

American Indian Law Review

Volume 18 | Number 2

1-1-1993

Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"?

Gene Bergman

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#), [Legal History Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Gene Bergman, *Defying Precedent: Can Abenaki Aboriginal Title Be Extinguished by the "Weight of History"?*, 18 AM. INDIAN L. REV. 447 (1993), <https://digitalcommons.law.ou.edu/air/vol18/iss2/4>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

DEFYING PRECEDENT: CAN ABENAKI ABORIGINAL TITLE BE EXTINGUISHED BY THE "WEIGHT OF HISTORY"?

Gene Bergman*

Thus ends the account of the St. Francis Indians, the remnant of a great tribe . . . whose story is closely connected with the hills and valleys, with the rivers and streams of our own town, and especially with the village known long ago as Missisquoi. Of those who gave name to our beautiful river, we are now almost, within a few years we may, alas! be wholly able to say, with literal exactness:

*"They have all passed away,
The noble and the brave;
Their light canoes have vanished
From off the crested wave.*

. . . .

*But, their name is on our waters,
We may not wash it out." ¹*

Introduction

The Abenaki supposedly disappeared from Vermont a long time ago.² Yet reports of their departure were greatly exaggerated. Historical and anthropological studies have shown that the Abenaki never left Vermont; instead, they

* Third-year student, Vermont Law School. B.A., 1987, University of Vermont. Member, *Vermont Law School Law Review*. The author wishes to thank Professor Bruce Duthu, Greg Eaton, Eric D. Jones, John Moody, and the author's patient family.

Third place winner, 1992-93 *American Indian Law Review* Writing Competition.

1. George Barney & John B. Perry, *History of Swanton*, in 4 THE VERMONT HISTORICAL GAZETTEER 933, 1001 (Montpelier, Vt., Abby M. Hemenway 1882). The Missisquoi River flows into Lake Champlain near the Canadian border in northwestern Vermont, emptying into the large Missisquoi Bay which spans the Canadian-United States border at the forty-fifth degree north latitude.

2. See Dorothy C. Fisher, *The Settlers*, in REPRINTS FROM VERMONT HISTORY 14, 17 (Vt. Historical Society ed., 1975) Fisher tells the story of Vermont through epic-like stories. Here, a mythical Vermonter is asked by mythical settlers about the danger posed by "Injuns." The Vermonter encourages the settlers to stay in Vermont by responding: "No Indians in the Grants at all. Only just a few that come and go with their families to hunt and fish. They're Abnakis [sic], anyhow, not Iroquois. They're decent folks." *Id.* at 17; see also WALTER H. CROCKETT, VERMONT: THE GREEN MOUNTAIN STATE (Fireside Forum ed., 1938). Crockett described the Abenaki presence in Vermont in terms of Indian war raids. He believed that Indians resided in the Missisquoi region "until the white men settled here." *Id.* at 51. He mentions no date but implies that the 1759 raid by Rogers Rangers on the Abenaki reservation at St. Francis, Quebec, marked the effective end of Abenaki presence in Vermont. *Id.* at 31-116.

have been present in their historic Vermont Missisquoi-Swanton-Highgate homelands continuously from 9300 B.C. until today.³ For the past twenty years, a resurgent Abenaki Tribal Council has asserted Abenaki pride and rights, often engaging in acts of civil disobedience.⁴ Abenaki-Vermont relations took a dramatic turn on August 11, 1989, when Vermont District Court Judge Joseph J. Wolchik dismissed charges of fishing without a state license against Chief Homer St. Francis and other Abenaki "because [the court] recognizes their claim to unextinguished aboriginal fishing rights."⁵

The State of Vermont appealed Judge Wolchik's decision to the Vermont Supreme Court, and on June 12, 1992, the court reversed and remanded the district court's decision.⁶ In a unanimous decision, the court concluded that a series of historical events had extinguished Abenaki aboriginal rights: "Extinguishment," the court held, "may be established by the increasing weight of history."⁷

Political reaction to the decision was swift. Governor Howard Dean praised the court for clearing up title insurance problems caused by insurance companies that declined to provide title insurance for properties in northwestern Vermont due to potential Abenaki land claims.⁸ The *Burlington Free*

3. WILLIAM A. HAVILAND & MARJORY W. POWER, *THE ORIGINAL VERMONTERS: NATIVE INHABITANTS, PAST & PRESENT* 38 (1981); see also COLIN G. CALLOWAY, *THE WESTERN ABENAKIS OF VERMONT, 1600-1800* (1990); Christine A. Doremus, Note, *Abenaki Indians of Vermont*, 10 VT. L. REV. 417, 420 (1985); Robert O. Lucido II, Note, *Aboriginal Title: Abenaki Indian Land Claim in Vermont*, 16 VT. L. REV. 611, 623-32 (1992).

4. Under the leadership of Chief Homer St. Francis, Vermont's native people began confronting state authority. One tactic has been civil disobedience in the form of "fish-ins," fishing without state licenses; this has been used to assert hunting and fishing rights based on the doctrine of aboriginal title. See CALLOWAY, *supra* note 3, 248-50; see also Richard Cowperthwait, *Abenakis Plead Innocent to Fishing Charges*, BURLINGTON FREE PRESS (Burlington, Vt.), April 23, 1979, at 7A, col. 4.

5. *State v. St. Francis*, No. 1171-10-86Fcr, slip op. at 1 (Vt., Franklin Dist. Ct. Aug. 11, 1989).

6. *State v. Elliot*, 616 A.2d 210 (Vt. 1992), cert. denied, 113 S. Ct. 1258 (1993). Lawyers for the Abenaki filed a petition for a writ of certiorari on November 18, 1992, presenting two issues for the Court:

(1) Were the aboriginal fishing rights of the Missisquoi Abenaki Tribe extinguished merely by the 'increasing weight of history' in the absence of any lawful means of extinguishment recognized by this Court?; [and] (2) Were Petitioners' due process rights violated by the Vermont Supreme Court's reliance upon secondary sources of information, not introduced at trial, to supply adjudicative facts?

Petition for Writ of Certiorari at i, *Elliot v. Vermont*, 113 S. Ct. 1258 (1993) (No. 92-877).

7. *Id.* at 218. These events began in 1763 when New Hampshire Governor Benning Wentworth made a series of land grants that formed the basis of Vermont and ended with Vermont's admission to the Union in 1791.

8. Yvonne Daley, *Court Ruling Against Abenakis Debated*, SUNDAY RUTLAND HERALD & SUNDAY TIMES ARGUS (Rutland, Vt.), June 21, 1992 at 1D, 2D. For a practitioner's guide to Indian land claims litigation, see Sharon J. Bell, *Indian Title Problems: A Survival Primer*, PROB.

Press editorialized that the "Vermont Supreme Court's job was to determine whether the Abenaki were robbed 200 years ago — and if so, to make sure they stay[ed] robbed. They were, and the court did."⁹ Legal reactions were likewise divided.¹⁰

This note focuses on questions of extinguishment of Abenaki aboriginal title, using historical and legal analysis. After reviewing the aboriginal claims of the Abenaki and the basic rules for extinguishment, it asks whether the Vermont Supreme Court misanalyzed the historical record. The note then asks whether the court used this historical record to pay homage to clearly established rules for extinguishing aboriginal title while establishing a new and weaker extinguishment test that radically undermines the animating purpose of the United States Supreme Court's test.

I. Background: Aboriginal Claims of the Abenaki

A. Aboriginal Title Generally

In the 1823 case *Johnson v. M'Intosh*,¹¹ Chief Justice John Marshall set forth the theory of aboriginal title:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war and whose subsistence was drawn

& PROP., Sept.-Oct. 1987, at 30.

9. Editorial, *Wrongs a Right*, BURLINGTON FREE PRESS (Burlington, Vt.), June 18, 1992, at 10A; see also William Haviland, *Vermont Must Address Grievances*, BURLINGTON FREE PRESS (Burlington, Vt.), July 6, 1992, at 6A (Vermont Perspective guest editorial). An anthropologist, University of Vermont professor, Abenaki expert, and author of *The Original Vermonters*, Haviland criticized the decision for perpetuating a "continuing injustice" against Vermont's native people. *Id.*; see also Letter from Board of Directors, Peace & Justice Coalition, Burlington, Vt., to Governor Howard Dean (July 22, 1992) (on file with the Peace & Justice Coalition, Burlington, Vt.) (attacking the decision as being "not compelled by law but only by the hubris of a government bent on breaking the will of the Abenaki people."). But see David Barra, *Abenaki "Tribe" and Claims Fail Legal Tests*, Vermont Perspective, BURLINGTON FREE PRESS (Burlington, Vt.), July 6, 1992, at 7A. A Burlington lawyer who has represented various Franklin County, Vermont municipalities in cases involving Abenakis, Barra called the decision a "fair reading of the documents and the history of this area." *Id.*

10. Daley, *supra* note 8, at 1D, 2D. Franklin County State's Attorney Howard VanBenthuyzen viewed the decision as one based on history and law rather than a political maneuver. He applauded the decision especially in light of the roughly 160 cases that had been pending in his office since 1987. *Id.* at 2D. However, Indian law experts were quick to criticize the decision as clearly political. "The thing that is most disturbing is that the court does not talk about aboriginal fishing rights in its ruling, but turned this into an aboriginal land claim case. . . . It's a clear indication that this was a political decision." *Id.* at 1D (quoting Ben Bridges, a North Carolina attorney who represents the eastern band of Cherokee).

Bob Anderson, staff attorney with the Native American Rights Fund, characterized the decision as a "typical state law massacre of Indian interests." Telephone Interview with Bob Anderson, Staff Attorney, Native American Rights Fund (Jan. 19, 1993).

11. 21 U.S. (8 Wheat.) 543 (1823).

chiefly from the forest. . . . 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 afterward sustained; if a country has been acquired and held under it; if 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 principle that the Indian inhabitants are to be considered merely as occupants to be protected while in peace in the possession of their lands but to be deemed incapable of transferring the absolute title to others.¹²

This theory did not spring full-blown from the mind of Chief Justice Marshall.¹³ Instead of being unique to the United States, the theory has deep roots in colonial outlooks of each European power that set foot in the New World.¹⁴ Aboriginal title is the Indians' nontreaty right to possess, use, and occupy lands they have continuously occupied since time immemorial.¹⁵ In order to successfully invoke the protection of aboriginal title, Indians must prove actual, exclusive, and continuous use over an extended period of time.¹⁶ When land is held under aboriginal title "no one [can] purchase it or

12. *Id.* at 590-91 (Marshall, C.J.).

13. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 43-47 (1947) [hereinafter Cohen, *Original Indian Title*] ("In the main, [our concepts of Indian title] are to be traced to Spanish origins, and particularly to doctrines developed by Francisco de Vitoria, the real founder of modern international law."); see also FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 58-60 (1984) (explaining views of Thomas Jefferson and Henry Knox, the nation's first Secretary of War); Richard A. Brisbin, Jr., *John Marshall on History, Virtue, and Legality*, in JOHN MARSHALL'S ACHIEVEMENT: LAW, POLITICS, AND CONSTITUTIONAL INTERPRETATIONS 95, 99-100 (Thomas C. Shevory ed., 1989); ROBERT K. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 52 (1968) (stating that Marshall's principles "accorded perfectly with the peculiar blend of subdued 'realism' and conspicuous humanity guiding Locke's discussion of conquest in Chapter XVI of the SECOND TREATISE").

Marshall noted that his theory was not novel when he wrote, "This opinion conforms precisely to the principle which has been supposed to be recognised by all European governments, from the first settlement of America." *M'Intosh*, 21 U.S. (8 Wheat.) at 592.

14. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 50-58, 486-87 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S HANDBOOK].

15. *M'Intosh*, 21 U.S. (8 Wheat.) at 574; see COHEN'S HANDBOOK, *supra* note 14, at 487.

16. See, e.g., *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 345 (1941); COHEN'S HANDBOOK, *supra* note 14, at 442, 492; see also Lucido, *supra* note 3, at 615-19; David G. Kelly, Jr., Note, *Indian Title: The Right of American Natives to Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975); Ralph Erikson, Note, *Aboriginal Land Rights in the United States and Canada*, 60 N.D. L. REV. 107 (1984); Kimberly Ordon, Note, *Aboriginal Title: The Trials of Aboriginal Indian Title and Rights — An Overview of Recent Case Law*, 13 AM. INDIAN L. REV. 59 (1988).

An interesting collateral issue is whether the existence of aboriginal hunting and fishing rights depends upon aboriginal title to land. See COHEN'S HANDBOOK, *supra* note 14, at 442; Ordon, *supra*, at 70-71, 76-77. Ordon has found that the existence of aboriginal rights separate from

otherwise terminate aboriginal title without the consent of the sovereign" or until the sovereign has "extinguished" the aboriginal title.¹⁷ Extinguishment is the "exclusive right of the United States' . . . whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise"¹⁸

B. Abenaki Claim of Aboriginal Title

Abenaki aboriginal claims are based upon archeological and historical findings, as well as oral tradition, that show their continuous presence in the Missisquoi River region of northwestern Vermont, the Swanton-Highgate area, since 9300 B.C.¹⁹ The Franklin District Court found that the Abenaki, "as a result of their long use and occupancy of the Missi[s]quoi territory to the exclusion of other tribes, held aboriginal title and aboriginal fishing rights in the Missisquoi territory."²⁰ Judge Wolchik found this title to be unextinguished.²¹ However, in *State v. Elliot*,²² the Vermont Supreme Court held otherwise, finding Abenaki aboriginal title extinguished by the "increasing weight of history."²³

II. Extinguishment

A. United States Supreme Court Test

Although extinguishment cannot exist in isolation from other questions of aboriginal title, it is a crucial issue because once extinguished, aboriginal title

aboriginal title to land is a "question that awaits judicial resolution." *Id.* at 59; *see also* *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *rev'd on other grounds and remanded*, 470 U.S. 39, 44-45 (1984); *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176, 180 n.12 (9th Cir. 1981) (implying that while the court did not "necessarily" look favorably on the proposition, the question was still open).

17. *Oneida County v. Oneida Indian Nation* 470 U.S. 226, 234, 248 (1985) (*Oneida II*) (holding that the sovereign is the United States government and the power to extinguish lies with Congress).

18. *Santa Fe*, 314 U.S. at 347 (citing *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)).

