards the natives . . . breathes the purest love of forms and legality. Provided that the Indians stay in the savage state, the Americans do not mix at all in their affairs and treat them as independent peoples; they do not permit themselves to occupy their lands without having duly acquired them by means of a contract; and if by chance an Indian nation can no longer live on its territory, they take it like a brother by the hand and lead it to die outside the country of its fathers. The Spanish, with the help of unexampled monstrous deeds, covering themselves with an indelible shame, could not succeed in exterminating the Indian race, nor even prevent it from sharing their rights; the Americans of the United States have attained this double result with marvelous facility — tranquilly, legally, philanthropically, without spilling blood, without violating a single one of the great principles of morality in the eyes of the world. One cannot destroy men while being more respectful of the laws of humanity.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 325 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835).

29. *See* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 486-93 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN, 1982 ED.].

> much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.[30]

In this way, as has famously been said, the Indians' "right of occupancy [was] considered as sacred as the fee simple of the whites,"[31] so that, despite lacking fundamental characteristics of that estate (such as alienability), the Indian title is nonetheless deemed perpetual (though subject to abandonment[32]), exclusive as against third parties (but able to be terminated by the federal government[33]), and bestowing full beneficial use of the lands occupied, including rights to timber and subsurface minerals.[34]

The radical or sovereign title held by the United States and the aboriginal title held collectively by a given native tribe are altogether "separate but nonexclusive forms of ownership," which can "be held in the same lands at the same time."[35] As the Supreme Court explained in *Oneida Indian Nation v. County of Oneida*,

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right occupancy, was extinguishable only by the United States.[36]

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30. *Mitchel*, 34 U.S. at 746; MCNEIL, *supra* note 7, at 253-54.

31. *Mitchel*, 34 U.S. at 746.

32. *See, e.g.*, Northwestern Shoshone Indians v. United States, 324 U.S. 335, 339 (1945).

33. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974) (*Oneida I*).

34. *See, e.g.*, United States v. Shoshone Tribe of Indians, 304 U.S. 111, 115-17 (1938).

35. Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 941 (Ct. Cl. 1974); *see also* Sac & Fox Tribe v. United States, 383 F.2d 991 (Ct. Cl. 1967) (demonstrating that sovereign and Indian title can be held in the same lands at the same time). For English colonial law, *see* PAUL G. MCHUGH, THE MĀORI MAGNA CARTA: NEW ZEALAND AND THE TREATY OF WAITANGI 103 (1991).

36. *Oneida I*, 414 U.S. at 667.

Indian tribes retain their aboriginal title unless and until Congress extinguishes it, which Congress alone may do in its plenary capacity (and without offering compensation, unless the title is protected by treaty or statute).[37] In this way an exclusive aboriginal title does not and cannot

37. The preemptive rights of purchase recognized in *Johnson* and the federal trust relationship over Indian tribes — created by the Indian Commerce Clause and various statutes since 1790 — grant this authority to Congress alone. *See* COHEN, 1982 ED., *supra* note 29, at 489. Common law aboriginal title is to be distinguished from aboriginal title guaranteed by treaty or statute. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (holding that aboriginal title is not a property interest but a right of permissive occupancy which the sovereign grants and protects against intrusion by third parties but may terminate at any time without being constitutionally obliged to offer compensation); MCNEIL, *supra* note 7, at 259-64, 303. In spite of *Tee-Hit-Ton*'s hateful holding, which may have partly arisen from Justice Reed's particular conclusion that the Indian land claim "was more a claim of sovereignty than of ownership," *id.* at 287, wholly uncompensated takings of Indians' non-proprietary interest in their land remain the exception in the United States. Rather, most have been compensated for by treaties, agreements, special legislation allowing individual tribal claims (for example, the post-*Tee-Hit-Ton* Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 (2000)), and claims made pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. § 70 (2000)). *See* FEDERAL INDIAN LAW, *supra* note 21, at 275-86. Such outcomes reflect the preference, made clear in both the majority and minority opinions in the second *Oneida* case and *Tee-Hit-Ton* itself, that a political solution to such takings is preferable to their judicial resolution, at least in instances of high visibility and importance. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (*Oneida II*) (holding that, even in the absence of an express congressional preservation of aboriginal rights to vast portions of New York, such rights are sua sponte preserved under the common law doctrine of sovereign succession unless and until clearly extinguished by Congress). Moreover, the holding in *Tee-Hit-Ton* itself is not so absolute as one might think. While representing the Passamaquoddy and Penobscot Indians in their judicially mediated claims against the State of Maine, Archibald Cox made the following argument:

> Congress has power, under *Tee-Hit-Ton*, to legislate concerning the property of Indian tribes but that regulatory power, like all other regulatory powers, must be exercised in conformity with the Bill of Rights, including the Due Process Clause of the Fifth Amendment. An exercise of Congressional Power over Indian affairs which would simply confiscate the interest of the Indians would violate the guarantees of fundamental fairness embodied in the Due Process Clause. The principle that Congress must exercise its power over Indian affairs consistently with the Due Process Clause of the Fifth Amendment lies at the heart of the . . . decision in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977) . . . In that case the court held that the validity of a given legislative solution involving tribal property rights depends on whether it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." Citing to Morton v. Mancari, 417 U.S. 535 (1974). The opinion [also] cites United States v. Alcea Band of Tillamooks . . . , 329 U.S. 40 (1946)

conflict with the paramountcy of the federal government. This is the logical concomitant of what Chief Justice Vinson wrote in *United States v. Alcea Band of Tillamooks*: "As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will."[38] Indeed, the Supreme Court held almost 200 years ago that "the nature of the Indian title . . . is not such as to be . . . repugnant to seisin in fee on the part of the state."[39] In the years since *Fletcher* and before *Eyak*, the Court has consistently held that federal sovereignty and exclusive aboriginal title are wholly compatible.[40] It has moreover recognized aboriginal title every time the United States extended its jurisdiction into territory occupied by Indians, including Alaska.[41] With these canonical principles in mind, we turn to the Ninth Circuit's decision in *Eyak*.

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for the proposition that the "power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." 329 U.S. at 54.

FEDERAL INDIAN LAW, *supra* note 21, at 351; *see also* Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899) (assuming that Congress enjoys "plenary power of legislation" in respect of tribes but that such power is subject to the Constitution). With respect to *Tee-Hit-Ton*'s holding, *see* St. Catherine's Milling & Lumber Co. v. The Queen, [1888] 14 App. Cas. 46 (P.C.) (appeal taken from Can.) and Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 App. Cas. 401 (P.C.) (appeal taken from Can.) (advising that native title is subject to the Sovereign's good will).

38. United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). The naked fee underlying an aboriginal title is a reversionary interest that becomes possessory once Congress extinguishes the aboriginal title. *See* COHEN, 1982 ED., *supra* note 29, at 489.

39. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142-43 (1810); *cf.* Nireaha Tamaki v. Baker, 1901 App. Cas. 561, 574 (P.C.) (appeal taken from N.Z.) (holding that the native title of possession and occupancy is not inconsistent with the seisin in fee of the Crown and that, by asserting a claim to native title in a court of the Crown, a claimant acknowledges and relies on the paramount title of the Crown).

40. *Oneida II*, 470 U.S. at 233-36 (1985); United States v. Shoshone Tribe, 304 U.S. 111, 116-18 (1938).

41. *See, e.g.*, Holden v. Joy, 84 U.S. (17 Wall.) 211, 244 (1872) (Florida Cession Treaty); Mitchel et al. v. United States, 34 U.S. (9 Pet.) 711 (1835) (Florida Cession Treaty); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345-47 (1941) (Mexican Cession Treaty); Tee-Hit-Ton, 348 U.S. at 279-85 (Alaska Cession Treaty); *see also* Organized Vill. of Kake v. Egan, 369 U.S. 60, 65 (1962) (observing that when Congress passed the Alaska Statehood Act, its concern was "to preserve the status quo with respect to aboriginal and possessory Indian claims, so that statehood would neither extinguish them nor recognize them as compensable").

III. The Federal Paramountcy Doctrine and State Claims to Fee Simple Title to the OCS

The Circuit first considered whether the district court erroneously held that the federal paramountcy doctrine barred the villages' aboriginal title claims to the OCS as well as any other claims they might make there to exclusive hunting and fishing rights.

