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BROWN AND *TEE-HIT-TON*

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The year 2004 witnessed a vast outpouring of scholarship celebrating and analyzing the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education*.[1] The magnitude of this literature reflects the impact of *Brown* not only on the development of constitutional jurisprudence, but also on the overall pattern of race relations in America. By holding that state-mandated segregation in schools violated the Equal Protection Clause of the Fourteenth Amendment, the Court brought an end to the American system of official racial apartheid and set in motion a series of events that have dramatically altered the relationship between whites and African-Americans in our society more generally. Thus, the scope of the reaction to the anniversary of the decision was entirely predictable and understandable.

The attention lavished on *Brown* stands in marked contrast to the treatment of *Tee-Hit-Ton Indians v. United States*,[2] which was handed down less than a year later. The context in which *Tee-Hit-Ton* was decided was in many ways analogous to that of *Brown* itself. Like *Brown*, *Tee-Hit-Ton* profoundly effected the rights of a racial minority that had suffered greatly at the hands of the white majority — in this case, Native Americans. Moreover, during the late nineteenth century and early twentieth centuries, the Court had shown no more sympathy for the plight of Native Americans than it had for African-Americans. However, the ultimate result in *Tee-Hit-Ton* could not have been more different than that in *Brown*. Rather than breaking new ground in defense of Native American rights, the Court issued one of the most retrograde Indian law decisions of the twentieth century — a decision that commentators have argued is marked by "blatant racism,"[3] and analogous to the Court's infamous 1857 decision in *Dred Scott v. Sanford*.[4]

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1. 347 U.S. 483 (1954); *see, e.g.*, Symposium, *The Quest for Equal Opportunity:* Brown *Turns 50*, San Antonio *Turns 30*, 52 AM. U. L. REV. 1341 (2003-2004); Symposium, Brown v. Board of Education *Revisited*, 43 WASHBURN L.J. 224 (2004).

2. 348 U.S. 272 (1955).

3. Matthew L. M. Fletcher, *Sawnawegezewog*, 28 AM. INDIAN L. REV. 35, 50 (2003); *see also* Philip P. Frickey, *Book Review*, 87 MICH. L. REV. 1199, 1210 n.81 (1989) (*Tee-Hit-Ton* decision marked by "implicit racism").

4. Joseph William Singer, *Well-Settled?: The Increasing Weight of History In American Indian Law Claims*, 28 GA. L. REV. 481, 484-85 (1994).

The ironies inherent in the juxtaposition of *Brown* and *Tee-Hit-Ton* have been ignored in the widespread discussions and celebrations that have surrounded the fiftieth anniversary of *Brown*.[5] Indeed, with the exception of a small band of Property teachers and Indian law experts, few scholars take any note of *Tee-Hit-Ton* at all; the case is typically ignored even in detailed studies of the structure and impact of Warren Court jurisprudence generally.[6] This article, by contrast, will explore the lessons that can be learned from the Court's disparate treatment of the two cases. The article will begin by briefly recapitulating the events that ultimately led to the *Brown* decision. Next, the article will outline the complex doctrinal background of *Tee-Hit-Ton* and discuss the analysis of the *Tee-Hit-Ton* Court itself. Finally, the article will describe the forces that led the Court to its very different conclusions in *Brown* and *Tee-Hit-Ton*.

I. Brown v. Board of Education

The tale of *Brown v. Board of Education* is one of the best-known stories in legal history. The story begins with the adoption of the Equal Protection Clause of the Fourteenth Amendment. Drafted by Northern Republicans in response to what they viewed as the unwillingness of Southerners to accept the full consequences of their defeat in the Civil War, the Amendment was proposed by Congress in 1866 and ratified by the requisite number of states in 1868.[7] The Equal Protection Clause was part of Section 1 of the Amendment, which in turn was intended to guarantee at least a measure of legal equality to African-Americans. Nonetheless, most commentators have concluded that the framers of the Amendment did not have a specific intention to outlaw racial segregation in the public schools.[8] Many, however, have also

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5. The juxtaposition is noted in passing in Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L. J. 1215, 1247-48 (1979-80), and Singer, *supra* note 4, at 483.

6. *E.g.*, LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS (2000). Not surprisingly, *Tee-Hit-Ton* has received much more attention from specialists in Indian law. The most complete treatment of the background and impact of the case is Newton, *supra* note 5.

7. Much of the vast literature that discusses the drafting of the Fourteenth Amendment is cited and analyzed in EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS, 1863-1869 (1990) [hereinafter MALTZ, CIVIL RIGHTS] and EARL M. MALTZ, THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION (2003).

8. *E.g.*, Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995); MALTZ, CIVIL RIGHTS, *supra* note 7, at 109-13.

A notable exception is found at Michael W. McConnell, *Originalism and the Desegregation*

argued that the language of the clause by its terms suggests a more general commitment to a principle of equality that is broad enough to encompass a requirement that the state not segregate its schools by race.[9]

Ultimately, of course, the Supreme Court was called upon to determine the scope of the protections provided by the Fourteenth Amendment. The Court's first major pronouncement on the constitutionality of racial segregation came in its 1896 decision in *Plessy v. Ferguson*.[10] In *Plessy*, with only a single dissent, the Court rejected a Fourteenth Amendment challenge to a Louisiana statute that required the operators of street railways to maintain separate but equal facilities for white passengers and their African-American counterparts. Speaking for the majority, Justice Henry B. Brown first rejected a Thirteenth Amendment challenge to the statute, declaring that "[a] statute which implies merely a legal distinction between the races . . . has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."[11] Turning to the Fourteenth Amendment, Brown began by sketching in general terms his vision of the reach of the Amendment:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color . . . as distinguished from political equality, or a commingling of the two races upon grounds unsatisfactory to either.[12]

The key question, of course, was how one was to define the phrase "equality . . . before the law." In part, Brown's treatment of this issue reflected the evolution of the Republican position on race during the Reconstruction era. At the time the Fourteenth Amendment was drafted, many Republicans drew a sharp distinction between civil rights and political rights, and the drafters made a conscious decision not to directly protect political rights.[13] For Justice Brown, by contrast, political equality was an essential element of equality before the law, and he cited the jury discrimination struck down in *Strauder v. West Virginia*[14] as the classic example of a forbidden racial

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Decisions, 81 VA. L. REV. 947 (1995).