19. *Doremus*, *supra* note 3, at 420-21; *Lucido*, *supra* note 3, at 629-32; *see* HAVILAND & POWER, *supra* note 3; CALLOWAY, *supra* note 3; *see also* *State v. St. Francis*, No. 1171-10-86Fcr, slip op. at 5 (Vt., Franklin Dist. Ct. Aug 11, 1989) ("[The Abenaki] have a very definite, carefully maintained, carefully transmitted oral tradition, which is a useful source of information concerning the location of their ancestral homelands.").

20. *St. Francis*, No. 1171-10-86Fcr, slip op. at 53-54.

21. *Id.*, slip op. at 1, 92. "[T]he State has failed to prove by the preponderance of the evidence that the Missisquoi [Abenaki] abandoned or ceded their Missisquoi homeland or that their aboriginal rights were extinguished by either an express act or an act clearly and unambiguously implying any sovereign's intent to extinguish those rights." *Id.*, slip op. at 92.

22. 616 A.2d 210 (Vt. 1992), *cert. denied*, 113 S. Ct. 1258 (1993).

23. *Id.* at 218. The court did not rule on whether the Abenaki had satisfied the requirements of tribal status, and actual, exclusive and continuous use over an extended period of time because of their holding that any such claims were extinguished by 1791.

is gone forever.²⁴ The framework for extinguishment was established by Chief Justice Marshall, first in the 1823 case *Johnson v. M'Intosh*,²⁵ and then in 1831 and 1832 with two other seminal Indian title and rights decisions.²⁶ This "Marshall Trilogy" established a basic rule that Indians "have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished" by the sovereign.²⁷ Under this framework, the sovereign holds a fee simple title created by the right of "discovery."²⁸ However, the title is merely a "naked fee title"²⁹ which gives the holder "no present possessory interest in the land."³⁰ This interest only allows for an "ultimate reversion in fee,"³¹ because it is subject to an Indian "perpetual right of occupancy."³² Because "naked fee title merely constitutes a reversionary interest, [it] becomes possessory only if Congress clearly and plainly extinguishes the Indian title."³³

This bedrock of Indian law was reaffirmed in this century in *United States v. Santa Fe Pacific Railroad*.³⁴ *Santa Fe* stands for several basic proposi-

24. See, e.g., *United States v. Alcea Bands of Tillamooks*, 329 U.S. 40, 46 (1946) ("Termination of the right by the sovereign action was complete and left the land free and clear of Indian claims.").

25. 21 U.S. (8 Wheat.) 543 (1823).

26. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

27. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; see also *M'Intosh*, 21 U.S. (8 Wheat.) at 585; *Worcester*, 31 U.S. (6 Pet.) at 544.

28. COHEN'S HANDBOOK, *supra* note 14, at 489-90.

29. *Id.* at 489.

30. *Id.*

31. *Mitchell v. United States*, 34 U.S. (9 Pet.) 711, 756 (1835).

32. *Id.* at 746.

33. The plenary power of Congress is derived from the Indian Commerce Clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); COHEN'S HANDBOOK, *supra* note 14, at 489; see also Cohen, *Original Indian Title*, *supra* note 13, at 52-54 (stating that although Congress granted railroads millions of acres of public lands, grantees took lands encumbered with Indian title); Nell J. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215, 1225-26 (1980).

34. 314 U.S. 339 (1941). At issue was a claim by the Walapai (Hualpai) Indians, brought by the federal government on their behalf, that the Santa Fe Pacific Railroad was interfering with their right to possess and occupy certain lands in northwestern Arizona. *Id.* at 343-44. The railroad claimed full title to these lands based on a grant to its predecessor, the Atlantic and Pacific Railroad made by act of Congress: *Id.* (citing Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292, 294). The Act, however, required a voluntary cession to "all lands falling under the operation of this act." *Id.* (quoting Act of July 27, 1866, 14 Stat. at 294).

The Supreme Court, in a decision by Justice Douglas, found that an executive order in 1883 establishing a reservation had extinguished aboriginal title to lands off the reservation. *Id.* at 358. The tribe had requested a reservation to protect lands that were "fast being populated" by whites. *Id.* The Court also stated:

The reservation solution had long seemed desirable in view of recurring tension between the settlers and the Walapais. In view of the long standing attempt to

tions: (1) the supreme power of Congress, as sovereign, to extinguish aboriginal title; (2) the validity of various means to extinguish Indian title: treaties, force, purchase, the "exercise of complete dominion adverse to the right of occupancy, or otherwise"; (3) the necessity for "plain and unambiguous action to deprive the [Indians]" of aboriginal title; and (4) the judicial construction that "extinguishment cannot be lightly implied."³⁵

The continued validity of the Marshall Trilogy and the *Santa Fe* elaboration is evidenced by a trilogy of cases regarding the claims of the Oneida Indian Nation against the State of New York.³⁶ In *Oneida County v. Oneida Indian Nation (Oneida II)*,³⁷ the Court reaffirmed the doctrine of discovery, holding that discovering nations held "fee title to these lands, subject to the Indians' right of occupancy and use."³⁸ It noted that "with the adoption of the Constitution, Indian relations became the exclusive province of federal law."³⁹ The Court further noted that the right of use and occupancy "need not be based on treaty, statute, or other formal Government action."⁴⁰ Finally, the Court endorsed the key holding on extinguishment from *Santa Fe*: extinguishment must be "plain and unambiguous and will not be lightly implied."⁴¹

B. Animating Policies

The role that this special canon of construction plays — extinguishment must be "plain and unambiguous" and will not be "lightly implied" — was acknowledged by the Vermont court in *Elliot*.⁴² This canon stems from

settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation.

Id.

35. *Id.* at 344-55.

36. The *Oneida* trilogy concerned the legitimacy of various treaties between the Oneida Nation and the State of New York which conveyed title to millions of acres of land between the 1780s and 1790s. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*), the United States Supreme Court held that once the Constitution was adopted only Congress could extinguish title to Indian lands. *Id.* at 667. In *County of Oneida v. Oneida Indian Nation* 470 U.S. 226 (1985) (*Oneida II*), the Court found that the conveyances violated the Constitution and the Nonintercourse Act. *Id.* at 233. In *Oneida Indian Nation v. New York*, 860 F.2d 1145 (2d Cir. 1988) (*Oneida III*), the court held that during the Confederation period, states had the right to extinguish Indian title within their borders. *Id.* at 1154.

37. 470 U.S. 226 (1985).

38. *Id.* at 234.

39. *Id.* The Constitution was ratified by the requisite number of states in 1788, one year after being adopted by the Constitutional Convention in Philadelphia. See also CHARLES A. BEARD & MARY R. BEARD, A BASIC HISTORY OF THE UNITED STATES 120-37 (1944).

40. *Oneida II*, 470 U.S. at 236.

41. *Id.* at 247-48. Implicit in *Santa Fe* and *Oneida II* is an understanding that while courts review particular actions of Congress or the applicable sovereign, they will also look at "a series of [sovereign] actions . . . [that] clearly demonstrate that the . . . Indian title has been extinguished." *United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976).

42. *State v. Elliot*, 616 A.2d 210, 213 (Vt. 1992), cert. denied, 113 S. Ct. 1258 (1993)

official United States Indian policy, including that of aboriginal title, which has been motivated by a highly paternalistic attitude toward Indian nations.⁴³ The Marshall Trilogy reflected this attitude.⁴⁴ Marshall based his characterization of the "peculiar" status of Indians as both "a dependent" and "a distinct people" on his understanding of British colonial policy before the Revolution.⁴⁵ The Indian Commerce Clause of the Constitution and the Trade and

(quoting *Oneida II*, 470 U.S. at 248; *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346 (1941)). However, this acknowledgement seems perfunctory. The Vermont court found extinguishment despite the lack of any express statement of intent to extinguish Abenaki title. It also conceded that the "period preceding Vermont's statehood was a confusing era, and that valid questions remain as to the legitimacy of the opposing governing entities." *Elliot*, 616 A.2d at 221.

43. In upholding employment preferences for Indians in the Bureau of Indian Affairs against an equal protection challenge, the Supreme Court noted a "special relationship" between the federal government and Indian tribes. *Morton v. Mancari*, 417 U.S. 535, 552 (1974). The Court described the relationship: "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence." *Id.*

44. In *Cherokee Nation*, Marshall termed Indian nations "domestic dependent nations" and asserted that they "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

In *Worcester*, Marshall was protective of Indian rights although less paternalistic:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government, by associating with a stronger, and taking its protection. 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.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832).

Worcester recognized the sovereign powers that Indian nations still possessed in holding that the laws of Georgia violated treaties with the Cherokee Nation. The treaties "mark out the boundary that separates the Cherokee country from Georgia; guaranty to [the Cherokee] all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the [Cherokee] nation to govern itself." *Id.* at 561-62. Interestingly, the law that Marshall nullified was used to indict a Vermonter, Samuel A. Worcester. Worcester was a missionary who was translating the Bible into the Cherokee language and was residing within the limits of the Cherokee Nation, "with the permission and approval" of the Cherokee but without a state license. *Id.* at 529.

45. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 596 (1823). In *Worcester*, Marshall cited a 1763 speech by the superintendent of Indian affairs, Mr. Stuart for the "general views of Great Britain" that the Crown's policy was "to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them . . ." *Worcester*, 31 U.S. (6 Pet.) at 547.

Marshall also cited the Royal Proclamation of 1763 in *Worcester*. *Id.* at 548; see Royal Proclamation of 1763 (Gr. Brit. Oct. 7, 1763), in 3 *THE AMERICAN INDIAN AND THE UNITED STATES* 2:135-39 (Wilcomb E. Washburn comp., 1973); see also Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, 69 B.U. L. REV. 329 (1989). For more on the Indian policies and practices of the Crown during the pre-Revolution period, see *infra* notes 109-39 and accompanying text. Clinton notes that Marshall has offered "the most extended judicial discussion of the historical importance of the Proclamation in American Indian law" in *Worcester*, a point Clinton

Intercourse Acts also reflected the underlying premise that the federal government was a guardian for its Indian "wards."⁴⁶ Treaties with Indian tribes and Nations in the formative days of our republic also shed light on a policy to protect Indian land rights, although the purpose was to maintain peace.⁴⁷ For example, the 1795 Treaty of Greenville with twelve Indian nations for lands west of the Pennsylvania frontier stated:

feels does not speak well of the Nation's jurisprudence in this area. *Id.* at 367. The thrust of Clinton's argument is that the Proclamation "embodied an enlightened colonial policy that sought to facilitate both Native American trade and colonial expansion while recognizing Indian rights in the land." *Id.* at 329. The failure of United States policy towards its native peoples, Clinton asserts, is due in part to "the failure of federal and state governments to learn from the teachings of this past." *Id.* at 330. In essence, therefore, the United States has followed formalistic protection over Native American affairs while ignoring the central tenet that supposedly underlies it, justice.

46. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138. Section 4 of the Act provided that
no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id.

The Constitution and the Nonintercourse Act were a return to the British colonial policy of centralized control over Indian affairs and a departure from the Articles of Confederation period. See ARTICLES OF CONFEDERATION art. IX, cl. 4 (U.S. 1781) (reserving the original 13 states power to deal with Indians living within their borders).

Clinton notes that the Framers of the Constitution realized that the Confederation's reservation of power to the states was not working. The states would not and could not stop the "avaricious disposition in some of our people to acquire large tracts of land and often by unfair means, [which] appears to be the principal source of difficulties with the Indians . . ." See Clinton, *supra* note 45, at 371. See generally FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, at 26-46 (1962) [hereinafter PRUCHA, FORMATIVE YEARS].

The continual reassertion by Congress of its ideas of justice toward the Indians began to have a hollow sound. Part of the problem undoubtedly came from the haziness . . . about the exact authority of Congress, and the intermeddling of the states in Indian affairs aggravated the difficulties of the general government.

Id. at 38. Prucha quotes Secretary of War Henry Knox as telling Governor William Blount in 1792:

[I]t is the most ardent desire of the President of the United States, and the general government, that a firm peace should be established with all the neighbouring tribes of Indians on such pure principles of justice and moderation. . . . We may therefore now [that the Constitution is in force] speak to them with the confidence of men conscious of the fairest motives towards their happiness and interest in all respects. . . . The reproach which our country has sustained will be obliterated and the protection of the helpless, ignorant Indians, while they demean themselves peaceably, will adorn the character of the United States.

Id. at 41; see also COHEN'S HANDBOOK, *supra* note 14, at 510-15.

47. See COHEN'S HANDBOOK, *supra* note 14, at 62-74. "[T]hrough the application of special canons of construction, Indian treaties are construed in favor of the Indians . . . the rules are based upon the trust relationship with Indian tribes." *Id.* at 63.

The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same.⁴⁸

Thus, the requirement for plain and unambiguous acts of extinguishment stems from this underlying assumption of guardianship.⁴⁹ The deconstruction of a sovereign's actions towards Indians is essential because implicit extinguishment must be judged in light of an "avowed solicitude of the Federal government for the welfare of its Indian wards."⁵⁰ Furthermore, "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people [Indians], who are wards of the nation and dependent wholly upon its protection and good faith."⁵¹ It is upon this standard that *Elliot* must stand or fall.

C. Application of Rules of Extinguishment

Aboriginal title does not need to be codified in order to be valid.⁵² However, federal courts have used a distinction drawn between aboriginal title and "treaty-reserved title"⁵³ to conclude that aboriginal title enjoys a "different legal status than a treaty-recognized use. . . . [T]he difference is significant in determining how explicit a subsequent Congressional enactment must be in order to abrogate the Indians usufructuary rights."⁵⁴ For aboriginal

48. Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee'a's, Kickapoos, Piankashaws, and Kaskaskias, Aug. 3, 1795, art. V, 7 Stat. 49, 52.

49. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 346, 354; *Oneida Indian Nation v. County of Oneida* 414 U.S. 661, 677 (1974) (*Oneida I*) (stating that Indian land claim "rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands").

50. *Santa Fe*, 314 U.S. at 354.

51. *Id.*

52. *County of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 236 (1985).

53. *Tea-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 (1955); *accord United States v. Sioux Nation*, 448 U.S. 371, 415 n.29 (1980).

54. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983). The Supreme Court has made clear that treaty-recognized rights require, if not explicit unilateral abrogation by Congress, then "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *United States v. Dion*, 476 U.S. 734, 739-40 (1986); see also Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859 (1991). But see Charles F. Wilkinson & John M. Volkman, *Judicial*

title, the Supreme Court and lower federal courts have held that implicit sovereign abrogation or extinguishment is sufficient.⁵⁵ It is in the struggle over what acts or combination of acts constitute implicit extinguishment in which the policies underlying the *Santa Fe* test are themselves tested.⁵⁶

When treaties have been voluntarily entered into between the federal government and Indian nations courts have been willing to extinguish rights not reserved by these treaties.⁵⁷ However, the creation of a reservation and the consensual settlement of Indians on it has only served to extinguish aboriginal title in light of other supporting circumstances.⁵⁸ Likewise, preparation for or anticipation of white settlement on Indian lands do not alone serve to extinguish aboriginal rights.⁵⁹ Preparation can be contrasted with the actual settlement or entry by non-Indians accomplished through lawful conveyances by the Congress or other congressional acts which have been held to extinguish aboriginal title.⁶⁰ Acquisition of a huge expanse of

Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth" — How Long a Time Is That?, 63 CAL. L. REV. 601 (1975) (urging an express statement requirement for abrogation, a rule rejected by *Dion*).

55. *Lac Courte Oreilles* pointed to *Santa Fe* as "[r]eflecting the ease with which Congress may extinguish aboriginal title" *Lac Courte Oreilles*, 700 F.2d at 352. However, *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977), relied on *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976), for the proposition that "when the United States acts in a manner which manifests an intention to extinguish, regardless of the means or propriety of the action," extinguishment occurs. *Atlantic Richfield*, 435 F. Supp. at 1020 n.45 (citing *Gemmill*, 535 F.2d at 1148).

56. There is an inherent tension involved in remaining true to the policies inspiring the "solicitude" towards Indian nations while responding to the "normal" everyday legal concerns of the United States and its political subdivisions. Divining congressional motives based on ambiguous acts, without Congress's having made an explicit consideration of the effect these acts will have on aboriginal rights, is difficult enough without also having to look through the lens of historical hindsight and current political expediency, as is the case in virtually all questions of extinguishment. And in the case of the eastern tribes of Indians, where the issue is further complicated by actions of the English sovereign before the Revolution and the States during the pre-Constitution period, the task of deciding if extinguishment has occurred is especially difficult. The Abenaki claims exist in the most problematic of all of these worlds since Vermont declared itself an independent republic between 1777 and its 1791 admission as the 14th State. It was created within the context of a jurisdictional dispute between New York and New Hampshire over land grants and political-judicial control.

57. See *Buttz v. Northern Pac. R.R.*, 119 U.S. 55 (1888); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Sac & Fox Tribe of Indians v. United States*, 383 F.2d 991 (Ct. Cl. 1967); *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (Ct. Cl. 1974).

58. See *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386 (Ct. Cl. 1974); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941).

59. See *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386 (Ct. Cl. 1974); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975).

60. See *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975); *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (Ct. Cl. 1974); *Gila River Pima-Maricopa*

land, i.e., Alaska, has been deemed not to automatically extinguish aboriginal title without something more.⁶¹ However, land claims settlement acts, general or express with regard to extinguishing Indian claims, have been given great weight by the courts.⁶² Forcible removal, military conquest, and confinement to the reservation have been generally found to extinguish Indian title.⁶³ Inclusion of Indian lands in forest reserves, conservation, or recreation districts have been insufficient by themselves but considered a significant factor when looking at other acts of the sovereign.⁶⁴ Payments of Indian land claims have increasingly been found to have extinguished aboriginal title to those lands.⁶⁵ Finally, if complete dominion by the sovereign is exercised over aboriginal lands in any manner or means, courts have found that Indian title over this land is extinguished.⁶⁶

III. Weight Of History Decision

A. Test Derived from Elliot

The Vermont Supreme Court ostensibly paid homage to these clearly established rules for extinguishing Abenaki aboriginal title. Yet *Elliot* misinterprets Abenaki/Vermont history during the period from 1763 to 1791. An honest account of history would not have found extinguishment under the traditional rules. Hence, to avoid this conclusion, the Vermont Court created a radical new test that undermines the United States Supreme Court's rules and purposes protecting aboriginal title.

The court created the "weight of history" test: "Extinguishment may be established by the increasing weight of history."⁶⁷ The "weight of history" in turn means the "cumulative effect of many historical events."⁶⁸ Essentially, the court changed the test from an examination of intent/purpose to a review of cumulative effects. Under this new test, a sovereign need not have known

Indian Community v. United States, 494 F.2d 1386 (Ct. Cl. 1974).

61. See *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

62. See *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

63. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

64. See *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976); *Tlingit & Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (D. Alaska 1959); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975).

65. See *United States v. Dann*, 470 U.S. 39 (1984); *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir. 1981).

66. See *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976).

67. *State v. Elliot*, 616 A.2d 210, 218 (Vt. 1992).

68. *Id.*

that the consequences of an act would eliminate aboriginal title. Therefore, if the sovereign unleashed forces which eventually frustrated Indian occupancy, *Elliot* would find extinguishment in that act. *Elliot* implicitly holds that the cumulative effects need not be manifested at the time of or near in time to the sovereign action. The functional result of *Elliot* is that courts will weigh the cumulative effects of a sovereign's action over a long time — say, 200 years. This removes the barrier prohibiting the light imputing of extinguishment. *Elliot* undermines the entire framework of aboriginal title law.

B. Elliot's Weak Legal Foundation

The Vermont Court's point of departure was the fact that federal courts have found extinguishment on the basis of a combination of individually insufficient acts of the sovereign. "The legal standard does not require that extinguishment spring full blown from a single telling event."⁶⁹ In particular the court looked to *United States v. Gemmill*,⁷⁰ *Gila River Pima-Maricopa Indian Community v. United States*,⁷¹ and *United States v. Pueblo of San Ildefonso*⁷² for guidance.⁷³

These three cases do not support the "weight of history" test for extinguishment. For example, what is so strikingly different about *Elliot* and *Gemmill* is that the three events relied upon in *Gemmill* were decisive acts by the federal government which directly undermined aboriginal title: successful military campaigns directed against the Pit River Indians, inclusion of Indian

69. *Id.*

70. 535 F.2d 1145 (9th Cir. 1976).

71. 494 F.2d 1386 (Ct. Cl. 1974).

72. 513 F.2d 1383 (Ct. Cl. 1975).

73. The *Elliot* court relied on *Gemmill* for three propositions: (1) that a historical event, although insufficient itself, may contribute to a finding of extinguishment; (2) that a course of conduct over a long period of time may prove extinguishment, although the actual date is difficult to decide; and (3) congressional action may resolve ambiguities inherent in noncongressional actions. *Elliot*, 616 A.2d at 213-14, 221 (citing *Gemmill*, 535 F.2d at 1148-49).

Elliot also relied on *Gila River* for three propositions: (1) that authorized white settlement is one factor in deciding when aboriginal title ceased; (2) that in an appropriate factual context the opening up of an area for settlement can be tantamount to ending aboriginal title over the whole region; and (3) that congressional actions which authorized and ratified previous events may suffice as evidence of extinguishment. *Id.* at 219, 221 (citing *Gila River*, 494 F.2d at 1391-93).

Finally, *Elliot* relied upon *San Ildefonso* for three propositions: (1) extinguishment is to be analyzed in light of the particular facts, circumstances and history of the case; (2) the inclusion of Native American lands in a "forest reserve and grazing district, as well as conveyances made to various grantees at different times is evidence supporting a finding of extinguishment;" and (3) that "there are no fine spun or precise formulas for determining the end of aboriginal ownership." *Id.* at 214, 219, 221 (citing *San Ildefonso*, 513 F.2d at 1387, 1389-92).

lands into a national forest reserve, and the payment of congressionally authorized compensation.⁷⁴ The Abenaki situation is not analogous.⁷⁵

In *Gila River*, neither creation of a reservation, formation of a land district, surveying of Indian lands, nor actual settlement by non-Indians on a small percentage of aboriginal title lands was sufficient alone or cumulatively to extinguish Indian title.⁷⁶ Clearly, if a cumulative effects test were adopted as the standard, the *Gila River* court would have had no problem establishing extinguishment based on these events.⁷⁷

Elliot's use of *San Ildefonso* is odd because *San Ildefonso* stipulates that extinguishment may not be implied without clear and unambiguous acts by Congress. *San Ildefonso* rejected the government's proposed extinguishment dates of 1858 and 1905 because of an "absolute dearth of evidence indicating an express Congressional purpose to abolish Indian title over the whole of [Indian] ancestral homelands and the lack of any clear and convincing evidence from which to imply an intent to terminate the [Indians'] entire aboriginal ownership."⁷⁸ The absence of such evidence is what makes *Elliot* such a radical departure from previously established jurisprudence.⁷⁹

C. The Weights of History

The historical record supports a judgment in favor of the Abenaki. To avoid such a result, the Vermont Court misconstrued history and changed the test. This enabled the court to appear as if it was paying homage to clearly established jurisprudential rules. The *Elliot* court differed "with the trial court principally in its application of the test for extinguishment . . ."⁸⁰ *Elliot* relied upon four factors: (1) the land grants of New Hampshire's colonial Governor Benning Wentworth during the early 1760s;⁸¹ (2) Britain's sanctioning of European dominion over the area that is now the State of Vermont during the period from 1763 to 1777; (3) the zeal with which Vermont's political leaders and armed militiamen protected their land grants from the 1760s up to admission to the Union in 1791; and (4) the decade-long negotiations between Congress and Vermont culminating in Vermont's 1791 admission into the Union.⁸² The following sections discuss the historical and legal problems inherent in the court's reliance upon these factors and how the court's application results in the establishment of a new and unsound test.

74. *Gemmill*, 535 F.2d at 1148-49.

75. See *infra* notes 76-186 and accompanying text.

76. *Gila River*, 494 F.2d at 1388-92.

77. See *infra* notes 77-186 and accompanying text.

78. *San Ildefonso*, 513 F.2d at 1386, 1387, 1390.

79. See *infra* notes 80-186 and accompanying text.

80. *State v. Elliot*, 616 A.2d 210, 218 (Vt. 1992).

81. *Id.*

82. *Id.*

1. *Wentworth Grants*

Elliot holds that "[t]he first significant historical event relevant to extinguishment of Abenaki aboriginal title was the royal grant of lands to European settlers in the area claimed by the Abenakis in this case."⁸³ Despite *Elliot's* assertions, the *Wentworth Grants* did not imply an intent to extinguish Abenaki aboriginal title, nor can they accurately be used as part of a series of sovereign acts which plainly and unambiguously show an intent to extinguish Abenaki title.

The court's cursory review of this historical record does a great injustice to the Abenaki. Three problems are inherent with reliance upon the grants: (1) their ultra vires nature; (2) the failure of grantees to satisfy their conditions; and (3) the lack of impact by grantees upon Abenaki lands in the Missisquoi region.

a) *The Grants' Ultra Vires Nature*

The court admitted that the grants were beyond the scope of *Wentworth's* powers: "Governor *Wentworth's* grants of the lands at issue may not have been authorized by the Crown . . ."⁸⁴ It chose, however, to rationalize this problem away and in doing so changed the test from sovereign intent to cumulative effects (regardless of whether those effects stemmed from ultra vires actions of a non-sovereign or not): "but any ultra vires exercise of power . . . does not detract from the vast political changes it inspired."⁸⁵

The grants were ultra vires because the land was actually in New York Province.⁸⁶ The grants were functionally revoked by the 1764 Privy Council

83. *Id.* at 215. "On August 17, 1763 Royal Governor Benning *Wentworth* of New Hampshire made land grants in the areas now known as St. Albans, Highgate and Swanton." *Id.*

84. *Id.* at 218.

85. *Id.* The court recited these "vast political changes": (1) the emergence of an independent Vermont; (2) a drastic realignment of jurisdictional boundaries; (3) Crown sanction of European domination over the area. *Id.*

86. New York's colonial authorities immediately protested these grants to the Crown. *Elliot* noted that New York's claim was based upon a Crown grant of 1674. A 1764 Privy Council Order confirmed New York's claims and set the border between New York and New Hampshire as the eastern bank of the Connecticut River. *Id.* at 218. However, because Royal authorities did not or could not resolve the jurisdictional conflict, disputes continued. In 1767, the Crown ordered New York to stop making grants until higher authorities could resolve the matter. 12 STATE PAPERS OF VERMONT: LAWS OF VERMONT 1777-1780, at ix-x (Allen Soule ed., 1964) (one of 17 volumes issued by the State of Vermont compiling laws, petitions, proceedings, and public papers of state authorities). In 1767, Royal authorities also passed a Revenue Act, the Customs Commissions Act, and the Tea Act; British attempts at enforcement sparked the beginnings of a continental revolution. See, e.g., BEARD & BEARD, *supra* note 39, at 98-99. Without the Crown's ability to devote the necessary resources to end the dispute, New York attempted on its own to assert jurisdiction. This sparked a concurrent local revolution, spearheaded by Ethan Allen and the Green Mountain Boys, which resulted in the birth of an independent entity, Vermont. See generally 1 RECORDS OF THE COUNCIL OF SAFETY AND

Order reaffirming New York's border on the Connecticut River.⁸⁷ By undervaluing the fact that the grants were beyond Wentworth's authority, *Elliot* ignores the sovereign's clear and unambiguous intent to restrict the actions of a colonial governor.

History and sound and proper application of the law does not support extinguishment based upon these ultra vires grants. To avoid this conclusion, *Elliot* creates a "weight of history" which obligated the Crown to affirmatively preserve aboriginal rights during this jurisdictional dispute.⁸⁸ Yet as *Oneida II* and other claims of eastern Indian tribes clearly indicate, just because a sovereign did not stop wrongful encroachments upon Indian rights does not mean the sovereign intended to allow them to occur.⁸⁹ *Elliot* ignores the *Oneida* trilogy⁹⁰ in holding that the sovereign must effectively exercise its guardianship powers if it is to undo the cumulative effects of ultra vires actions which infringe upon aboriginal title. Given the problem of unauthorized encroachment within the overall national policy to assert dominion over the entire continent, if the court's rule of law were valid, no aboriginal title would have existed in the original thirteen colonies, a point disproved by *Oneida* and the other land claims of the eastern tribes of Indians.⁹¹ Were this

GOVERNOR AND COUNCIL OF THE STATE OF VERMONT, TO WHICH ARE PREFIXED THE RECORDS OF THE GENERAL CONVENTIONS FROM JULY 1775 TO DECEMBER 1777, at 4-19 (Montpelier, Vt., E.P. Walton, ed., Steam Press of J. & J.M. Poland 1873) [hereinafter 1 COUNCIL & GOVERNOR]; WILLIAM DOYLE, THE VERMONT POLITICAL TRADITION AND THOSE WHO HELPED MAKE IT 12-60 (1984).