The "federal paramountcy doctrine" was established by four Supreme Court cases in which the federal government and various coastal states contested ownership and control of the territorial sea and landward portions of the OCS. In the first of these cases, *United States v. California*, the United States sought an injunction against the execution of certain leases California had contracted with private companies.[42] The leases authorized the companies to extract petroleum, gas, and other mineral deposits from the Pacific Ocean. In *California*, the principal argument of the United States was that it possessed "paramount rights" in the lands and "other things of value" subjacent to the ocean.[43] California in turn insisted that the territorial sea, i.e., the area extending from the low-water mark of the state's coast three miles into the ocean, was within its boundaries.[44] As California had it, insofar as the original colonies had acquired from the English or Dutch Crown a title to all the lands within their boundaries under navigable waters (including a three-mile appurtenance in adjacent seas), and because California was admitted into the Union on an "equal footing" with the original states, it also became vested with title to the seabed when it became part of the United States.[45]

The Supreme Court had to decide, then,

> whether the state or the Federal Government ha[d] the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.[46]

Through a rationale that would prove dispositive in the subsequent paramountcy cases, the Court rejected California's argument, concluding instead that the acquisition of the marginal sea, as well as its protection and control, had

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42. 332 U.S. 19 (1947).
43. *Id.* at 22.
44. *Id.*
45. *Id.* at 23.
46. *Id.* at 29.

been and was always a function of "national external sovereignty."[47] There was no meaningful comparison in the Court's view between the "local interests" that supported a state's control of internal navigable waters and the sources of sovereignty over any part of the ocean. In sum, the federal government "must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts."[48] So much could be inferred from international law and the American constitutional scheme: the former required that matters occurring in the open sea be resolved by sovereign nations (rather than their constituent units), the latter did not equip states "with the powers or the facilities for exercising the responsibilities" attending dominion over the ocean.[49] The Court consequently declared that "the

47. *Id.* at 34.

48. *Id.* at 35.

49. *Id.* Compare the High Court of Australia's holding in the so-called "Seas and Submerged Lands Case," New South Wales v. Commonwealth (1975) 135 C.L.R. 337, 479-80 (Austl.). Although the Australian case was constitutional in nature rather than derived from the law of property, it is worthwhile to note here the different *common law* English approach to the foreshore. In English property law, the foreshore and seabed are considered Crown property by prerogative right (rather than by constitutional provision and judicial construction). *See* Matthew Hale, *De Jure Maris et Brachiorum Ejusdem, in* STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370-413 (1888). *See generally* GEOFFREY MARSTON, THE MARGINAL SEABED: UNITED KINGDOM LEGAL PRACTICE (1981). Thus in contrast to the usual scheme in which the Crown can only possess lands to which its title is a matter of record, in the case of the foreshore and seabed claimants to these areas must demonstrate their possession of an actual Crown grant. For an example of how a claim to exclusive title to the seabed in a navigable waterway can be demonstrated, *see* Attorney-General v. Emerson, 1891 App. Cas. 649 (appeal taken from Engl.) (holding that proof of ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery). A plausible aetiology for this rule has been well articulated by Kent McNeil:

> A possible explanation lies in the fact that the fiction of grants was invented along with the fiction of original Crown occupation and ownership to explain the Crown's paramount lordship over lands that were originally occupied by others. But the foreshore and sea-bed are different because, except where a pier, retaining wall, or the like is built, they cannot be occupied in the same way as other lands. More commonly they are unoccupied, and probably always have been, and are therefore presumed to have remained in the original occupation of the Crown, which extends to all waste lands [sc. *terrae nullius*] that have never been held by subjects. Furthermore, there are important public rights of navigation and fishing over tidal and coastal waters that need to be protected. Consequently, the 'ownership of the Crown is for the benefit of the subject'. The existence of these rights also excludes to a large extent the possibility of exclusive occupation of the underlying lands. For these reasons, the foreshore and sea-bed are unique, and so special rules respecting them have been developed that do not apply to other

Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil."

In the wake of its success in *California*, the United States determined to confirm its title to other seabeds adjacent to coastal states. Three years later, in *United States v. Louisiana*, the federal government contended that it held title to the land beneath the sea extending twenty-seven miles into the Gulf of Mexico.[50] To the contrary, Louisiana argued that before and since the time of its admission into the Union, it had exercised control over the area in question and had even statutorily included the twenty-seven-mile marginal sea within its state territory. As might have been expected, the Supreme Court disagreed: *California*, the Court's own ipse dixit, was controlling:

> Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.[51]

To be sure, the only difference between Louisiana's and California's arguments was one of degree, i.e., that the former state claimed twenty-four miles more than the latter, a point which could hardly have militated in Louisiana's favor.

> If . . . the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. . . . Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.[52]

In *United States v. Texas*, the Supreme Court again confirmed the federal government's paramount interests in the seabed.[53] Like Louisiana, Texas had by

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lands.

MCNEIL, *supra* note 7, at 103-05 (internal citations omitted). *See also* MARSTON, *supra* at 270-85 for the historical and juridical bases of the Crown's claim to the marginal solum.

50. 339 U.S. 699 (1950).

51. *Id.* at 704.

52. *Id.* at 705-06.

53. 339 U.S. 707 (1950). *Louisiana* and *Texas* were brought by the United States as

statute extended its boundary twenty-four miles beyond the three-mile limit. The state subsequently enlarged its territory even more, however: it passed another law declaring its territory to reach to the outer edge of the continental shelf, i.e., to 200 miles from its shores.[54] Texas's argument differed from the one Louisiana and California propounded. More subtle and refined, its contention was that (1) as a separate republic prior to its entry into the United States, Texas enjoyed *plenum* of title (both *dominium* and *imperium*) over the lands, minerals, and other fruits which underlay the marginal sea, and that (2) on entering the Union, Texas conveyed to the federal government its powers of *imperium*, i.e., its sovereignty, over the marginal sea, but reserved its *dominium*.[55]

Those acquainted with Indian claims to title and rights will find Texas's gossamer reasoning familiar. In fact, far from being inventive or fanciful, Texas's argument arises from the doctrine of continuity, a commonplace tenet of sovereign succession under international and common law, which has been frequently expressed and affirmed in the judicial resolution of native claims in America and the Commonwealth: upon a sovereign's conquest or acquisition of a new territory, imperium over that region passed to the new sovereign, but the underlying dominium, whether usufructuary in nature or in fee simple, was left unaffected.[56] Although willing to find such a principle controlling in other

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companion cases.

54. *Id.* at 720.

55. *Id.* at 712-13.

56. *See, e.g.*, Chief Justice Marshall's statement in *Worcester*:

> The king purchased [the Indians'] lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self[-]government, so far as respected themselves only.

Worcester, 31 U.S. at 547; *see also* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 748-49 (1835) (holding that an established principle of international law requires that the laws of a conquered or ceded country remain in force until altered by the new sovereign and that the inhabitants of the conquered country also retain all rights not taken from them by the new sovereign in right of conquest, cession, or by new laws); *cf.* Viscount Haldane's Privy Council advice in Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 App. Cas. 399, 407 (P.C.) (appeal taken from S. Nig.) ("mere change in sovereignty is not to be presumed as meant to disturb rights of private owners"); Viscount Sumner's in Bakare Ajakaiye v. Southern Provinces (Lieutenant-Governor), 1929 App. Cas. 679 (P.C.) (appeal taken from S. Nig.). *See also* the High Court of Australia's rulings in Mabo v. Queensland [No. 2] (1992) 175 C.L.R. 1, 54-57 (Austl.), and Western Australia v. Commonwealth (1995) 183 C.L.R. 373, 422-23 (Austl.) ("at common law, a mere change in sovereignty does not extinguish pre-existing rights and interests in land in that territory"), and the concurrence of Justice Binnie of the Supreme Court of Canada in Minister of National Revenue Appellant v. Grand Chief Michael Mitchell and Attorney-

contexts, the Supreme Court had little patience for it in the instant case.[57] "When Texas came into the Union, she ceased to be an independent nation. . . . The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like."[58] When it conveyed its sovereignty, any "claim that Texas may have had to the marginal sea was relinquished to the United States."[59] The Court rejected the contention that "the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it."[60] "Once low-water mark is passed the international domain is reached," and from that point "property rights must . . . be so subordinated to political rights as in substance to coalesce and unite in the national sovereign."[61] The Court then pronounced both doctrine and oracle:

> Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.[62]

Twenty-five years after *Texas*, the United States brought an action against the original thirteen Atlantic coastal states. In this last of the paramountcy cases, *United States v. Maine*, the United States argued that it was entitled to exclusive exercise of its sovereign entitlement to dominium and imperium over the seabed beneath the Atlantic Ocean in order to explore and exploit the area and its natural resources.[63] The area at issue extended from the mean low-water mark and outer limit of inland coastal waters seaward to the OCS, i.e., to the limit of the exclusive economic zone. With the exception of Florida, the coastal states claimed that, as successors in title to certain grantees of the Crowns of England and Holland, they were entitled to exclusive dominium and imperium over the

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General of Quebec, [2001] 1 S.C.R. 911 (Can.) ("As with the modern law of aboriginal rights, the law of sovereign succession was intended to reconcile the interests of the local inhabitants across the empire to a change in sovereignty."); MCNEIL, *supra* note 7, at 162-79.

57. The Court acknowledged that while "dominion and imperium are normally separable and separate," in the case of the OCS "property interests are so subordinated to the rights of sovereignty as to follow sovereignty." *Texas*, 339 U.S. at 719.

58. *Id.* at 717-18.

59. *Id.* at 718.

60. *Id.* at 719.

61. *Id.*

62. *Id. See infra* note 115 and accompanying text.

