

Re-Reading Property

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B. Possession

Legal scholars often argue that first possession is the basis of original acquisition of property.²⁸ The traditional story about the settlement of the frontier in the United States is that pioneers made the difficult journey out into the wilderness, staked their claims and worked the land. Government followed, recognizing their property rights based on their occupation of vacant land and the labor they expended in improving it. I believe some property casebooks unconsciously convey this message. By beginning consideration of the topic of property with cases about first possession, lost or abandoned property, or wild animals,²⁹ these books suggest that property rights in the United States originate in possession of unclaimed resources. First possession appears legitimate as a principle of property acquisition since it rewards investment and labor and does not interfere with the rights of others. This traditional story allows Richard Epstein, for example, to claim that property rights originate from below in the United States, by the actions of private individuals possessing vacant land, and not from government grant, as in what he views as tyrannical regimes.³⁰ This assumption overlooks the fact that homesteading itself was based on government grant.

Moreover, if we focus our attention on the relation between race and property, we notice that American Indians are left out of this traditional story of origins.³¹ Often they are not mentioned at all in legal scholarship about property, in property casebooks, or in cases about property rights. This omission in discussions of the principle of first possession implies that the land which the settlers occupied was vacant. When American Indians are mentioned, their situation and history is often distorted and false. Many non-Indians believe that American Indian nations did not occupy most of the land in the United States; that

28. Epstein, *supra* note 8; Richard Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979); Rose, *supra* note 6. *But see* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990) (explaining how colonial theories of first possession justified seizing land from the actual first possessors of land in America).

29. *See* OLIN L. BROWDER ET AL., *BASIC PROPERTY LAW* 21-38 (5th ed. 1989) (beginning with cases about wild animals and first possession); A. JAMES CASNER & W. BARTON LEACH, *CASES AND TEXT ON PROPERTY* 7-64 (3d ed. 1984) (beginning with cases about wild animals and first possession); SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 45-84 (1987) (first cases about the doctrine of capture in the context of wild animals and doctrines related to ownership of lost and abandoned property). *But see* JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* (2d ed. 1988) (beginning with conquest); CHARLES M. HAAR & LANCE LIEBMAN, *PROPERTY AND LAW* (2d ed. 1985) (beginning with conquest).

30. Epstein, *supra* note 8, at 750.

31. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989). *See* WILLIAMS, *supra* note 28, for an act of recovery.

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it really was vacant.³² Or they assume that these nations voluntarily ceded their lands in mutually advantageous treaties.

The truth is that, although the United States generally protected the possessory interests of non-Indians, it has often run roughshod over the possessory interests of American Indians. It is simply not true that most of the land in the United States was "vacant." Although the land may not have been built up, almost no land fell outside recognized areas of tribal sovereignty. The settlers did not enter wilderness lands unclaimed by anyone. Rather, they invaded Indian lands. They took land away from the first possessors, and in most cases, were backed up by the coercive power of the United States military. The history of original acquisition of property in land in the United States therefore is based not on the principle of first possession, but on the very opposite: the seizure of property from first possessors by force. The real first possessors of land were deemed to be outsiders, savages. Their humanity was questioned, their possessory rights denied, their just claims rendered invisible.³³

Nor is this oppressive treatment of American Indian nations something that happened only in the distant past. In 1955, for example, one year after the decision in *Brown v. Board of Education*,³⁴ the Supreme Court ruled that Congress was constitutionally free to seize the property of American Indian nations without compensation if the United States had not previously recognized tribal rights to the land by treaty or statute.³⁵ As recently as 1980, the Supreme Court held that Congress has no constitutional obligation to pay just compensation for property seized from American Indian nations if it is, in good faith, exercising its so-called "trust" power to manage tribal property, as it sees fit, in the best interests of the tribe, and exchanges that property for property of "equivalent value."³⁶ In the non-Indian context, the

32. Reverend Lyman Abbott, one of the founders of the Lake Mohonk Conference, wrote in 1885: "We do owe the Indians sacred rights and obligations, but one of those is not the right to let them hold forever the land they did not occupy, and which they were not making fruitful for themselves or others." 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 624 (1984) (quoting Lyman Abbott).

