



...for the  
Inter-Tribal Monitoring Association

TERRITORY and PROPERTY

Governance and Rights

**SOVEREIGNTY  
IN THE BALANCE**

Law Professor  
Richard Monette  
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# PART I



“You own the stars?”

“Yes.”

“But I have seen a king who  
....”

“Kings do not *own*, they *reign*.  
It is a very different matter.”

- St. Exupery,  
*The Little*

*Prince*

# Fletcher v. Peck

(1810 C.J Marshall)

“What is an Indian title?

\*\*\* It is a right not to be *transferred*, but *extinguished*. (*emphasis in orig*) It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right. \*\*\*”





# Johnson v. McIntosh

1823

“[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other **European governments**.... \*\*\* *Discovery* gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest....”



# Thomas Jefferson

(Letter to British Minister in 1792)

“I considered our right of pre-emption of the Indian lands not as amounting to any dominion, or jurisdiction, or paramountship whatever, but merely in the nature of a remainder after the extinguishment of a present right, which gave us no present right whatever, but of preventing other nations from taking possession, and so defeating our expectancy; that the Indians had the full, undivided and independent sovereignty as long as they chose to keep it, **and that this might be forever.**”

# Johnson v. M'Intosh

(CJ Marshall, 1823)

“If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the **common stock**, and hold it in **severalty**, still it is a **part of their territory**, and is held under them, by a **title dependent on their laws.**”



# Johnson v. M'Intosh

(continued)

“The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.”





THE

SOURCE

OF

SOVEREIGNTY



RESERVED RIGHTS

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# 10<sup>th</sup> Amendment

U.S. Constitution

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are **reserved** to the states respectively, or to the people.”



# United States v. Winans

198 U.S. 371 (1905)

“In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a **reservation** of those not granted.”



“The Plaintiff \* contends that \* the fifth amendment \* ought to be so construed as to restrain the legislative power of a state .... ” **Barron v. Baltimore, 32 US 243 (1833).**

“The question, therefore, is, does the Fifth Amendment apply to the local legislation of the Cherokee nation ....”  
**Talton v. Mayes, 163 US 376 (1896).**



“The constitution was ordained \* by the people \* for themselves, and not for the governments of the individual states. Each state established a constitution for itself ....” **Barron, 32 US 243.**

“The case \* depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States ....” **Talton, 163 US 376.**



“[T]he fifth amendment \* is intended solely as a limitation on the exercise of power by the [federal] government, and is not applicable to the legislation of the States.”

**Barron, 32 US 243.**

“It follows that the powers of local government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment ....” **Talton, 163 US 376.**

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# US v. Lanza

260 US 377 (1922).

Issue: Whether subsequent prosecutions by Federal government and State government for actions arising out of same incident constitute double jeopardy.



“To regard the Amendment as the **source** of power of the States \* is to take a partial and erroneous view of the matter.

\*\*\* Such laws derive their force \* not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment ....” **US v. Lanza, 260 US 377,382 (1922).**



“We have here two sovereignties, deriving power from different **sources**, capable of dealing with the same subject matter within the same territory.” **US v. Lanza, 260 US at 382 (1922).**



“It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by both.” *US v. Lanza*, 260 US at 382.



# United States v. Wheeler

435 US 313 (1978)

Issue: Whether subsequent prosecutions by Federal government and Tribe government for actions arising out of same incident constitute double jeopardy.



“The controlling question in this case is the **source** of the power to punish tribal offenders: Is it part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?” **US v. Wheeler, 435 US at 322.**



“But none of these laws *created* the Indians’ power to govern themselves and their right to punish crimes committed by tribal offenders. *(emphasis in original)* When the \* tribe exercises this power, it does so as part of its retained sovereignty and not as an arm of the Federal Government. **US v. Wheeler, 435 US at 328.**



“Since tribal and federal prosecutions are brought by separate sovereigns, they are not “for the same offence,” and the Double Jeopardy Clause thus does not bar one when the other has occurred.” *US v.*

*Wheeler*, 435 US at 329-30.



## SOVEREIGNTY

Indian tribes retain  
“attributes of  
sovereignty over both  
their **members** and their  
**territory.**”

Opinion by William Rehnquist

US v. Mazurie, 419 US 544, 557 (1975)



Territory contains  
Property.

Property is subset of  
Territory.



# General Allotment Act (GAA)

In 1887, President Cleveland signed the General Allotment Act, also known as the Dawes Act, that authorized the government to divide reservations and allot tracts of land to individual Indians. They came in with **cookie cutters** and carved up the land.



- Who or what is the **source** of the property interest created by the allotment and thus fractionated interests? Who or what was the **settlor** of any trust deriving therefrom?

Our forebears reserved  
these territories in treaties.

Thus:

OUR COOKIE DOUGH

THEIR COOKIE CUTTER

OUR COOKIES!



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# Burke Act of 1906

- **Burke Act** ([1906](#)), was designed to correct certain defects in the [Dawes Act](#) of [1887](#), under which the land in the [Indian reservations](#) was to be broken up and distributed in severalty to the individual Indians. Because of the unpreparedness of most Indians for [citizenship](#) it provided that citizenship be granted on the final validation of their trust patents at the end of the probationary period of twenty-five years instead of on the receipt of the trust patents as stated in the Dawes Act.