63. United States v. Maine, 420 U.S. 515, 516-17 (1975).

seabed underlying the Atlantic from the coastline to the limit of U.S. jurisdiction.[64] This argument rested on the same principles of sovereign succession as Texas's argument in its eponymous case. In *Maine*, however, the appellees additionally contended, presumably in the light of the Tenth Amendment to the U.S. Constitution, that "they acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States."[65]

The coastal states urged the Supreme Court to re-examine its decisions in *California*, *Louisiana*, and *Texas*. Acceding to the states' request, the Court nevertheless found these cases to rest on firm constitutional ground:

> [As a matter of] purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense and . . . it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea.[66]

The Court therefore found that the existence of the thirteen original states prior to the formation of the Union was of no constitutional significance in the instant case.[67] Put differently, one of the basic structural principles of the Constitution, federalism, required that certain powers granted by the states to the federal government include as their incident exclusive national sovereignty over the OCS.

The Court did not formulate its decision in *Maine* solely in constitutional terms, however. It also stated that Congress had legitimately confirmed federal paramountcy over the seabed when it passed the Submerged Lands Act of 1953 and the Outer Continental Shelf Lands Act of 1953.[68] The former granted the individual states title to submerged lands extending three miles from their shores

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64. *Id.* at 517-18. Florida argued that Congress had approved the maritime boundaries of Florida which, in certain areas, included more than three miles of the Atlantic. *See* Act of June 25, 1868, ch. 70, 15 Stat. 73 (admitting the states of North Carolina, South Carolina, Louisiana, Alabama, and Florida to representation in Congress). As a result, Florida claimed the federal government had thereby granted to Florida the entire seabed within those bounds. Florida additionally contended that the Florida Straits were not in the Atlantic Ocean (as the United States argued) but the Gulf of Mexico.

65. *Maine*, 420 U.S. at 519.

66. *Id.* at 522-23.

67. *Id.* 515, 523 (citing *Texas*, 339 U.S. at 717).

68. *Id.* at 524-28.

(and so made clear by grant the superior title of the United States), the latter reaffirmed federal control of the seabed beyond the three-mile limit.

As the Ninth Circuit reviewed the federal paramountcy doctrine, its disposition of the villages' appeal of the district court's legal holding acquired an inevitability. Indeed, Judge O'Scannlain restated the district court's conclusion that,

> if the states have no property rights in the OCS via the paramountcy doctrine, *a fortiori*, it cannot be otherwise for a tribal entity which, even if possessed of sovereign rights, is dependent upon the United States in the same manner as a state with regard to, inter alia, national defense, foreign affairs, and world commerce.[69]

The Secretary of Commerce naturally sought to have the paramountcy doctrine held applicable as against native title in order to avoid litigating the more complex questions of fact and law that usually attend native claims; this Alexandrian doctrine would loose the Gordian knot before him. Undoubtedly, then, he was pleased when the Ninth Circuit concluded that the district court had not erred in law.

The Circuit recapitulated the district court's reasoning: (1) whereas Indian tribes existed and governed their lands prior to the United States, the same was true of the original states; (2) this consideration did not prevent the Supreme Court from finding the claims of the latter to the seabed legally precluded; (3) it could not be otherwise but that the villages' pretensions were inconsistent with the paramount sovereignty of the federal government in the OCS.[70] We shall see that this three-step process was an egregious analytical failure that traduced the most basic tenet of federal Indian law.

IV. The Federal Paramountry Doctrine and Common Law Aboriginal Title

A. The Analogical Vice

As we consider the villages' appeal against this conclusion and the Ninth Circuit's support of it, let us call to mind a famous obiter made by Viscount Haldane of the Privy Council:

> There is a tendency, operating at times unconsciously, to render [aboriginal] title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency

69. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1094 (9th Cir. 1998).
70. *Id.* at 1094-95.

> has to be held in check closely. . . . A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. . . . Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.[71]

Viscount Haldane cautions against the tendency indulged in by the *Eyak* district court and ultimately the Ninth Circuit. By rendering the villages' aboriginal claims in the same terms as the states' common law claims to title, the district court found the former as repugnant as the latter to the federal government's paramount interest in the OCS. For both the district and Circuit courts, such a conclusion followed "*a fortiori*" from the paramountcy doctrine.

The trouble with a fortiori reasoning, however, is that the validity (to say nothing of the soundness) of an a fortiori conclusion depends on the strength of the logical connection (i.e., the analogy) between its propositions. That logical connection is pointedly missing in the comparative relationship between fee and aboriginal title vis-à-vis federal paramountcy. It means little to say that because federal paramountcy precludes state claims to title to the seabed, it must *really* treat native claims so. To argue in this way is to misunderstand the fundamental nature of aboriginal title, which, unlike fee title, is not a creature of the common law but a possessory right recognized by it.[72] To argue in this way is to fall victim to those analogical vices against which Viscount Haldane cautioned.

To be sure, had the lower and appellate courts been more sensitive to the nature of aboriginal title, they might have reached a different result in their applications of the paramountcy doctrine, or at the least arrived at the same practical conclusion without reliance on mistaken analogy.[73] An aboriginal

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71. *See* Amodu Tijani v. Southern Nigeria (Secretary), [1921] 2 App. Cas. 399, 403-04 (P.C.) (appeal taken from S.Nig.). *Amodu Tijani*, itself derived from American jurisprudence, is one of the Commonwealth's foundational cases in aboriginal law.

72. *See Ex parte* Tiger, 47 S.W. 304 (Ct. App. Ind. Terr. 1898); *see supra* Part II.

73. In its recent disposition of a claim to native title to the seabed under the Native Title Act of 1993, the High Court of Australia explained how a valid treatment of native title should eschew such false associations:

> Those [native title] rights and interests may have some or all of the features which a common [law] lawyer might recognise as a species of property. Neither the use of the word "title" nor the fact that the rights and interests include some rights and

claim to title to the seabed should, like every aboriginal claim, be considered on its own terms, even if after such consideration it is judged to be extinguished by sovereign command or cession.[74]

B. The Misconstruction of Precedent

In their appellate brief, the villages marshaled the Ninth Circuit's decision in *Village of Gambell v. Hodel*, in which the Circuit stated, after clarification by the Supreme Court, that "aboriginal rights may exist concurrently with a paramount federal interest [in the OCS], without undermining that interest."[75] In *Gambell*, however, only nonexclusive assertions of aboriginal subsistence rights were considered. After making clear that these were neither precluded by the paramountcy doctrine nor otherwise extinguished by Congress, the Ninth Circuit remanded to the district court consideration whether, as a factual matter, the village of Gambell and its sister appellants possessed subsistence rights in the OCS and, if they did, whether the drilling activities undertaken by oil companies (at the authorization of the Secretary of the Interior) interfered "significantly" with those rights.[76] Clearly, had the villages enjoyed exclusive aboriginal rights in or title to the OCS, any interference by third parties would have violated their interest.

Gambell thus was relevant but not controlling, at least so far as regarded the exclusive claims to title at stake in *Eyak*. Unfortunately for the villages, the Ninth Circuit found a different case more apposite: *Inupiat Community of the Arctic Slope v. United States*.[77] In that case, the Inupiats filed suit against the United States to "quiet title in large portions of the Beaufort and Chukchi Seas beyond the three-mile limit."[78] More specifically, the Inupiats (1) claimed

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> interests in relation to land should, however, be seen as necessarily requiring identification of the rights and interests as what the common law traditionally recognised as items of "real property". Still less do those facts necessarily require analysis of the content of those rights and interests according to those features which the common law would traditionally identify as necessary or sufficient to constitute "property."

Commonwealth v. Yarmirr (2001) 208 CLR 1, 16 (Austl.).

74. *Cf.* Delgamuukw v. British Columbia, [1997] S.C.R. 1010, 1081 (Can.) ("Aboriginal title has been described as sui generis in order to distinguish it from 'normal' proprietary interests, such as fee simple. . . . The idea that aboriginal title is sui generis is the underlying principle unifying the various dimensions of that title.").

75. 869 F.2d 1273, 1277 (9th Cir. 1989). The Supreme Court considered the village of Gambell's claims in Amoco Production Co. v. Vill. of Gambell, 480 U.S. 531 (1987).

76. *Gambell*, 869 F.2d at 1280.

77. 548 F. Supp. 182 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984).