33. WILLIAMS, *supra* note 28.

34. 347 U.S. 483 (1954).

35. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For a criticism of *Tee-Hit-Ton*, see Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980) [hereinafter Newton, *At the Whim of the Sovereign*]; Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 247-53 (1984) [hereinafter Newton, *Federal Power*].

36. *United States v. Sioux Nation*, 448 U.S. 371 (1980). For criticisms of this case, see Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 64-65 (now, LAW & SOC. INQUIRY); Newton, *Federal Power*, *supra* note 35, at 254-57; Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1982).

Supreme Court is not satisfied with equivalent value; it requires fair market value for the property.³⁷ Nor would the Supreme Court ask whether or not the government acted in "good faith." The government's motivations are simply irrelevant in the non-Indian context; compensation is required if a property right has been invaded, period.

Although many treaties were entered into with the American Indian nations, it is wrong to conceptualize these agreements as mutually advantageous, voluntary undertakings. They were, rather, involuntary arrangements by which the various Indian nations gave up their lands under threat of violence and further loss. The treaties were advantageous to the tribes in the same way that it is advantageous to acquiesce when a robber announces: "Your money or your life"—advantageous compared to the available alternatives.

These agreements did provide some security to the tribes that their right to possess their remaining lands would be protected forever. The United States has repeatedly violated those promises, abrogating almost every treaty it has ever made.

It turns out that the fundamental premise underlying the actual distribution of land in the United States was not first possession, but rather the race of the possessor. The United States failed to respect the first possession of American Indian nations. It is true that the federal government at times distributed the property it had seized from Indian nations to second possessors; that is, the first people to settle the land after the Indians. This practice, however, conditioned the principle of first possession on race: first possession was protected, as long as the possessor was not an American Indian.

Not only did the United States take property from first possessors on the basis of race; it also used race as a criterion in distributing the property so acquired. Most freed slaves were not enabled to take advantage of homesteading acts.³⁸ "Forty acres and a mule" was a dream that was never fulfilled. In contrast, the United States handed out much of the newly acquired land in the western territory to white settlers and to railroad corporations.³⁹

Focusing on race, therefore, places in substantial doubt the traditional story about the genesis of property rights in the United States. Failing to focus on race means committing the same offense as the United States in its early history; that is, treating American Indians as outside the community, as invisible. First possession was infringed

37. See, e.g., *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (fair market value); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979) (fair market value); *Almonta Farmers Elevator and Warehouse Co. v. United States*, 409 U.S. 470 (1973) (fair market value).

38. See LITWACK, *supra* note 9, at 403.

39. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230-34, 414-19 (2d ed. 1985).

rather than protected. Therefore, the existing distribution of property in land cannot be justified by the traditional story of origins. Why was land taken from American Indian nations? The justifications were many, including the desire to Christianize and civilize the Indians.⁴⁰ Crucial, however, were the arguments that the Indians had more land than they needed, and that they were misusing the land by not developing it.⁴¹ Moreover, the land was needed by non-Indians for settlement. It was therefore deemed appropriate for the state to redistribute land from those who did not need it or were misusing it to those who needed it and would use it in ways that would promote the general welfare.⁴²

The origins of property rights in the United States, therefore, are based partly on possession, but possessory rights were associated with race. Moreover, the allocation of property rights was often based on a vast program of nationalization and redistribution to promote social goals and to satisfy the needs of the United States. Does this mean that we should feel comfortable in continuing to redistribute property in this way? Much of this past redistribution was unjust. What lessons are we to take from this history? What obligations does the United States now have toward American Indian nations? What obligations does it have toward the descendants of freed slaves? Can we do something to remedy the injustices of the past without perpetuating wrongful practices in the present? If government distribution and redistribution is implied in the very notion of a private property system, how should those decisions be made and who should make them?