9. *E.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

10. 163 U.S. 537 (1896).

11. *Id.* at 543.

12. *Id.* at 544.

13. *See* MALTZ, CIVIL RIGHTS, *supra* note 7.

14. *Plessy*, 163 U.S. at 545 (discussing Strauder v. West Virginia, 100 U.S. 303 (1879)).

classification. Outside the area of political rights, however, Brown was far more willing to countenance the use of race in government decision making. He cited a series of state court cases that had upheld school segregation as paradigms for the view that some racially-based laws did not violate Fourteenth Amendment principles.[15]

Having established the parameters of his analysis, Brown next turned to the case law that had dealt specifically with the issue of segregation by common carriers, concluding that the right of access to public conveyances did not merit special constitutional protection. He then applied a rational basis test, noting that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted . . . for the promotion of the public good, and not for the annoyance or oppression of a particular class."[16] Characterizing the Louisiana statute as an appropriate measure to ensure "good order" and the comfort of passengers of all races, Brown then proceeded to the most widely-quoted portion of his opinion:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it . . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.[17]

Three years later, the Court addressed the specific issue of racial segregation in schools in *Cumming v. County Board of Education*.[18] In *Cumming*, a group of African-American parents launched a Fourteenth Amendment challenge to the use of their tax dollars to support a high school

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15. The leading case in this line was *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849).

16. *Plessy*, 163 U.S. at 550.

17. *Id.* at 551-52.

18. 175 U.S. 528 (1899). For a detailed discussion and analysis of *Cumming*, see J. Morgan Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J.S. LEGAL HIST. 17 (1980).

for whites where no analogous institution was provided for the education of blacks. Speaking for a unanimous Court, Justice John Marshall Harlan, whose dissent in *Plessy* has become justly famous, rejected the black parents' contentions. The specific basis for his ruling was that even if there were a Fourteenth Amendment violation in the allocation of funds, an injunction which undermined the white school was not an appropriate remedy.[19] At the same time, however the opinion seemed to implicitly approve the concept of segregated schools[20] and closed with this language:

> [W]hile all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination . . . on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.[21]

If any doubt remained about the constitutionality of the practice of maintaining segregated public schools, it was dispelled by the 1927 decision in *Gong Lum v. Rice*.[22] In *Gong Lum*, the state of Mississippi required the daughter of a Chinese merchant to attend the public school for African-Americans, rather than the school for whites. The Court unanimously rejected an equal protection challenge to this decision. Citing *Plessy*, *Cumming* and a variety of state court cases, Chief Justice William Howard Taft argued that the case presented "the same question which has been many times decided to be within the constitutional power of the state Legislature [*sic*] to settle"[23] and that while "[m]ost of the cases cited arose . . . over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different . . . where the issue is as between white pupils and pupils of the yellow races."[24]

By its terms, the prevailing doctrine of the *Plessy/Gong Lum* era required the states to provide equal facilities for whites and African-Americans. Nonetheless, in practice, the school systems in states which mandated racial

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19. *Cumming*, 175 U.S. at 544-45.
20. *Id.* at 545.
21. *Id.*
22. 275 U.S. 78 (1927).
23. *Id.* at 85-86 (citations omitted).
24. *Id.* at 87.

segregation were both separate and unequal. Beginning in 1937 with *Missouri ex rel. Gaines v. Canada*,[25] a series of Supreme Court decisions involving law schools clearly signaled that the Court was taking the requirement of equality very seriously indeed.[26] However, by its nature, attacks based on the theory that the schools provided to African-Americans were inferior to those attended by whites required laborious, case-by-case challenges to the specific conditions that existed in each school system. Thus, those seeking to improve educational opportunities for African-American children decided to mount an assault on the basic principles that the Court had enunciated in *Plessy*. *Brown* and its companion cases were the vehicles for that assault.

Brown was first argued before the Court during its October 1952 term. In the conference that followed the argument, the justices split along geographic lines.[27] Justices Felix Frankfurter of Massachusetts, William O. Douglas of Connecticut, Robert H. Jackson of New York, Harold H. Burton of Ohio, and Sherman Minton of Indiana — all of whom were appointed from states that had been free states at the outbreak of the Civil War — were apparently in favor of overturning *Plessy*; among the free state justices, only Robert H. Jackson appeared to be undecided.[28] Conversely, three of the four justices from former slave states — Chief Justice Frederick M. Vinson of Missouri and Justices Stanley F. Reed of Kentucky and Thomas C. Clark of Texas — initially argued that *Plessy* should remain good law. Only Justice Hugo L. Black crossed the regional divide and joined the Northerners in advocating the abandonment of *Plessy*.

Even those justices who favored overruling *Plessy* recognized that such a decision would engender great political upheaval in the South, and that the scope of this upheaval would likely be magnified if the decision were not

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25. 305 U.S. 337 (1938).

26. The cases included *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631 (1948).

27. The internal deliberations of the Court in *Brown* are described in detail in RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) and MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

28. Klarman suggests that Frankfurter was also undecided at this stage. KLARMAN, *supra* note 27, at 295. However, the evidence of the Court's internal proceedings is to the contrary. Admittedly, Frankfurter had great difficulty in reconciling the ultimate result in *Brown* with conventional legal analysis. However, his own conference notes describe the Court as divided 5-4 in favor of overruling *Plessy*, and Burton's notes describe a 6-3 split. KLUGER, *supra* note 27, at 614. Given that Jackson was clearly undecided at this point, the only plausible conclusion is that Frankfurter was prepared to overrule *Plessy* (albeit with some misgivings).

unanimous. Hoping to find some way to compose their differences, they put *Brown* over for re-argument, directing the attorneys on both sides to address the original understanding of the Fourteenth Amendment. In the interim, Chief Justice Vinson died, and was replaced by Earl Warren of California. Warren personally favored overruling *Plessy*, and after the re-argument Justice Clark was convinced to join the majority. Reed was the final holdout; however, cognizant of the desirability of unanimity and faced with the reality that *Plessy* was going to be overruled in any event, he relented as well. Thus, on May 17, 1954, Chief Justice Earl Warren announced that the Court had concluded unanimously that the government could not allow public schools to be segregated on the basis of race.