78. *Id.* at 184.

absolute title in themselves to large areas of the OCS (i.e., they sought the radical title of the sovereign rather than aboriginal title as such), (2) rejected the notion that they had "submitted to the jurisdiction of the United States," and (3) claimed "all the rights of self-determination and sovereignty of an independent nation."[79]

The villages distinguished *Inupiat* by observing quite correctly that the district court in that case failed to consider the Inupiats' claims to aboriginal title separately from their claims to be an "independent nation," the latter being a patently non-justiciable question.[80] Moreover, the villages noted, the Ninth Circuit itself found it unnecessary to consider this question when it affirmed the district court's holding: the Circuit rather confined itself to an alternative basis for decision, namely that any aboriginal interests the Inupiat might have had in the OCS had been extinguished by the Alaska Native Claims Settlement Act (ANCSA). This statute, however, which did extinguish *terrestrial* aboriginal title, was no longer relevant for purposes of aboriginal claims to the OCS. In *Amoco Production Co. v. Village of Gambell*, a case subsequent to *Inupiat*, the Supreme Court held that the Alaska National Interest Lands Conservation Act (ANILCA), whose geographical limitations mirrored ANCSA's, did not apply beyond Alaska's limits in areas like the OCS; ANCSA therefore had the same territorial reach.[81] Incomprehensibly, none of these distinctions carried water with the Ninth Circuit. *Inupiat*, the Circuit stubbornly said, made clear that "[a]ny claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases."[82]

As it clarified its extension of the paramountcy doctrine, the Circuit insisted that the villages' claims did not differ from the states' in *California*, *Louisiana*, *Texas*, and *Maine*. Indeed, it waspishly observed that "[s]imply saying that a claim of aboriginal title is less intrusive than a claim of fee title does not make

79. *Id.* at 187. During the district court proceedings the Inupiat Community's leader sent telegrams to President Reagan claiming that the presence of the U.S. government in the offshore areas at issue constituted trespass. The President was warned that he had "three days to evacuate the citizens of the United States." A copy of this message was also sent to the Soviet Embassy in Washington attended by the expression of a desire to establish "détente." *See* Appellees' Brief at 4 n.1, Inupiat Community of the Arctic Slope v. United States, 746 F.2d 570 (9th Cir. 1984) (No. 82-3678).

80. Recalling that in federal Indian law, Indian tribes are "domestic dependent nations." *See supra* note 20 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

81. 480 U.S. 531 (1987).

82. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1095 (9th Cir. 1998).

it so."[83] While this is true as a logical proposition, the court did not probe the substantive justifications for the villages' contention. The fee simple title claimed by the states in the paramountcy cases posed a real and definite threat to the federal government's national interests and responsibilities in respect of the OCS (including its ability to recognize aboriginal title there). A state with fee title to the OCS could freely alienate or otherwise dispose of its interest to any party, including aliens and foreign nations, and would be entitled to compensation in the event that Congress exercised its power to take the state's interest. Moreover, the anti-commandeering principle inherent in the Constitution would prevent the federal government from interfering with a state's authority over its own territory and consequently limit the efficacy of Congress and the Executive in fulfilling duties related to foreign intercourse.[84] Aboriginal title, on the other hand, poses no conflict, theoretical or in fact, with federal paramountcy anywhere in the United States.[85] Unlike the states, the native villages sought a declaration that both presupposed and relied on the federal government's sovereign fee and paramountcy, for it is the first principle of aboriginal title that the "title" itself is but a "right of occupancy" dependent on the sovereign's estate and sufferance.[86] Consequently, the villages' claim in *Eyak* was founded squarely on *California*, *Louisiana*, *Texas*, and *Maine* as well as *Johnson*, its progeny, and statutes like the Indian Non-Intercourse Act, 25 U.S.C. § 177, which long ago deprived tribes of their ability to treat with foreign nations or alienate or control their property contrary to Congress's will.

Notwithstanding such differences, the Circuit also failed to find meaning in "the Native Villages' purported concession that they 'do not dispute Congress's ultimate power to enact laws authorizing non-tribal members to fish within their aboriginal fishing grounds.'"[87] In this respect *Texas* was singled out for being distinctively germane: in that case, we recall the Supreme Court eschewed applying the usual real property discrimination between proprietary and

83. *Id.* at 1096.

84. New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

85. *Gambell*, 869 F.2d at 1277 (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 233-36 (1985)). Courts outside the United States have employed similar analyzes. *See, e.g.*, Attorney-General v. Ngati Apa [2003] 3 N.Z.L.R. 643, ¶ 136-49 (C.A.), in which the Court of Appeal of New Zealand applied *Johnson*'s conceptualization to determine that Maori could hold aboriginal title to the adjacent seabed without threatening the Crown's sovereignty.

86. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572-73 (1823); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832).

87. *Eyak*, 154 F.3d at 1096.

regulatory rights to the ocean, whose use, disposition, management, and control rather involved "national interests" and "national responsibilities."[88]

Although the Supreme Court never considered aboriginal rights in any of the paramountcy cases, the Ninth Circuit relied on the *Inupiat* district court's conclusion that Indian tribes, like states, cannot "claim rights which are . . . entrusted to the one external sovereign recognized by the Constitution."[89] In this way the court disdained respecting the difference between aboriginal and common law property concepts and deliberately confused the nature of the villages' claim: unlike the Inupiat, the villages in *Eyak* neither disputed the sovereign authority of the United States nor sought to quiet the latter's title to the OCS; to the contrary, the villages accepted from the first that federal paramountcy could and did co-exist with aboriginal title.[90]

C. The Willful Disregard of Johnson in Favor of a New Colonial Program

Most fundamentally, then, the Ninth Circuit refused to entertain the underlying premise of two centuries of federal Indian law, namely "that federal sovereignty is 'subject to' the Indians' right of occupancy," unless and until Congress extinguishes it.[91] As Andrew P. Richards has noted, the court should have employed the canonical three-step analysis delineated by the Supreme Court in *Santa Fe* (and previously used by the Ninth Circuit in *Gambell*) to consider (1) whether the United States had extended its sovereignty over the area at issue; (2) if it had, whether Congress had extinguished aboriginal title thereto by a "plain and unambiguous command"[92]; and (3), if Congress had not, whether the claimed aboriginal title existed in fact.[93] "By conflating the first and second steps of the aboriginal title analysis," the Ninth Circuit "held that

88. United States v. Texas, 339 U.S. 707, 719 (1950).

89. Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182, 187 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984)

90. Note as well that even in the case of internal navigable waters, the federal government enjoys a paramount power, known as the navigation servitude, and can appropriate private interests in water courses without being obliged to give compensation. *See* United States v. Oregon, 295 U.S. 1, 14 (1935). With respect to Indian reservations in these areas, the government's power is no less, but the rights and interests are treated more like terrestrial Indian interests, such that they are not precluded ipso facto by the federal government's paramountcy but are merely subject to it. *See* COHEN, 1982 ED., *supra* note 29, at 506.

91. Cramer v. United States, 261 U.S. 219, 227 (1923); *cf. Johnson*, 21 U.S. at 586.

92. *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346 (1941).

93. *Id.* at 345; *see* Richards, *supra* note 17, at 965.

extending federal sovereignty over the seabed and ocean via the paramountcy doctrine amounted to an extinguishment of offshore aboriginal title."[94]

The basis for the principle of plain and unambiguous action is found in seminal works of Anglo-American political philosophy and receives full expression in the Declaration of Independence and Constitution, which make political legitimacy turn on "the consent of the governed."[95] When Congress exercises its plenary power over Indian affairs, the legitimacy of its action is questionable under any theory requiring such consent.[96] The principle of plain and unambiguous action consequently operates to ensure against the casual extinguishment of aboriginal title even as it vindicates Congress's ultimate power to achieve that end. Put differently, it reflects federal paramountcy as well as the fiduciary duties governing relations between the United States and Native Americans.

It has rightly been said that "[n]ative title involves concepts that are not traditionally the domain of the courts, such as collective rights, legal pluralism, and issues of competing sovereignty."[97] In this instance the Circuit either lost its juridical bearings or refused to take them: as Congress had never addressed aboriginal title in the OCS in any way other than to affirm its existence, and given that the United States had obviously extended its sovereignty over the area by its offshore regulatory schemes, the villages should have had the opportunity to prove their aboriginal title by long-term use and occupation.[98] This was not even an instance of legislative ambiguity requiring the canons of construction, for Congress explicitly sought to preserve tribal interests in the OCS.[99] Indeed, the Savings Clause of the Outer

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94. *Santa Fe,* 314 U.S. at 345.

95. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* JOHN H. ELY, DEMOCRACY AND DISTRUST, 89-90 (1980); Frederic W. Maitland, *A Historical Sketch of Liberty and Equality, in* 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 1-161 (H.A.L. Fisher ed., 1911). *Cf.* Brief of Amici Curiae Indian Law Professors in Support of Affirmance at 6-7, Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998) (No. 96-1577).

96. Richard B. Collins, *Indian Consent to American Government,* 31 ARIZ. L. REV. 365, 374 (1989).

97. Lisa Strelein, *Conceptualising Native Title,* 23 SYDNEY L. REV. 95, 97 (2001).

98. *See Santa Fe,* 314 U.S. at 345. As explained elsewhere, in the United States formal recognition is not a prerequisite for common law aboriginal title to exist; it is rather presumed to continue after sovereign succession in the absence of a plain act of extinguishment.

