American Indian Law Review

Volume 44 | Number 1

2019

How the New Deal Became a Raw Deal for Indian Nations: Justice Stanley Reed and the *Tee-Hit-Ton* Decision on Indian Title

Kent McNeil

HOW THE NEW DEAL BECAME A RAW DEAL FOR INDIAN NATIONS: JUSTICE STANLEY REED AND THE *TEE-HIT-TON* DECISION ON INDIAN TITLE

*Kent McNeil**

In 1955, the Supreme Court delivered one of the most regressive, and in some ways surprising, decisions it has ever made regarding Indian rights. The case, *Tee-Hit-Ton Indians v. United States*,[1] involved a claim to original Indian title to traditional lands by a small, but identifiable, subgroup of Tlingit Indians in Alaska. The group sought compensation from the United States government for the taking of timber from a portion of its lands located within the Tongass National Forest. Prior to the case, in 1947, Congress authorized the sale of timber within the forest,[2] and in

* Osgoode Hall Law School, York University, Toronto. The research assistance of Liza Bowman, Brent Arnold, Ryan Gibson, and Laura Achoneftos is very gratefully acknowledged, as is the helpful feedback of Kerry Wilkins. I would also like to express my appreciation to the very helpful staff at the Breckinridge Research Room, Margaret I. King Library, Special Collections, University of Kentucky, Lexington, where Justice Stanley Forman Reed's papers are archived.

1. 348 U.S. 272 (1955). For background, see Stephen Haycox, *Tee-Hit-Ton and Alaska Native Rights*, *in* LAW FOR THE ELEPHANT, LAW FOR THE BEAVER: ESSAYS IN THE LEGAL HISTORY OF THE NORTH AMERICAN WEST 127 (John McLaren, Hamar Foster & Chet Orloff eds., 1992); DONALD CRAIG MITCHELL, SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867–1959, at 355–58 (1997); Joseph William Singer, *Erasing Indian Country: The Story of* Tee-Hit-Ton Indians v. United States, *in* INDIAN LAW STORIES 229 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011).

2. H.R.J. Res. 205, 80th Cong. (1947), 62 Stat. 920; *see* Stephen W. Haycox, *Economic Development and Indian Land Rights in Modern Alaska: The 1947 Tongass Timber Act*, 21 W. HIST. Q. 20 (1990); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 169–71 (1997). Felix S. Cohen, whose 1942 text, *Handbook of Federal Indian Law*, became a classic (for the latest edition, *see infra* note 42), published a forceful article criticizing this statute and the way it had been enacted. *See* Felix S. Cohen, *Alaska's Nuremberg Laws: Congress Sanctions Racial Discrimination*, COMMENTARY, Aug. 1948, at 136, https://www.commentarymagazine.com/articles/alaskas-nuremberg-lawscongress-sanctions-racial-discrimination/. In it, he wrote:

> For the first time in our history, it has been decreed by Congress that a government bureau may seize the possessions of Americans solely because they belong to a minority race. That is the meaning of the Tongass Act, which deprives Alaskans of their land and timber if two or more of their grandparents were Indians . . . .

Id. at 136. Nor was Cohen alone in publicly criticizing the Act. He referred to similarly critical articles in *Christian Century*, the Catholic weekly *Commonweal*, and the *Richmond*

1951, the Secretary of Agriculture sold the timber from these lands to a private company. The Tee-Hit-Ton Indians claimed that they were entitled to just compensation for the taking of their property according to the Fifth Amendment to the United States Constitution.[3]

In a decision delivered by Justice Stanley Reed, the Supreme Court denied the Tribe's claim. The decision is surprising because it contradicts earlier jurisprudence on Indian rights, especially Chief Justice Marshall's decisions in *Fletcher v. Peck*,[4] *Johnson v. M'Intosh*,[5] and *Worcester v. Georgia*,[6] all of which acknowledged the proprietary nature of original Indian title. If proprietary, it should be protected against government taking without just compensation. So why did the Supreme Court decide otherwise? This article seeks to answer this question by examining Justice Reed's Indian rights opinions from the 1940s and demonstrating how he was able to persuade other members of the Court to accept his view that compensation for the taking of Indian lands should be left to Congress's discretion.

Justice Reed's opinion on Indian law matters stemmed from his experience as President Franklin D. Roosevelt's Solicitor General in the mid-1930s. During that era, a conservative Supreme Court invoked constitutional provisions to strike down many of the administration's New Deal legislative initiatives. After he was appointed to the Supreme Court by Roosevelt in 1937, Justice Reed expressed a preference for deference to government and for judicial restraint in the use of constitutional provisions to limit the authority of the legislative and executive branches. His decision in the *Tee-Hit-Ton* case applied this philosophy to the detriment of the Indian nations and the consistent development of federal Indian law.

I. The Tee-Hit-Ton Judgment

The Supreme Court decided that, if unrecognized by Congress, the rights of the Indian tribes to their traditional lands are not protected by the Fifth Amendment because they are not proprietary. Instead, they amount to a

---

Times-Dispatch. *Id.* at 138–39. Regrettably, Cohen died in 1953 at the young age of forty-six before the Court of Claims handed down the judgment in *Tee-Hit-Ton Indians v. United States*, 120 F. Supp. 202 (Ct. Cl. 1954), that was affirmed by the Supreme Court.

3. Inter alia, the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

4. 10 U.S. (6 Cranch) 87 (1810).

5. 21 U.S. (8 Wheat.) 543 (1823).

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

mere "right of occupancy" at the sufferance of American government. Justice Reed described this right of permissive occupation in this way:

> This is not a property right but amounts to a right of occupancy which the sovereign [the United States] grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[7]

Relying on the dubious historical supposition that "[e]very American schoolboy knows that the savage tribes of this continent were deprived" of their lands, not by treaty, but by conquest,[8] Reed concluded:

> In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, *where it belongs*, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.[9]

---

7. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

8. *Id.* at 289–90. Reed was dismissive of the treaties as consensual cessions of land: "[E]ven when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." *Id.* at 290; *cf.* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–35 (1947) (describing what "[e]very American schoolboy is taught" as the "prevailing mythology"). The reality, Cohen wrote, is that "practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners." *Id.* at 35. In a footnote to this passage, Cohen quotes Thomas Jefferson, *Notes on the State of Virginia, 1781-1785*, *in* THE COMPLETE JEFFERSON: CONTAINING HIS MAJOR WRITINGS, PUBLISHED AND UNPUBLISHED, EXCEPT HIS LETTERS 632 (Saul K. Padover ed., Books for Libraries Press 1969) (1943) ("That the lands of this country were taken from them [the Indian tribes] by conquest, is not so general a truth as is supposed. I find in our historians and records, repeated proofs of purchase."). *See also* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 31–33 (1996).

9. *Tee-Hit-Ton*, 348 U.S. at 290–91 (emphasis added). It is worth noting that the first sentence in this quotation, which is a frank admission that the United States had to be able to take Indian lands without any legal obligation to pay for them in order to afford to expand, was not in an earlier draft of Reed's judgment, dated January 21, 1955. It was added in

Reed was quite explicit about the policy grounds for his decision. He thought that Congress, rather than the courts, should have the authority to determine what compensation, if any, should be paid to the Indian nations when their right of occupancy was terminated.

But to reach this conclusion, Justice Reed had to classify the Indian interest in their traditional lands as non-proprietary, that is, as not amounting to a property interest in land protected by the Fifth Amendment. How did he do this? First, he began with a very questionable interpretation of earlier Supreme Court cases, starting with Chief Justice Marshall's celebrated decision in *Johnson v. M'Intosh*,[10] which according to Reed, had held that Indian title is a non-proprietary right of occupancy. As Professor Nell Newton has so ably demonstrated in her article, "At the Whim of the Sovereign: Aboriginal Title Reconsidered,"[11] Reed's interpretation of these decisions does not stand up to scrutiny. Well before *Johnson*, Marshall had held in *Fletcher v. Peck* "that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state [of Georgia]."[12] In other words, even though the state's underlying title to the lands in question might be a fee simple estate, the Indian title was nonetheless a proprietary legal burden on it, for if it did not amount to a legal property interest courts would not have to respect it. Relying on *Fletcher*, Marshall stated in *Johnson* that Indian title would bar an ejectment brought to acquire possession by the holder of the fee simple just as effectively as a lease for years.[13] For Chief Justice Marshall, this meant that a grantee who acquired the fee simple from the state would not be able

---

handwriting to that draft and included in the last paragraph of the January 24, 1955 typescript. These drafts and other papers relating to the *Tee-Hit-Ton* case are in the University of Kentucky, Margaret I. King Library, Special Collections, Stanley Forman Reed Collection, 81M3, Box 159, Supreme Court Series, Opinions File, October Term 1954, Case No. 43, Tee-Hit-Ton Indians vs United States [hereinafter Reed Collection: *Tee-Hit-Ton Indians*].

10. 21 U.S. (8 Wheat.) 543 (1823). Other cases relied on by Reed included *Beecher v. Wetherby*, 95 U.S. 517 (1877), and *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).

11. Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980); *see also* J. Youngblood Henderson, *Unraveling the Riddle of Aboriginal Title*, 5 AM. INDIAN L. REV. 75 (1977); Steven John Bloxham, *Aboriginal Title, Alaskan Native Property Rights, and the Case of the Tee-Hit-Ton Indians*, 8 AM. INDIAN L. REV. 299, 325–26 (1980); Singer, *supra* note 1, at 243–47.

12. 10 U.S. (6 Cranch) 87, 142–43 (1810).

13. *Johnson*, 21 U.S. at 592.

to obtain possession until the Indian title had been legitimately extinguished by the United States.[14]

In *Johnson*, Marshall opined that the colonizing European powers had agreed among themselves that "discovery" of new lands in North America gave the discovering nation sovereignty and the sole right to acquire Indian lands. Discovery did not, however, result in loss of the Indian nations' rights to the lands they occupied and used. Marshall said that the Indians were "the rightful occupants of the soil, with a *legal* as well as just claim to retain possession of it, and use it according to their discretion."[15] He confirmed this idea in *Cherokee Nation v. Georgia* in 1831, stating that "the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."[16] A year later in *Worcester v. Georgia*, Marshall again affirmed the legal nature of Indian title, stating that "the Indian nations possessed a full right to the lands they occupied."[17] Commenting on the doctrine of discovery that he had relied on in *Johnson* to give European sovereigns, and subsequently the United States, the exclusive right to purchase lands from the Indians, Marshall wrote that it

> was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in

14. *See also Beecher*, 95 U.S. at 525. In *Johnson*, Marshall was answering the following question posed in *Fletcher*: "It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they [the states] were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title." *Fletcher*, 10 U.S. at 142. The term "ejectment" is used here in its legal sense to refer to the old action of ejectment, whereby a person with a better title could recover land from a person in possession. *See* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 38–63, 250–52 (1989). Likewise, the holders of Indian title could recover their land from a wrongdoer by an action of ejectment, demonstrating again the proprietary nature of their title. *See* Marsh v. Brooks, 49 U.S. (8 How.) 223, 232 (1850); Cty. of Oneida v. Oneida Indian Nation, 105 S. Ct. 1245, 1252 (1985).

15. *Johnson*, 21 U.S. at 574 (emphasis added).

16. 30 U.S. (5 Pet.) 1, 17 (1831).

17. 31 U.S. (6 Pet.) 515, 560 (1832).

> possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.[18]

So discovery by Europeans did not diminish the pre-existing sovereignty and land rights of the Indian nations. For that to happen, the lands had to be brought within the territorial jurisdiction of the discovering sovereign, which according to *Johnson*, could be accomplished by treaty or conquest.[19] Once that occurred, the Indians nonetheless retained internal sovereignty and ownership of lands not ceded to or taken by the European nation or, subsequently, the United States.[20]

In the unanimous decision in *Mitchel v. United States* in 1835, Justice Baldwin reaffirmed the proprietary nature of the Indians' title:

> [T]heir hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. . . .
>
> . . . [I]t is enough to consider it as a settled principle, that their right of occupancy is considered as sacred as the fee simple of the whites.[21]

To be as sacred as the fee simple, the most complete form of common law ownership, Indian title must be proprietary and enjoy the same kind of legal protection the common law has provided fee simple owners against government takings—protection the framers of the Fifth Amendment regarded as sufficiently important to add to the Constitution.[22]

---

18. *Id.* at 544.

19. For further discussion, see Kent McNeil, Review Essay, *The Doctrine of Discovery Reconsidered: Reflecting on* Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, by Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and* Reconciling Sovereignties: Aboriginal Nations and Canada*, by Felix Hoehn*, 53 OSGOODE HALL L.J. 699 (2016).

20. *Johnson*, 21 U.S. at 574, 593, 603; *Cherokee Nation*, 30 U.S. at 16–17; *Worcester*, 31 U.S. at 542–44, 547, 553, 556–57, 559–61; *Ex parte* Crow Dog, 109 U.S. 556, 560–62 (1883); United States v. Wheeler, 435 U.S. 313, 322–24 (1978); United States v. Lara, 541 U.S. 193, 204–05 (2004).

21. 34 U.S. (9 Pet.) 711, 746 (1835).

22. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *129; HERBERT BROOM & GEORGE L. DENMAN, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW 225–45 (London, W. Maxwell & Son, 2d ed. 1885) (1866); T.R.S. Allan, *Legislative Supremacy and the Rule*

The Supreme Court has nonetheless held Congress has plenary power over the Indian nations and so can infringe upon their rights at any time.[23] In *Lone Wolf v. Hitchcock*,[24] the Court decided that Congress could ignore a provision in an 1867 treaty between the Comanche and Kiowa tribes requiring that three-quarters of the adult males occupying their reservation had to consent to any cession of reservation lands. Justice White delivered the opinion of the Court, stating, "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[25] The Court held this plenary power includes power over tribal property.

However, while Congress may have unfettered authority to take tribal lands, this does not mean it can do so without paying compensation. The issue of compensation was apparently not at issue in *Lone Wolf* because the statutes in question "purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit."[26] But, if just compensation had not been provided, one would expect the Court to have ordered it be paid because the Court referred to the

---

of Law: Democracy and Constitutionalism, 44 CAMBRIDGE L.J. 111 (1985); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998); Singer, *supra* note 1, at 245–46, 248. In addition, it is worth noting that the highest courts of Canada and Australia have held that Aboriginal or Native title is proprietary in nature. *See* Delgamuukw v. British Columbia, (1997) 3 S.C.R. 1010 (Can.); Tsilhqot'in Nation v. British Columbia, (2014) 2 S.C.R. 257 (Can.); Mabo v. Queensland [No. 2] (1992) 175 CLR 1 (Austl.). Given that title in these jurisdictions is based on British law that existed prior to the independence of these countries and that Chief Justice Marshall in *Johnson* also relied on that law, one would expect similar results. *See* BRIAN SLATTERY, ANCESTRAL LANDS, ALIEN LAWS: JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE (1983); SIMON YOUNG, THE TROUBLE WITH TRADITION: NATIVE TITLE AND CULTURAL CHANGE (2008). Note, too, that in Canada, Aboriginal title is protected not only by the common law but also by section 35 of the Constitution Act, 1982, Schedule B to the Canada Act 1982, (U.K.) 1982, ch. 11. Indeed, Aboriginal land rights are the only property rights that enjoy this protection, as there is no equivalent in the Canadian Constitution to the Fifth Amendment safeguarding property rights generally.

23. For confirmation of the plenary power doctrine in the twenty-first century, see *Lara*, 541 U.S. 193. For criticism of the doctrine, see Frickey, *supra* note 8; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 71–83 (2005).

24. 187 U.S. 553 (1903).

25. *Id.* at 565.

26. *Id.* at 568.

reservation lands as "tribal property," and Congress is subject to the Fifth Amendment.[27]

Similarly, in the more recent case of *United States v. Sioux Nation*,[28] the United States was required to pay just compensation to the Sioux Nation for the congressional taking of the Black Hills that had been part of the Great Sioux Reservation established by the Fort Laramie Treaty of 1868. The Supreme Court distinguished *Lone Wolf* from this case on the basis that Congress had purported to pay just compensation in *Lone Wolf*, whereas it had not to the Sioux Nation. Moreover, the Court rejected its suggestion in *Lone Wolf* that "relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review."[29] The Court cited several cases, some of which pre-dated *Tee-Hit-Ton*, to affirm Congress's power over tribal affairs is subject to "pertinent constitutional restrictions," including the Fifth Amendment.[30]

Significantly, Justice Reed did not rely on or even cite *Lone Wolf* in *Tee-Hit-Ton*. He was obviously aware that in order to avoid the application of the Fifth Amendment, he had to decide that original Indian title is not proprietary and *Lone Wolf* would have been of no assistance to him in that regard. So, Justice Reed relied principally on Chief Justice Marshall's decision in *Johnson* instead. However, he must have been aware that he was manipulating judicial precedent by, in Professor Joseph Singer's words, "making the most of its dicta about conquest and discovery, ignoring the

---

27. *Id.* Even according to the law as formulated by Justice Reed in *Tee-Hit-Ton*, compensation would have been payable under the Fifth Amendment because the Comanche and Kiousa's title to the reservation had been recognized by a treaty.

28. 448 U.S. 371 (1980).

29. *Id.* at 413.

30. *Id.* at 415 (citing United States v. Creek Nation, 295 U.S. 103, 109–10 (1935); Shoshone Tribe v. United States, 299 U.S. 476, 497–98 (1936); United States v. Klamath Indians, 304 U.S. 119, 123 (1938); United States v. Shoshone Tribe, 304 U.S. 111, 115–16 (1938); Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 122 (1960); Menominee Tribe v. United States, 391 U.S. 404, 413 (1968)). The Court nonetheless acknowledged in *Sioux Nation* that, given the *Tee-Hit-Ton* decision,

> the taking by the United States of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment. . . . The principles we set forth today are applicable only to instances in which "Congress, by treaty or other agreement, has declared that, thereafter, Indians were to hold the lands permanently." In such instances, "compensation must be paid for subsequent taking."

Sioux Nation, 448 U.S. at 415 n.29 (citations omitted) (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277–78 (1955)).

actual holding of the case."[31] Moreover, Reed deliberately disregarded authority that did not support his view that Indian title is merely non-proprietary, permissive occupation of government-owned land,[32] citing *Worcester* only in an unrelated footnote and not referring to *Fletcher*, *Cherokee Nation*, or *Mitchel* at all.[33] As both Professor Singer and Professor Newton have described in much greater detail, Reed's opinion on the nature of Indian title simply cannot be reconciled with previous Supreme Court decisions.[34] The question remains: what caused Reed to consciously disregard precedent?

In her article, Professor Newton suggested three possible motivations for Justice Reed's departure from precedent.[35] The first she termed "realism," noting that he may have believed that his view that Indian lands had generally been taken by conquest was more consistent with historical reality than the notion that they had been purchased. But, as Newton pointed out,

---

31. Singer, *supra* note 1, at 246; *cf.* WILLIAMS, *supra* note 23, at 89–95.

32. This view was strengthened in Reed's January 24, 1955 draft, where he replaced "the policy of Indian gratuities for taking Indian title" with "the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land" in the last paragraph of his judgment. Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159. *See supra* text accompanying note 9.

33. In *Lone Wolf*, Justice White acknowledged that

> in decisions of this Court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected states or individuals.

Lone Wolf v. Hitchcock, 187 U.S. 553, 564–65 (1903) (citations omitted) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat) 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 48 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832); United States v. Cook, 86 U.S. (19 Wall.) 591, 592 (1873); Leavenworth, L. & G.R. Co. v. United States, 92 U.S. 733, 755 (1875); Beecher v. Wetherby, 95 U.S. 517, 525 (1877)). But, as pointed out above, although Congress has power that states and individuals do not have to take tribal lands, this does not mean it can do so without paying compensation. As held by Chief Justice Vinson in *United States v. Alcea Band of Tillamooks* (*Tillamooks I*), "Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid." 329 U.S. 40, 47 (1946); *see* discussion *infra* text accompanying notes 50–94.

34. Singer, *supra* note 1, at 243–47; Newton, *supra* note 11, at 1220–28.

35. Newton, *supra* note 11, at 1246–53.

even if the United States had often failed to respect the rights of the Indian tribes as articulated by Chief Justice Marshall in the 1820s and 1830s, that failure was not a reason to reject the principles on which those rights were based. Moreover, the Indians of Alaska have never been conquered, neither by the Russians nor by the United States after it purchased the territory from them in 1867. As Newton succinctly put it, "The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself."[36] I am therefore skeptical of the realism explanation. In my opinion, Reed simply rewrote history in order to rationalize his opinion that, whatever land rights the Indian nations had before colonization, those rights were extinguished, making the Indians permissive occupants of government-owned land.[37] Conquest provided a facile explanation for extinguishment.

Another explanation Newton gave is that the *Tee-Hit-Ton* case came to court at the height of the termination period of American Indian policy,[38]

---

36. *Id.* at 1244.

37. *See supra* text accompanying notes 7, 9. In *Worcester*, Marshall described the British policy for acquiring Indian lands: "The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them." 31 U.S. at 547; *see also Tillamooks I*, 329 U.S. at 47–48 (Vinson, C.J.) ("The early acquisition of Indian lands in the main progressed by a process of negotiation and treaty. The first treaties reveal the striking deference paid to Indian claims, as the analysis in *Worcester*, clearly details. It was usual policy not to coerce the surrender of lands without consent and without compensation. The great drive to open Western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1896, this Court noted that . . . 'nearly every tribe and band of Indians within the territorial limits of the United States was under some treaty relations with the government.' Something more than sovereign grace prompted the obvious regard given to original Indian title." (citation omitted) (citing Marks v. United States, 161 U.S. 297 (1896)).

38. Newton, *supra* note 11, at 1249–50; *see also* WILKINS, *supra* note 2, at 166–67. The termination period was initiated less than two years prior to the *Tee-Hit-Ton* decision by House Concurrent Resolution 108, which declared it to be

> the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship.

H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953), 67 Stat. B132. Though framed in the language of equality, this policy was designed to do away with tribal sovereignty and territories and assimilate Indians into American society as individual citizens. *See* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960, at 91–110 (1986); INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM

which was based on the ethnocentric view that Indian societies and cultures are inferior to the dominant American culture. Assimilation was therefore thought to be in the best interests of the Indians. There is certainly evidence in Justice Reed's decision that he regarded Indian societies as inferior. For example, he referred to them as "savage tribes" who were forced by the "drive of civilization" to give up their "ancestral ranges."[39] I have no doubt that this ethnocentricity was a factor, albeit a misinformed and improper one, that influenced his decision.[40] Linked to this mindset was the notion that Indian tribes living predominantly by means of hunting and fishing should not be accorded property rights to the vast territories over which they "roamed."[41]

In my opinion, it was Newton's third explanation—namely, that compensating Indians for the taking of their lands would cost the government too much money—that was foremost in Justice Reed's mind. As already mentioned, his decision in *Tee-Hit-Ton* was based explicitly on policy. He thought it was up to Congress to determine what compensation, if any, should be paid to the Indian nations for the taking of their lands, and courts should not impede this discretionary power by according Fifth Amendment protection to Indian title. An evident reason for this position was his opinion that the financial weight of constitutional protection would impose an onerous burden on the United States government. In a footnote in the *Tee-Hit-Ton* decision, he noted that government lawyers had "pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000."[42]

ROOSEVELT TO REAGAN 111–85 (Kenneth R. Philp ed., 1986) [hereinafter INDIAN SELF-RULE]; ROBERTA ULRICH, AMERICAN INDIAN NATIONS FROM TERMINATION TO RESTORATION, 1953–2006 (2010).

39. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, 289–90 (1955).

40. *See* WILLIAMS, *supra* note 23. On how attitudes of racial and cultural superiority have influenced government policy and judicial decisions on Indian rights in the United States and Canada, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989); KENT MCNEIL, FLAWED PRECEDENT: THE ST. CATHERINE'S CASE AND ABORIGINAL TITLE 8–18 (2019).

41. *See infra* note 64; *see infra* notes 135–39 and accompanying text.

42. *Tee-Hit-Ton*, 348 U.S. at 283 n.17. The Act referred to was the Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.06[3], at 438–40 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].

This figure was likely inflated,[43] but even if accurate, it seems unreasonable that the sheer cost of honoring constitutional property rights should serve as a basis for denying them.[44] This idea poses another question to consider. Would the potential amount have been a factor if compensation for government taking was owed to non-Indigenous ranchers or wealthy corporations instead of Indian nations?[45] Nonetheless, this estimate clearly influenced Reed—and probably other members of the Court—in concluding that the taking of Indian title land is not compensable under the Fifth Amendment. Although Reed did not explicitly state that he relied on this number to reach the conclusion in *Tee-Hit-Ton*,[46] a memorandum between justices is telling. Dated January 21, 1955, in a memorandum from Justice Reed to Justice Hugo Black that apparently accompanied the draft

---

43. *See* Newton, *supra* note 11, at 1248–49 (pointing out that the actual total of Indian Claims Commission awards for all the claims the government had listed amounted to slightly less than $150 million, bringing the aggregate figure to just over one billion if interest were added); *see also* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 136 (1997). The final figure those authors gave for Indian Claims Commission Act cases was about $1.3 billion. Putting this figure into perspective, they noted that, based on the Native American population of about 1.5 million in 1980, this would have amounted to less than $1000 per person. By way of comparison, they observed that, "Under an act passed in 1988, citizens of Japanese ancestry who were interned during World War II became eligible to receive $20,000 apiece, as well as a formal apology from Congress." *Id.* at 257. Roger Buffalohead pointed out in regard to the claims settled through the Commission that "the United States government ended up paying Indian people fifty cents an acre for the United States of America. The title was quieted, but in many cases it is still unsettled." Quoted in INDIAN SELF-RULE, *supra* note 38, at 150.

44. *See* Louisville Joint Stock Land Band v. Radford, 295 U.S. 555, 602 (1935) ("[T]he Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation."). Compare this with Justice Reed's statement in *Tee-Hit-Ton* in the quotation at text accompanying *supra* note 9, to the effect that the expansion of the United States required Indian lands to be taken without any legal obligation to pay compensation.

45. See WILLIAMS, *supra* note 23, on the racial discrimination inherent in the decision.

46. Significantly, however, in an earlier undated draft of his *Tee-Hit-Ton* judgment Reed had written in the last paragraph:

> What in this case would be that value [of the obligations owed to the Tee-Hit-Tons if original Indian title is a compensable legal right]? The worth of the land and timber when taken as alleged under this Resolution of 1947 and the Fifth Amendment? There was no taking of Indian occupancy before that time. Would mineral rights be compensable? Indians with recognized titles have profited from oil.

Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159. In the judgment he delivered, these sentences were replaced with the first sentence in the quotation at text accompanying *supra* note 9.

judgment he circulated to Black and other members of the Court, Reed wrote:

> It is important, however, to get your adherence to this opinion. Otherwise, it may well be that interest will be earned by claims for old takings under the I.C.A. [Indian Claims Commission Act[47]]. We did not bar this in Tillamooks.[[48]] That was not I.C.A. The U.S. says that 1¾ billions in claims are before the I.C.A. and 7 ¼ billions in interest. Furthermore what is the value-test in the I.C.A. – value at taking or what seems fair to the I.C.A. . . . Let's get it decided now that Fifth Amendment taking of Indian title is not compensable without congressional action as I think you said in first Tillamooks, 329 U.S., and Shoshone, 324 U.S.[49]

To understand the significance of this memorandum, we must examine the *Tillamooks* case, as it reveals how the debate over recognized and unrecognized Indian lands rights originated in the mid-1940s, only to be resolved a decade later in *Tee-Hit-Ton* when Justice Reed was able to swing a divided Court to his view that only recognized rights enjoy constitutional protection.

---

47. *See supra* note 42 and accompanying text. *See also* Singer, *supra* note 1, at 247 (observing that, before the *Tee-Hit-Ton* decision, pre-judgment interest might have been payable on Indian Claims Commission judgments if the Fifth Amendment applied to original Indian title). But as Singer pointed out, "The act was intended to put to rest Indian claims for unjust takings of property once and for all. For that reason, the idea that the United States could not afford to pay for the land flew in the face of then-existing congressional policy." *Id.*

48. United States v. Alcea Band of Tillamooks (*Tillamooks II*), 341 U.S. 48 (1951).

49. Reed to Black (Jan. 21, 1955), *in* Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159. This memo does not bear Reed's name or signature, but the file contains a version of it in his handwriting and the content shows it is from him. The two cases referred to at the end of the memo are *Tillamooks I*, in which Justice Black wrote a short concurring judgment expressing the view that the Tillamooks and other Indian nations had no legal or equitable claim against the government for the taking of their lands by the United States except as provided by statute, and *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 354–58 (1945), in which Justice Black joined in a concurring judgment with Justice Jackson expressing their view that the obligations of the United States to the Shoshone were merely moral, as an 1863 treaty with them did not give rise to legal rights.

II. The Tillamooks *Case*

In *United States v. Alcea Band of Tillamooks* (*Tillamooks I*),[50] decided in 1946, four Indian tribes brought an action in the Court of Claims under a 1935 jurisdictional Act of Congress that gave these tribes access to the courts to sue the United States on the basis of "any and all legal and equitable claims arising under or growing out of the original Indian title" to certain lands.[51] The Supreme Court decided that the plaintiffs had proven their original Indian title and were entitled to compensation for the taking of those lands by the government. According to the Court, in a judgment delivered by Chief Justice Vinson[52] and joined by Justices Frankfurter, Douglas, and Murphy, this was the first time it had to decide "whether the Indians ha[d] a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title."[53] Prior to this, "[a]s against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will."[54] However, "[a]dmitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid."[55]

What barred Indian nations in the past from suing the federal government for a unilateral taking of their lands was the procedural barrier of sovereign immunity.[56] Once that barrier had been removed by the 1935 jurisdictional Act, they were able to sue and were entitled to recover on the basis of their

50. 329 U.S. 40 (1946).

51. *Id.* at 41 (quoting Act of Aug. 26, 1935, ch. 686, § 1, 49 Stat. 801, 801).

52. *Tillamooks I* was the first Court opinion written by Vinson after he took the oaths of office as Chief Justice on June 24, 1946. *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 416 (1994). Remarkably, in this 755-page biography of Reed, Fassett devotes less than a paragraph to the *Tee-Hit-Ton* case. *See id.* at 585–86.

53. *Tillamooks I*, 329 U.S. at 47.

54. *Id.* at 46. The authority the Court cited for Indian title amounting to complete ownership against anyone except the sovereign was *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).

55. *Tillamooks I*, 329 U.S. at 47.

56. *Id.* at 45.

original Indian title.[57] As Chief Justice Vinson pointed out, the 1935 Act would be of no benefit to tribes without an entitlement to compensation.[58]

In *Tillamooks I*, the government argued that compensation would be payable only if the tribes, in addition to proving their original Indian title, could point to some official act of title recognition by the government. This notion raised the distinction between recognized and unrecognized Indian title that prominently came to fruition in Justice Reed's opinion in *Tee-Hit-Ton*. Chief Justice Vinson examined the government's cited case law and found it did not support the contention that only recognized title is compensable.

In particular, Chief Justice Vinson commented on *Northwestern Bands of Shoshone Indians v. United States*,[59] a judgment delivered by Justice Reed the previous year. The issue in that case was whether the 1863 Box Elder Treaty with the Shoshone had given rise to a claim against the United States for compensation for the taking of lands within the meaning of a jurisdictional Act of 1929,[60] which authorized the Court of Claims to adjudicate such claims. Justice Reed decided that a compensation claim did not arise from the treaty, as required by the 1929 Act, because the treaty did not acknowledge that the Shoshone had Indian title to the lands in question. As pointed out by Chief Justice Vinson in *Tillamooks I*, the *Northwestern Bands of Shoshone* decision did not involve original Indian title; instead, it relied on a statute requiring that a claim, in order to be adjudicated under the Act, had to arise out of the treaty. Regarding the interpretation of the treaty, Justice Reed concluded in *Northwestern Bands of Shoshone* that no claim arose out of it because

> the parties did not intend to recognize or acknowledge by that treaty the Indian title to the lands in question. Whether the lands were in fact held by the Shoshones by Indian title from

57. Original Indian title had to be a pre-existing legal right because the 1935 Act did not create any "new right or cause of action . . . . A merely moral claim is not made a legal one." *Id.*

58. *Id.* at 51–54. The Court relied on the following quotation from *Minnesota v. Hitchcock*: "[T]he Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." 185 U.S. 373, 389 (1902).

59. 324 U.S. 335 (1945); *see supra* note 49.

60. Act of Feb. 28, 1929, ch. 377, 45 Stat. 1407.

> occupancy or otherwise or what rights flow to the Indians from such title is not involved.[61]

Chief Justice Vinson therefore observed in *Tillamooks I* that the *Northwestern Bands of Shoshone* decision was not authority for the government's alleged distinction between recognized and unrecognized Indian title, noting that the Court in that case had "made no attempt to settle controversies brought under other jurisdictional acts authorizing the litigation of claims arising from the taking of original Indian title."[62] Summing up, he stated:

> Requiring formal acknowledgment of original Indian title as well as proof of that title would nullify the intended consequences of the 1935 Act. The rigors of "recognition," according to petitioner's [U.S. government's] view, would appear to require in every case some definite act of the United States guaranteeing undisturbed, exclusive and perpetual occupancy, which, for example, a treaty or statute could provide. Yet it was the very absence of such acknowledgment which gave rise to the present statute.[63]

Significantly, Justice Reed wrote a dissenting opinion in *Tillamooks I* that was joined by Justices Rutledge and Burton.[64] He started off by

---

61. 324 U.S. at 354. Justice Douglas dissented in this case, as he thought the claims asserted did arise or grow out of the 1863 treaty. Justices Murphy and Frankfurter agreed and applied the "well-settled rule that in the interpretation of Indian treaties all ambiguities are to be resolved in favor of the Indians." *Id.* at 362.

62. *Tillamooks I*, 329 U.S. at 51.

63. *Id.* at 53.