The price of unanimity was a nonaccusatory, bland opinion that focused narrowly on the impact of segregated schools on African-American children. Warren began by describing the discussions surrounding the adoption of the Fourteenth Amendment as "inconclusive" on the question of whether the maintenance of segregated schools was originally understood to be rendered unconstitutional by the Equal Protection Clause.[29] He also argued that, in any event, public schools had grown in importance in the intervening years, declaring that "[t]oday, education is perhaps the most important function of state and local governments"[30] and that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."[31] Citing modern studies which suggested that African-Americans suffered psychological harm from being educated in a segregated environment,[32] Warren concluded that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[33]

While the decision in *Brown* clearly outlawed racial segregation in schools operated by state governments and their subdivisions, it did not directly resolve the issue of segregation in the District of Columbia public schools. These schools were operated by an institution of the *federal* government, and by its terms the Equal Protection Clause applies only to the *states*. However, from a political perspective, it would have been unthinkable to outlaw segregation in the states and leave the federal government free to classify

29. *Brown*, 347 U.S. at 489.
30. *Id.* at 493.
31. *Id.*
32. *Id.* at 494 & n.11.
33. *Id.* at 495.

students on the basis of race. Thus, in *Bolling v. Sharpe*,[34] Warren concluded that the maintenance of segregated schools was also prohibited by the Due Process Clause of the Fifth Amendment.

Given the reasoning of the Court in *Brown*, in theory the impact of the decision might have been limited to the specific context of school segregation. However, the Court soon made it clear that it viewed *Brown* as establishing the principle that government-imposed racial segregation generally violated the Equal Protection Clause, as well as the Fifth Amendment Due Process Clause.[35] Thus, although some have questioned its practical significance,[36] *Brown* clearly stands as an important milestone in the struggle for racial justice in America. *Tee-Hit-Ton*, by contrast, is a milestone of a quite different sort.

II. Tee-Hit-Ton Indians v. United States

In *Tee-Hit-Ton*, the Court was called upon to resolve the constitutional status of aboriginal title in land — title that Native Americans derived not from treaties, but rather from their status as preexisting occupants of the territory that became the United States. Even prior to the *Tee-Hit-Ton* decision, the Court had consistently held that Congress had broad authority to abrogate such claims, asserting that "[t]he power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues."[37] However, while the right of Congress to extinguish aboriginal title was well established, the question of whether Native Americans had a constitutional right to compensation for the extinction of aboriginal title had not been clearly answered prior to 1955.

The issue came to the *Tee-Hit-Ton* Court against the background of a long and complex series of doctrinal developments. The Court first directly addressed the issue of Indian land rights in 1810, in *Fletcher v. Peck*.[38] In *Fletcher*, the state legislature of Georgia had conveyed to private parties a large tract of land that was occupied by Indians.[39] One of the grounds for challenging the sale was based on the theory that the Indian tribes possessed

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34. 347 U.S. 497 (1954).

35. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 n.72 (1959).

36. *E.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN THE COURTS BRING ABOUT SOCIAL CHANGE? (1993).

37. *E.g.*, United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941).

38. 10 U.S. (6 Cranch.) 87 (1810).

39. *Id.*

sufficient title to prevent the state of Georgia from holding a fee simple in the property.[40] Speaking for a majority of the Court, Chief Justice John Marshall rejected this argument, concluding that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state."[41] Thus, although Marshall recognized the authority of the state government to convey title in land occupied by Native Americans, the language of the opinion strongly suggested that the grantee would take subject to the interest inherent in aboriginal title.

In any event, the treatment of the Indian land claims in *Fletcher* was only a prelude to the pivotal decision in *Johnson and Graham's Lessee v. M'Intosh.*[42] *Johnson* arose from a dispute over the title to a number of parcels of land in southern Illinois and Indiana. The claims of the plaintiffs derived from private purchases made directly by white land speculators from the Illinois and Piankeshaw Indians in 1773 and 1775, respectively; at the time of the transactions, such private purchases were forbidden by the British Proclamation of 1763.[43] Subsequent to these purchases, after the victory of the colonists in the Revolutionary War, the Indian tribes ceded the same land to the United States government by treaty. The government had in turn sold the land to the defendants in *Johnson.* The question in the case was which claim had priority.

The theoretical difficulties in *Johnson* derived in large measure from the somewhat ambiguous position of the right to acquire and convey real property generally. On one hand, the right to own real property was characterized by prominent authorities such as Sir William Blackstone and Emmerich de Vattel as a natural right.[44] On the other, it was closely related to membership in a political community. Thus, in theory, under English law, title to all real

40. *Id.* at 142.

41. *Id.* at 142-43.

42. 21 U.S. (8 Wheat.) 543 (1823). Important treatments of *Johnson* include ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1992) and Eric Kades, *History and Interpretation of the Great Case of* Johnson v. M'Intosh, 19 LAW & HIST. REV. 67 (2001).

43. *Johnson,* 21 U.S. at 564.

44. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 138 (Sharswood ed., 1875); Emmerich de Vattel, Le droit des gens: ou, Principes de la loi naturelle appliques a la conduite et aux affaires des nations et des souverains 194 (Oceana Publ'ns 1964) (1758).

property was ultimately traced to the Crown and, in general, noncitizens could legitimately be denied the right to acquire such property.[45]

The problem in *Johnson* was that the case involved the rights of two different entities claiming sovereign authority over the same parcels of land. Of course, the rights of the United States were derived from their treaties with the Illinois and Piankeshaw Indian tribes. However, if prior to the execution of the treaties the Indian tribes had possessed full sovereign authority over the land, then the prior conveyance to the land speculators would have priority over the sale from the United States. Thus, *Johnson* necessarily raised the question of which sovereign had ultimate authority over the land that was in dispute.