99. On the canons' usage in non-treaty contexts, *see, e.g.*, Winters v. United States, 207 U.S. 564 (1908) (construing agreement liberally to recognize tribal water rights); Choate v. Trapp, 224 U.S. 665 (1912) (construing agreement and statute liberally to recognize tribal exemptions from state taxing authority); Arizona v. California, 373 U.S. 546 (1963), decree entered 376 U.S. 340 (1964) (construing executive orders liberally to recognize tribal water

Continental Shelf Lands Act provided that the Act "shall [not] affect such rights, if any, as may have been acquired [in the OCS] under any law of the United States,"[100] and the Submerged Lands Act included a similar reservation.[101] Given that aboriginal title has been recognized by the United States since *Johnson*, the villages' title was accordingly a right acquired in the OCS under American law. The Magnuson Act also protected pre-existing rights by its requirement that the Secretary of Commerce "prepare a fishery management plan" "consistent with . . . any other applicable law."[102] In *Parravano v. Babbit*, the Ninth Circuit held that Indian fishing rights fell within the meaning of "other applicable law" under the Magnuson Act.[103] In the Halibut Act, Congress stipulated that the Northern Pacific Fishery Management Council, in its allocation of fishing privileges among U.S. fishers, shall "be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law . . . ."[104] Aboriginal rights are of course such "rights and obligations in existing Federal law." Finally, exclusive aboriginal rights in the OCS were also preserved in the Marine Mammal Protection Act of 1972,[105] the Endangered Species Act of 1973,[106] and the Convention Between United States and Other Governments Respecting Whaling.[107] Congress's intentions could hardly have been plainer.

In disregard of these, the Ninth Circuit adopted an implicit balancing test that pitted federal sovereignty against aboriginal title when as a matter of legal principle never the twain conflict. This depleted reasoning is characteristic of the "profound 'flattening' of federal Indian law into the broader public law" that typifies recent developments in the field.[108] The court in *Eyak* treated the

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rights); Antoine v. Washington, 420 U.S. 194 (1975) (construing executive order and statute liberally to recognize tribal hunting and fishing rights).

100. 43 U.S.C. § 1342 (2000).

101. *See id.* § 1313.

102. 16 U.S.C. § 1854(c)(1) (2000).

103. 70 F.3d 539, 544 (9th Cir. 1995).

104. 16 U.S.C. § 773(c) (2000).

105. *See id.* §§ 1361-1421h (prohibiting the hunting of marine mammals with an exclusive exemption for Indians).

106. *See id.* §§ 1531-44 (prohibiting the hunting of endangered species with an exclusive exemption for Indians).

107. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (protecting whales with an exclusive exemption for aboriginal whaling rights).

108. Frickey, *supra* note 4, at 73. For an example of the "flattening" approach to indigenous peoples in legal philosophy, *see* Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135 (2002) and *Taking Group Rights Carefully*, *in* LITIGATING RIGHTS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW 203 (Grant Huscroft & Paul Rishworth eds., 2002). To

tribes and states as similarly situated and assumed as an analytically anterior matter that the former could have no more powers or property rights than states and if anything fewer. In point of fact, federal Indian law is often the reverse: its underlying principle is that tribes enjoy all the sovereign powers of a post-Westphalian state that have not been expressly ceded by treaty or abrogated by Congress. Although in recent years the Supreme Court has assumed the task of limiting tribal power over nonmembers in a way inconsistent with its prior jurisprudence, it is traditionally true that tribes enjoy more powers than states.[109] (To mention the most famous example, they are not limited by the Bill of Rights.) What is more, the tribes *should* be treated differently so far as their property is concerned: whereas individual states chose through constitutional conventions to join the United States and therefore voluntarily acquiesced in federal power over national issues (hence the paramountcy cases), the Alaskan Natives did none of these things. They neither signed the Constitution nor a treaty with America, nor were they parties to the contract between Russia and the United States that transferred sovereignty over their land to the latter.

The Ninth Circuit's refusal to follow federal Indian law's basic rule was tantamount to a judicial extinguishment of aboriginal title, one which jealously usurped legislative prerogative and violated the separation of powers delineated in the U.S. Constitution.[110] It also endorsed the vicious "recognition view" of sovereign succession in which pre-existing rights are deemed extinguished by the mere assertion of sovereignty, never to be vindicated until recognition by a formal act of state.[111]

Indeed, the clear implication of the Circuit's reasoning is that the villages' title was extinguished at the moment that the Constitution, with its allocation

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the extent classical liberalism coincides with this view, *see* CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO: A THEORY OF DIVERSITY AND FREEDOM (2003).

109. *See supra* notes 3, 20; *see infra* note 131.

110. Congress enjoys exclusive plenary power over Indian affairs and alone has the right to extinguish Indian title. *See supra* note 1 and accompanying text; Buttz v. N. Pac. R.R. Co., 119 U.S. 55, 66 (1886); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 586 (1823). Nor is Congress's intent to extinguish title to be "lightly imputed" in view of its fiduciary obligations to Indian nations, but must rather be "plain and unambiguous." *See* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 346, 353 (1941).

111. *See supra* notes 7, 56. The absurdity of this idea is demonstrated by the example Kent McNeil uses: "This would mean that failing recognition of . . . pre-existing rights or a Crown grant or licence to continue their occupation, the inhabitants would automatically have become trespassers in their own homes. More startling still, their personal possessions — including the clothes on their backs — would have suddenly become Crown property!" MCNEIL, *supra* note 7, at 165.

of external sovereignty to the federal government, came to apply in the Gulf of Alaska. Certainly there was no congressional act of state (like the Alaska Native Claims Settlement Act[112]) that did anything of the sort. By way of contrast, when the states joined the Union, as the paramountcy cases explained, they relinquished their external sovereignty and its incidents, like fee title to the OCS, to the federal government. Their consent to the constitutional order followed by the relevant acts of statehood supplied the formal actions necessary under the doctrine of sovereign succession to modify their pre-existing rights. *Eyak*, on the other hand, treated the OCS as terra nullius and repudiated Chief Justice Marshall's classical effort to reconcile the invidious nature of colonialism with deduced natural law property rights.[113] Its vision of sovereign succession comes late in the day and runs counter to what was long ago articulated by Marshall himself:

> It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled: The people change their allegiance; their relation to their ancient sovereign is dissolved: but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?[114]

As the political philosopher James Tully has written, "The essence of internal colonisation . . . is the appropriation of the land, resources and jurisdiction of the indigenous peoples, not only for the sake of resettlement and exploitation (which is also true in external [i.e., imperial] colonisation), but for the territorial foundation of the dominant society itself."[115] Tully made this comment in awareness of "the intensification of the colonial appropriation of formerly neglected or under-exploited indigenous lands and resources, on the one hand, and the globally coordinated insubordination of indigenous

112. 43 U.S.C. § 1601 (2000).

113. For this characterization of *Johnson*, *see* Frickey, *supra* note 6, at 385-90.

114. United States v. Percheman, 32 U.S. (7 Pet.) 51, 86-87 (1833).

115. *The Struggles of Indigenous Peoples for and of Freedom*, *in* POLITICAL THEORY, *supra* note 6, at 39.

peoples on the other."[116] The OCS is, of course, precisely the kind of "formerly neglected or under-exploited" area to which Tully adverts.[117]

The Circuit did not end its opinion there. It further rejected what it called "the argument that the Native Villages are entitled to exclusive use of the OCS because they have hunted and fished in the sea for thousands of years prior to the founding of the United States."[118] Sustaining it's a fortiori fallacy, the Circuit observed that the history of the coastal states did not preserve their claims in the paramountcy cases, and the villages could themselves find no support in such arguments. The court once again incorrectly presumed isometry between aboriginal title and freehold estates. Demonstrating long-term occupation and use is a factual predicate of proving an aboriginal title not otherwise acknowledged by Congress[119]; the title once proven, as stated time and again, is a surviving sui generis customary interest, one that by its nature coexists with the naked fee of the sovereign.

V. Exclusive Aboriginal Fishing Rights Absent Treaty or Statute: The Court's Mistake of Law

In a final footnote the Ninth Circuit stated that because the villages' claims were barred by the paramountcy doctrine, it did not consider the district court's alternative holding that common law property precepts precluded tribes from possessing exclusive hunting or fishing rights in navigable waters absent a treaty or statute. In the same note, however, the Circuit observed that it had ruled on the issue previously and held, like the district court, that "an [exclusive] aboriginal right to fish [in navigable waters] has been recognized only in the context of interpretation of a ratified treaty or federal statute, where courts have held that aboriginal fishing rights were impliedly reserved to the Indians."[120]

Although this note is only dicta, it needs saying that, contrary to the Ninth Circuit's supposition, federal Indian law and executive policy have long recognized uncodified, exclusive aboriginal fisheries which have no analogues at common law.[121] In *Knight v. U.S. Land Ass'n*, the Supreme Court vindicated

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116. *Id.* at 43.

117. *See* United States v. Texas, 339 U.S. 707, 719 (1950).

118. Native Vill. of Eyak v. Trawler Diane Marie, Inc., 154 F.3d 1090, 1096 (9th Cir. 1998).

119. In the case of submerged reservation lands beneath navigable waterways, tribes can prove ownership to the lands by demonstrating ownership of a historical fishery, another use of the waterways, a statutory grant, a treaty grant, or other special facts. *See* COHEN, 1982 ED., *supra* note 29, at 504.