87. *State v. St. Francis*, No. 1171-10-86Fcr, slip op. at 68-71 (Vt., Franklin Dist. Ct. Aug. 11, 1989).

88. *Elliot*, 616 A.2d at 218. The court stated:

While the Crown may have declared the grants invalid based on a lack of jurisdictional authority in this particular governor, the sovereign's intent to allow British appropriation of the area was not in question. Despite earlier royal statements, the Crown's conduct sanctioned European appropriation. Indeed, the Crown was given opportunities to prevent European settlement to preserve aboriginal rights during disputes between New York and New Hampshire over the Wentworth Grants. Instead, the Crown maintained the status quo, advancing the interests of European settlement in contravention of its earlier policy statements about preserving Indian occupation.

Id. See *supra* notes 24-33 and accompanying text.

89. In *Oneida II*, the federal government knew that the negotiations by New York to buy the Oneidas lands were in violation of the Nonintercourse Act, yet when the state ignored federal warnings and entered into an agreement with the Indians, the federal government did nothing. *Oneida County v. Oneida Indian Nation* 470 U.S. 226, 232 (1985) (*Oneida II*). For 200 years this ultra vires action stood, yet *Oneida II* stands for the proposition that silence does not equal ratification. *Id.* at 246-48; see also *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) (holding that failure of the sovereign to exercise its trust responsibility did not allow a non-sovereign to encroach or purchase Indian lands without sovereign approval).

90. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*); *County of Oneida v. Oneida Indian Nation*, 860 F.2d 1145 (2d Cir. 1988) (*Oneida III*).

91. *Oneida I*, 414 U.S. at 667; see also *County of Oneida v. Oneida Indian Nation* 470 U.S.

the case, few Indian claims would withstand the cumulative effects of the continental expansion of the United States.

b) Failure to Fulfill the Grants Conditions

Another problem with relying on the grants is that while the Missisquoi grants were ostensibly conditioned on settlement,⁹² in fact they were nothing more than a lucrative means of land speculation. While *Elliot* drew the conclusion that these conditions evidenced an intent of Europeans to hold dominion over these Indian lands,⁹³ "it does not appear that any of the original grantees ever settled in Swanton, or even visited the lands which were so generously conceded to them."⁹⁴ In the Missisquoi region, "the Wentworth proprietors had not occupied their property, of course, and the town's first permanent white inhabitants were Dutch settlers who began to arrive around 1785 under the impression that their lands were located in Canada."⁹⁵ Instead of fulfilling their conditions, the original grantees sold their rights to others, who in turn did the same until Ira Allen appropriated nearly all the Swanton grant land.⁹⁶ According to Vermont historian Kevin Graffagnino:

In actual practice, Wentworth's charters were little more than thinly-veiled exercises in wholesale land speculation. The Governor made no attempt to include prospective settlers among his proprietors, and few of the original grantees [in any of the grants in Vermont] ever visited the lands to which they held title. . . . With only a few exceptions, the Wentworth proprietors

226 (1985) (*Oneida II*); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Narragansett Tribe v. South R.I. Land Dev., 418 F. Supp. 798 (D. R.I. 1976); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980).

92. BENNING WENTWORTH, GRANT OF LANDS IN HIGHGATE AND SWANTON (1763), reprinted in 26 NEW HAMPSHIRE GRANTS, CHARTERS OF TOWNSHIPS [vol. 3] 220-23, 485-89 (Albert S. Batchellor ed., Concord, Vt., State of Vermont 1895) [hereinafter 26 NEW HAMPSHIRE GRANTS]. The governor required that the conditions be satisfied within five years or the lands would revert to the Crown. *Id.* at 221, 486.

93. *Elliot*, 616 A.2d at 215. "Continued ownership was conditional: without actual settlement and cultivation of the lands, title would revert to the British Crown." *Id.*

94. Barney & Perry, *supra* note 1, at 992.

95. KEVIN J. GRAFFAGNINO, THE SHAPING OF VERMONT 77 (1983).

96. Barney & Perry, *supra* note 1, at 992. Ira Allen was Vermont's first Surveyor General and it is often noted that his work was disorganized and self-serving.

The Ira Allen private survey-bills are usually of less value, being mostly made for the benefit of himself or his Onion River Company. . . . Hence, the greater part of the lotting done by Allen or under his direction, dating from 1772 down to the close of the Revolution, though historically helpful as affording the basis from which relotting was made . . . has slight value as record.

1 STATE PAPERS OF VERMONT: INDEX TO THE PAPERS OF THE SURVEYORS-GENERAL 6-7 (Franklin H. Dewart comp. 1918).

consisted of speculators, New Hampshire politicians and members of the Governor's administration and family.⁹⁷

Therefore, by misstating the conditional nature of the grants as an intent to assert dominion, the Vermont court characterized the British's inability to actualize revocation as an intentional acquiescence. However, as was the case with the ultra vires nature of the grants themselves, silence will not demonstrate an intent to acquiesce in extinguishment sufficient to satisfy the canon against lightly imputing extinguishment.⁹⁸ If anything, the fact that the grant conditions were not fulfilled supports a finding that the Crown saw no need to intervene in the Missisquoi because no encroachment actually occurred. The Crown did have other concerns, after all, like the impending American Revolution. As such, the holding in *Elliot* takes a radical step away from the "strong policy of the United States" from the beginning to respect the Indian right of occupancy⁹⁹

c) Actual Settlement Did Not Negate Abenaki Occupation

Elliot asserted that "[w]hile the Crown may have declared the grants invalid based on a lack of jurisdictional authority in this particular governor, the sovereign's intent to allow British appropriation of the area was not in question."¹⁰⁰ The court erred, however, because sovereign authorities did not engage in actions which were inconsistent with Abenaki dominion.

Grantees never came to the area, and settlement was sparse until after Vermont's admission to the Union. Therefore, at best, the grants only provided grantees with "naked fee" subject to the continuing Abenaki occupation.¹⁰¹ Furthermore, this formulation of "British appropriation of the area" misstates the nature of aboriginal title: the sovereign through the "discovery" doctrine already had "appropriated" the area subject to Indian occupancy.¹⁰²

97. GRAFFAGNINO, *supra* note 90, at 4. In 1805 state surveyor John Johnson ran a survey of the town of Highgate. He found that:

Highgate was certainly one of the prime examples of the "Errors and confusions produced by mad Speculators" [spawned by Wentworth's grants]. . . . Ira Allen and the Onion River Land Company had purchased many of the original New Hampshire rights in the 1770's and Ira maintained the family interest during a dizzying succession of state-ordered tax sales in the 1790's. In addition, the lawsuits that Hathaway and others brought against Allen included claims for his Highgate lands, and by the time of [John] Johnson's [state] survey in 1805, the town's property records were hopelessly muddled.

Id. at 77.

98. *See supra* notes 89-90 and accompanying text.

99. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248 (1985) (*Oneida II*).

100. *State v. Elliot*, 616 A.2d 210, 218 (Vt. 1992).

101. *See supra* notes 29-33 and accompanying text.

102. *See supra* notes 11-14 and accompanying text.

What *Elliot* failed to demonstrate was any action by the British which showed an intent to take away Indian lands and give them to settlers. As noted, there was a long period between the Wentworth Grants and the establishment of any permanent European settlement in Missisquoi. The Abenaki continued to dominate the area.¹⁰³ The first permanent white settler, John Hilliker, leased his 100 acres in 1786 from the Abenaki, not from any grantee.¹⁰⁴ Swanton, according to the 1790 census (taken in 1791), had seventy-four non-Indian residents,¹⁰⁵ while local *white* historians put the number of Abenaki at about seventy in 1793.¹⁰⁶ The Wentworth Grants, therefore, had "little perhaps no practical effect" on settlement and land tenure in the Missisquoi region prior to Vermont's admission into the Union in

103. For example, a large settlement of 400-500 Abenaki resided quite openly at the Missisquoi village in 1775. CALLOWAY, *supra* note 3, at 206. After the first settler, John Hilliker, moved to the area in the mid-1780s, there were

no additional families [that] came here to live. During all this time he had no neighbors in what are now the adjoining townships of Franklin County. . . . At the period of his settlement, the Jesuit chapel and the Indian village were still in existence. The bell used to be rung daily.

Barney & Perry, *supra* note 1, at 972.

104. RODNEY R. LEDOUX, *THE HISTORY OF SWANTON, VERMONT* 2 (1988). Previous non-Indian settlers were associated with a sawmill on the banks of the Missisquoi, first operated by French and then leased to a Quebec merchant, James Robertson, in 1765 by the Abenakis. The Abenaki lease lands were quite extensive, 1.5 miles by 4 miles. It did not however encompass all the "Old Indian Castle" lands and it reserved certain lands within the lease for the Abenakis. The lease was recorded in an office of registry in Quebec province. It is likely that Robertson leased other lands of the extensive Abenaki territory in the Missisquoi River and Bay region near the Canadian border. Barney & Perry, *supra* note 1, at 962-64; Calloway, *supra* note 3, at 194.

In the war of competing land grants between Wentworth and New York, colonial authorities in New York granted Simon Metcalfe a grant of 33,000 acres in the region to establish Prattsburgh in 1767. He established a sawmill at the site of the abandoned Robertson-French mill, and a home and traded with the Indians. Local historians surmised that he worked closely with Robertson and might have been in his employ. He was also a New York provincial surveyor. Metcalfe's sawmill employed about 50 workmen, so that around the mill a sizeable community existed. This community dispersed after the mill was burnt around the beginning of the Revolution. Metcalfe lived amongst the Abenakis and relied on their trade in furs. Barney & Perry, *supra* note 1, at 965-71; LEDOUX, *supra*, at 14-16.

105. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE & LABOR, *HEADS OF FAMILIES AT THE FIRST CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1790, VERMONT* at 27 (1907).

106. Barney & Perry, *supra* note 1, at 1001. Town settlement was concentrated in five basic areas, leaving much of the town unsettled by whites. *Id.* at 996-97. The town's first "Town Meeting" occurred in 1790 in the home of a man living in the Abenaki lease section of Swanton and Highgate. *Id.* In fact, most of the early settlers were Dutch and most had been loyalists during the Revolution who went north thinking they were in Canada. *Id.* at 993-1001. Whatever settlement that occurred in the Missisquoi region "largely ignored the political" boundaries. The region, lake-bay-river, was treated as a unit by its inhabitants. Brian Young, *Conflict and Consensus: Lake Champlain from the Canadian Perspective*, in *LAKE CHAMPLAIN: REFLECTIONS ON OUR PAST* 143, 144 (Jennie G. Versteeg ed., 1987).

1791.¹⁰⁷ Furthermore, significant amounts of land were ungranted. In 1796, for example, Silas Hathaway petitioned the General Assembly for land in Swanton and Highgate because after a survey by the Surveyor-General there existed a vast amount of ungranted lands.¹⁰⁸

Elliot used the Wentworth Grants for two misguided purposes: to hint at a sovereign intent to divest the Abenaki of their Missisquoi homelands and, acknowledging the problems inherent in that exercise, to establish the baseline for its cumulative effects test. Unable to point to a sovereign action manifesting an intent to extinguish, *Elliot* substituted silence and inaction for the requisite plain and unambiguous act. It transformed a requirement to demonstrate an intent to extinguish into a requirement to demonstrate an intent to stop unauthorized actions from dispossessing Indians. The grants were ultra vires and revoked by the Crown, the grantees never fulfilled their obligations, and the Abenaki continued to hold dominion over the area up through Admission. To these facts, *Elliot* answers with the cry of "vast political changes [the grants] inspired." This is not a mere misapplication. *Elliot* turns two centuries of Indian law and its guiding principle on its head in creating its new rule.

2. British Policy Towards the Abenaki and the Region

Elliot might have successfully applied the extinguishment test if it had noted any British policy clearly implying that the Crown desired to end aboriginal title in the Missisquoi. If the court could have pointed to a clear effect of the Wentworth Grants that undermined Abenaki title, it might have successfully invoked the traditional test by pointing to a British action that ratified that effect. This could have been a proper application of *Gila River* and *San Ildefonso*.¹⁰⁹

107. Barney & Perry, *supra* note 1, at 962.

108. According to Hathaway:

[A] Quantity of land in Each of said Towns Considered by him as wast lands & lands Covered with water by means of which the Surveyor General Included in the Survey of sd. Towns a grater Quantity of land than was Given or Granted them by thare Respective Charters — which lands so Included as aforesaid Remains the lands & property of this State

5 STATE PAPERS OF VERMONT: PETITIONS FOR GRANTS OF LAND 1778-1811, at 431 (Mary G. Nye ed., 1939) (quoting Petition of Silas Hathaway for All Ungranted Land Between Lake Champlain, Sheldon and Fairfield (Oct. 18, 1796)). That the grants for Swanton and Highgate were made without the benefit of surveys is easily determined by their square shapes when seen in comparison to the actual topography. 26 NEW HAMPSHIRE GRANTS, *supra* note 92, at 220-23, 485-88. For example, the maps accompanying the grants do not show either Missisquoi or Maquam Bays, significant features of the topography. *Id.* at 223, 488. Furthermore, the grants were for no more than twelve square miles combined, yet Swanton is twenty miles at its greatest length. Barney & Perry, *supra* note 1, at 989, 991.