The claim of the United States derived from the English assertion of dominion over the land in question. As a theoretical matter, however, it was far from clear why this claim should supercede the rights of the Indian tribe as the original inhabitants of the land — a status which normally carried with it a right to assert sovereign authority.[46] Some early authorities had suggested that, as "infidels," Indians lacked the capacity to exercise legally cognizable sovereign rights over the land in which they lived.[47] Vattel, a leading jurisprude of the late eighteenth century, took a somewhat different tack in his classic *Law of Nations*. He combined the doctrine that nations could validly assert claims to land that they discovered with one of the most important themes in the rhetoric of white supremacy — the superiority of a lifestyle and economy based on agricultural life to one based upon hunting and fishing:

> It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers cannot populate the whole country. [Because] of the obligation of cultivating the earth . . . these tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.[48]

45. VATTEL, *supra* note 44, at 149.
46. *Id.* at 84-85; WILLIAMS, *supra* note 42, at 98-100.
47. WILLIAMS, *supra* note 42, at 209-11.
48. VATTEL, *supra* note 44, at 85.

Whatever the theoretical merits of these arguments, their impact was buttressed by important pragmatic considerations. What was at stake in *Johnson* was no less than the ability of the United States government to control and regularize the disposition of the territory over which it claimed sovereignty. A decision granting priority to the land speculators' deed would have created a regime under which the title to federal lands would have been effectively controlled not by the federal government, but rather by the numerous Indian tribes that had inhabited the land prior to the arrival of European explorers.

Under these circumstances, it should be no surprise that the Supreme Court ruled unanimously against the land speculators. Speaking for the Court, Chief Justice Marshall relied in part on the fact that the original purchase from the Indians had been invalid under the proclamation of 1763.[49] In addition, however, he engaged in a wide-ranging analysis of the status of Indian titles in the United States. Marshall began this analysis with a detailed account of the chain of events which underlay the British claim of title to the Indian lands.[50] He then addressed the relationship between this claim and natural law claims that supported the rights of the Indians themselves (and thus the claims of the speculators). Marshall argued that the Supreme Court was in essence a conduit for the sovereign authority of the government of the United States, and as such was bound to vindicate the policies of that government, even in the face of contrary natural law principles:

> The United States . . . have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain . . . that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest.
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> We will not enter the into controversy, whether agriculturists, merchants, and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. . . . The British government . . . whose rights have passed to the United States, asserted a title to all the lands occupied by Indians, within the chartered limits of the British colonies. . . . It is

49. *Johnson*, 21 U.S. at 564.
50. *Id.* at 572-86.

> not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.[51]

One problem remained, however. Under widely accepted principles of international law, conquerors generally recognized the private property rights of conquered peoples, and incorporated them into their citizenry.[52] Marshall was clearly cognizant of this problem and sought to deal with it by resorting to the image of the Indians as savages whose way of life was incompatible with European values:[53]

> [T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.[54]

The two strands of Marshall's analysis came together in his ultimate description of the status of Indian land titles:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace in the possession of their lands, but to be deemed incapable of transferring the absolute right to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[55]

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51. *Id.* at 587-89.
52. VATTEL, *supra* note 44, at 309-11
53. *Johnson*, 21 U.S. at 589-90.
54. *Id.* at 590.
55. *Id.* at 591-92.

Obviously, *Johnson* was something less than a major victory for the supporters of Indian land rights. However, Chief Justice Marshall did *not* conclude that the legal rights of Native Americans had been totally extinguished by the doctrine of discovery.[56] Instead, he explicitly noted that until the discoverer exercised its right "by purchase or by conquest," Indians remained "the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it."[57] In 1832, Marshall elaborated on the legal significance of aboriginal title in *Worcester v. Georgia*.[58]

Worcester arose from an effort by the government of the state of Georgia to assert its authority over the Cherokee Indians who were residing on a reservation within the state's borders.[59] In 1802, Georgia had ceded its claims to western lands in return for the promise of the United States to extinguish the Indian claims to land within its boundaries as soon as it could be done "peaceably" and on "reasonable terms."[60] The Cherokees, however, with the encouragement and aid of the federal government, had adopted farming in place of hunting, and had become attached to their lands.[61] They refused to move. Moreover, in 1827 they adopted a constitution based on the United States model and declared themselves an independent nation.[62] In response, the Georgia state legislature adopted a series of laws that placed the Cherokee lands within the boundaries of several counties of the state and declared that after June 1, 1830, Georgia law would be enforced in the area and that all Indian customs and laws would be null and void.[63] In addition, Indians were denied the right to testify in cases involving whites, and whites were prohibited from discouraging them from emigrating westward.[64]

The Cherokees first sought to maintain an action in their own name challenging the constitutionality of the Georgia statutes.[65] In *Cherokee Nation*

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56. *Id.* at 583.

57. *Id.* at 574, 587 (emphasis added).

58. 31 U.S. (6 Pet.) 515 (1832).

59. G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, at 716 (1988); *see also* JILL NORGEN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 115 (1995); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality,* 21 STAN. L. REV 500 (1969) (detailed in descriptions and analysis of the factual and political background of *Worcester*).

60. WHITE, *supra* note 59, at 714.

61. *Id.* at 715.

62. *Id.*

63. *Id.* at 711, 715.

64. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 11 (1831).

65. WHITE, *supra* note 59, at 720.

v. Georgia,[66] Marshall spoke for a majority of the justices in concluding that the Court lacked Article III jurisdiction over the suit. However, the following term, in *Worcester*, the Court was faced with an appeal by a white missionary who had been convicted for violating the Georgia law which prohibited white men from residing in Cherokee territory without a license from the state.[67] In this procedural posture, *Worcester* did not present the Article III problems that had characterized *Cherokee Nation*. Moreover, as a clear invocation of personal right, the case could not be characterized as involving purely political questions. Thus, a decision on the merits became inevitable.