120. *Eyak*, 154 F.3d at 1097 n.6.

121. *Cf.* Mark D. Walters, *Aboriginal Rights, Magna Carta and Exclusive Rights to*

exclusive aboriginal rights in areas below the high-water mark, when such rights had been recognized by the prior sovereigns Spain and Mexico.[122] Similarly, in *Damon v. Hawaii*, Justice Holmes, writing for a unanimous Court, upheld exclusive aboriginal fishing rights in the absence of a treaty or applicable statute and despite the fact that non-aboriginals could not possess these:

> The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or, alternatively, to put a taboo on all fishing within the limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit-à-prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.[123]

Two years later, Justice Holmes reaffirmed *Damon*'s holding in *Carter v. Hawaii*.[124] These cases were consistent with an earlier ruling in which the Court of Appeals of Indian Territory rejected the argument that the common law limited the rights and supplanted the customary law of the Creek Nation:

> If the Creek Nation derived its system of jurisprudence through the common law, there would be much plausibility in this reasoning. But they are strangers to the common law. They derive their jurisprudence from an entirely different source, and they are as

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Fisheries in the Waters of Upper Canada, 23 QUEEN'S L. J. 301 (1998). *Cf. also* analogous British cases: Stephens v. Snell, 3 All E.R. 622 (Ch. 1939) (holding that a several fishery created before Magna Carta may be re-granted by the Crown after Magna Carta, despite the public's common law right to fish); Loose v. Castleton, 41 P. & C.R. 19 (C.A. 1978) (holding that evidence of long usage raises a presumption of a pre-Magna Carta several fishery); and the unreported judgment of Justice Charles in the Solomon Islands case, Hanasiki v. Symes (1951) (holding that an indigenous group may continue to enjoy an exclusive aboriginal right to fish when the aboriginal right was established under indigenous custom antedating the protectorate), cited in B. Hocking, Native Land Rights Appendix 2 (1970) (unpublished M.A. thesis, Monash University) (on file with the Monash University Library).

122. 142 U.S. 161, 187-88 (1891). Such recognition is a usual part of sovereign succession. *See supra* note 56.

123. 194 U.S. 154, 158 (1904).

124. 200 U.S. 255, 256 (1906).

> unfamiliar with common-law terms and definitions as they are with Sanskrit or Hebrew.[125]

In support of his argument Judge O'Scannlain cited two Ninth Circuit precedents[126] and said that he was "unaware of cases to the contrary," in spite of the inclusion of *Knight*, *Damon*, *Carter*, and *Tiger* in the villages' brief.[127]

Case law aside, the Executive Branch also eschewed applying Anglo-American common law precepts to preclude Alaskan Indians' aboriginal rights in navigable waters and submerged lands. In an opinion which remains unmodified, the Solicitor of the Department of the Interior stated, "[I]n the absence of express Federal legislation to the contrary, Indian property rights are to be defined in terms of tribal law rather than on the basis of the common law . . . ."[128] The Solicitor in turn inferred from the Supreme Court's opinion in *Santa Fe* that:

> Without attempting to mark out the locality and extent of particular Indian claims, we may note that available information shows that the Indians clearly recognized, inter se, private and exclusive rights to take fish in designated waters. . . . [U]nless the rights which natives enjoyed from time immemorial in waters and submerged lands of Alaska have been modified under Russian or American sovereignty, it must be held that aboriginal rights of the Indians continue in effect.[129]

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125. *Ex parte* Tiger, 47 S.W. 304, 305 (Ind. Terr. 1898) (holding that the word "indict" as used in the Creek Constitution was not to be given its common law signification of "indictment through the interposition of a grand jury" but rather its Creek meaning of "filing a written accusation charging a person with crime"); *cf.* Mullick v. Mullick, 52 I.A. 245 (P.C. 1925) (Privy Council applying Hindu customary law rather than English common law to advise that a Hindu idol is a juristic entity capable of suing and being sued whose interests are represented by the person charged with being the deity's manager); Bumper Dev. Corp. Ltd. v. Comm'r of Police, [1991] 4 All E.R. 638 (C.A.) (holding that a Hindu temple with legal personality in Indian but not English law may nonetheless sue in an English court).

126. Native Vill. of Eyak v. Trawler Diane Marie, 154 F.3d 1090, 1097 n.6 (9th Cir. 1998). The two Ninth Circuit cases cited were Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, 180 n.12 (9th Cir. 1981) and Confederated Tribes of Chehalis v. Washington, 96 F.3d 334, 341 (9th Cir. 1996). The former case discussed the issue of aboriginal fishing rights in a terse footnote and also failed to take account of the superior precedents of *Damon* and *Knight*; the latter merely cited the footnote in *Wahkiakum Band* for the same proposition.

127. *See* Appellants' Brief at 20, 26, 31, *Eyak*, 154 F.3d at 1090 (No. 97-35944).

128. Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 465 (1942).

129. *Id.* at 462-63; *see* United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).

As noted elsewhere, Congress in its plenary capacity has also chosen to recognize exclusive aboriginal rights in the OCS.[130]

Prior to *Eyak*, the bottom-line was continuity of rights and title: what had not been taken by cession or an act of state was presumed to remain.[131] Indeed, this concept is as much at the heart of fishing rights guaranteed by treaty or statute as it is those based on use and occupation. The reason this is so is because the powers and interests of a tribe are not delegations by Congress but reservations of tribal sovereignty not ceded to the federal government.[132] In this way all aboriginal fishing rights, whether codified or not, are predicated on long-term use and occupation.[133]

VI. The Supreme Court's Endorsement of the New Program

In the end, the Supreme Court denied the villages' petition for certiorari.[134] Whether this was because it actually approved of the dubious legal reasoning of the Ninth Circuit or merely its practical effect is hard to say. One could, for instance, have concluded that federal paramountcy precluded exclusive aboriginal title to the OCS without also concluding that it did so because it treated common law claims to title in that way. The High Court of Australia, for instance, analyzed and then acknowledged aboriginal title to the seabed on its own terms even as it also held, contestably, that such title could not give rise to an exclusive right of use and occupancy inconsistent with the principles of the Australian common law which the majority deemed fundamental.[135]

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130. *See supra* note 110 and accompanying text.

131. As Felix Cohen put it in his classic formulation, "What is not expressly limited remains within the domain of tribal sovereignty." COHEN, 1982 ED., *supra* note 29, at 122.

132. United States v. Winans, 198 U.S. 371, 381 (1905).

133. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823); Cramer v. United States, 261 U.S. 219, 229 (1923).

134. Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

135. In Commonwealth v. Yarmirr (2001) 208 C.L.R. 1 (Austl.), the High Court vindicated the claimants' native title (statutorily envisaged in Australia as a bundle of rights) even as it held that such title could no longer (i.e., after the Crown became sovereign of Australia) include exclusive occupancy, use, and possession of the ocean waters. The aboriginal title could not yield these exclusive rights because to do so, in the majority's view, would be fundamentally inconsistent with the common law of Australia, which includes public rights of fishing and navigation and international commitments to innocent passage through navigable waters. Whether or not all of these rights are equal and so fundamental as the majority suggests is debatable, however. Justice Kirby argued in his dissent that an exclusive title should be recognized, but one allowing for innocent passage, which by his reckoning is more important than the right of a public to fish that has now been generally displaced through statutory

American lawyers know that a bedrock principle of their constitutional scheme is the Supreme Court's emphatic duty to pronounce the law.[136] During the latter half of the twentieth century, the Court articulated the paramountcy doctrine to dispose of claims to the OCS by the states and federal government. The Ninth Circuit extended that doctrine to extinguish aboriginal title to the Alaskan offshore shelf without concerning itself about compensation or the nonfungible role that the OCS plays in the villages' ability to exercise their culture, a right the United States guaranteed to them when it acceded to instruments like the International Covenant on Civil and Political Rights.[137] The Supreme Court allowed the Circuit to do so, diluted once more the legislature's plenary authority over Indian nations, and continued the "massive assault" it has led against tribal sovereignty during the last twenty-five years.[138] In its haste to colonize one of America's last frontiers by dispossessing the indigenous occupants of it, the judiciary struck at the core of aboriginal title itself, the primordial doctrine Chief Justice Marshall created in *Johnson* to accommodate American rule-of-law to the political and humanitarian quagmire of colonialism.[139] It is too early to know whether *Eyak* was a once-off mistake limited to a peculiar juridical space, i.e., the ocean, or the reductio ad absurdum of a recrudescent colonialism that views aboriginal territory not recognized by treaty or statute as terra nullius, a contemptible doctrine with no place in our time.