The complexity of these questions is apparent when we consider what response the United States should take toward the possibility of oppression within tribal governments. For example, in the case of *Santa Clara Pueblo v. Martinez*,⁴³ the Santa Clara Pueblo government enforced a tribal law which provided that children of male tribal members would be recognized as members of the tribe even if they married non-members, but that the children of women members would not be recognized as members of the tribe if they married outside the tribe.⁴⁴ Membership was important because it could determine not only the ability to participate in the Santa Clara Pueblo political and religious community but also eligibility for government benefits under treaties between the Santa Clara Pueblo and the United States.⁴⁵

The case presents a wrenching dilemma. If the United States failed to intervene, it may have been allowing the tribal government to en-

40. PRUCHA, *supra* note 32, at 198.

41. *Id.* at 196.

42. WILLIAMS, *supra* note 28, at 312-17.

43. 436 U.S. 49 (1978).

44. *Id.* at 51.

45. *Id.* at 52-53.

gage in wrongful discrimination against women, and therefore failing to protect the rights of American Indian women who are both citizens of the United States and members of tribes. By staying its hand, the federal government may deny Indian women equal treatment under the law. If the United States intervenes, however, it is imposing its vision of membership on the tribe and interfering in tribal sovereignty in a way that may wrongfully impose outside cultural norms upon the tribe. Such a result is contrary to principles of group autonomy implicit, for example, in the constitutional guarantee of free exercise of religion. The dilemma is heightened by the fact that the differential treatment of women and men may be the result, not of longstanding tribal history, religion, and culture, but of outside imposition by the United States itself through its coercive interference with tribal sovereignty in the past.⁴⁶

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

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The Vermont Supreme Court acknowledged that extinguishment of Indian title requires an unequivocal act of Congress.²⁸⁷ How then could the court conclude that the Abenaki title had been extinguished in the absence of any congressional action that even mentioned the Abenaki claims? How could the court conclude that the property rights of its citizens were casually lost when Vermont was admitted to the Union²⁸⁸ when the Abenakis had previously waged war against Great Britain five times, and the United States in 1791 was greatly concerned about preventing future wars with its Indian neighbors? How could the court conclude that the Abenaki title was lost when the Abenakis were never conquered and Congress failed to negotiate a treaty or otherwise deal with their property rights in any explicit way? How could the court, in good conscience, tell its Abenaki citizens that the Republic of Vermont was established for the sole purpose of protecting the property rights of all Vermonters except themselves?

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

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

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

²⁸⁸ *Elliott*, 616 A.2d at 218.

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

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

This denial of history²⁹⁰ has profound consequences. In the case of the law governing the relations between Indian nations and the United States, the distancing of past injustice allows the courts to rewrite both history and legal precedent. The courts rewrite history by pretending that conquest happened long ago in the past rather than recently—or even in 1992 as a consequence of their own actions. The courts rewrite precedent by relying on cases which misstate or distort the meaning of earlier cases and by failing to recognize conflicting lines of precedent and competing and contradictory policies.

At the same time, the courts continue to cite, or rather to mis-cite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions²⁹¹ contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights. To the extent they are read to authorize unjust expropriation of Indian lands, they provide a convenient scapegoat. They shift responsibility from current judges to a Court led by perhaps the most respected of all Chief Justices. If a proposition is compelled by a case decided in 1823, it not only has the backing of Chief Justice John Marshall, but also appears to be so long-standing that current courts have no choice but to submit to the principles upon which the country was established and which form the basis of current expectations of non-Indians. To the extent that process entails injustice, it is safely relegated to the past. Yet the past intrudes on the present; the old Indian law opinions are given current force.²⁹² To the extent that courts currently define Indian rights by reference to doctrines designed to

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

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

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

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

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

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

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

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

²⁹⁴ See *Elliott*, 616 A.2d at 220.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 218.

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

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

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

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

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

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

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

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

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

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