Once again speaking for the Court, Chief Justice Marshall concluded that the Georgia statute was unconstitutional.[68] *Worcester* is best known for holding that only Congress possessed authority to regulate Indian tribes.[69] In rejecting the state of Georgia's argument, however, Marshall was forced to confront the claim that Georgia possessed sovereignty over the Indian lands because, under the doctrine of discovery, the Cherokees had no legally cognizable property interest in the land that they occupied.[70] Rejecting this claim, Marshall emphasized the legal significance of the aboriginal title that had been recognized in *Johnson*, asserting that the doctrine of discovery "regulated the right . . . among the [E]uropean discoverers; but could not affect the right of those already in possession . . . as aboriginal occupants. . . . It gave the exclusive right to purchase [to the discoverer], but did not found that right on a denial of the right of the possessor to sell."[71]

In 1835, the Marshall Court once again focused on the status of aboriginal title in *Mitchel v. United States*.[72] In *Mitchel*, an English mercantile house had purchased large amounts of property from the Seminole Indian tribe in Florida.[73] The purchase was made with the permission of the Spanish government, which was at that time generally recognized as the ruler of Florida.[74] Subsequently, Florida was ceded to the United States in the Adams-Onis Treaty of 1819. The United States claimed that the rights that it had

66. 30 U.S. (5 Pet.) 1 (1831).

67. *Worcester*, 31 U.S. at 537.

68. *Id.* at 562.

69. *Id.* at 561.

70. *Id.* at 542-57.

71. *Id.* at 544.

72. 34 U.S. (9 Pet.) 711 (1835); *see also* David E. Wilkins, Johnson v. M'Intosh *Revisited: Through the Eyes of* Mitchel v. United States, 19 AM. INDIAN L. REV. 171 (1994) (for a comprehensive treatment of *Mitchel*).

73. *Mitchel*, 34 U.S. at 727.

74. *Id.*

acquired by the treaty superceded the claim of the successors to the purchaser from the Seminole tribe.[75] The Court unanimously held that the claim of the original purchasers had precedence.[76]

The fact that the purchasers had acted with the blessing of the Spanish government loomed large in the Court's disposition of *Mitchel*. Nonetheless, the opinion of the Court is notable for its emphasis on the significance of aboriginal title. Justice Henry Baldwin spoke for the Court in *Mitchel*. Baldwin was something less than a consistent supporter of Native American rights; for example, in *Cherokee Nation v. Georgia*, he stood alone in arguing in favor of the right of the state of Georgia to assert sovereignty over the Cherokee lands.[77] In *Mitchel*, however, he asserted that, during the colonial period, "friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them . . . from generation to generation"[78] and that "their hunting grounds were as much in their actual possession as the cleared fields of the whites."[79] Thus, Baldwin concluded, "their right of occupancy is considered as sacred as the fee simple of the whites,"[80] and that "[t]he Indian right to the lands as property was not merely of possession, that of alienation was concomitant."[81]

With their emphasis on the legal significance of aboriginal title, *Worcester* and *Mitchel* provide at least inferential support for the view that the abrogation of aboriginal title gives rise to a Fifth Amendment claim for compensation. By contrast, a series of decisions in the late nineteenth and early twentieth centuries might be seen as pointing in the opposite direction. These decisions did not deal directly with the status of aboriginal title. However, they reflect a vision of congressional authority over Indian affairs that is virtually unfettered by extrinsic constitutional constraints.[82]

The most infamous of these decisions is *Lone Wolf v. Hitchcock*.[83] The complex fact situation of *Lone Wolf* revolved around the Medicine Lodge Treaty 1867, which provided that the heads of families of the Kiowa and

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75. *Id.* at 761.

76. *Id.*

77. *Cherokee Nation*, 30 U.S. at 31-50 (Baldwin, J., concurring).

78. *Mitchel*, 34 U.S. at 745.

79. *Id.* at 746.

80. *Id.*

81. *Id.* at 758.

82. *See, e.g.*, United States v. Kagama, 118 U.S. 375 (1886) (holding Congress has plenary power to regulate conduct on Indian reservations).

83. 187 U.S. 553 (1903).

Comanche tribes could claim 320 acres from the common land of the reservation as separate property, and provided further that reservation land could not be ceded without the consent of three-fourths of the male adult Indians occupying the land.[84] Later, the Apache Tribe was brought under the same regime.[85] In 1892, 456 adult males signed a treaty ceding over two million acres of reservation land in exchange for a payment of $2 million, to be held in trust.[86] The Indian agent certified that at the time, the three tribes contained 562 male adults.[87] After Congress adopted implementing legislation, members of the relevant tribe sought to void the agreement.[88] They alleged that the count of eligible adult males was wrong, and that less than three-quarters had in fact signed.[89] Moreover, they contended that the signatures had been fraudulently obtained because the translator had misled them regarding the amount that they would receive.[90] Finally, they asserted that the implementing legislation unlawfully changed the agreement that was signed. Under these circumstances, the Indians argued that implementation of the agreement would violate the Fifth Amendment by depriving them of a property interest which was established by treaty.[91]

The Supreme Court unanimously rejected the Indians' argument. Speaking for the majority, Justice Edward White quoted at length from the Court's earlier decision in *United States v. Kagama*[92] and emphasized the plenary authority of Congress over Indian affairs — even in the face of contrary treaty language:

> When . . . treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. . . .

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84. *Id.* at 554-55. For a detailed discussion of *Lone Wolf*, see generally Ann Laquer Estin, Lone Wolf v. Hitchcock*: The Long Shadow, in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S, at 215-45 (Sandra L. Cadwalder & Vine Deloria eds., 1984).

85. *Lone Wolf*, 187 U.S. at 559.

86. *Id.* at 555.

87. *Id.* at 554.

88. *Id.* at 560.

89. *Id.* at 561.

90. *Id.*

91. *Id.*

92. *Id.* at 566-67 (alteration in original) (quoting United States v. Kagama, 118 U.S. 375 (1886)).

> Congress [has full administrative power] over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of the investment of Indian tribal property, the property of those who . . . were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings, with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation.[93]

While not directly addressing the issue of aboriginal title, the *Lone Wolf* Court's emphasis on the prerogatives of Congress plainly did not bode well for judicial protection of Indian land claims generally.[94] Indeed, if anything, one might have thought that the *Lone Wolf* plaintiffs stood on stronger legal ground than subsequent parties who might seek to vindicate aboriginal title *per se*. In *Lone Wolf*, the Native Americans could point to an agreement to which the federal government had voluntarily acceded and which both parties must have believed to have been legally binding.[95] Nonetheless, the Court was willing in effect to allow Congress to modify the agreement without the consent of the Native American parties. Intuitively, one might well have expected the Court to be even less hospitable to claims based solely on common law principles that established the rights of preexisting occupants.