With respect to the first alternative, it is worth recalling that the jurisprudence relating to Indian reservation interests in internal navigable waters is also strange. Briefly, in view of the public importance of navigable waterways, ownership of land underlying them is "strongly identified with the sovereign power of the government"[140] and is in this way analogous to the OCS under the

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licensing. It must also be noted that the New Zealand Court of Appeal recently held in a landmark decision that several Maori tribes could pursue their claims to exclusive aboriginal title to the foreshore and seabed at common law or before the Maori Land Court under the Te Ture Whenua Maori Act of 1993. The Court ruled that such claims were not legally precluded as a matter of the common law of New Zealand (in contrast to Australia) nor did they fall outside the statutory jurisdiction of the Maori Land Court. *See* Attorney-General v. Ngati Apa [2003] 3 N.Z.L.R. 643; Ani Mikaere et al., *Treaty of Waitangi and Maori Land Law*, N.Z. L. REV. 447, 462-83 (2003); Richard Boast, *Maori Proprietary Claims to the Foreshore and Seabed After* Ngati Apa, 21 NZU L. REV. 1 (2004).

136. Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803).

137. *See supra* note 7.

138. *See* cases cited *supra* note 3; *see also* Singer, *supra* note 3, at 644; Frickey, *supra* note 113, at 418-39.

139. *See* Singer, *supra* note 25, at 492.

140. Montana v. United States, 450 U.S. 544, 552 (1981); United States v. Alaska, 521 U.S.

paramountcy doctrine. Unlike the OCS, however, the government holds submerged land beneath internal navigable watercourses "for the ultimate benefit of future States,"[141] which presumptively take title to the land on their admission to the Union. In this scenario a tribe is "more likely to own the beds and banks of a boundary river than of waters interior to a reservation because boundary descriptions often explicitly refer to the midpoint of a stream,"[142] a specificity sufficiently robust to demonstrate that Congress intended both to include the submerged land within the tribal reservation and to defeat the future state's title to it.[143] Thus the Supreme Court recently vindicated a tribe's ownership of submerged reservation land beneath an internal navigable waterway after construing treaty clauses, executive orders, and congressional actions to overcome the presumption against conveyance.[144] Going to such lengths is peculiar because it runs counter to the oft repeated rule that a tribal reservation is a "reservation" of rights not ceded by a tribe (instead of the sum of powers delegated to it by the federal government). In other words a tribe should not need to overcome the presumption against conveyance; its plenum of title ought to be assumed aprioristically.[145]

1, 5 (1997). This is in contrast to the usual law applied to surface land. *See* Scott v. Lattig, 227 U.S. 229, 244 (1913).

141. United States v. Holt State Bank, 270 U.S. 49, 55 (1926).

142. COHEN, 1982 ED., *supra* note 29, at 504.

143. Idaho v. United States, 533 U.S. 262, 273 (2001) *citing* Alaska, 521 U.S. at 36; Utah Div. of State Lands v. United States, 482 U.S. 193, 202 (1987).

144. *Idaho*, 533 U.S. at 280-81. In *Montana*, 450 U.S. at 556, the Court held otherwise, ostensibly because it found no intention on Congress's part to include submerged lands within a reservation where the tribe did not depend on fishing or use of navigable water. Justice Blackmun, joined by Justices Brennan and Marshall, strongly dissented from *Montana*'s ruling. They observed that the majority's reasoning was factually incorrect with respect to the Crow Tribe's subsistence habits, disregarded the canons of construction to be applied to treaties with Indian nations, and willfully ignored an established line of cases involving claims to submerged lands adjacent to or encompassed by Indian reservations. *Id.* at 569-81. The precedent to which Justice Blackmun referred included Donnelly v. United States, 228 U.S. 243 (1913); Alaska Pacific Fisheries v. United States, 248 U.S. 79 (1918); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

145. Cohen's editors make the following remark whose inconclusiveness reflects the crux:

> One theoretical explanation is that because ownership of the beds and banks of [internal] navigable waters is a sovereign prerogative of the federal government or the states under the Constitution, it automatically extinguished Indian title upon incorporation of a tribe into the United States. . . . But this theory seems inconsistent with the recognized right of either federal or state governments to convey fee ownership of submerged lands to private persons.

COHEN, 1982 ED., *supra* note 29, at 504 n.260.

Still, we should not discount the pernicious nature of *Eyak*'s holding. To the contrary, recent caselaw even suggests that common law aboriginal title *to surface land* is not doctrinally secure, a proposition that militates against construing the OCS as a unique zone. In *State v. Elliott*, the Vermont Supreme Court assumed that the aboriginal title of the Missisquoi Abenaki could be extinguished by the "increasing weight of history," an argument never before tolerated in America, where it was thought that aboriginal title was generally as "sacred as the fee simple of the whites" and consequently as durable.[146] When the tribe appealed the Vermont Supreme Court's ruling, their petition for certiorari was denied. The Supreme Court thus endorsed Vermont's ex silentio reasoning and in this way tacitly agreed, in contradiction of countless prior holdings, that "the longer tribal rights are ignored, the greater the reason for construing the federal government's failure to protect Indian interests as an affirmative intent to extinguish Indian title."[147]

It is important, then, that the Ninth Circuit en banc or the Supreme Court itself follow the traditional approach to aboriginal title and reverse *Eyak*.[148] Alternatively, Congress should avail itself of the second-best option by using its own paramountcy to grant the villages a title to an area commensurate with their claim. Surely this is within its power: if it could do so much for the states when it passed the Submerged Lands Act of 1953, a fortiori it could act in the villages' behalf. Indeed, the Supreme Court itself once said the following in a more orthodox federal Indian law case:

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to

146. State v. Elliott, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993). *Elliott* was persuasively criticized by Singer, *supra* note 25, *passim*. In Australia native title can be "washed away by the tide of history." *See* Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 194 A.L.R. 538 (Austl.).

147. Singer, *supra* note 25, at 482. A similar kind of reasoning may be found in a recent Canadian case, Chippewas of Sarnia Band v. Canada, [2000] 195 D.L.R. (4th) 135 (Ont. C.A.), which demonstrated that aboriginal title and treaty rights in Canada may be defeated by judicial discretion, despite their constitutionalization.

148. *See* Richards, *supra* note 17, at 965, 971.

> carry out other public purposes appropriate to the objects for which the United States hold the Territory.[149]

Such a statute could be seen to arise from Congress's fiduciary obligations to the Indian villages rather than an endorsement of the terra nullius view of aboriginal title, a consideration the legislative history must be sure to reflect.[150] It would also be one of those "other public purposes appropriate to the objects for which the United States holds the Territory" of the OCS.[151] After all, the Supreme Court had already held more than eighty years ago that Congress acted for a recognized public purpose when it made a reservation that included adjacent waters and submerged land.[152]

Failing to act so, Congress should at least compensate the villages for the taking of their aboriginal title. If we assume that the villages can adduce the necessary proof of use and occupation, it is indisputable that they enjoyed an exclusive property right that was extinguished. (Such proof is unlikely to be overwhelmingly problematic under the usual common law tests of "regular use."[153]) If the import of this is that the United States has no legal obligation to offer compensation, then such reasoning relies on the dreadful ruling in *Tee-Hit-Ton*, which sanctified the racist seizure of property rights.[154]

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149. United States v. Winans, 198 U.S. 371, 383 (1905), *citing* Shively v. Bowlby, 152 U.S. 1, 48 (1894).

150. The federal government owes a fiduciary duty to the Indian nations in view of the legal fact that they are in a state of "pupilage" to it. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. Creek Nation, 295 U.S. 103, 110 (1935) (holding federal executive officers to a strict standard of compliance with the federal government's fiduciary duty to the Indian nations); Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (imposing the same fiduciary obligations on the federal government in respect of tribes as a private trustee has to his beneficiary); Menominee Tribe v. United States, 101 Ct. Cl. 10, 18-19 (1944) (finding that a statute requiring that the United States act as a tribe's fiduciary added little to the settled federal Indian law doctrine that this was so); COHEN, 1982 ED., *supra* note 29, at 220-28. Note also that Congress may legislate to Indians' benefit without running foul of the Due Process Clause of the Fifth Amendment: "As long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." Morton v. Mancari, 417 U.S. 535, 555 (1974) (holding such special treatment to be political in nature rather than racial); *see also* Eugene Volokh, *The California Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1358-59 (1997).

151. Choctaw Nation v. Oklahoma, 397 U.S. 620, 647 (1970).

152. *See* Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 88 (1918).

153. *See* MCNEIL, *supra* note 7, at 202.