109. *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1394 (Ct. Cl. 1974); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1391 (Ct. Cl. 1974). In

Elliot pointed to neither Crown policies nor acts which might have allowed it to properly infer extinguishment. Instead, it ignores express Crown policy and intent to protect Indian rights, including those of the Abenaki.¹¹⁰ *Elliot* changed the standard by which to judge acts of the sovereign by finding support for extinguishment in the failure of the English authorities to affirmatively, actively, and constantly protect Abenaki land rights.¹¹¹ Worst of all, *Elliot* ignored express actions of Crown officials that were supportive of Abenaki aboriginal rights.¹¹² Neither did the Vermont court point to specific changes that so undermined Abenaki occupancy of the Missisquoi region as to negate this essential element of aboriginal title.¹¹³ The historical record supports the Abenaki, not extinguishment; the court evaded this conclusion by creating a new test in which extinguishment was lightly imputed, in contravention of fundamental Indian policy.

a) *Crown Indian Policy*

Crown policy towards Indians in general, including the Abenakis, was established by the 1761 Royal Instruction, the Royal Proclamation of 1763, and the terms of peace that resulted from the British victory in the French and Indian War.¹¹⁴ *Elliot* found the 1761 Royal Instruction and, the Royal

Gila River, the court pointed to the continuing interest by the Commissioner of Indian Affairs in protecting Indian lands from encroachment in relationship to the protective role that the reservation, created in 1859, played in stopping such encroachments. *Gila River*, 494 F.2d at 1390. The Commissioner looked with alarm at the explosion of white settlement on off-reservation lands between 1870 and 1880 and recommended to Congress and the President the expansion of the reservation to preserve and protect Indian agricultural lands. *Id.* Therefore it "is not far afield to infer that the Government was very aware of the extent and [negative] potentiality of settlement at that period" and the court found that expansion of the reservation to 96% of its final size in 1883 was a reasonable date to set extinguishment. *Id.* at 1393.

San Ildefonso, in noting the piecemeal fashion of white settlement, rejected the "vast political changes" approach of *Elliot*. It found extinguishment only when these changes were endorsed by settlement made actually pursuant to public land law conveyances, when Indian lands were included by the federal government in the Jemez Forest Reserve, or when the land was placed within federal New Mexico Grazing District No. 1. *San Ildefonso*, 513 F.2d at 1391-92. Hence to properly analogize the Abenaki situation to these cases, the Vermont court would have had to have shown that the British confronted any changes the grants had spawned and then decided to ratify the changes in a manner adverse to Abenaki possession.

110. See *infra* notes 114-25 and accompanying text.

111. See *infra* notes 126-29 and accompanying text.

112. See *infra* notes 130-39 and accompanying text.

113. See *infra* notes 130-39 and accompanying text.

114. See 1761 Royal Instruction (Gr. Brit. Dec. 2, 1761), in 5 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 478-79 (E.B. O'Callaghan ed., Albany, Weed, Parsons & Co. 1856), cited in Clinton, *supra* note 45, at 354; see also *State v. St. Francis*, No. 1171-10-86Fcr, slip op. at 21-23 (Vt., Franklin Dist. Ct. Aug. 11, 1989); Royal Proclamation of 1763, *supra* note 45, cited in *St. Francis*, No. 1171-10-86Fcr, slip op. at 23-25; Articles of Capitulation, Sept. 8, 1760, Eng.-Fr., art. XL, cited in *St. Francis*, No. 1171-10-86Fcr, slip op. at 20-21; Treaty of Paris, Feb. 10, 1763, Eng.-Fr., cited in *St. Francis*, No. 1171-10-86Fcr, slip

Proclamation of 1763 to be "paper tigers" because the grantees were not dispossessed of the land or removed at the Crown's direction; this indicated an "increasing European dominion adverse to the use and occupation of the Indians, to which the Crown impliedly consented."¹¹⁵

The Vermont court misjudged the nature of British Indian policy. It did not acknowledge that British policy was evolutionary; for decades the Crown relied upon colonial authorities to manage Indian relations while reserving for the Crown the right of oversight.¹¹⁶ The British did not fully centralize

op. at 20-21.

Because the Abenaki fought for the French during the French and Indian War and article XL of the Articles of Capitulation of 1760 provided for the "honorable, good, and fair treatment of the French native American allies," the British had an obligation to protect Abenaki interests. *St. Francis*, No. 1171-10-86Fcr, slip op. at 20. The Treaty of Paris in 1763 formalized this obligation. *Id.* at 20-21. British Indian policy was codified in both the 1761 Instruction and Proclamation of 1763. Clinton, *supra* note 45, at 354.

The Proclamation "embodied an enlightened colonial policy that sought to facilitate both Native American trade and colonial expansion while recognizing Indian rights in the land." Clinton, *supra* note 45, at 329. The policy evolved slowly, beginning in the 1720s with the growing role of the London Board of Trade in regulating Indian affairs and the subsequent diminution of the role of colonial governors. By 1739, instead of leaving all decisions regarding Indian affairs to colonial governors, "the British government had begun to coordinate and direct colonial Indian policy with increasing frequency and force." *Id.* at 342.

In 1754, the Albany Conference was convened to discuss Indian affairs (the seven northern colonies, including New Hampshire were all represented); initiated by the Board of Trade in order to make uniform policy towards the Indians, the conference plan recommended that only colonial governments be permitted to purchase Indian lands and such purchases would only occur at public councils with the Indians. The plan was never implemented. *Id.* at 345-49.

The French and Indian War of 1756 disrupted, yet accelerated, the centralizing process. In 1761 the Crown "divested local colonial authorities of control over Indian land cessions" in a Royal Instruction. *Id.* at 354. The Royal Proclamation of 1763 (barely two months after the Swanton-Highgate Grants) reaffirmed and implemented Crown Indian policy.

Special licenses were required for settlements on Indian lands and the Crown forbade granting title to Indian lands not "ceded to or purchased" by the Crown. *Id.* at 356. Such cessions had to have occurred at open meetings convened for that purpose. *St. Francis*, No. 1171-10-86Fcr, slip op. at 23-25. The Proclamation established a boundary line that ran up the spine of the Appalachian Mountains, of which the Green Mountains are a part. Land to the west of the line was reserved for the Native Americans. The Missisquoi lands of the Abenaki were located within this Indian country. *Id.* The Proclamation and the 1764 implementation plan marked the "apex of British efforts to centralize control of Indian affairs." Clinton, *supra* note 45, at 360.

115. *State v. Elliot*, 616 A.2d 210, 219 (Vt. 1992). The court asserted that after 1763 the Crown did not retract any authority to make grants in this area in order to protect the Missisquoi Abenakis, but only acted to resolve the jurisdictional dispute between New York and New Hampshire. *Id.*

116. Clinton, *supra* note 45, at 334; see also Robert N. Clinton & Margaret T. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 19-23 (1979).

Having conveyed property rights in North America to the colonists by various charters and patents, the crown was initially satisfied to let the colonists purchase and extinguish Indian title, either individually or through the colonies. Since

Indian policy until the early 1760s.¹¹⁷ Therefore, the *Elliot* court had unrealistic and inequitable expectations about the British capacity to effectively implement a new, ambitious policy. Indeed, the problem in implementing British Indian policy is analogous to a problem facing many modern American political jurisdictions: strong laws have been written in response to serious deficiencies in the common law or existing statutes, but implementation is hampered by serious problems, including insufficient funding, poor enforcement mechanisms, and inconsistent administration based on the vagaries of politics.¹¹⁸ Yet the inability to implement laws does not support an argument that the laws have lost their binding effect.

Thus, *Elliot* is wrong to equate poor implementation of the Proclamation with implicit intent to extinguish Abenaki title or seriously undermine it. The Vermont court did not analyze why the Crown failed to enforce the Proclamation more vigorously, imputing reasons not supported by the historical record. In fact, implementation of the new, centralized approach was extremely difficult and costly. For example, it took four years for the British Indian Superintendents to achieve the first implementing task: to set a more meticulous Indian boundary line as called for in the Proclamation.¹¹⁹ Also, a western frontier war, Pontiac's Rebellion, had to be fought during the inception

individual land transactions frequently created military frictions with the Indians, the British colonies soon filled the regulatory void. . . .

Thus, by 1755 the British government had recognized that the colonies were unable to keep peace with the Indians in the absence of a comprehensive and uniform imperial Indian policy.

Id. at 20, 22.

117. Clinton, *supra* note 45, at 354-55. Prior to centralization, conflicts arose due to the competing needs of colonialists and Native Americans while competition with France and Spain over the loyalty of Indian nations also increased. The Crown responded by centralizing its Indian policy, manifesting its goals through the use of instructions and proclamations, but not the resources necessary to effectively enforce them. *Id.* at 331-54; *see also* Clinton & Hotopp, *supra* note 116, at 22 ("[E]ven more stringent measures were required to stem the tide of white settlers encroaching on Indian land."). *And*:

Although [the Proclamation of 1763] was a new departure, there was a background from which it grew. Wise men who were acquainted with the evils existing in Indian affairs in the colonies and who realized more and more that the great cause of Indian troubles was the steady encroachment of the whites upon the land of the Indians had been advocating that a clear line of demarcation be drawn between the areas of the two races.

PRUCHA, *FORMATIVE YEARS*, *supra* note 46, at 14.

118. As a City Councilor in Burlington, Vermont, from 1986 to 1992, the author can attest to the inability of government to effectively fund the enforcement of all the laws on its books; this is true for zoning, traffic control, drug enforcement, or pollution control. One example is in minimum housing code enforcement, where inspections are mandated to be conducted every three years, yet funds are insufficient to staff the necessary personnel.

119. Clinton, *supra* note 45, at 358.

of the policy.¹²⁰ Finally, a 1764 proclamation implementation plan was shelved in 1768, primarily due to the cost.¹²¹

In 1768, the Crown returned implementation of its new policy to colonial authorities because it was "hoping that [they] would learn from [their] previous mismanagement"¹²² Unfortunately, colonial authorities did not implement the policy, resulting in abuses and land encroachments which caused widespread Indian unrest up to the eve of the Revolution.¹²³ By the mid-1770s, the British were poised for a reassertion of centralized control, only to be forestalled by the American Revolution.¹²⁴ Benning Wentworth, the New Hampshire Grants, and subsequent New York Grants in the Missisquoi region were not exceptions to this historical record.¹²⁵

120. *Id.* at 354; see PRUCHA, *FORMATIVE YEARS*, *supra* note 46, at 17. Pontiac's Rebellion gave an "emergency stamp" to English policy because of its serious blockade of Detroit, the defeat of many British rescue missions, and the "universal panic throughout the Frontiers" that it inspired. *Id.* at 17.

121. The policy always faced colonial opposition. Therefore, "the very success of prior British efforts to centralize control over Indian affairs rendered less ominous the Indian and French threats" so that the "heavy estimated cost to the Crown of twenty thousand pounds a year" did not seem justified. Clinton, *supra* note 45, at 360-61.

122. *Id.* at 361. In light of the cost, it is also not unreasonable to believe that the British hoped that colonial implementation of the Proclamation would appease the colonists who bristled at the restrictions and the fact that "British officials were henceforward to dispose of large sections of the Western territory and settle the question as to who was to reap the profits of the various operations there, including the fur business." BEARD & BEARD, *supra* note 39, at 94.

123. British officials lamented colonial failure to implement the Proclamation. According to the Earl of Hillsborough: "I am persuaded that could it have been foreseen, that the Colonies would have been so backward and negligent in meeting those gracious intentions of the King, which induced his Majesty to leave the . . . [implementation] to them, their Representation on the subject would have not so far prevailed" Clinton, *supra* note 45, at 362.

Even such a notable American such as George Washington did not take the implementation of the policy as well as the policy itself seriously. "I can never look upon that proclamation in any other light (but this I say between ourselves), than as a temporary expedient to quiet the minds of the Indians, and must fall, of course, in a few years." Clinton & Hotopp, *supra* note 115, at 22-23 (citing VIRGIL J. VOGEL, *THIS COUNTRY WAS OURS 57* (1972) (quoting in turn 2 *THE WRITINGS OF GEORGE WASHINGTON 218-24* (Worthington C. Ford ed., New York, London, G.B. Putnam & Sons 1889))).

124. Clinton, *supra* note 45, at 362 ("Immediately prior to 1776, the stage was set for reassertion of complete imperial control over the management of Indian matters. The Revolution, however, threw colonial hierarchies into complete disarray"); see PRUCHA, *FORMATIVE YEARS*, *supra* note 46, at 24-25. In 1775, the British government sent Governor Carleton of Quebec the Plan of 1764 to serve as a guide for a return to centralized control.

125. New Hampshire was represented at the 1754 Albany Conference. Clinton, *supra* note 45, at 346. New Hampshire was also sent the 1761 Royal Instruction and the Proclamation of 1763 was directed to all colonial governors. *State v. St. Francis*, No. 1171-10-86Fcr, slip op. at 21-25 (Vt., Franklin Dist. Ct. Aug. 11, 1989). If Wentworth had willfully ignored official Crown policy when he began making grants, any such action would have been an *ultra vires* act; such acts would have been functionally prohibited by the 1761 Instruction and then revoked by the Proclamation of 1763, issued some two months after the Wentworth Grants in the Missisquoi. *Id.* at 64-71.

b) A Requirement for Affirmative Action?

The *Elliot* court found that Royal efforts to end the dispute between New York and New Hampshire "manifest an intention to pacify the two British jurisdictions, not protect Native Americans."¹²⁶ This evidences another attempt to establish a requirement that the sovereign must exercise its guardianship powers or Native Americans will lose whatever protective shield guardianship offers. *Elliot* concludes that "[t]he necessary and inevitable outcome of the Crown's position would still be that Europeans would appropriate the area, especially since the settlement of the lands was a British goal during this time."¹²⁷ Yet the same "necessary and inevitable outcome" that resulted from the general opening up of western United States lands to white settlement was found by *Gila River* to be insufficient to satisfy the canon against light extinguishment.¹²⁸ This was the same outcome that inevitably resulted from vesting powers over Indian affairs in the states through the Articles of Confederation. The Constitution and the Nonintercourse Acts removed those powers and centralized them, but it did so without adequate implementation mechanisms. The argument that inaction equalled ratification and implicit consent was expressly rejected by *Oneida II*.¹²⁹

c) British Settlement Policy in the Missisquoi

Although it was a fundamental premise in *Elliot* that European settlement adverse to Abenaki possession resulted from the grants, clearly the Wentworth

Given the distance, the wildness of the country, and his basic desire to spawn a speculative buying spree of land title, not land use or occupancy, there is no evidence Wentworth even knew of the Abenaki occupation of the Missisquoi. Also, the grants covered only a small part of the region. There was no intention to enforce the conditions of the grant. Early settlers were not grant holders. The closest government to the area, Montreal, enforced the protective aspect of the Crown's policy in 1765 when it refused to grant title to English settlers because it would conflict with Abenaki lands. See *supra* notes 92-108 and accompanying text.