64. In his diary, Justice Frankfurter observed that conference discussion of the case had generated considerable friction among members of the Court. He remarked that "Stanley Reed has written a rather stiff dissent and the Chief [Justice Vinson] showed extreme sensitiveness about it, as indeed he did to me yesterday when he said he did not quite understand 'why Stanley should write a dissent in such strong terms.'" FELIX FRANKFURTER, FROM THE DIARIES OF FELIX FRANKFURTER 304 (Joseph P. Lash ed., 1975) (entry for Saturday, November 23, 1946). Reed's disagreement with the Chief Justice, as well as his attitude towards compensating Indians for the taking of their lands, is revealed as well in his handwritten comments on the back of the last page of a draft judgment that Vinson had circulated. Reed wrote:

> Congress carefully and in accordance with well recognized principles of fair dealing with the Indians offered them compensation for legal and equitable claims which this Court now interprets with extravagant generosity with public money into a requirement to pay for lands over which the ancestors of these tribes hunted with the freedom of birds of prey.

discussing the policy consideration of the potential cost if compensation were payable for unrecognized original Indian title:

> It is difficult to foresee the result of this ruling in the consideration of claims by Indian tribes against the United States. We do not know the amount of land so taken. West of the Mississippi it must be large. Even where releases of Indian title have been obtained in return for recognition of Indian rights to smaller areas, charges of unfair dealings may open up to consideration again legal or equitable claims for taking aboriginal lands.[65]

In a footnote at the end of this passage, he quoted at length from the Indian Claims Commission Act, enacted just three months earlier, which authorized the Commission to hear Indian claims based on law or equity as well as on "fair and honorable dealings."[66]

Justice Reed was obviously concerned about the potential reach of the removal of the sovereign immunity barrier. His solution to this perceived threat to the federal treasury was to deny legal status to unrecognized original Indian title:

> The character of Indian occupancy of tribal lands is at least of two kinds: first, occupancy as aborigines until that occupancy is interrupted by governmental order; and, second, occupancy when by an act of Congress they are given a definite area as a place upon which to live. When Indians receive recognition of their right to occupy lands by an act of Congress, they have a right of occupancy which cannot be taken from them without compensation. But by the other type of occupancy, it may be called Indian title, the Indians get no right to continue to occupy the lands; and any interference with their occupancy by the United States has not heretofore given rise to any right of compensation, legal or equitable.[67]

University of Kentucky, Margaret I. King Library, Special Collections, Stanley Forman Reed Collection, 81M3, at Box 99, Supreme Court Series, Opinions File, October Term 1946, Case No. 26, United States v. Alcea Band of Tillamooks.

65. *Tillamooks I*, 329 U.S. at 55–56.

66. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, § 2, 60 Stat. 1049, 1050.

67. *Tillamooks I*, 329 U.S. at 57–58 (footnotes omitted).

Reed found support for this distinction between recognized occupancy and unrecognized Indian title in the heavily criticized doctrine of discovery,[68] which he said gave the "conquering" European nations "the right to extinguish that Indian title without legal responsibility to compensate the Indian for his loss."[69] However, that is not how Chief Justice Marshall described the discovery doctrine in *Worcester v. Georgia*.[70] For him, the doctrine only applied among the European powers—it did not diminish the pre-existing rights of the Indian nations because they had not agreed to it.[71] *Johnson v. M'Intosh*[72] prevented Indian nations from selling their lands to Europeans other than the sovereign of the discovering nation, but it did not follow from this that the sovereign could simply take Indian lands without paying compensation. As held by Chief Justice Vinson and Justices Frankfurter, Douglas, and Murphy in *Tillamooks I*, what had previously prevented compensation was the procedural bar of sovereign immunity, not original Indian title's lack of legal character and government recognition.

Nonetheless, Justice Reed thought that the conclusion of the majority in *Tillamooks I* that compensation was payable once that bar was removed "conflict[ed] with our understanding of this Government's right in the public lands of the nation."[73] The assumption Reed made in this quotation from his dissent, which is not consistent with earlier Supreme Court decisions referred to above,[74] is that Indian title lands are "public lands."

---

68. *See*, *e.g.*, VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 85–111 (1985); DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 19–63 (2001); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 88–115 (2009); ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010); Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507 (2011); McNeil, *supra* note 19.

69. *Tillamooks I*, 329 U.S. at 58. In a footnote, Reed stated that the "Treaty of Paris, 1783, confirmed the sovereignty of the United States without reservation of Indian rights." *Id.* at 58 n.6. But in the international law governing treaties and in American law, property rights are presumed to continue after a change in sovereignty. *See* D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (1967) (two volumes); *see, e.g.*, 1 *id.* at 240 nn.3–4; United States v. Percheman, 32 U.S. (7 Pet.) 51, 86–87 (1833).

70. Justice Reed summarily dismissed the relevance of *Worcester* on the basis that "lands had been specifically set apart for the Cherokees." *Tillamooks I*, 329 U.S. at 63.

71. *See* text accompanying *supra* note 18.

72. *See* 21 U.S. (8 Wheat.) 543 (1823).

73. *Tillamooks I*, 329 U.S. at 57.

74. See the numerous cases, starting with *Fletcher*, where the Supreme Court has held that government grants of land subject to Indian title do not give the grantee a right to

The extent to which he was willing to push this assumption is revealed in his shocking conclusion that "Indians who continued to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted."[75] In other words, without express government permission, Indians would be trespassers on government land. In reaching this conclusion, Reed was selective, as he would be in *Tee-Hit-Ton*, in citing passages from Chief Justice Marshall's judgment in *Johnson v. M'Intosh* that emphasized government power to extinguish Indian title while ignoring other passages that acknowledged Indian title's legal character.[76] Reed concluded in his dissent that no compensation was payable because the jurisdictional Act of 1935 did not "create a new liability because Indian title had been taken."[77]

Justice Black wrote a judgment concurring with the opinion of the Court given by Chief Justice Vinson. He stated:

> Before Congress passed the special Act under which this suit was brought, I think that the Government was under no more legal or equitable obligation to pay these respondents than it was under obligation to pay whatever descendants are left of the numerous other tribes whose lands and homes have been taken from them since the Nation was founded.[78]

He thus appears to have agreed with Justice Reed that original Indian title does not give rise to legal rights. The only authority he gave was the 1945 *Northwestern Bands of Shoshone* decision, citing the concurring opinion of Justice Jackson in which he had joined.[79] Given that the decision in that case dealt with treaty interpretation and did not involve original Indian title, and that Justice Jackson's opinion was a concurring minority judgment, that opinion is hardly persuasive that original Indian title is not legal in nature. Justice Black nonetheless concurred with the result in *Tillamooks I* because he thought the 1935 jurisdictional Act "created an obligation on the part of

---

possession until the Indian title has been legitimately extinguished, discussed in Kent McNeil, *Extinguishment of Native Title: The High Court and American Law*, 2 AUSTL. INDIGENOUS L. REP. 365 (1997). If the Indian titleholders had no legal land rights, their occupation would be no impediment to the grantees taking possession.

75. *Tillamooks I*, 329 U.S. at 58.
76. *Id.* at 60–62.
77. *Id.* at 63.
78. *Id.* at 54.
79. *See supra* note 49.

the Government to pay these Indians for all lands to which their ancestors held an 'original Indian title'."[80]

Interestingly, in his dissenting judgment in *Tillamooks I*, Justice Reed commented directly on Justice Black's concurring judgment. He disagreed with Black's interpretation of the 1935 Act, as he did not think it created a government obligation arising out of original Indian title if that title did not give rise to rights in the first place.[81] Reed, however, still regarded Justice Black's concurring judgment in *Tillamooks I*, along with Black's joinder with Justice Jackson's concurring judgment in *Northwestern Bands of Shoshone*, as significant because he mentioned these instances in his January 21, 1955 memorandum to Black to try to persuade him to deny Fifth Amendment protection to original Indian title.[82]

In sum, *Tillamooks I* revealed how deeply divided the Court was on the issue of original Indian title: four judges—Chief Justice Vinson and Justices Frankfurter, Douglas, and Murphy—were of the opinion that, as long as Congress had waived sovereign immunity, original Indian title was a judicially enforceable legal right without any need for government recognition; whereas, Justices Reed, Rutledge, and Burton opined that original Indian title had to be recognized in order to be enforceable. In his brief concurring judgment, Justice Black denied legal status to original Indian title, but he decided it had been made judicially enforceable by an Act of Congress in the circumstances of the *Tillamooks I* case. He did not use the word "recognized" in his judgment, stating instead that Congress "had created an obligation on the part of the Government."[83] However, one can understand how Reed might interpret this statement as support for the distinction between recognized and unrecognized Indian title.

The *Tillamooks II* decision[84] five years later involved the narrow issue of whether interest was payable on the compensation the government owed as a result of *Tillamooks I*. In a brief *per curiam* judgment, in which Justice Jackson took no part, the Court observed that the traditional rule is that interest is only payable on claims against the federal government if there is an express provision for interest in the statute or contract or the compensation is payable under the Fifth Amendment. Because the Court observed that the 1935 jurisdiction Act did not provide for an award of interest and opined that recovery in *Tillamooks I* was not based on the Fifth

80. *Tillamooks I*, 329 U.S. at 54.
81. *Id.* at 64.
82. *See supra* text accompanying note 49.
83. *Tillamooks I*, 329 U.S. at 54.
84. *Tillamooks II*, 341 U.S. 48 (1951).

Amendment, it reversed the Court of Claims' decision and held that interest was not payable. Remarkably, the Supreme Court did not give a specific reason why this was not a Fifth Amendment taking, other than stating: "Looking to the former opinions in this case, we [found] that none of them expressed the view that recovery was grounded on a taking under the Fifth Amendment."[85] It is true that, in its lower court decision in *Tillamooks I*,[86] the Court of Claims did not mention the Fifth Amendment, but in *Tillamooks II* that court stated that the issue for determination was "the amount of compensation to which the four plaintiff tribes are entitled under the Fifth Amendment, measured by the value of the lands taken on November 9, 1855, plus an additional amount measured by a reasonable rate of interest to make just compensation."[87]

But if compensation was not based on the Fifth Amendment, as the Supreme Court decided, what was it based on?[88] According to Justice Black in his concurring judgment in *Tillamooks I*, government liability had been created by the 1935 jurisdiction Act. If this is correct, interest would not have been payable because the Act did not provide for interest. However, Black was only one member of an eight-member court, and no one concurred with him. Chief Justice Vinson and three other judges held that original Indian title gives rise to preexisting rights and the 1935 jurisdictional Act simply removed sovereign immunity so that the Indian tribes could sue the United States on the basis of that title. Justices Reed, Rutledge, and Burton thought that original Indian title was not a source of legal rights and that the Act did not provide the tribes with any right to compensation from the government; yet, once a majority of the Court ordered the government to pay compensation in *Tillamooks I*, it would be understandable for these three dissenting judges to prefer Black's explanation for liability to that of the Chief Justice because Black's opinion was consistent with their view that original Indian title is not legally enforceable.[89]

---

85. *Id.* at 49.

86. Alcea Band of Tillamooks v. United States, 59 F. Supp. 934 (Ct. Cl. 1945).

87. Alcea Band of Tillamooks v. United States, 87 F. Supp. 938, 940 (Ct. Cl. 1950). The Court of Claims awarded interest at five percent from 1855 to 1934 and four percent from 1934 to 1950, only to be reversed by the Supreme Court. *Id.* at 954.

88. *See* Newton, *supra* note 11, at 1231–32.

89. Remarkably, in *Tee-Hit-Ton*, Justice Reed turned Justice Black's concurring one-justice judgment into the opinion of the Court. See the quotation at note 129, and the assessment of LIEDER & PAGE, *supra* note 43, at 135.

In 1949, Justices Murphy and Rutledge both died seven weeks apart while in office and were replaced by Justices Clark and Minton. The changes in justices presumably left the Court split three to three on the issue of whether to pay interest, with Clark's and Minton's opinions unknown.[90] And yet Chief Justice Vinson and Justices Frankfurter and Douglas went along with denial of Fifth Amendment protection and, therefore, the payment of interest, in *Tillamooks II*. Why?