154. *See supra* note 37. In *Tee-Hit-Ton*, Justice Reed wrote that tribal property rights should not be understood as rights at all, but were instead revocable licenses, i.e., "permission by the whites to occupy." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955); *see also* Singer, *supra* note 25, at 490, 519-27. Five years before *Tee-Hit-Ton*, Justice Reed had refused

As we celebrate the fiftieth anniversary of *Brown v. Board of Education*,[155] we should recall that *Tee-Hit-Ton* was argued in the same year and, like *Brown* but to contrary effect, remains "good" law. For *Tee-Hit-Ton* infamously held that Native Americans were outside the Constitution's guarantees and that, unlike every other American citizen, were not entitled to compensation when their property was taken by the state.[156] To put this in relief, indigenous Alaskans' occupation of land for millennia was not subject to the same protection as an adverse possessor who held his property openly and notoriously for a trivial statutory period. Such were the implications of what Justice Reed wrote when he contended, with more recourse to myth and prejudice than history, that the United States had conquered by the sword every Native American tribe in what is now America and by right of law owed compensation to none[157]:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[158]

In Justice Reed's view, the Court's decision left with Congress, "where it belongs," the moral obligation of providing "Indian gratuities for the termination of Indian occupation of government-owned land rather than making compensation for its value a rigid constitutional principle" such as whites enjoy.[159] It is high time that this case be overturned: *Tee-Hit-Ton* betrays our commitment to equal protection and due process; it violates our international law obligations; it ignores the basis of the common law of property, namely that

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to uphold Fish and Wildlife Service regulations that prevented whites from commercial fishing inside the Karluk reservation because he thought that doing so would be "too much for the Indians." *See* DONALD CRAIG MITCHELL, SOLD AMERICAN: THE STORY OF ALASKAN NATIVES AND THEIR LAND, 1867-1959, at 407 (2003).

155. 347 U.S. 483 (1954). For a recent, similarly odious case, *see* State v. Elliott, 616 A.2d 210 (Vt. 1992), *cert. denied*, 507 U.S. 911 (1993) (criticized by Singer, *supra* note 25, *passim*).

156. U.S. CONST. amend. V.

157. As Singer notes, "the only act that may constitute a conquest of the Tee-Hit-Ton Indians is the Supreme Court decision itself" in view of the fact that no military action of the sort Justice Reed envisaged ever occurred. Singer, *supra* note 25, at 525 (citing Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1244 (1980)).

158. *Tee-Hit-Ton*, 348 U.S. at 289-90.

159. *Id.* at 291. It is worth noting that Justice Reed was the "lone holdout" in *Brown* and only agreed to that case's unanimous holding after much pressure from Chief Justice Warren. *See* Richard Brust, *The Court Comes Together*, ABA J., Apr. 2004, at 40, 43.

occupation of land gives rise to a proprietary interest; it is out of step with other jurisdictions that have characterized aboriginal title as proprietary in nature.[160]

As for the Alaskan villages, compensation was something that the Ninth Circuit never raised in *Eyak*. (Presumably it had no need in view of *Tee-Hit-Ton*'s holding.) In normative terms, however, it remains an issue demanding political resolution. The Supreme Court held in *Amoco* that ANCSA did not apply offshore, and no other law has been enacted to grant the villages a means of statutory restitution. It is also the case that the Alaskan Indians, unlike the fifty states, never had the opportunity to agree to the Constitution's allocation of national external sovereignty to the federal government. The extinguishment of their title was uncompensated and nonconsensual.[161] As the villages' fiduciary, Congress should rectify this invidious state of affairs.

VII. Aboriginal Rights and Judicial Wrongs

In November 1998, following the dismissal of *Eyak* by the Ninth Circuit and the Supreme Court's refusal to review it,[162] the village members filed a new claim, *Native Village of Eyak v. Evans* (*Evans*), seeking a declaratory judgment confirming their *nonexclusive* aboriginal rights in the territorial sea, an order prohibiting the Secretary of Commerce from authorizing or permitting anyone to interfere with those rights, and an order declaring void any commercial and noncommercial regulations that prevented the villagers themselves from exercising their entitlements.[163] The rationale of *Evans* was that *Eyak* applied only to a claim of exclusive territorial title whereas previous cases, like *Gambell* and *Amoco*, pertained to usufructs like the aboriginal right to fish instead of

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160. In Canada, for instance, aboriginal title and rights are not only considered proprietary, they are in fact the *only* property interests subject to constitutional protection (beyond common law presumption, no equivalent to the Fifth Amendment exists in Canada). *See* Kent McNeil, How the New Deal Became a Raw Deal for Native Americans: The *Tee-Hit-Ton* Alaska Decision and the Denial of Fifth Amendment Protection to Indian Title, Remarks at the 40th Annual Conference of the Western History Association (Oct. 11-14, 2000) (transcript on file with author). Under New Zealand's common law aboriginal title is also protected from uncompensated takings, and in Australia it is statutorily so. *See* Te Runanganui o Te Ika Whenua Inc. Soc'y v. Attorney-General [1994] 2 N.Z.L.R. 20; Racial Discrimination Act of 1975 (Austl.).

161. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 545-46, 602 (1823) (holding that aboriginal title may be acquired by the United States only through a voluntary, consensual transfer); *see also* Worcester v. Georgia, 31 U.S. (1 Pet.) 515, 547 (1832); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974).

162. Native Vill. of Eyak v. Daley, 527 U.S. 1003 (1999).

163. Native Vill. of Eyak v. Evans, No. 98-0365 (D. Alaska Sept. 25, 2002).

ownership as such. The district court nevertheless granted summary judgment to the Secretary in spite of having denied his every argument. Why? Because the villages' hunting and fishing rights were purportedly barred as a matter of law by federal paramountcy. The district court's ruling was in direct conflict with the Ninth Circuit's decision in *Gambell* and the Supreme Court's in *Amoco*.[164] On December 19, 2002, the villages appealed *Evans* to the Ninth Circuit.

When it came time for *Evans* to be decided, the panel of judges recognized the inconsistency in the Circuit's caselaw and consequently recommended that the appeal be decided, and *Eyak* revisited, in an en banc hearing. The Circuit voted to do so in April 2004,[165] and, after receiving new pleadings from the parties, convened in June. A month later it issued a terse order in favor of the villages.[166]

The panel's order vacated the district court's ruling in *Evans*. It also remanded with instructions that the district court determine the content of the rights the villages actually have under the assumption that these have been abrogated neither by federal paramountcy nor by other applicable law (viz., statutes). The en banc panel retained jurisdiction over future proceedings in anticipation of ruling at some later date whether the villages' substantive rights actually conflict with federal responsibilities offshore.

Unquestionably, the Ninth Circuit's order was a victory for the villages. The fundamental hurdle opposing them, the effect of the paramountcy doctrine, did not foreclose their claims as a legal matter. Offshore aboriginal rights may continue to be exercised so long as they do not conflict in fact with national external sovereignty; *Gambell* lives. However, the extent of the order and its effect on *Eyak* remain uncertain. Indeed, *Eyak* was not mentioned once despite its prominence in the parties' briefs, the brief of the amici curiae,[167] and reasoning of the district court in *Evans*. In the light of this absence, one may conclude either that territorial aboriginal title remains in conflict with federal paramountcy or that it may, like aboriginal rights, only do so when that is proven as a matter of fact. The better view is the latter alternative. As I have demonstrated in this Article, aboriginal title is no more analytically repugnant to federal paramountcy than aboriginal rights are. Indeed, the title is a species

164. *See* People of Vill. of Gambell v. Hodel, 869 F.2d 1273 (9th Cir. 1989); Amoco Prod. Co v. Vill. of Gambell, 480 U.S. 531 (1987).

165. Eyak Native Vill. v. Daley, 364 F.3d 1057 (9th Cir. 2004).

166. Eyak Native Vill. v. Daley, 375 F.3d 1218 (9th Cir. 2004).

167. *See* Brief of Amici Curiae Indian Law Academics in Support of Plaintiffs - Appellants, Eyak Native Vill. v. Daley, 375 F.3d 1218 (9th Cir. 2004) (No. 02-36155).

of right, and its consistency with national sovereignty over land and water is amply supported by 175 years of precedent.

In a sparsely populated area are several villages living on the water's edge. The livelihood of their members depends as much today on the Gulf of Alaska as it has for the last 7000 years. In the twilight of the twentieth century, *Eyak* wrongly denied the villages' their opportunity to prove continued use and occupation of parts of the OCS. It did so contrary to pronouncements by Congress. It did so despite entrenched jurisprudence. It did so in denial of what "'[H]umanity demands, and a wise policy requires.'"[168] Allowing *Eyak* to stand will perpetuate an injustice against the villages as well as other Native Americans who rely on cardinal principles of federal Indian law for the certainty and stability that their proprietary rights demand.[169] Many years ago Chief Justice Marshall articulated a doctrine that remains good law. When the en banc panel reconvenes to evaluate the actual consistency of the villages' rights with federal paramountcy, it should finally overturn *Eyak* in affirmation of the rule that has governed every claim to aboriginal title since the Republic's founding.

168. *Gambell*, 869 F.2d at 1278 (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589-90 (1823)).

169. This is especially true for Indian nations with substantial land claims taking decades to resolve. *See, e.g.*, Cayuga Indian Nation of N.Y. v. Vill. of Union Springs, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) (motion for summary judgment granted following 1981 filing of suit); Oneida Indian Nation of N.Y. v. County of Oneida, No. 70-CV-35, 2003 U.S. Dist. LEXIS 7505 (N.D.N.Y. Apr. 7, 2003) (latest phase of claim dating from 1895).