126. *State v. Elliot*, 616 A.2d 210, 230 (Vt. 1992) ("[T]he Crown did not retract any authority to make grants in order to protect the aboriginal occupants in this area, but instead merely attempted, as the trial court stated, to end the two provinces dispute over who had jurisdiction.").

127. *Id.* (citation omitted).

128. See *supra* notes 76-77 and accompanying text.

129. See also *Clinton & Hotopp*, *supra* note 116, at 34-35.

[T]he Constitution and the Trade and Intercourse Acts were intended to vest control of Indian affairs in the federal government and to end the abuses caused by lack of uniform policies among the states. . . . The lines drawn delineating Indian Country were intended to regulate western expansion by defining the territory within which whites could not freely move. The United States fully contemplated that the Indian tribes would continue to cede lands east of the line but that these cessions would conform fully to the requirements of the statutory restraint against alienation. *In this respect the Trade and Intercourse Acts were similar in approach to the Proclamation of 1763*

Id. (emphasis added). See *supra* notes 89-90 and accompanying text.

Grants did not result in grantees coming into possession of Abenaki lands. The discrepancy between the lands granted and the lands aboriginally occupied was significant. Actual settlement practice left the Abenaki in control of their historic homelands.¹³⁰

Elliot grudgingly acknowledges the Crown's intent to protect aboriginal title when it refers to the policy as a "paper tiger." Yet the court ignored key acts of English support for the Abenaki that resulted from these obligations and policies. For example, the English acknowledged the Abenaki's Missisquoi possessions and encouraged them to lease these lands in the mid-1760s.¹³¹ In 1765 the Governor of Lower Canada refused to grant title of 2000 acres on the Missisquoi because it was found to be Abenaki land.¹³² In the same year, Robertson's ninety-one-year lease of timberland from the Abenaki — some 4.5 miles long by 1.5 miles wide — was registered with colonial authorities in Quebec province.¹³³ At a meeting on Isle La Motte in 1766, the Governor of Quebec responded to Abenaki complaints that their lands were being encroached upon by saying: "I will enquire into the particulars of your request, in the mean while you may rest assured of Justice and Protection

.....¹³⁴

In addition to other factors, geography also played a role in the reaction of the British to the interests of the Abenaki in the Missisquoi. Authorities in Canada, French and English, historically exercised jurisdiction over the Missisquoi region.¹³⁵ A survey (circa 1770) placed most Missisquoi lands

130. See *supra* notes 100-08 and accompanying text.

131. Gordon Day, *Abenakis in the Champlain Valley*, in LAKE CHAMPLAIN: REFLECTIONS ON OUR PAST 277, 286 (Jennie G. Versteeg ed., 1987).

132. CALLOWAY, *supra* note 3, at 194.

133. Barney & Perry, *supra* note 1, at 962; CALLOWAY, *supra* note 3, at 194.

134. Speech by A. Belt and Strings of the Missisquoi Indians to the Governor of Quebec (Sept. 8, 1766) (transcript on file with Public Archives of Canada, Archives Branch, Ottawa, Can. (MG 11, Q 3, at 328-30)), noted in Gordon Day Deposition, Defendants' Exhibit 3, State v. St. Francis, No. 1171-10-86Fcr, slip op. at 1 (Vt., Franklin Dist. Ct. Aug. 11, 1989).

The September 1766 meeting took place near Missisquoi on Isle La Motte between the governor of Quebec, Governor Murray, and New York's governor, Governor Moore. *St. Francis*, No. 1171-10-86Fcr, slip op. at 72-76. The purpose of the meeting was to determine the border between New York and Quebec. The Isle La Motte meeting confirmed the border at the 45th parallel north latitude but did not resolve any Indian issues. *Id.*

Abenaki representative attended, as did Caughnawaga Mohawks and Daniel Claus, a deputy in the Crown Indian Affairs office. *Id.* at 73. During the meeting, the Abenaki asserted their right to their ancestral Missisquoi lands. They complained in the particular of the New York grant to Simon Metcalfe, who was claiming a significant portion of Abenaki land in Missisquoi, including their "Village and Plantations." CALLOWAY, *supra* note 3, at 195. The Caughnawagas also asserted claims to these lands, and proceeded to cede these land claims to the English, retaining only hunting and fishing rights. *Id.* at 194-95. The Abenakis never ceded or sold any rights at this meeting. The governor of Quebec's response that the Abenaki could expect "Justice and Protection" was a clear indication that the British respected Abenaki claims to the Missisquoi. Gordon Day Deposition, Defendants' Exhibit at 3, *St. Francis*, No. 1171-10-86Fcr, slip op. at 1.

135. Young, *supra* note 106, at 143-47; Day, *supra* note 131, at 286; see also *St. Francis*,

in New York, not Quebec. This removed the protective shield of those authorities who knew the Abenaki the best. It caused confusion amongst the Abenakis who "had looked [to Canada] for so long for trade and assistance" and who, along with their few white neighbors, treated both sides of the 45th parallel as one area governed from Canada.¹³⁶ Opportunities for oversight by British authorities were thereby lessened,¹³⁷ and the possibility of illegal,¹³⁸ although colonially sanctioned, encroachment upon Abenaki lands in the Missisquoi was consequently increased.¹³⁹

No. 1171-10-86Fcr, slip op. at 19-21, 25-28.

136. Day, *supra* note 131, at 286. In 1783 the Treaty of Paris ended the American Revolution, and the 45th parallel, since 1765 the boundary between Quebec and New York, became the international boundary. *Id.*; see, e.g., LEDOUX, *supra* note 104, at 1.

137. In 1773, the Abenaki sent a delegation to Claus in order to reconfirm their complaint that Metcalfe was encroaching upon Abenaki lands in Missisquoi. CALLOWAY, *supra* note 3, at 196. At that meeting, Claus informed the Abenakis that the English considered that the Caughnawaga cession at Isle La Motte had bound the Abenakis also. "[T]he Indians should have free hunting & fishing in Lake Champlain but . . . Ground belongd. to the king & his Subjects to wch. the Caughnaws. in behalf of the rest agreed." *Id.*

Extinguishment should not be implied from these events. British policy required voluntary cessions of Indian lands, yet as *St. Francis* noted, the Caughnawagas had no right to cede the Missisquoi lands. *St. Francis*, No. 1171-10-86Fcr, slip op. at 74. Also, Claus' acceptance of the ultra vires Caughnawaga cession did not ratify it. "[T]hat a deputy of the Indian Affairs Office considered the event to operate as a cession is not an act clearly and unambiguously implying the sovereign's intent to extinguish the Missisquoi's aboriginal rights . . ." *Id.* at 75. Furthermore, the Abenakis still possessed the lands of the Missisquoi basin. Vast expanses of land remained ungranted. Metcalfe's was the only significant white presence on their land, but he did not occupy all of it, and much of his business depended on the Abenaki fur trade. See *supra* notes 103-08 and accompanying text.

138. See *St. Francis*, No. 1171-10-86Fcr, slip op. at 76-78. The Metcalfe and subsequent Prattsburgh grants, roughly covering the Wentworth grants and claiming the historic Abenaki village and best farmland, did not extinguish aboriginal title for several reasons.

These grants violated Proclamation of 1763 policy by taking advantage of the Crown decision to vest colonial authorities with the power to implement the Proclamation. Because the policy limited acquisition of Indian lands to voluntary agreement made at an open, public meeting, attended by the Indians and colonial governor and no such meeting occurred, the grants were in contravention of British policy. When confronted with a similar request two years earlier, British officials in Quebec refused to make the grants. New York's grants were exactly the sort of action that would lead the British to seek recentralization in the 1770s. Also, the grants were still subject to a right of occupancy, which the Abenaki exercised. *Id.*

139. The New York grants in the Missisquoi were in violation of royal instructions issued in 1767, 1769, and 1770 which prohibited the making of any grants in the Champlain valley. 7 STATE PAPERS OF VERMONT: NEW YORK LAND PATENTS 1688-1786, at 8-9 (Mary G. Nye ed., 1947) [hereinafter 7 STATE PAPERS OF VERMONT]. The reality was that the

handicaps of distance, slow communication and transportation which prevailed at that time, and often the lack of a clear understanding of the actual condition on such a vast unsettled tract of wilderness sometimes led to a miscarriage of the intentions of the home office, and human nature being what it is, the colonial representatives of the Crown occasionally took advantage of the opportunities which lay before them, and granted lands in opposition to their instructions.

Hence, when looked at in its entirety, Royal policy towards the Abenaki was not a dead letter in the northwest corner of Vermont. The region was a wilderness, barely surveyed. Topographically, Abenaki lands spanned the political border. Abenaki occupied the Missisquoi River and Bay region and white settlement was de minimis. Settlers in the pre-Revolution period coexisted with Abenakis in a manner demonstrating that Abenaki aboriginal title could coexist with Crown policy and the settlement that it allowed. If anything, the Wentworth Grants' title and dominion in this period, for this region, were "paper tigers."

3. *Sovereign Acts of the Republic of Vermont*

The Vermont Supreme Court could not have found the Abenaki aboriginal title to the Missisquoi extinguished by actions of the government of Vermont prior to admission to the Union in 1791.¹⁴⁰ Primarily this is because Vermonters never even confronted the issue of aboriginal title until 1798, some seven years after admission to the Union.¹⁴¹ Furthermore, it is doubtful that Vermont was legally entitled to any of the sovereign powers required to extinguish aboriginal title. Finally, the vigorous assertion of Vermont sovereignty by the Green Mountain Boys, so relied upon by *Elliot*, had no impact upon the Abenaki during the "republic" period between 1777 and 1791. Therefore, only a radical alteration of the traditional test for extinguishment would have allowed Vermont to contribute to the termination of the Abenaki's title.

a) *Legislative Action*

That Vermont as a republic never extinguished Abenaki title is best evidenced by a comprehensive report made to the Vermont House of Representatives in 1854.¹⁴² The report notes that on September 29, 1798, representatives of the Iroquois Confederacy petitioned the Vermont legislature for settlement of a land claim stretching from Ticonderoga to the Canadian

Id. at 10.

140. *Elliot* held that acts of the "Republic of Vermont" contributed to a finding that aboriginal title was extinguished, although the court refused to say exactly who, when, or how it was actually extinguished. *State v. Elliot*, 616 A.2d 210, 218 (Vt. 1992). It did note that Vermont's 1777 Declaration of Independence rejected all authority but its own, and declared Vermont an autonomous "republic" in dominion over the grant lands. *Id.* at 216-18.

141. See *infra* notes 142-58 and accompanying text. The only prior reference to Indian land requests occurred in 1781 when a group of Mohegans requested of Vermont and received a land grant in the Marshfield land grant. In 1782, another land grant was given to these Indians. 2 RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT 127-28 (Montpelier, Vt., E.P. Walton, ed., Steam Press of J. & J.M. Poland 1874) [hereinafter 2 GOVERNOR & COUNCIL].

142. TIMOTHY P. REDFIELD, REPORT OF THE CLAIM OF THE IROQUOIS INDIANS UPON THE STATE OF VERMONT FOR THEIR "HUNTING GROUND" (1854), reprinted in JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF VERMONT, OCTOBER SESSION, 1854, at 605 (E.P. Walton ed., 1855) [hereinafter REDFIELD REPORT].

border, spanning from Lake Champlain to the spine of the Green Mountains.¹⁴³ The legislature appointed an investigating legislative committee; the committee refused to recommend a settlement, properly assessing the 1790 Nonintercourse Act as prohibiting state action.¹⁴⁴ Most importantly, it reported that "the committee . . . cannot ascertain whether that title has been extinguished by purchase, conquest, dereliction of occupancy, or in any other way whatever."¹⁴⁵

Therefore, the report unambiguously infers that Vermont never took an action to extinguish aboriginal title. After receiving the report, the legislature, with the governor and council concurring,¹⁴⁶ passed an act¹⁴⁷ which validated this finding¹⁴⁸ and authorized a gubernatorial investigation of the issue plus "a present of affection, not exceeding the value of one hundred dollars" to the Indian representatives.¹⁴⁹

Further evidence that the "Republic of Vermont" never extinguished aboriginal title is found in the report the following year by Governor Isaac Tichenor.¹⁵⁰ Given that Tichenor was part of an "oligarchy of a small but powerful group of men who dominated Vermont politics for over two decades,"¹⁵¹ if the Vermont legislature had acted to extinguish aboriginal title, clearly Tichenor would have participated in and alluded to those actions. He did not.

143. *Id.* at 613.

144. *Id.* at 614. The committee requested Vermont Governor Isaac Tichenor to notify the Indians that

when they shall exhibit clear and circumstantial proofs that the claim they now make is founded on the unerring and unalterable rules of justice, and shall produce therewith the necessary documents, authorising this state to treat with them, they will find their brethren ready and willing to maintain inviolable the most friendly intercourse with the Indians of the seven nations

Id. at 614-15.

145. *Id.* at 614.

146. The Governor and Council were the executive branch of government until the 1830s; see Gary J. Aichele, *Making the Vermont Constitution, in A MORE PERFECT UNION: VERMONT BECOMES A STATE, 1777-1816*, at 31-33 (Michael Sherman, ed., 1991).

147. REDFIELD REPORT, *supra* note 142, at 615-18.

148. The Assembly focused on that part of the report that alluded to the necessity of the Indians producing the "necessary documents" and "clear and circumstantial proofs" that the claim rested upon a proper legal foundation. *Id.* at 614.

149. "And whereas, this Assembly feel a strong desire to maintain perfect peace and good understanding with the nations above mentioned, although this claim stands entirely unsupported by any legal or equitable proof hitherto exhibited to this Assembly" *Id.* at 616.

150. *Id.* at 619-23. Tichenor's report is based upon inquiries "made relative to the claims of the seven nations of Indians of Lower Canada, in pursuance of the act of legislature on this subject, passed at their session in October last." *Id.* at 619.

151. Aichele, *supra* note 146, at 31. His one year term as governor in 1789-90 was the only interruption in the reign of Governor Thomas Chittenden (1777-97). *Id.* Tichenor was a member of the Vermont delegation which negotiated a settlement over the land grants dispute with New York in 1790. 7 STATE PAPERS OF VERMONT, *supra* note 139, at 14.