In *Tillamooks II*, the government lawyers included in their brief a list of all the claims pending before the Indian Claims Commission. They estimated the claims to total approximately nine billion dollars, of which over seven billion was interest.[91] These were the figures that Justice Reed referred to in his January 21, 1955 memorandum to Justice Black, in which he urged his colleague to join him in deciding "that Fifth Amendment taking of Indian title is not compensable without congressional action."[92] In Reed's opinion, *Tillamooks II* did not bar interest where claims were made under the Indian Claims Commission Act because *Tillamooks* was not a claim brought under the Act. It may have been that Chief Justice Vinson and Justices Frankfurter and Douglas were also impressed by these figures, albeit inflated,[93] which might explain their apparent shift in position from *Tillamooks I* to *Tillamooks II*, as well as Douglas and Frankfurter's reliance on recognition of Indian title instead of Fifth Amendment protection for original Indian title in their dissent (concurred in by Chief Justice Warren, who had replaced Vinson in 1953) in *Tee-Hit-Ton*.[94] Two important cases from Alaska decided between *Tillamooks I* and *Tillamooks II* help to explain the evident positional shift of some members of the Supreme Court in relation to this matter.

*III. The Pre-*Tee-Hit-Ton *Alaska Cases*

The first of these cases, *Miller v. United States*,[95] was decided by the Ninth Circuit Court of Appeals. In 1942, the United States condemned

90. Jackson took no part in either *Tillamooks I* or *Tillamooks II*.

91. Newton, *supra* note 11, at 1248 (citing Brief for Petitioner at 55–56).

92. *See supra* text accompanying note 49.

93. *See supra* note 43.

94. Given that the Acts they relied upon as recognizing Indian land rights in Alaska did not provide for interest for taking, their dissenting judgment would not have resulted in an award of interest, unlike a decision based on the Fifth Amendment.

95. 159 F.2d 997 (9th Cir. 1947). For background and commentary on the case, see Haycox, *supra* note 1, at 132–35; MITCHELL, *supra* note 1, at 322–23; Singer, *supra* note 1, at 233–34.

10.95 acres of tidelands in Juneau, Alaska, for the establishment of wharfage facilities pursuant to the Second War Powers Act of 1942.[96] In response, the appellants filed a compensation claim, alleging that from time immemorial, they and their predecessors, being Tlingit Indians, had been and continued to be in exclusive possession of the condemned lands "under the laws, customs and usages of the Tlingit Indians of Alaska and in conformity with the laws of the United States."[97] The district court decision that "aboriginal title created no compensable interest against the United States"[98] was overturned by a unanimous decision of the Ninth Circuit delivered by Justice Garrecht. While accepting that original Indian title is only a right of occupancy that cannot be alienated except to the United States, the Court pointed out that numerous Supreme Court decisions had also described this title as "sacred." For example, in *United States v. Cook*, Chief Justice Waite "held that 'the right of the Indians to their occupancy' is not only as sacred as the right of private white landowners to their fee, but that it is 'as sacred as that of the United States to the fee,' i.e., as sacred as the fee title of the sovereign itself."[99] Garrecht noted as well that Chief Justice Marshall in *Johnson v. M'Intosh* stressed that the fee, whether held by the government or by its grantees, was "subject only to the Indian right of occupancy" a reoccurring phrase in Marshall's judgment and subsequent Supreme Court decisions.[100]

Justice Garrecht then turned to the question of whether compensation should be paid when the government takes lands subject to the Indian right of occupancy, and he concluded that it should be: "It would be indulgence in pious and high-sounding but empty generalizations to say that the Indian right of occupancy is 'sacred,' and at the same time to refuse to grant compensation to Indian possessors when their land is taken away from them under condemnation proceedings."[101] Significantly, he relied heavily on Chief Justice Vinson's decision in *Tillamooks I* in reaching this conclusion. On the issue of whether compensation should be paid for the taking of "unrecognized" Indian title, he quoted from that decision:

> Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what

96. Pub. L. No. 77-507, 56 Stat. 177.
97. *Miller*, 159 F.2d at 999.
98. *Id.*
99. *Id.* at 1000 (quoting United States v. Cook, 86 U.S. (19 Wall.) 591, 593 (1873)).
100. *Id.* (citing Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835)).
101. *Id.* at 1001.

> petitioner would call 'recognized' title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of 'recognized' title. *We think the same rule applicable to a taking of original Indian title.*[102]

Justice Garrecht found support for this opinion in the following passage from *United States v. Klamath Indians*:

> The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.[103]

He went on to hold that the Tlingit's original Indian title had nonetheless been extinguished by the treaty of 1867—by which the United States had acquired Alaska from Russia—but that their possessory rights had been guaranteed by a series of congressional statutes, starting in 1884 with An Act Providing a Civil Government for Alaska.[104] The Tlingits were therefore entitled to compensation for the government taking, not on the basis of their original Indian title, but because "[t]he true foundation of their right is the repeated Congressional *recognition* of the occupancy or possession of the land by the 'Indians' who were on the land at the time the act of 1884 was passed."[105] "Recognition" here referred to their possession in 1884, not of their original Indian title in the sense Justice Reed would require in *Tee-Hit-Ton.*

The *Klamath* case that Justice Garrecht relied upon involved a claim by the Klamath and Moadoc Tribes and the Yahooskin Band of Snake Indians for compensation for a taking by the United States of lands from their

---

102. *Id.* (emphasis added) (quoting *Tillamooks I*, 329 U.S. 40, 51–52 (1946) (footnotes omitted)).

103. *Id.* (quoting United States v. Klamath & Moadoc Tribes, 304 U.S. 119, 123 (1938), which relied in turn on Jacobs v. United States, 290 U.S. 13, 16–17 (1933), and cases cited therein).

104. Ch. 53, 23 Stat. 24 (1884).

105. *Miller*, 159 F.2d at 1005 (emphasis added). The issue of whether interest was payable was not considered, as the Court dealt only with the right to compensation, not the quantum. *Id.* at 1006. The case was remanded to the Alaska District Court, where the claim was dismissed, mainly because the Tlingit did not establish sufficient possession and continuity of usage after 1884. United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841 (1948).

reservation in Oregon. The tribes had ceded large swaths of land to the United States by treaty in 1864; the reservation consisted of the lands that remained with the tribes following the treaty. In other words, the lands in question were original Indian title lands that, by a provision in the treaty, were retained by the tribes "as a residence" and "regarded as an Indian reservation."[106] In 1906, the federal government conveyed 87,000 acres of the reservation to a private company, "without the knowledge or consent of the plaintiffs, and without giving them any compensation."[107] Later, the government paid the tribes an amount that, in light of the fact that there was valuable merchantable timber on the land, was a tiny fraction of the land's worth. In 1936, Congress enacted a statute conferring jurisdiction on the Court of Claims to hear and enter judgment on their claim for compensation, irrespective of the fact that the tribes had signed a release when they received the unconscionably small payment. The Court of Claims found for the tribes and ordered the government to pay an amount equal to the full value of the land, including the value of the timber, plus five percent interest from the time of taking, minus the amount the government had previously paid. The United States appealed to the Supreme Court, arguing that the value of the timber should not have been included and that interest should not have been awarded because the taking did not involve exercise of the government's power of eminent domain.

The Supreme Court, in a unanimous judgment delivered by Justice Butler,[108] rejected both of these contentions. The treaty, he said, "clearly did not detract from the tribes' right of occupancy," and "the timber was a part of the value of the land upon which it was standing."[109] Regarding interest, he stated, "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefor to appropriate lands of an Indian tribe to its own use or to hand them over to others."[110] Because the United States had the power to take the lands and the intent to do so, the lands were not taken by mistake or wrongfully appropriated; instead, the taking was authorized by law and was "a valid

106. *Klamath*, 304 U.S. at 123.

107. *Id.* at 122.

108. He delivered the opinion of the Court, and Justice Black concurred in the result. *Id.* at 126

109. *Id.* at 123 (citing United States v. Shoshone Tribe, 304 U.S. 111 (1938), decided the same day).

110. *Id.*

exertion of the sovereign power of eminent domain. It therefore implied a promise on the part of the government to pay plaintiffs just compensation."[111] As authority, Justice Butler cited *Jacobs v. United States,*[112] a Fifth Amendment taking case (not involving Indians) in which the Supreme Court held that just compensation includes interest from the time of taking.

Justice Reed, who had been appointed to the Supreme Court by President Franklin D. Roosevelt just three months before *Klamath* was heard and decided, took no part in the case. In *Tee-Hit-Ton*, Justice Reed used *Klamath* as authority for the notion that "[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking."[113] After pointing out that *Klamath* had been relied upon by the Ninth Circuit in *Miller v. United States*[114] and *Minnesota v. Hitchcock*,[115] Justice Reed stated, "These cases, however, concern Government taking of lands held under Indian title recognized by the United States as an Indian reservation."[116] However, in *Klamath,* the Court did not use the term "recognized" in relation to original Indian title and did not imply that the tribes' entitlement to compensation was based on Congressional acknowledgment of that title. On the contrary, compensation was payable, as reliance on *Jacobs* makes clear,[117] under the Fifth Amendment because the reservation lands that were taken were original Indian title lands excluded from the lands surrendered by the 1864 treaty. Consequently, not only does the *Klamath* decision provide no support for Reed's denial of Fifth Amendment protection to original Indian title—it is in direct contradiction to his position.[118]

The other significant Alaska case leading up to *Tillamooks II* was *Hynes v. Grimes Packing Co.*,[119] in which Justice Reed delivered the opinion of the Court and Justices Rutledge, Black, and Murphy (Justice Douglas

111. *Id.* at 125.
112. 290 U.S. 13 (1933).
113. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277–78 (1955).
114. 159 F.2d 997 (1947).
115. 185 U.S. 373 (1902).
116. *Tee-Hit-Ton*, 348 U.S. at 282 n.15.
117. *See also* H.R. REP. NO. 74-2354 (1936), *quoted in Klamath*, 304 U.S. at 125 n.14 (stating that the intention was to grant "the Klamath tribes the right to have their claim for just compensation under the Constitution for the taking of the 87,000 acres of their lands judicially determined on its merits").
118. *Accord* Newton, *supra* note 11, at 1239–40.
119. 337 U.S. 86 (1949).

concurring in part) dissented in part. By a 1943 Order, the Secretary of the Interior designated a certain area, including tidelands and coastal waters, as an Indian reservation for the native inhabitants of Karluk. Then in 1946, the Secretary amended the *Alaska Fisheries General Regulations* to prohibit commercial fishing in the coastal waters included in the reservation, except "by natives in possession of the said reservation . . . [and] other persons under authority granted by said natives."[120] Canning companies that depended on fish from these waters claimed that this prohibition would substantially impact their businesses and asked the Alaska District Court to enjoin enforcement of the prohibition on the grounds that the order and amendment to the regulations were invalid. The district court granted the injunction, and the Ninth Circuit Court of Appeals affirmed, leading to a *certiorari* application to the Supreme Court. For reasons not relevant to our discussion, the Court held that the order including the coastal waters was valid, but found the amendment to the regulations limiting commercial fishing in those waters to the native inhabitants of the reservation and their licensees to be invalid (it was on the latter issue that four judges dissented, as they viewed the regulations as valid except to the extent that they permitted the Karluk Indians to grant authority to others to fish commercially in the reservation waters).[121] However, instead of upholding the injunction, the Court remanded the case to the district court because an injunction is a purely equitable remedy, and public policy was at stake, as well as the interests of the Indians of the Karluk Reservation who were not parties.[122] The *Hynes* case is nonetheless relevant to our discussion because of the following *obiter* comments that Justice Reed included in a footnote in relation to *Tillamooks I* and *Miller*:

---

120. 50 C.F.R. § 208.23 (1946 Supp.).

121. *Hynes*, 337 U.S. 86. In a memorandum to Justice Reed dated February 1, 1949, Justice Douglas, one of the dissenters, had already expressed his disagreement with his colleague:

> The right to create Indian reservations should, I think, carry with it a right to grant to the Indians in question the exclusive right to fish therein. The problem in Alaska has been to protect the Indians and the public against the packing houses, not to protect the packing houses against the Indians.