Subsequent caselaw, however, clearly revealed limits to Congressional power under the *Lone Wolf* regime. In a series of decisions such as *United States v. Creek Nation*[96] and *Shoshone Tribe of Indians v. United States*,[97] the Court repeatedly and consistently held that the outright transfer of tribal lands held under treaty required the government to pay compensation to the affected tribes. These cases did not address the question of whether similar compensation was required when aboriginal title was at stake. Nonetheless, decided as they were against the background of the plenary power analysis of *Lone Wolf*, they could plausibly be viewed as providing at least inferential support for a right to compensation in the absence of treaties.

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93. *Id.* at 566, 568 (quotations and citations omitted).
94. *Id.*
95. *Id.* at 554-56.
96. 295 U.S. 103 (1935).
97. 299 U.S. 476 (1937).

For much of the twentieth century, jurisdictional barriers prevented the assertion of claims for Native American compensation based on claims that were not derived from treaty rights. In general, prior to 1946, the federal courts were granted jurisdiction only to hear Indian land claims based on a statute or treaty. By definition, the narrowness of this jurisdictional grant excluded claims based on aboriginal title. However, the general grant of jurisdictional authority was at times supplemented by statutes that expanded jurisdiction in specific, narrowly defined circumstances. For example, in 1935, Congress adopted a statute granting the Court of Claims authority to hear cases involving "any and all legal and equitable claims arising under or growing out of the original Indian title claim or rights" in lands described in a number of unratified treaties dealing with land originally located in the Oregon Territory.[98] This statute laid the groundwork for *United States v. Alcea Band of Tillamooks*[99] (*Tillamooks I*), which ultimately found its way to the Supreme Court in 1946.

The story of *Tillamooks I* began in 1850, when Congress authorized the negotiation of treaties with Indian tribes in the Oregon Territory.[100] In 1855, acting under the authority provided by this statute, the representatives of the United States and the Alcea Tillamooks concluded an agreement whereby the tribes agreed to cede much of their land in return for a cash payment and the creation of a reservation.[101] The treaty was not self executing.[102] Anticipating ratification, on November 9, 1855, President Franklin Pierce issued an executive order creating a reservation for the Tillamooks whose dimensions were substantially the same as those described in the treaty, and the Tillamooks were almost immediately confined to the reservation.[103] The size of the reservation was reduced by a new executive order in 1865.[104] An 1875 statute further reduced the reservation.[105] Finally, in 1894, Congress passed a statute officially accepting and approving the reservation with the new dimensions.[106] However, the original treaty was never ratified, and the Tillamooks did not receive the cash payment promised in the agreement.[107]

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98. Act of Aug. 25, 1935, ch. 386, 49 Stat. 801.
99. 329 U.S. 40 (1946).
100. *Id.* at 43.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 43.
106. *Id.* at 43-44.
107. *Id.* at 44.

In their suit in the Court of Claims, the Tillamooks sought compensation for being deprived of their land.[108] In addition to arguing that extinguishment of aboriginal title by its terms constituted a cognizable taking under the Fifth Amendment[109], they relied on two statutory arguments. First, they asserted that the 1935 statute creating jurisdiction in the Court of Claims implicitly recognized aboriginal title as a compensable property interest.[110] Second, they noted that the 1848 statute establishing a government for the Oregon Territory provided that "nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in [the Oregon] Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."[111]

After the Court of Claims ruled in favor of the Tillamooks, the government appealed to the Supreme Court. With Justice Robert H. Jackson absent due to his participation in the Nuremberg trials, the case was initially argued in early 1946 before a Court of eight justices. At the initial conference, Chief Justice Harlan Fiske Stone and Justices Stanley F. Reed, Wiley B. Rutledge and Harold H. Burton voted to reverse the Court of Claims and reject the claim for compensation, while Justices Felix Frankfurter, William O. Douglas and Frank Murphy supported the Tillamooks and Justice Hugo Lafayette Black expressed some uncertainty about the proper resolution of the case. However, Stone died suddenly before the case was finally resolved, and the case was put over for re-argument. At the conference after the re-argument, Frederick M. Vinson, Stone's replacement, announced his support for the position of the Tillamooks. Black also took this view, creating a clear majority in favor of compensation.[112]

Vinson's plurality opinion is replete with language that might be seen as supporting the view that the extinguishment of aboriginal title carries with it an automatic right to compensation. He began by asserting that "[a]dmitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid"[113] that "[t]he Indians have more than a mere moral claim for compensation,"[114] and that denying the claim of the Tillamooks would "ignore the plain import of traditional methods

108. *Id.*

109. *Id.* at 60.

110. *Id.* at 57.

111. *Id.* at 42 (citing Act of Aug. 14, 1848, ch. 177, 9 Stat. 323).

112. This account is taken from the conference notes of Justice Wiley B. Rutledge, Box 152, Wiley B. Rutledge Papers, Library of Congress.

113. *Tillamooks I*, 329 U.S. at 47 (opinion of Vincent, C. J.).

114. *Id.*

of extinguishing original Indian title."[115] In addition, he explicitly rejected a rule that would allow recovery only in cases where Congress had formally recognized the validity of the aboriginal title.[116]

However, Chief Justice Vinson stopped short of endorsing the principle that all aboriginal title was protected by the Takings Clause of the Fifth Amendment. While concluding that the jurisdictional statute did not convey any substantive rights, he inferred a right to recovery from the protections that had been provided by the 1848 statute.[117] Concurring, Justice Black — whose vote was critical to the establishment of any binding rule in *Tillamooks I* — was even more explicit. While arguing that right to compensation could be derived from the jurisdictional statute, Black also asserted that:

> "[b]efore Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or ethical obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded."[118]

The Court clarified the import of its decision in *Tillamooks I* when *United States v. Tillamooks*[119] (*Tillamooks II*) returned to the Court five years later. On remand from *Tillamooks I*, the Court of Claims had awarded the tribe $3,000,000 plus interest from the date of the taking. The government appealed from the award of interest, noting that interest was only appropriate if the damage award was founded on the Fifth Amendment and contending that the original decision had been based instead on statutory authority. In a brief, per curiam opinion the Court accepted the government's argument, observing that "[l]ooking to the former opinions in this case, we find that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment."[120] Thus, when *Tee-Hit-Ton*[121] came before the Court in 1955, the constitutional status of aboriginal title remained uncertain.