Instead he found that the British had not made "any express reservation of an Indian claim" in Vermont.¹⁵² Furthermore, he believed that Indian title had been extinguished for three reasons: (1) as French allies in the French and Indian War, the Indians lost aboriginal title to the English as a result of the French defeat; (2) the Indians "never caused the voice of their claim to be heard respecting these lands, during the existence of this government, or at any period since the conquest, or since the grant of these lands by his Britannic majesty"; and (3) as British allies during the American Revolution, the Indians lost "all lands to the south of Canada."¹⁵³ The Vermont House of Representatives incorporated the report in an act passed in November 1799, resolving that

the State of Vermont has taken all possible care to examine into the merit of the claims . . . and are fully of the opinion that their claim . . . has long since been done away and become extinct, in consequence of the treaty of peace in 1763 between the King of Great Britain and the French King, and the treaty of peace between the King of Great Britain and the United States, of which this State is a part, in the year 1783¹⁵⁴

The Vermont legislature, therefore, did not rely on any action it had taken on its own to extinguish aboriginal title. Its conclusion that aboriginal title was extinguished was based upon an assessment of actions taken by Britain and the federal government. In fact, the Vermont legislature was wrong in concluding that the 1763 peace treaty had extinguished aboriginal title in the Missisquoi,¹⁵⁵ wrong in finding that Indian occupancy of the Missisquoi had

152. REDFIELD REPORT, *supra* note 142, at 619.

153. *Id.* at 619-21.

154. *Id.* at 621-22. On October, 27, 1800, Tichenor reported to the Vermont House that he had presented the Indians a copy of the forementioned resolution. He also noted that during the legislative session then in progress another delegation of Indians had come forward, "properly authorized to make a final settlement of their claims." *Id.* at 622. This delegation was "joined by a representation from the Abernaki [sic] nation." *Id.* Tichenor reported to this Indian delegation the reasons proffered by himself and the legislature for why the Legislature decided against the "justice of their claims." *Id.* at 622-23.

A pattern developed through out the 1800s of Indian delegations coming to the legislature seeking resolution of their claims on lands in Vermont; the legislature always offered the same basic reasons proffered first in 1798-99. In 1812, the Iroquois complained that the legislature's requirement of documentary proof was impossible to satisfy in light of the traditional Indian reliance upon oral tradition. The state again relied upon the constitution and statutes of the United States to put off the Iroquois claim. *Id.* at 624-30. In 1826, the legislature added a further finding to the reasons for claiming that aboriginal title was extinguished: "[T]his tribe of Indians, then or before, moved within the now limits of Canada, and have resided there ever since." JOURNAL OF THE GENERAL ASSEMBLY OF THE STATE OF VERMONT 140-41 (State of Vermont 1826). The legislature, however, still found extinguishment to have been accomplished by the Treaty of Paris in 1783 between the British and the Americans. *Id.*

155. *See, e.g.,* State v. St. Francis, No. 1171-10-86Fcr, slip op. at 63-64 (Vt., Franklin Dist.

been terminated,¹⁵⁶ and wrong about the effect of the peace treaty ending the Revolution.¹⁵⁷

In addition, other legislative actions taken by Vermont during this period cannot fairly imply extinguishment.¹⁵⁸ No act of the legislature, save the land grant to the Mohegans in 1781, addresses Indians or aboriginal title. Acts relating to settlement were generic in nature and were not inconsistent with aboriginal title. Hence, Vermont did not evince a clear and unambiguous intent to extinguish the Abenaki aboriginal title in the Missisquoi.¹⁵⁹ Clearly, the "Republic of Vermont" never extinguished the Abenaki's aboriginal title.

b) Vermont's Sovereignty

Furthermore, a serious question exists as to whether any acts of the republic would have sufficed to extinguish Abenaki title because Vermont could not be properly seen to be a "sovereign." The arrangement by which Vermont received New York's support to gain admittance into the Union seems to preclude any clear showing of Vermont's legal sovereignty. The joint New York-Vermont commission, established to resolve the jurisdictional dispute, recommended that upon admission to the Union, all claims of jurisdiction on the part of New York within Vermont should end, while upon payment of \$30,000 by Vermont, all rights and titles to land within Vermont under grants from New York would also end. On October 28, 1790, Vermont ratified the recommendation of the commission.¹⁶⁰ *Elliot* admits that the very

Ct. Aug. 11, 1989). The peace between France and Britain provided for the "honorable, good, and fair treatment of the French native American allies" such that Britain had an obligation to protect Abenaki interests. *Id.* at 20-21. The British did act protectively of Abenaki interests in the 1760s. See *supra* notes 131-34 and accompanying text.

156. See, e.g., *St. Francis*, No. 1171-10-86Fcr, slip op. at 31, 86-87 ("The Missisquoi survived as a native American community in their traditional homeland throughout the existence of the Republic of Vermont, living openly and unmolested.").

157. There is no evidence that the 1783 treaty ending the American Revolution extinguished Abenaki aboriginal title. Furthermore, the Abenakis in Missisquoi were not unambiguously regarded as enemies of the Americans. "The outbreak of the American Revolution found many Native American tribes divided over which side, if either, to support. The Missisquoi were no exception. Though most stayed out of it, some sided with the British and some with the Americans, apparently more with the Americans." *St. Francis*, No. 1171-10-86Fcr, slip op. at 27-28. As such, the Abenakis would not have lost aboriginal title by virtue of being "losers" in the Revolution. *Id.* at 86-87.

158. *St. Francis* looked at several acts of the Vermont legislature proffered by the State as evidence of an intent to extinguish the aboriginal title but found them insufficient to do so. *St. Francis*, No. 1171-10-86Fcr, slip op. at 79. Essential to the finding was a reliance on *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967). *St. Francis*, No. 1171-10-86Fcr, slip op. at 80. *Lipan* held that absent convincing contrary evidence, the Republic of Texas was deemed to have adhered to the general principles in regards to aboriginal title and the rules of extinguishment. *Lipan*, 180 Ct. Cl. at 492-93. The historical record in Vermont is bereft of such evidence.

159. *St. Francis*, No. 1171-10-86Fcr, slip op. at 79-91.

160. 7 STATE PAPERS OF VERMONT, *supra* note 139, at 14; 14 STATE PAPERS OF VERMONT:

legitimacy of Vermont as an independent republic is still open to question.¹⁶¹ Without a legitimate status as a sovereign, actions by the "Republic of Vermont" could not lead to extinguishment.¹⁶²

c) *Vermont's Domination of the Missisquoi?*

The Vermont court asserted that the military actions of the Green Mountain Boys evidenced an intent to assert domination over all of the Wentworth Grants' lands.¹⁶³ Despite the lack of extensive civil authority,¹⁶⁴ clearly there was assertion of authority in southern Vermont: "[I]n a series of skirmishes along the old border, inhabitants of the Grants dealt roughly with New York surveyors and other officials of Albany County who attempted to dispossess them of their land."¹⁶⁵ The revolt of southeastern Vermonters,

LAWS OF VERMONT, 1785-1791, at 532-34 (John A. Williams ed., 1966). In January 1791, a constitutional convention in Bennington ratified the United States Constitution, and on March 4, 1791, Congress admitted Vermont into the Union. DOYLE, *supra* note 86, at 60.

161. *State v. Elliot*, 616 A.2d 210, 218 (Vt. 1992). New York had clear legal title to the land now encompassing Vermont, derived by the 1764 royal order, to the grants. This was dissolved only after the \$30,000 payment in 1790 and admission to the Union. 7 STATE PAPERS OF VERMONT, *supra* note 139, at 14.

162. Actions by Vermont between 1777 and 1791 must be overlaid upon a complex framework. Prior to the Revolution, sovereign power obviously resided with the Crown, and its Indian policy enunciated in the 1763 Royal Proclamation was operative. *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 615 (2d Cir. 1980). As shown previously, the British did not extinguish the Abenaki's aboriginal title.

Adoption of the Articles of Confederation in 1781, in particular the limitation on centralized authority included in Article IX, marked the only, and brief, departure from the policy of centralized federal control over Indian affairs. States had control over Indian relations within their state boundaries. *Id.* at 615-16. Because the peace treaty of 1783 was only between the states and the Crown, and because as well of the clear legal title it possessed, New York must be considered the appropriate sovereign during the Articles of Confederation period. During this period, New York did not act to extinguish the Abenaki's title either.

As *Oneida I* noted, after the adoption of the Constitution in 1787, Indian law became the exclusive province of the federal government. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) (*Oneida I*). Despite its 1777 declaration, after the 1781 creation of the Articles of Confederation and the 1783 peace treaty with England, Vermont was considered by the rest of the Union to be a part of New York, a fact made clear by the negotiations for admission. *See, e.g., Vermont v. New Hampshire*, 289 U.S. 593 (1932). During this period, New York took no action to expressly or implicitly extinguish Abenaki aboriginal title. Nor did the federal government.

163. *Elliot*, 616 A.2d at 229, 231.

164. Even those Wentworth Grants for southern Vermont that were settled had little in the way of colonial authority exerted over them.

The basic authority in the early settlements had been that inherent in the town charter. . . . Nor was any significant governing authority exercised over the Grants by the chartering authority, New Hampshire. This was due in part to the dispute of jurisdiction, lack of need for authority, and the decline of the New England proprietorship system generally.

12 STATE PAPERS OF VERMONT: LAWS OF VERMONT, *supra* note 86, at x.

165. Aichele, *supra* note 146, at 6. The Green Mountain Boys were organized as "military

capped by the arrest of New York's judicial officers at Westminster on March 14-16, 1775, destroyed the last real vestiges of New York power over Vermont and set in motion the creation of Vermont.¹⁶⁶

This is in sharp contrast to the absolute lack of presence by grantees and their government in the Abenaki's aboriginal lands. Neither the creation of nor the governance of Vermont was accomplished through the actions of white settlers living in the northwestern corner of the state. They were simply not a part of this action. The region would not fall under effective control of Vermont until after Vermont's 1791 admission to the Union.¹⁶⁷ Therefore, without the evidence that it tried to extinguish Abenaki aboriginal title and with the questionable sovereign power to do so, Vermont cannot be said to have extinguished Abenaki aboriginal title during the "republic" period.

4. Vermont's Admission into the Union as the Fourteenth State

Elliot does not allude to evidence which shows that the negotiations for Vermont's admission into the Union considered the Abenaki occupation of the Missisquoi. Nor did the court refer to evidence indicating that the impact of white settlement — past, present, or future — on the Abenaki was considered in these negotiations. If it had, the court might have been correct in holding that admission effectively "ratified" extinguishment.¹⁶⁸

These facts do not exist. *Elliot* departs from precedent in finding extinguishment without identifying the congressional consideration which clearly and unambiguously imply a ratification of extinguishment. The complete absence of federal consideration stands in sharp comparison to *Oneida*, which refused to impute ratification based upon a much stronger showing of federal consideration.¹⁶⁹

companies" that were "sympathetic to the claims" of neighboring farms.

166. 1 COUNCIL & GOVERNOR, *supra* note 86, at 4-11; see DOYLE, *supra* note 86, at 12-15. Within the year after the Westminster Massacre, the coalescing of grantees into a coherent political body began.

167. The first Vermont surveyors did not appear in Swanton until 1787. No roads existed. The first settlers in the Wentworth Grant section, west Swanton, were of Dutch decent, British loyalists who settled in both Swanton and Highgate mistakenly thinking that they were in Canada, north of the 45th degree of latitude. The first town meeting was not held until March 23, 1790, and only five of the more than twenty offices available were filled. No permanent white settlements in east Swanton occurred prior to 1790. Barney & Perry, *supra* note 1, at 993-1002.

168. *Elliot*, 616 A.2d at 221. *Elliot* posited that it merely differed with *St. Francis* over its application of the extinguishment test, and indeed it does try to focus upon a "sovereign consent to extinguish aboriginal rights." *Id.* at 214. It held that "Vermont's admission to the Union . . . [gave] final, official sanction to the previous events . . ." *Id.* at 221. It pointed to the preadmission negotiations in general and the 1781 congressional inquiry into fulfillment of the grants' conditions as evidence that Congress knew it was granting Vermont full, unencumbered title to the Wentworth Grants. *Id.* at 217 n.8. "There is no doubt that Congress considered and intended the New Hampshire Grants, in 1791, to be possessory." *Id.* at 221.

169. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 232, 246-48 (1985) (*Oneida II*).

"Ratification" is subject to the canon against lightly implying extinguishment of aboriginal title.¹⁷⁰ Extinguishment by statute must be shown unequivocally by the circumstances of a statute's passage.¹⁷¹ The historical record clearly demonstrates that Congress was only interested in jurisdictional disputes between Vermont, New Hampshire, and New York and is bereft of any consideration of the Abenaki or any other Native Americans. For example, the first petition by Vermont for recognition by the Continental Congress, on July 24, 1776, specifically noted the conflict over titles with New York.¹⁷² Then, throughout 1777, the newly declared "Republic of Vermont" was unsuccessful in gaining recognition from and acceptance by the Continental Congress because of New York's jurisdictional claims upon Vermont.¹⁷³ For the next thirteen years, Vermont's admission to the Union was blocked because of jurisdictional conflicts with New York and New Hampshire and because of the potentially destructive impact admission would have on the territorial integrity of other states facing similar "independence" movements.¹⁷⁴

Elliot finds "ratification" in Vermont's admission to the Union,¹⁷⁵ yet there

170. *See id.* at 246-48. "The Court has applied similar canons of construction in nontreaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be 'plain and unambiguous.'" *Id.* at 247-48.

171. *Id.* at 248; *Mattz v. United States*, 412 U.S. 481, 505 (1972) ("A Congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.").

172. 1 COUNCIL & GOVERNOR, *supra* note 86, at 15-19.