University of Kentucky, Margaret I. King Library, Special Collections, Stanley Forman Reed Collection, 81M3, Supreme Court Series, Opinions File, October Term 1948, Case No. 24, Hynes v. Grimes Packing, Box 118 [hereinafter Reed Collection: *Hynes*], *quoted in* MITCHELL, *supra* note 1, at 279.

122. *Hynes*, 337 U.S. at 127. An amici curiae brief urging reversal had, however, been filed by Felix S. Cohen, James E. Curry, and Henry Cohen on behalf of the Native Village of Karluk.

> We have carefully considered the opinion in *Miller v. United States*, where it is held . . . that the Indian right of occupancy of Alaska lands is compensable. With all respect to the learned judges, familiar with Alaska land laws, we cannot express agreement with that conclusion. The opinion upon which they chiefly rely, *United States v. Alcea Band of Tillamooks*, is not an authority for this position. That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment. See also *United States v. 10.95 Acres of Land in Juneau*.[123]

The problem here is that Reed was attempting (successfully, as it turned out in *Tee-Hit-Ton*) to impose his own view, as expressed in his dissent in *Tillamooks I,* that original Indian title is not compensable without congressional recognition. But that was not what *Tillamooks I* decided. On the contrary, four out of eight justices decided just the opposite, as expressed in the opinion of the Court delivered by Chief Justice Vinson. A fifth justice, Justice Black, decided there had been recognition, making it unnecessary for him to decide whether recognition was necessary.[124] Unfortunately, because Reed's opinion in *Hynes* was the majority decision, with only four out of nine judges dissenting (including Justice Black), his erroneous interpretation of *Tillamooks I* thereby received a stamp of approval from the Supreme Court. Justice Frankfurter, who joined the majority in *Hynes*, later regretted this approval when *Tee-Hit-Ton* came before the Court. This is evidenced by his handwritten comments on Reed's draft judgment in *Tee-Hit-To*n. Here, Frankfurter penciled in the word "irrelevantly" before "commented" on page 10 (page 283 of the reported judgment) where Reed wrote in reference to footnote 28 in the *Hynes* case, "We there [irrelevantly] commented as to the first *Tillamook* case: 'That opinion does not hold the Indian right of occupancy compensable without

123. *Id.* at 106 n.28 (citations omitted) (citing Miller v. United States, 159 F. 2d 997, 1001 (1947); United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946); United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841 (1948)). On the *10.95 Acres* case, *see supra* note 105.

124. *Id.* at 103. Black's observation that, before Congress passed the 1935 jurisdictional Act allowing the tribes to sue in that case, the government had no legal or equitable obligation to pay them compensation for the taking of their lands, *see supra* text accompanying note 78, could be interpreted to mean that sovereign immunity prevented them from suing the United States, which would be consistent with the Chief Justice's judgment. In any case, given Black's conclusion that the 1835 Act imposed an obligation on the government to pay compensation, that observation was *obiter*.

specific legislative direction to make payment.'"[125] Frankfurter also inserted a marginal, self-critical comment to Reed's draft judgment: "and Mr. Justice Frankfurter must now be properly charged with negligence not to have scrutinized & asked to have deleted that unwarranted footnote."[126]

---

125. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 283 (1955). However, Reed attempted to make the footnote in *Hynes* necessary for the decision. In *Tee-Hit-Ton*, he noted that, in the *Hynes*' footnote, "We further declared 'we cannot express agreement with that (compensability of Indian title by the *Miller* case) conclusion.'" *Id.* In a footnote at the end of this sentence, he wrote:

> The statement concerning the Miller case was needed to meet the Grimes Packing Company argument that Congress could not have intended to authorize the Interior Department to include an important and valuable fishing area, in a permanent reservation for an Indian population of 57 eligible voters. Actual occupation of Alaskan lands by Indians authorized the creation of a reservation. One created by Congress through recognition of a permanent right in the Indians from aboriginal use would require compensation to them for re-opening to the public. It was therefore important to show that there was no right arising from aboriginal occupation.

Id. at 283 n.16 (citations omitted) (citing *Hynes,* 337 U.S. at 86 n.10, 91, 103–06). See also Justice Reed, Memorandum to the Conference: Re No. 43, The Tee-Hit-Ton Indians v. United States (n.d.) [hereinafter Memorandum to Conference], *in* Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159, where he addressed the argument made in conference the previous Saturday that "the note was unnecessary to the decision in Hynes v. Grimes, 337 U.S. 86" and argued in similar terms that the footnote was necessary to the decision. He went on to explain the connection between *Tillamooks I*, *Hynes*, and *Tillamooks II*. *See infra* note 129 and accompanying text.

126. Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159. On January 27, 1949, in a memorandum to Reed in relation to his draft judgment in *Hynes*, Frankfurter expressed the view that the Court should not have granted certiorari and commented:

> When dealing with such specialized, pernickety matters as is the stuff of your opinion, inescapably one has to rely on the writer of the opinion and indulge in a game of follow-the-leader. Since Indians are not among those disadvantaged as to whom your "zeal for the underdog" weights your judicial judgment, I feel clear in my conscience to agree with you merely on the basis of a studious consideration of your opinion in light of my general feel in dealing with Indian legislation.

Reed Collection: *Hynes*, *supra* note 121, at Box 118. From these remarks and Frankfurter's comments on Reed's draft opinion in *Tee-Hit-Ton*, one has to wonder whether he spent much time on Reed's draft in *Hynes* or even read the offending footnote. However, in a subsequent hand-written note to Reed (April 14, 1949), Frankfurter queried why the Karluk Indians could not simply exclude the Grimes fishing boats from the reservation waters, and Reed in response (April 15, 1949) opined that they could "get an injunction against continued trespasses of commercial fishermen on the reservation." *Id.* Frankfurter's discontent with the way the argument went in *Tee-Hit-Ton* is also revealed in an interview Arthur Lazarus, who had replaced Felix Cohen as attorney for the Association on American

The damage had nonetheless been done. Justice Reed got his way in *Tillamooks II* and relied on that decision and his footnote in *Hynes* to carry the Court in *Tee-Hit-Ton*, stating that

> the Government used the *Hynes v. Grimes Packing Co.* note in the second *Tillamook* case, petition for certiorari, p. 10, to support its argument that the first *Tillamook* opinion did not decide that taking of original Indian title was compensable under the Fifth Amendment.[127] Thereupon this Court in the second *Tillamook case,* 341 U.S. 48, held that the first case was not "grounded on a taking under the Fifth Amendment."[128] Therefore, no interest was due. . . . We think it must be concluded that the recovery in the *Tillamook* case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment.[129]

Indian Affairs when Cohen died in 1953 and who was in the audience when the case was argued, gave to Donald Mitchell:

> According to Lazarus, one of the justices asked Peocock [James Craig Peocock, lawyer for the Tee-Hit-Tons] whether he agreed that the Tee-Hit-Tons were not entitled to compensation if the Court disagreed that Tlingit aboriginal title was the Indian equivalent of fee simple ownership and Peacock answered yes. "[Justice] Felix Frankfurter slammed a book down and stormed off the bench." "It was such a wrong answer," Lazarus recalled. "I'm not saying that comment lost the case, but it damn sure didn't help it."

Recounted in MITCHELL, *supra* note 1, at 357.

127. It was in a footnote at this point in his judgment that Justice Reed pointed to the potential cost of compensating the Indian nations for the taking of their lands, especially if interest was awarded:

> Three million dollars was involved in the Tillamook case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The Government pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000.

Tee-Hit-Ton, 348 U.S. at 283 n.17.

128. *Tillamook II*, 341 U.S. 48, 49 (1951).

129. *Tee-Hit-Ton*, 348 U.S. at 283–84. In his Memorandum to Conference, Reed had already laid out his position on the significance of *Tillamooks II*:

> At the time of the Miller decision and the lower court decisions in the Grimes case [*Hynes v. Grimes Packing Co*.], the first Alcea Band of Tillamooks had been decided in this Court. 329 U.S. 40. A plurality but less than a majority of this Court had apparently decided that original Indian title or rights were

Not even the dissenting judges in *Tee-Hit-Ton*—Justices Douglas and Frankfurter and Chief Justice Warren—disagreed with this conclusion, as they based their dissent instead on statutory recognition of pre-existing Indian rights by the Organic Act for Alaska of May 17, 1884.[130] This Act provided that

> the Indians or other persons in the said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.[131]

Justice Reed for the majority reached the opposite conclusion, summarily dismissing the Tee-Hit-Ton's argument that the Organic Act and a 1900 statute[132] providing for a civil government for Alaska had recognized their possessory rights. He stated:

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress.

> compensable. Later the Government used the Hynes v. Grimes note in the second Tillamook case, petn for cert. p. 10, to assist in escaping from the effect of the first Tillamook decision that the taking of original Indian title was compensable. Three million dollars was involved in the Tillamook case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The government there pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims already pending under the Indian jurisdiction act aggregating $9,000,000,000. Thereupon this Court in the second Tillamooks case, 341 U.S. 48, held that the first case was not "grounded on a taking under the Fifth Amendment." Therefore no interest was due.

Memorandum to Conference, *supra* note 125. It may well have been this memorandum that persuaded the other members of the Court to accept Reed's conclusion in *Tee-Hit-Ton* that no compensation is due for government taking of unrecognized Indian title.

130. Ch. 53, 23 Stat. 24 (1884).

131. *Id.* § 8. Justice Douglas stated,

> It must be remembered that the Congress was legislating about a Territory concerning which little was known. No report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had prior to the new Act.

Tee-Hit-Ton, 348 U.S. at 294.

132. Act of June 6, 1900, ch. 786, § 27, 31 Stat. 321, 330.

> Rather, it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken.[133]

As he found that the title of the Tee-Hit-Ton had not been recognized, he denied their claim to compensation, leaving "with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land."[134]

IV. Justice Reed's Role as New Deal Advocate and His View of the Role of the Courts

So why did Justice Reed believe that decisions on whether compensation should be paid to the Indian nations for the taking of their lands belong with Congress rather than the courts? Why should they be treated any differently than non-Indian Americans who are constitutionally entitled to just compensation? One explanation, of course, is racial prejudice—the language Reed used in his judgments dealing with Indians reveals that he did not regard them as equal to non-Indian American citizens.[135] He also appears to have been of the opinion that small groups of Indians should not be accorded extensive legal rights. In *Tee-Hit-Ton*, he noted that "the Tee-Hit-Tons had become greatly reduced in numbers," with "only a few women of childbearing age and a total membership of some 65."[136] What, one might ask, was the relevance of this observation, if not to suggest that it would be inappropriate to accord extensive property rights to a small,

---

133. *Tee-Hit-Ton*, 348 U.S. at 278.

134. *Id.* at 291. Here and elsewhere in his judgment Reed tightened the language between the first and second drafts of his judgment so as to diminish the status of Indian rights, in this instance by replacing the original words "for taking of Indian title" (which must have sounded too proprietary to him) with the final wording, "for the termination of Indian occupancy of Government-owned land." See draft judgments in Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159.

135. *See* WILLIAMS, *supra* note 23; *see also supra* text accompanying notes 38–41.