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115. *Id.*

116. *Id.* at 48-50.

117. *Id.* at 49.

118. *Id.* at 54 (Black, J., concurring) (citation omitted).

119. 341 U.S. 48 (1951) (per curiam).

120. *Id.* at 49. This conclusion had been foreshadowed by *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 106 n.28 (1949).

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

In *Tee-Hit-Ton*, a clan of Tlinglit Indians sought compensation after the Secretary of Agriculture authorized the sale of timber from the Tongass National Forest in Alaska. The Court of Claims found that, at the time that the United States acquired Alaska from Russia in 1867, the Tee-Hit-Tons possessed aboriginal title to the land on which the timber was located. The Tee-Hit-Tons argued that their title had been recognized by an 1884 statute organizing the Alaska Territory,[122] but that even if their title had not been officially recognized, they were entitled to compensation because the sale of the timber effected a partial taking of their preexisting property rights. The procedural barriers to the suit had been removed by the waiver of sovereign immunity in the Indian Claims Commission Act of 1946. Nonetheless, a six-justice majority not only held that the 1884 statute had not recognized any rights in the Tee-Hit-Ton, but also rejected the Tee-Hit-Ton's claim based on aboriginal title.

Justice Stanley Reed, who had dissented in *Tillamooks I*,[123] spoke for the Court in *Tee-Hit-Ton*. Reed asserted that aboriginal title "is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."[124] After reviewing the caselaw, he stated flatly that "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."[125] Reed was apparently deaf to the eerie similarities between this conclusion and Roger Brooke Taney's infamous claim that, at the time the Constitution was drafted, free African-Americans "had no rights that the white man was bound to respect."[126]

Against this background, the contrast between *Brown* and *Tee-Hit-Ton* could not be more stark. In *Brown*, the Court rejected deeply ingrained legal traditions that had contributed to the subjugation of African-Americans; in *Tee-Hit-Ton*, the Court reinforced the elements of the legal regime that contributed to the decimation of Native American culture. *Brown* paved the way for an improvement in the opportunities available to African-Americans; *Tee-Hit-Ton* denied recompense to Native Americans for economic injuries.

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122. Act of May 17, 1884, ch. 53, 23 Stat. 24.
123. *Tillamooks I*, 329 U.S. at 55-64 (Reed, J., dissenting).
124. *Tee-Hit-Ton*, 348 U.S. at 279.
125. *Id.* at 285.
126. Dred Scott v. Sanford, 60 U.S. (1 How.) 393, 407 (1857).

The question thus becomes why the Court vindicated the interests of African-Americans while treating the claims of Native Americans so cavalierly.

III. Understanding the Dynamic of Brown and Tee-Hit-Ton

The respective decisions in *Brown* and *Tee-Hit-Ton* reflect the influence to two different types of forces. The first is that of distinctively legal principles — formal legal analysis. The second is that of the more general political environment. Each of these forces played a significant role in generating the disparate results in *Brown* and *Tee-Hit-Ton.*

Formal differences between the two cases were a necessary but not sufficient condition for the Court's disparate conclusions in *Brown* and *Tee-Hit-Ton.* The two cases involved quite different claims of right, derived from quite different sources. *Brown* was an Fourteenth Amendment equal protection claim that was based solely on the positive authority of the Constitution itself. In *Tee-Hit-Ton*, by contrast, the source of the constitutional claim was the Takings Clause of the Fifth Amendment. Moreover, although all Native Americans had been made citizens of the United States by statute in 1925, the argument of the plaintiffs was ultimately based on a property interest that was not created by the Constitution, but instead allegedly existed even before the first Europeans settled what was to become the United States.

However, only the most naive observer would suggest that the Court was moved entirely or even primarily by formal considerations in *Brown* and *Tee-Hit-Ton.* Indeed, if one were to focus only on formal concerns, he could argue persuasively that the Native Americans in *Tee-Hit-Ton* had a much stronger constitutional claim than the children in *Brown.* Despite their ultimate support for the result, Justices Felix Frankfurter and Robert Jackson apparently believed that *Brown* could not plausibly be viewed as reflecting any "neutral" principle of constitutional law.[127] Obviously, the decision was inconsistent with existing precedent. In addition, it was based on a view of the original understanding of the Fourteenth Amendment that was questionable at best. By contrast, the commentators who have addressed the issue have often concluded that *Johnson*, *Worcester* and *Michel* strongly suggested that the Native Americans claimants were entitled to compensation in *Tee-Hit-Ton.*[128]

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127. KLARMAN, *supra* note 27, at 295-96.

128. *E.g.*, Newton, *supra* note 5, at 1217; Singer, *supra* note 4, at 519-27.

The difference between the treatment of *Brown* and *Tee-Hit-Ton* is more plausibly explained by reference to the political dynamic of the mid-1950s. Beginning with the presidential election of 1936, the African-American vote had been an important element of the coalition that brought victories to Democrats Franklin Delano Roosevelt and Harry S. Truman, who in turn appointed almost all of the justices who decided both cases. Moreover, by 1954, the issue of racial segregation had become an important issue in national politics. Indeed, Truman's decision to desegregate the military in 1946 had split the Democratic party along regional lines, leading to the formation of a short-lived "Dixiecrat" party that nominated Strom Thurmond for president in 1948 on an avowedly segregationist platform. With Thurmond depriving him of the electoral votes of five normally Democratic Southern states, Truman only defeated Thomas Dewey because of overwhelming support from African-Americans in the North. Although the Democratic party reunited in 1952, the issue of segregation and civil rights generally remained a high-profile issue, with African-Americans having the support of a number of important political constituencies in the North.[129]

The situation of Native Americans was quite different. With a population of only 357,000 in 1950, Native Americans had no substantial impact on the political process, and few influential allies in the white community. The disparity in political influence is illustrated dramatically by the briefs filed in *Brown* and *Tee-Hit-Ton*. The position of the African-American plaintiffs was supported not only by the United States government, but also by *amicus* briefs filed by groups as disparate as the American Jewish Congress, the American Civil Liberties Union, the American Federation of Teachers, the Congress of Industrial Organizations, and the American Veterans Committee.[130] By contrast, the only *amicus* briefs filed in *Tee-Hit-Ton* came from state attorneys-general who were opposed the Native American claimants.[131]

The widespread support enjoyed by the plaintiffs in *Brown* and its progeny also reflected a more basic aspect of the American political self-image. From much of the nation's history, the treatment of African-Americans in the South had been condemned by important figures in the North as a regional aberration that was inconsistent with the basic values embodied in the Declaration of Independence and the Constitution.[132] Segregation in

129. KLARMAN, *supra* note 27, at 180-81.

130. *Brown*, 347 U.S. at 496.