173. Aichele, *supra* note 146, at 19.

174. In June 1778 Vermont annexed 16 New Hampshire towns on the east side of the Connecticut River, a move that sparked New Hampshire to lay claim to all of Vermont and New York, in order to seek confirmation of its legal claim to Vermont. *Id.* at 27-28; DOYLE, *supra* note 86, at 35-36; James B. Wilbur, *Introduction*, in 3 STATE PAPERS OF VERMONT: JOURNALS AND PROCEEDINGS OF THE GENERAL ASSEMBLY 1778-1781, pt. 1, at x (2d ed. 1974). The Continental Congress refused to get involved, instead passing a resolution preventing the creation of any new state out an existing one without the consent of the Continental Congress and the legislature of the existing state. Aichele, *supra* note 146, at 24. By 1782, General Washington appealed to Vermont's Governor Chittenden to withdraw its claims to New Hampshire, assuring the governor that once the claims were removed the obstacles to admission to the Union would also be removed. *Id.* at 29; DOYLE, *supra* note 86, at 47. Vermont immediately renounced these claims and reapplied for admission to the Union but was rejected for political reasons: Vermont's expected opposition to western land claims of certain states, congressional desire to limit Vermont's participation in the ongoing peace negotiations with Britain, and fear that the Vermont example would spark the dismemberment of other states. *Id.* at 47-49.

However, in 1790, even after the resolution of the New York jurisdictional dispute, Vermont's admission to the Union hinged upon the power struggle between slave and non-slave states, big states and small states, and in general the territorial integrity of existing states. *See* 7 STATE PAPERS OF VERMONT, *supra* note 139, at 13-14; DOYLE, *supra* note 86, at 59; Peter S. Onuf, *Vermont and the Union*, in LAKE CHAMPLAIN: REFLECTIONS ON OUR PAST 189 (Jennie G. Versteeg ed., 1987).

175. *State v. Elliot*, 616 A.2d 210, 217 n.8, 220-21 (Vt. 1992). For example, the Vermont

is no clear and unambiguous action during the negotiations or act of admission which implies extinguishment. Indeed, *Vermont v. New Hampshire*,¹⁷⁶ relied upon by *Elliot*,¹⁷⁷ merely records the jurisdictional disputes over state borders between the states.¹⁷⁸ However, the setting of state borders is consistent with the existence of aboriginal title within those borders, absent something more explicit regarding Indians.¹⁷⁹

Hence, the various negotiations over admission which ratified those borders do not evidence a clear and unambiguous intent of the United States to ratify an extinguishment of Abenaki aboriginal title within those borders.¹⁸⁰ There is no support for the assertion by *Elliot* that Congress ratified extinguishment of aboriginal title; Congress ratified the extinguishment of the jurisdictional claims over Vermont by both New York and New Hampshire.¹⁸¹ Furthermore, the 1781 admission's negotiations concerning fulfillment of the Wentworth Grants' conditions, which *Elliot* relied upon, must be placed within

court concluded that "[u]pon Vermont's admission, Congress recognized the land claims based on the representations of the grantees, which cannot be harmonized with the contention that the grantees possessed only the 'naked fee.'" *Id.* at 221.

176. 289 U.S. 593 (1932).

177. *Elliot*, 616 A.2d at 219-21.

178. *Vermont v. New Hampshire*, 289 U.S. 593 (1932), involved a dispute regarding the location of the border between them: the low-water mark of the western side of the Connecticut River or its western bank. In order to establish the location, a historical review of the Wentworth Grants and the conflict with New York was essential. The Court held that the low-water mark was the border because of the explicit references to the "west side of the Connecticut River" in the 1764 Royal Order-in-Council. *Id.* at 597. Resolutions of Congress and the Vermont legislature prior regarding Vermont's admission into the United States were also cited as authority for setting the border. *Id.* at 600, 605, 607, 610-12, 619.

179. COHEN'S HANDBOOK, *supra* note 14, at 503 n.259 ("There is nothing inherently inconsistent between underlying 'fee' title being in a state but subject to aboriginal Indian title. That was the usual situation in the original states.") (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-70 (1974) (*Oneida I*)).

180. Nothing in *Vermont v. New Hampshire* or the admissions negotiations remotely touched on matters of Indian relations or aboriginal title. When Vermonters asserted in 1781 to a congressional committee investigating issues of admission that the conditions of the Wentworth Grants would be fulfilled, they were merely seeking to stop both New Hampshire and New York from succeeding in their bid to gain congressional support for their reassertion of jurisdiction over Vermont. *Vermont v. New Hampshire*, 289 U.S. at 608-10. *Elliot* claims that this "shed light on the understanding held by both Vermont and Congress as to who had rights to the territory of Vermont." *Elliot*, 616 A.2d at 217 n.8. But as *Vermont v. New Hampshire* makes clear, the understanding was that the conflict at hand was between states, not between states and Indians. These were Vermont's response to contemporaneous jurisdictional moves by New Hampshire. *Vermont v. New Hampshire*, 289 U.S. at 608-10.

181. On June 22, 1781, Vermont's legislature adopted a report proposing terms for admission. On June 24, New Hampshire adopted a report claiming all of Vermont, or in the alternative, accepting an independent Vermont that claimed jurisdiction "as far west as the western banks of the Connecticut River and no further." *Vermont v. New Hampshire*, 289 U.S. at 608-09. New Hampshire brought the jurisdictional dispute to the Continental Congress, which resolved that each state renounce claims on the other. *Id.* at 609-10.

the context of the Revolution¹⁸² and the May 1781 "not-so-secret negotiations with General Frederick Haldimand, British commander at Quebec."¹⁸³ At the same time it sought entry into the United States, Vermont was negotiating for recognition of its independence by England, possibly as a member of the British Empire.¹⁸⁴ Vermont's answers to inquiries by the Continental Congress can, therefore, be seen as either a threat to allow the British to regain a strategic position reaching deep within the fragile new American republic or simply an attempt to "shake Congress out of its chronic lethargy."¹⁸⁵ In any event, the negotiations do not support the proposition that Congress ratified the extinguishment of Abenaki aboriginal title.

Oneida II supports this conclusion. In *Oneida II*, the Court refused to find congressional ratification of Indian land conveyances despite references to these conveyances in subsequent federally approved treaties.¹⁸⁶ Relying on the canon of construction against lightly imputing extinguishment of Indian title, the Court did not find the reference to the "last purchase" plain and unambiguous enough, despite the fact that the last purchase was the one in question: "The language cited . . . 'the last purchase' and . . . 'land heretofore ceded,' far from demonstrates a plain and unambiguous intent to extinguish Indian title. There is no indication that either the Senate or the President intended by these references to ratify the 1795 conveyance."¹⁸⁷ Clearly, if vague language referencing the prior Indian conveyances in question is insufficient to impute extinguishment, then admission without reference to Indians cannot ratify extinguishment. Vermont's admission to the Union could not both ratify extinguishment and still follow the canon of construction and the underlying policies of Indian law. *Elliot's* finding of ratification seeks to jettison the canon of construction in favor of one which lightly imputes extinguishment.

182. *Elliot*, 616 A.2d at 217 n.8. See *supra* notes 92-99 and accompanying text. Vermont's answers to the congressional inquiry are understandable when seen in this light. On October 13, 1780, the Vermont legislature passed an Act which commanded the selectmen of frontier towns to evacuate to the interior of the state those persons who refused to aid in the defense of the frontier. 12 STATE PAPERS OF VERMONT: LAWS OF VERMONT, *supra* note 86, at 197. On October 16, 1780, the "burning of Royalton by Indians under British planning and leadership," sparked great fears on the frontier; the "enemy threat . . . caused [the] virtual evacuation of the northern part of the state . . ." 13 STATE PAPERS OF VERMONT: LAWS OF VERMONT, 1781-1784, at xii (John A. Williams ed., 1965). Hence, Vermont's response that the grants' conditions would be fulfilled can also be seen as a reassurance to the Continental Congress that Vermonters would not allow a hostile British presence to maintain a foothold in the militarily important Lake Champlain region.

183. Onuf, *supra* note 174, at 195.

184. *Id.*

185. *Id.*

186. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 246 (1985) (*Oneida II*).

187. *Id.* at 248.

Conclusion

The Vermont Supreme Court in *Elliot* committed a grave miscarriage of justice. It created a new cumulative effects test. It eliminated the need for a clear and unambiguous sovereign act to extinguish aboriginal title. It undermined the "guardianship" responsibility of the sovereign by requiring that the sovereign actively protect Indian interests; the court would have failure to do so henceforth evidence implicit consent to extinguish those interests. The court eliminated the canon against lightly imputing extinguishment by finding ratification in congressional actions which did not concern aboriginal title and which were not inconsistent with the exercise of aboriginal title.

Elliot is therefore a radical departure from the rules of aboriginal title. It undermines the well-settled policies that have long inspired Indian law. In light of the problems related to the issuance of title insurance in northwestern Vermont, it seems like an expedient solution, warranted not by the facts but by the exigencies of the moment. Ironically, it was the inability of states to uniformly apply principles of justice in their Native American relations that prompted the rules of law and centralized control which *Elliot* so radically undermines.

The *Elliot* decision's reach is much further than Vermont. Had *Elliot* defined the rules of extinguishment, it is quite possible that all of the eastern land claims by Indian nations from *Oneida I* in 1974 to the present would have been extinguished.¹⁸⁸ According to Bob Anderson, staff attorney with the Native American Rights Fund, had *Elliot* been the law prior to *Oneida I*, the *Oneida* would not have won that case.¹⁸⁹ Lawrence Aschenbrenner, another staff attorney with the Fund, added that should the United States Supreme Court eventually endorse the *Elliot* test, it would "have a damaging effect, a real damaging effect on any one of the other [outstanding] land claims," because courts "can find a lot of excuses" and "acts inconsistent with the existence of aboriginal title, such as when they just ignore it."¹⁹⁰ Both attorneys note that the practical effect of the Court denying certiorari to *Elliot* will be to send a message to other courts that this is the means to get around "sticky Indian land claims."¹⁹¹

188. For a survey of eastern Indian land claims, see Clinton & Hotopp, *supra* note 116; RICHARD S. JONES, CONGRESSIONAL RESEARCH SERVICE, INDIANS: LAND CLAIMS BY EASTERN TRIBES (1987); Note, *Indian Sovereignty and Eastern Indian Land Claims*, 27 N.Y.L. SCH. L. REV. 921 (1982). According to Lawrence Aschenbrenner, Staff Attorney with the Native American Rights Fund, *Elliot* is "certainly inconsistent" with *Oneida II* in finding implicit extinguishment. Telephone Interview with Lawrence Aschenbrenner, Staff Attorney, Native American Rights Fund (Jan. 19, 1993).

189. Telephone Interview with Bob Anderson, *supra* note 10.

190. Telephone Interview with Lawrence Aschenbrenner, *supra* note 188.

191. *Id.*; see also *State v. Elliot*, 616 A.2d 210 (Vt. 1992).

The effect on the Abenaki is likewise significant. Immediately after the Supreme Court denied certiorari, tribal leaders complained of increased harassment by Vermont law enforcement officials.¹⁹² Vermont began prosecuting Abenakis for the exercise of aboriginal fishing rights and alleged violations of motor vehicles laws.¹⁹³ However, the Vermont district court judge with jurisdiction decided to dismiss these charges, noting the "petty" nature of the violations, a court docket full of more serious offenses, and efforts by Vermont and Abenaki leaders to resolve disputes through dialogue.¹⁹⁴

Because of the injustice of the decision itself and the dangerous precedent that it will tend to set, *Elliot* should have been granted certiorari and reversed by the United States Supreme Court.¹⁹⁵ Although the Court denied certiorari, it should limit the reach of *Elliot* by taking the first available opportunity to strongly reaffirm its past aboriginal title holdings. Furthermore, the Court should consider clarifying the law of extinguishment by adopting a test which is not as prone to abuse and manipulation. One source for such a test is found in *United States v. Dion*,¹⁹⁶ where the Court adopted an "actually considered" and "chose to" abrogate the test for treaty abrogations.¹⁹⁷ This test provides for certain safeguards in its requirements for "clear evidence" and actual consideration and choice.¹⁹⁸ It is consistent with the canon against lightly

192. See Letter of Complaint from Michael Delaney, Tribal Judge, Sovereign Republic of the Abenaki Nation of Missisquoi, to Shelly Hill, Professional Conduct Board (Dec. 31, 1992) (charging that the Franklin County State Attorney had engaged in illegal harassment, selective prosecution, and a conspiracy to institute criminal charges against Abenaki Nation Chief Homer St. Francis) (on file with author).

193. See Michael Delaney, Tribal Judge, Sovereign Republic of the Abenaki Nation of Missisquoi, Press Release (Jan. 26, 1993) (challenging the commencement of the prosecution of fifty seven Abenakis for the exercise of aboriginal rights and charging that the state was threatening the physical and cultural survival of the Abenaki people) (on file with author).

194. See State Notes, *Judge to Dismiss 77 Cases Involving Abenaki*, BURLINGTON FREE PRESS (Burlington Vt.), May 1, 1993, at B1; see also Editorial, *Progress for Abenakis*, BURLINGTON FREE PRESS (Burlington Vt.), July 3, 1992, at A10; Yvonne Daley, *Commission Wants Meeting on Abenaki Ruling*, RUTLAND DAILY HERALD (Rutland Vt.), June 26, 1992, at 14.

195. See *State v. Elliot*, 616 A.2d 210 (Vt. 1992).

196. 476 U.S. 734 (1986).

197. *Id.* at 739-40. "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty." *Id.*

198. For a discussion of *Dion* and the "actual consideration and choice" test as applied to the abrogation of Indian treaties by federal statutes protecting the environment, see Laurence, *supra* note 53. Laurence concludes that Indian advocates should "feel reasonably comfortable" with the test because of these safeguards; the test "should remove from a court's concern arguments about what Congress is imputed to have known, or what it should have known, or what it constructively knew, or what it might have done had it been brought to its attention that a treaty abrogation was threatened." *Id.* at 865-66. Laurence argues that *Dion* still provides a measure of flexibility which may wrongly be used to impute abrogation where none was intended, but concludes that it still may be protective enough of treaties if used skillfully used by tribal

imputing extinguishment. It is a more precise formulation than that currently in operation. Clearly, as the treaty abrogation cases that rely upon *Dion* prove, an even more protective test which would require express references to aboriginal title extinguishment would be the most preferable choice of tests.¹⁹⁹ Yet in light of the manipulations by *Elliot*, a decision by the Court to firm up the language protecting aboriginal title seems not only just and in order, but also well within the bounds of the most recent articulations on the subject by the Court.

advocates. *Id.* at 866-86. However, in regards to aboriginal title, the *Dion* test provides significantly more precision than current articulations.

199. *Id.* at 864, 868-85.