136. *Tee-Hit-Ton*, 348 U.S. at 285–86; *see also* Nw. Bands of Shoshone Indians v. United States, 324 U.S. 335, 340 (1945) (Reed, J.) ("[P]etitioners here, the Northwestern bands, were at the time of the treaty a part of the Shoshone tribe, a nomadic Indian nation of less than ten thousand people which roamed over eighty million acres of prairie, forest and mountain in the present states of Wyoming, Colorado, Utah, Idaho and Nevada. The group with which we are concerned was comprised of some fifteen or eighteen hundred persons and claimed, by the treaty, Indian title to some ten million acres and now claim compensation for over six million additional acres.").

diminishing group of Indians?[137] This attitude was revealed as well when Reed, in his response to Justice Douglas's comments on Reed's draft judgment in *Hynes v. Grimes Packing Co.*, wrote that the opinion he had written "is best for the Indians. If the Indians were given a monopoly of a three million dollar a year fishery like the Karluk and if this Court did not decide that the reservation was temporary, it would be too much to give the Indians."[138] This is another way in which monetary considerations influenced Reed's decisions, as we have seen took place in *Tee-Hit-Ton* when he used the potential cost to the United States treasury of compensating Indian nations for takings of original Indian title to get Justice Black, and possibly other judges, to support his judgment.[139]

But I think there is a deeper explanation, going back to when, as Solicitor General, Reed argued the constitutionality of President Franklin D. Roosevelt's New Deal legislation before the Supreme Court in the mid-1930s. This experience probably influenced his political philosophy on the proper role of the judiciary.[140] President Roosevelt appointed Reed to serve as Solicitor General in March of 1935.[141] Among the major cases he argued

---

137. See Singer, *supra* note 1, at 249 (suggesting that this observation was relevant for Reed because "it triggers the story of the 'vanishing Indian' – it suggests to the reader that the land is mostly vacant.").

138. Stanley Reed to William O. Douglas (Feb. 1, 1949), *in* Reed Collection: *Hynes*, *supra* note 121, at Box 118, *quoted in* MITCHELL, *supra* note 1, at 280. This was in response to Douglas's memorandum quoted in *supra* note 121. See also the quotation from *Tee-Hit-Ton* in *supra* note 125, where Reed noted that the Karluk Indian population for whom the reservation had been created consisted of only fifty-seven eligible voters. But as Mitchell points out, the question of whether a fishing monopoly should be granted in reserve waters was a policy question that should have been "irrelevant to the task of discerning the intent of Congress embodied in the two statutes that deciding the case required Reed to construe." MITCHELL, *supra* note 1, at 280.

139. *See supra* text accompanying note 49. See also a hand-written note from Justice Burton to Justice Reed, dated January 24, in obvious reference to the draft judgment in *Tee-Hit-Ton* that Reed had circulated, where Burton wrote: "I agree. This adds an appropriate sequel to your dissent in the first *Tillamook* case, in which dissent I am now doubly glad I joined you." Reed Collection: *Tee-Hit-Ton Indians*, *supra* note 9, at Box 159.

140. For discussion of Reed's role in the Roosevelt administration, *see* FASSETT, *supra* note 52, at 45–195. Before becoming Solicitor General, Reed had served as general counsel in the Reconstruction Finance Corporation, where he first began to appear before the Supreme Court defending President Roosevelt's economic reforms. Fassett remarks that Reed "enlisted in FDR's New Deal crusade." *Id.* at 102.

141. Herman Pritchett observed,

> At a time when the American business and professional class still largely thought that the best government was the least government and regarded 'that man in the White House' as a wild-eyed radical, it was most important that the

and lost were *Schechter Poultry Corp. v. United States*,[142] *United States v. Butler*,[143] and *Carter v. Carter Coal Co*.[144] In *Carter*, the legislation in question was struck down because, among other reasons, it was found to violate the Fifth Amendment protection of property rights.[145] Reed thus had direct personal experience of how that constitutional provision could be judicially interpreted and applied to impede progressive governmental initiatives aimed at regulating the economy and furthering social and financial goals that he supported as vital to deal with the crisis brought on by the Great Depression.[146]

Roosevelt was so disturbed by the Supreme Court's opposition to his New Deal reforms that he proposed a congressional bill that would have enabled him to enlarge the Court, permitting him to "pack the Court" with more sympathetic judges.[147] That ill-fated plan died in Congress, but the Court apparently got the message and adopted a more conciliatory approach

---

> case for equipping the government with adequate powers for economic control and social welfare should be stated by a man with the soberly conservative instincts of Stanley Reed.

C. Herman Pritchett, *Stanley Reed*, *in* 3 JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 207, 218 (Leon Friedman & Fred L. Israel eds., 4th ed. 2013).

142. 295 U.S. 495 (1935).

143. 297 U.S. 1 (1936).

144. 298 U.S. 238 (1936).

145. *Id.* at 311; *see also* Louisville Joint Stock Land Band v. Radford, 295 U.S. 555, 602 (1935) (striking down the Frazier-Lemke Farm Bankruptcy Act of 1934 that had been enacted to protect farmers from mortgage foreclosures). The Court unanimously held that the Act deprived mortgagees of their property rights in violation of the Fifth Amendment's prohibition against the taking of private property without just compensation. *Id.* Although Reed was not directly involved in the case, he would undoubtedly have followed it closely because it was argued and decided just weeks after he became Solicitor General.

146. The dedication with which he presented the government's position before the Court is illustrated by an incident that occurred when he was arguing *Moor v. Texas & New Orleans Railroad Co.*, 297 U.S. 101 (1936). After fielding a barrage of questions from the judges, Reed suddenly paled and told the Court he was unable to continue. The Court adjourned and Reed had to be helped from the courtroom. According to an article in the *New York Times*, "Court officers and representatives of the Department of Justice explained that the Solicitor General was suffering from extreme weakness caused by the strain of the major cases he had prepared and argued." FASSETT, *supra* note 52, at 111 (quoting *Reed in Collapse; AAA Cases Halted*, N.Y. TIMES, Dec. 11, 1935, at 1). Further evidence of Reed's support for the New Deal is provided by the fact that he actively campaigned for Franklin D. Roosevelt's re-election at the end of his first term in 1936. *See id.* at 131–36.

147. *See* FRANKLIN D. ROOSEVELT AND THE SUPREME COURT (Alfred Haines Cope & Fred Krinsky eds., rev. ed. 1969); FASSETT, *supra* note 52, at 147–83; ELY, *supra* note 22, at 126–27.

towards economic reform.[148] Soon after, in January 1938, Roosevelt rewarded Reed for his faithful support of the New Deal by appointing him to the Supreme Court.[149] A front page article in the *New York Times* reporting the nomination provided this positive assessment: "Mr. Reed, while having liberal views and defending scores of administration measures before the highest court, is universally regarded in Washington as realistic rather than radical and as judicially minded toward all legislative ventures."[150]

Justice Reed has been described as "an economic liberal who was generally conservative on civil rights and liberties."[151] The most well-known example of his civil rights conservatism occurred just a year before *Tee-Hit-Ton* when the Court considered *Brown v. Board of Education of Topeka*.[152] In *Brown*, he planned to dissent but was finally persuaded to join the Court in ruling that separate public schools for black and white students violated the Fourteenth Amendment's guarantee of equal protection of the laws.[153] William O. Douglas, who was a colleague of Reed's on the Court for close to twenty years, said this about him in an autobiography of his own years on the Court:

> Reed was a liberal in the frame of reference of the social and business problems that had become FDR's cause. Those problems, however, were soon to disappear and new ones would take their place. As civil rights cases emerged, *Reed was usually on the side of the government*, which in one way made him consistent. The difficulty with his approach was that civil rights are often specifically protected against government action, while "property" interests have few particularized guarantees against

148. *See*, *e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937); Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).

149. *See* David O'Brien, *Reed, Stanley Forman*, *in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 712, 712–13 (Kermit L. Hall ed., 1992) [hereinafter O'Brien, *Reed*]. Ely referred to Reed as one of the "ardent New Dealers" whom Roosevelt named to the Court, along with Hugo Black, Felix Frankfurter, and William O. Douglas, when more conservative justices retired in the late 1930s. ELY, *supra* note 22, at 128.

150. *Stanley Reed Goes to Supreme Court; Known as Liberal*, N.Y. TIMES, Jan. 16, 1938, at 1, *quoted in* FASSETT, *supra* note 52, at 198.

151. O'Brien, *Reed*, *supra* note 149, at 712.

152. 347 U.S. 483 (1954).

153. *See* FASSETT, *supra* note 52, at 555–80; Stephen Ellmann, *The Rule of Law and the Achievement of Unanimity in* Brown, 49 N.Y.L. SCH. L. REV. 741 (2004–2005); WILLIAMS, *supra* note 23, at 91–95.

> regulation. . . . Reed, as it developed, was one of the most reactionary judges to occupy the Bench in my time.[154]

Douglas's assessment that "Reed was usually on the side of the government" is confirmed by his record of civil liberties cases. In a book published the year after Reed retired from the Court in 1957, William O'Brien examined Reed's voting record. O'Brien found that, in the years from 1946 to 1952, for example, he favored individual rights over government interference in only sixteen percent of cases, making him one of the most anti-liberal members of the Court.[155] Regarding First Amendment cases involving religious freedom, O'Brien observed: "In these unanimous or nonunanimous decisions of the Court from 1939 to 1955, Reed upheld the claimed right of the individual only 29 per cent of the time. The Court's majority rated considerably higher with a 59 percent."[156] O'Brien cautioned, however, against attaching facile political labels to

---

154. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 20–21 (1980) (emphasis added); *see also id*. at 243 ("FDR probably named him [to the Court] because he felt that Stanley Reed would never strike down New Deal legislation."). On a personal note, Douglas added that Reed "was also the most gentle, the friendliest, the most warm-hearted individual one could meet." *Id.* at 21. Regarding Indian rights, Douglas disapproved of Reed's opinions. (Douglas dissented in *Northwestern Bands of Shoshone*, *Hynes*, and *Tee-Hit-Ton*, where Reed had written the majority judgments.) For Christmas in 1967, he sent Reed a 1928 book by Patrick E. Byrne, *The Indian Warrior* (I have been unable to locate a copy), that apparently praised Indian civilizations before European colonization, accompanied by this note:

> As I started reading Indian Warrior, I realized I must have got it by mistake. For as you know, the Indians never had a better friend. Who should have received it? Then it dawned on me – Stanley Reed, of course, who could doubtless use this lamp to light his way. Merry Christmas.

THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF WILLIAM O. DOUGLAS 120 (Melvin I. Urofsky ed., 1987); *see also supra* note 126 (quoting Justice Frankfurter's memorandum to Reed). Douglas's Indian law judgments are discussed in Ralph W. Johnson, *"In Simple Justice to a Downtrodden People": Justice Douglas and the American Indian Cases*, *in* "HE SHALL NOT PASS THIS WAY AGAIN": THE LEGACY OF JUSTICE WILLIAM O. DOUGLAS 191 (Stephen L. Wasby ed., 1990).

155. F. WILLIAM O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT: THE RELIGION CLAUSES 197–202 (1958) [hereinafter O'BRIEN, JUSTICE REED]. O'Brien relied in part on Professor John Frank's analyses of the Supreme Court records during these years. *See*, *e.g.*, John P. Frank, *The United States Supreme Court: 1950-1951*, 19 U. CHI. L. REV. 165, 223 (1951) ("In matters of free speech, Reed is the hardest-hitting of the opponents of liberalism.").

156. O'BRIEN, JUSTICE REED, *supra* note 155, at 202. However, O'Brien went on to question whether this "pro-individual, anti-government" formula is the best way to evaluate a justice's "liberalism."