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

132. *See, e.g.*, CONG. GLOBE, 42d Cong., 2d Sess. 579-80 (1872) (remarks of Sen. Sumner); 15 ANNALS OF CONG. 1179-84 (1819) (remarks of Rep. Fuller).

particular was seen as an affront to the basic principles of equality embodied in the Reconstruction amendments (whatever the original understanding of those amendments might have been), as well as an embarrassment to a nation that was attempting to present itself to the Cold War world as the paragon of freedom, justice, opportunity and equality.[133] From this perspective, the decision in *Brown* did nothing more than remove an anomaly that was a stain on the national character.

Conversely, a victory for the plaintiffs in *Tee-Hit-Ton* would have been inconsistent with the image of America as a nation with a deep historical commitment to justice. The treatment of the Tee-Hit-Tons by the federal government could not be dismissed as a isolated phenomenon. Instead, in substantial measure, the nation owed its very existence to analogous actions. Thus, in *Tee-Hit-Ton*, in his majority opinion, Justice Reed observed that

> [e]very 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 conqueror's will that deprived them of their land.[134]

While some scholars have disputed this characterization of the process by which the United States acquired tribal lands,[135] the *belief* that the government had acquired vast amounts of Indian territory by force or fraud provides the backdrop for the Court's decision in *Tee-Hit-Ton*.

Given these assumptions, the actions of the United States government and its citizenry were justified by the widespread view that they were bringing civilization to a land that, despite the presence of Native Americans, was in a very real sense unclaimed. In 1945, Justice Jackson captured the essence of this view in his concurring opinion in *Northwestern Band of Shoshone Indians v. United States*:[136]

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133. For a detailed analysis of the interaction between the Cold War struggle and the issue of segregation, see MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

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

135. David E. Wilkins argues that the uncompensated seizure of Indian lands had generally rested at least formally on a process of negotiation and voluntary exchange, and that the Court should have honored this tradition by requiring the payment of compensation in *Tee-Hit-Ton*. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE SUPREME COURT: THE MASKING OF JUSTICE 179 (1997). Joseph W. Singer takes a similar view. Singer, *supra* note 4, at 525-27.

136. 324 U.S. 335 (1945).

> The Indian parties to this treaty were a band of simple, relatively peaceful, and extremely primitive men. . . . The Indian parties did not know what titles were, had no such concept as that of individual title, and had no sense of property in land. . . . Ownership meant no more to them than to roam the land as a great common, and to possess and enjoy it in the same way that they possessed and enjoyed sunlight and the west wind and the feel of spring in the air.[137]

Under this view, the white settlers and their government could plausibly claim that they had not done anything fundamentally wrong in asserting ownership over territory that Native Americans had previously seen as their homeland. Of course, the government was still bound to honor its agreements, and might also be viewed as having some moral obligation toward Native Americans. However, the government could still argue that it had not deprived Native Americans of any right that was seen as truly fundamental in the Anglo-American tradition.

This position, however, could not survive a holding that the abrogation of aboriginal title *per se* gave rise to a claim of constitutional magnitude. Such a holding would have decisively labeled the displacement of Native American claims as a massive, unjust expropriation of property — a particularly striking example of what today we would describe as ethnic cleansing. This conclusion fits at best uneasily with the concept of a nation that purports to be founded upon principles of law and justice.

Viewed against this background, *Brown* and *Tee-Hit-Ton* can be seen as complimentary rather than conflicting. On one hand, the *Brown* Court sought to eliminate practices that the dominant political faction viewed as aberrational and inconsistent with basic American principles of equality and justice. On the other, *Tee-Hit-Ton* minimized the import of the injustices inherent in the process by which the nation was established. Thus, in both cases, the decisions of the Court worked to bolster and reinforce the image that Americans had of themselves and sought to project to the world at large in the mid-1950s.

Conclusion

Any number of important lessons can be drawn from *Brown* and *Tee-Hit-Ton*. First, taken together, the cases illustrate the complexity of racial issues

137. *Id.* at 356-57 (Jackson, J., concurring).

in America. Both cases involved the claims of racial minority groups. Both groups had suffered grievously at the hands of the dominant whites. However, the two groups had quite different relationships with the white power structure, and the ultimate decisions in the two cases reflected the influence of these differences.

More generally, taken together, the two decisions reveal the flaws in the most common justification for judicial activism that does not reflect the original understanding of the Constitution. Many commentators have justified such activism on the ground that judges are institutionally well positioned to make dispassionate assessments of the merits of fundamental moral arguments. Thus, for example, Owen Fiss argues that judges search for what is "true, right and just,"[138] and Ronald Dworkin contends that nonoriginalist judicial review "insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply as issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself."[139] The decision in *Brown* is often seen as one of the quintessential example of the operation of this process.

When juxtaposed with *Tee-Hit-Ton*, however, *Brown* emerges in a quite different light. Without question, racial segregation was and is fundamentally wrong, and the elimination of segregated schools was a vindication of an important moral principle. However, the moral claim of the *Brown* plaintiffs was certainly no stronger than that of the Native Americans whose land was expropriated without even the shadow of consent. Against this background, the result in *Brown* cannot be seen as reflecting special judicial competence in dealing with basic moral questions. Rather, it must be seen as the result of a historical fortuity that created a Court that was dominated by adherents to Northern, liberal ideology on racial issues. We can and should celebrate the result of this fortuity; however, we should not overstate its significance for the justification of judicial review more generally.

138. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

139. Ronald M. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517-18 (1981).