Reed. He pointed out, for example, that while Reed was still Solicitor General, he successfully argued *National Labor Relations Board v. Jones & Laughlin Steel*.[157] The Court upheld the *National Labor Relations Act*, which protected workers' rights to organize and engage in collective bargaining.[158] So perhaps the best way to understand Reed's approach to judicial decision-making is to recognize that he was a proponent of judicial restraint in applying the Constitution to limit government powers.[159] In most cases, he preferred to defer to congressional wisdom and uphold the constitutionality of government actions and legislation. During the New Deal era, this made him look like a liberal, whereas it made him look like a conservative when civil rights and liberties were at stake.[160] Professor Herman Pritchett confirms this assessment:

> It is not easy to label Reed. He tended to be an economic liberal and a civil rights conservative. He believed in governmental power to regulate the economy and to protect labor's position, but not to the extent [Justice] Black did. He believed in judicial restraint and deference to legislatures, but not to the extent that [Justice] Frankfurter did. He was more inclined than either to favor the government and public order against the claims of the individual in the various situations where such a confrontation was presented.[161]

Pritchett identified two major themes in Reed's judgments: "a belief in government and organization [and] judicial restraint. As a judge, he did not think he should dictate to the President or Congress. He accepted the Holmes weak-judiciary-strong-legislature formula."[162]

In addition to his support of Roosevelt's New Deal in the 1930s, evidence of Justice Reed's economic liberalism can be found in some of his public addresses. For example, in a speech entitled "Trends in Government" that he gave on October 14, 1944, to the Judicial Conference of the Sixth Circuit in Cincinnati, Ohio, he stated:

---

157. 301 U.S. 1 (1937).

158. O'BRIEN, JUSTICE REED, *supra* note 155, at 210.

159. *Id.* at 232–42. O'Brien observed, "In a number of public addresses given while he was Solicitor General, Reed advocated that the courts exercise restraint in striking down pieces of legislation passed by the elected representatives of the people." *Id.* at 232; *see also* FASSETT, *supra* note 52, at 133–35.

160. See FASSETT, *supra* note 52, at 643–59, where numerous assessments of Reed's judicial career support this conclusion.

161. Pritchett, *supra* note 141, at 217–18.

162. *Id.* at 218 (emphasis added).

> The concept of economic freedom prevalent in days prior to the necessity for business regulation has left many persons with the conviction that freedom means the right of an employer, without statutory restraint, to hire and fire his employees, for any or no reason and to combine as he pleases with other producers to assure protection from cutthroat competition, a production attuned to demand and a fair price for the product. But unless a shift in sentiment takes place, the course of the law points towards greater participation of the employee in the affairs of industry and trade, and continuation of prohibitions against interference with free competition.
>
> This legislation is restrictive of economic liberty if one defines such liberty to mean the right of the individual to conduct business without legislative control. Viewed realistically, however, much of recent governmental regulation has increased the economic freedom of the average citizen.[163]

He went on to say that "[g]overnment may spend for social welfare," which is why "we have government intervention to accelerate the achievement of the modern social needs of the people in many important phases."[164]

However, when it was a matter of defining the role of the courts in relation to non-economic issues, Justice Reed adopted a more conservative tone. Both before and after his retirement from the Supreme Court in February, 1957, he gave numerous speeches outlining his judicial philosophy and the appropriate balance of power between the legislative and judicial branches. In these, he frequently expressed his opposition to what he referred to privately as "krytocracy," or government by judges.[165] One particular example, the content of which is similar to many of his public addresses, stands out because it was delivered just three days after he delivered the opinion in *Tee-Hit-Ton.* Speaking on February 10, 1955, to the Cincinnati Bar Association at a dinner commemorating the one hundredth anniversary of the establishment of the Southern District of Ohio

163. Justice Stanley Reed, Address to the Judicial Conference of the Sixth Circuit in Cincinnati, Ohio: Trends in Government 6 (Oct. 14, 1944), *in* University of Kentucky, Margaret I. King Library, Special Collections, Stanley Forman Reed Collection, 81M3, Box 221, Speech Series [hereinafter Reed Collection: Speech Series].

164. *Id.* at 10.

165. *See* FASSETT, *supra* note 52, at x, 262, 567, 582, 611, 654; Ellmann, *supra* note 153, at 760, 765–80.

as a district of the United States Courts, in a speech entitled "The Courts and the Constitution," he stated:

> Our courts must be meticulously careful not to overstep the limits of their powers. As courts are in a position to exceed their rightful authority they must be doubly careful to stay well within their allotted duties. In the United States the courts have been entrusted by the constitutions, the legislative bodies and the people with greater power than other nations have seen fit to grant or leave to others than legislative assemblies or monarchs. In consequence, it is incumbent upon our judiciary to restrain any inclination to exert those powers to achieve particular results merely because they are agreeable to the judges' conceptions of proper economic or social arrangements.[166]

From this speech, contemporaneous with the *Tee-Hit-Ton* decision, Justice Reed's commitment to judicial restraint and his deference to the legislative branch in matters of policy are evident. In this light, it is perhaps

---

166. Justice Stanley Reed, *The Courts and the Constitution*, 55 OHIO L. REP. 200, 202–03 (1955). In addition to this published speech, see Justice Stanley Reed, Address Before the Opening Session of the Twenty-sixth Annual Meeting of the American Law Institute, Washington, D.C. (May 18, 1949), *in* Reed Collection: Speech Series, *supra* note 163, at Box 221; Justice Stanley Reed, Address Before the Juristic Society, Philadelphia, Pennsylvania: A Constitutional Philosophy (Feb. 16, 1950), *in* Reed Collection: Speech Series, *supra* note 163, at Box 221; Justice Stanley Reed, Address Before the Kentucky Bar Association, Lexington, Kentucky: Our Constitutional Philosophy: Concerning the Significance of Judicial Review in the Evolution of American Democracy (Apr. 4, 1957), *in* Reed Collection: Speech Series, *supra* note 163, at Box 223. Reed's shift from economic liberalism to a more conservative approach to civil rights is revealed in Justice Stanley Reed, Address to the Thirteenth Annual Conference of the Federal Judges of the Sixth Judicial Circuit, Detroit, Michigan: A Constitutional Philosophy 8 (Apr. 18, 1952), *in* Reed Collection: Speech Series, *supra* note 163, at Box 222, where he implied none too subtly that some judges are soft on crime and subversion (this was at the height of McCarthyism):

> During the '30s there was strong support among liberal elements for a construction [of the Constitution] that would allow the Nation to make adjustments in finances, labor organization legislation, hours and wages, and regulation of investments. In recent years, there has been a shift in viewpoint. Many who advocated liberalism in property control, uphold strict construction in civil rights. Government must treat religion as though it did not exist. Speech must be so free that incitement to subversion cannot be punished. Those charged with committing crime almost seem to receive more consideration that the law-abiding group. As between the extremists of either view, the courts must fairly hold the scales.

Id.

easier to understand his position on Indian land rights. Recall what he said at the very end of his judgment in the *Tee-Hit-Ton* case: "Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, *where it belongs*, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle."[167]

This deference to Congress was at least partly the result of his experience as Solicitor General, resulting in a bias in favor of the government, which was observable throughout his judicial career up until his retirement from the Bench in 1957. However, the fact remains that he did not base his conclusion that the policy of paying Indians for their lands rests with Congress on legal precedent or principle. The judgment itself, along with Reed's memorandum to Justice Black expressing his fears of what a contrary decision might cost the government, reveal that his deference to Congress in this case was driven more by his own attitudes towards Indians and financial concerns than by law. This is true despite what he said in his speech to the Cincinnati Bar Association about judges not making decisions based on their own conceptions of proper economic or social arrangements.

V. Conclusion

It needs to be acknowledged that, although Justice Reed wrote the judgment in the *Tee-Hit-Ton* case, his opinion was supported by the four other judges who joined him.[168] Even the dissenting judges did not disagree that recognition was necessary for the taking of Indian title to be compensable. Perhaps their hands were tied by Reed's footnote in *Hynes* where he had disagreed with the Ninth Circuit's decision in *Miller* that "the Indian right of occupancy of Alaska lands is compensable."[169] This explanation would be consistent with Justice Frankfurter's observation in his marginal note on the draft of Reed's *Tee-Hit-Ton* judgment that he (Frankfurter) might have been negligent in not requesting the deletion of that footnote in *Hynes*.[170] And, after *Hynes* came *Tillamooks II*, where the full Court refused to grant the interest that would have been payable on

167. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (emphasis added).

168. Justice Robert Jackson died in office on October 9, 1954, before *Tee-Hit-Ton* was argued, and was replaced by Justice John Harlan on March 17, 1955, after the case was decided. Thus, the case was decided by a margin of 5–3.

169. Hynes v. Grimes Packing Co., 337 U.S. 86, 106 n.28 (1949). *See supra* note 123 and accompanying text.

170. *See supra* text accompanying notes 125–26.

compensation for the taking of Indian title if it were under the Fifth Amendment. Nonetheless, examination of the major Indian rights cases decided by the Supreme Court through the 1940s to the *Tee-Hit-Ton* decision reveals the growing influence of Reed's views, in particular, his insistence that the distinction between recognized and unrecognized Indian title could be used to deny Fifth Amendment protection to original Indian title. He likely not only carried the weight of his New Deal battles from the 1930s with him to the Supreme Court, but eventually was able to convince the other members of the Court that they should leave the matter of compensation for the taking of Indian lands with Congress. But to achieve this goal he ignored some earlier precedents and twisted others in order to relegate Indian title to a non-proprietary right of occupancy. It is ironic that a man who had argued passionately in favor of legislation to assist the economically disadvantaged in the 1930s would go on to pen a decision in the 1950s that undercut the property rights of the Indian nations, whose members are all too often among the poorest of America's poor.[171] Given the extent to which the *Tee-Hit-Ton* decision was driven by the experience, attitudes, and political views of one man, rather than by legal principle and precedent, the ruling that original Indian title is not a compensable property right under the Fifth Amendment should be reconsidered by the Supreme Court at the earliest opportunity.[172]

---

171. See the quotation from Justice Frankfurter's January 27, 1949 memorandum to Justice Reed quoted in *supra* note 126. On the impact of the *Tee-Hit-Ton* decision on Indian rights, see Newton, *supra* note 11, at 1253–84; Haycox, *supra* note 1, at 141–43; MITCHELL, *supra* note 1, at 357–58; LIEDER & PAGE, *supra* note 43, at 136–39; COHEN'S HANDBOOK, *supra* note 42, § 15.09[1][d][i], at 1054–56. In spite of the Court's negative decision, a political compromise on Indigenous land rights in Alaska was implemented when Congress enacted the Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (1971). *See* THOMAS R. BERGER, VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION (1985); MITCHELL, *supra* note 1, at 10–14, 380–86; COHEN'S HANDBOOK, *supra* note 42, § 4.07[3], at 326–56.

172. *Accord* Newton, *supra* note 11, at 1285–85. The Supreme Court is not averse to changing its mind and overruling its own decisions when justice so requires, especially when constitutional provisions are concerned. Justice Reed himself participated in just such a change in the law when he signed on to the majority decision in *Brown*, which overruled the "separate but equal" doctrine for public schools that had been established in *Plessy v. Ferguson*, 163 U.S. 537 (1896). And he delivered the opinion in *Smith v. Allwright*, 321 U.S. 649 (1944), explicitly overruling the Court's decision just nine years earlier in *Grovey v. Townsend*, 295 U.S. 45 (1935), which had held that the Constitution does not apply to political party primaries. In *Smith*, Reed stated:

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon

> amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle, rather than an interpretation of the Constitution to extract the principle itself.

Smith, 321 U.S. at 665–66 (footnotes omitted). Notably, while still contemplating a dissent in *Brown*, he asked his law clerk to update the long list of cases where the Court had overruled its prior decisions in footnote 10 of his judgment in *Smith v. Allwright*. *See* FASSETT, *supra* note 52, at 567. Until *Tee-Hit-Ton* is overruled, lower courts will continue to follow it, as did the court in *Karuk Tribe of California v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000). *See also* United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976); State v. Elliott, 616 A.2d 210, 213 (S.C. Vt. 1992).