# Indian Land Consolidation Act (1983)


- The Indian Land Consolidation Act attempted to address the fractionated ownership problem by:
  1. authorizing tribes to Develop Land Consolidation Plans which could include the buying, selling, and trading of fractionated interests;
  2. authorizing tribes to enact laws which Restrict the rights of non-Indians or Non-member to inherit Trust or Restricted Lands on their Reservations; and
  3. providing that small interest shall Escheat (go to) the Tribe.





# Re: ILCA

The U.S. Supreme Court, however, has twice overturned the Escheat Provision of the Indian Land Consolidation Act as a Fifth Amendment taking of property without just compensation. First, the Supreme Court overturned the original 1983 escheat provision in Hodel v. Irving, 481 U.S. 704 (1987) and then the Supreme Court overturned the 1984 escheat provision in Babbitt, et al. v. Youpee, Sr., et al., 95-1595, 24 Indian Law Reporter 1004, decided January 21, 1997.

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# Hodel v. Irving

## 481 U.S. 704 (1986)

Appellees, [beneficiaries](#), challenged § 207 of the Indian Land Consolidation Act, which addressed the problem of fractionation, claiming that it resulted in a taking of property without just compensation in violation of U.S. Const. The trial court concluded that § 207 was constitutional and held that appellees had no vested interest in the property of the decedents prior to their deaths... The court of appeals reversed, agreeing that appellees had no vested rights in the decedents' property, but concluded that the decedents had a right, derived from the original Sioux allotment statute... to control disposition of their property at death and that the taking of that right without compensation to decedents' estates violated the U.S. Constitution.



# In re: Hodel

- Tract 1305 [of Sisseton-Wahpeton Lake Traverse reservation] is 40 acres and produces \$1,080 in income annually. It is valued at \$8000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1... The common denominator used to compute fractional interests in property is 3,394,923,849,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its \$8000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at \$17,560 annually. Hodel vs. Irving, 481 U.S. 704, 713 (1987).

# Babbitt v. Youpee,

519 U.S. 234 (1997)

The court affirmed the judgment of the lower court that § 207 of the ILCA was invalid, effecting a taking of property without just compensation in violation of the US Const, 5th Amdt. The Supreme Court had previously invalidated the ILCA in *Irving* prior to its amendment. The Supreme Court determined that the narrow revisions that Congress made to the statute did not warrant a different disposition.





If we don't govern, some  
other government will:



## In the Estate of Covington

“Rarely does a probate matter find its way into federal court. Here we are presented with a will contest involving a member of an Indian tribe in a Department of the Interior probate proceeding where we must decide whether state or federal law of evidence applies.”

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# In re: Estate of Carrie Standing Haddon Miller

10 IBIA 128 (1982)

“Whether an Indian decedent has executed a will passing trust property is a question of Federal, not state law.”

**AND TRIBES?**



SO WHY  
AREN'T  
TRIBES  
GOVERNING?

# Three Falsehoods

- 1) We don't believe in private property.
- 2) We have no law to apply.
- 3) The Trust Responsibility interferes.


(And where we learn it from





Back to **Fletcher v.  
Peck**  
1810

“What is the Indian title? It is not like our tenures; they have no idea of a title to the soil itself. \*\*\* They had no idea of property in the soil, but a right of occupation. A right not individual but national.”



John Locke, *Two Treatises of Government, The Second Treatise*.  
Published 1690 (but written earlier.)

Sec. 27.


Whatsoever then [man] removes out of the State that Nature hath provided, and left it in, **he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property***. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. **For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.**



Robert Cushman, **Reasons and Considerations** (1622)

“[t]heir land is spacious and void... but all spoils, rots and is marred for want of manuring, gathering, ordering, etc.”

Because the Indians let the land lie “idle and waste... it is lawful now to take a land which none useth and make use of it ”




# John Cotton

(Theologian and Puritan  
Clergyman)

“...a Principle of Nature,  
That in a vacant soyle, hee  
that taketh possession of  
it, and bestoweth culture  
and husbandry upon it, his  
Right it is.”

- cited in his work, *God's Promise to His  
Plantations*, (1630)



# Memo to the Havasupai Tribe from the DOI

May 9, 2003

“the land belongs to the tribe **as a whole** and it is my opinion that the Havasupai Tribal Council has the authority to designate the use of the land for a helicopter landing site if they choose to do so **without any obligation** to the Marshall family.”

# Tribal Court Clearinghouse Website

“However, Tribal leaders appear hesitant to favor the Tribal government’s interests over those of individual members who own allotted lands.”





## A fossil Named Sue

In 1990 a fossilized T-Rex (nicknamed “Sue”) was discovered by a member of an archaeological team on a parcel of land situated within the Cheyenne River Tribe’s boundaries and held in Trust for an individual citizen of the Tribe pursuant to GAA.



## In re: Sue

Scientists paid the tribal citizen and excavated and removed the fossil. The US seized the fossil as evidence for a criminal investigation under federal law. Litigation ensued to determine the proper owner. The US determined that such a sale must have prior Secretarial level approval, that the sale was invalid, and the US' seizure of the fossil was valid.



## Sue (continued)

The Tribe then enacted a law providing for forfeiture of items gained in violation of Tribal law. The Tribe then filed suit against its own citizen, the allottee-owner of the fossil and the scientist who purchased the fossil. The **tribal court** concluded that the forfeiture was without effect because the Tribe's ordinance was not in effect at the time of removal.



# American Indian Agriculture Resource Mgmt Act (AIARMA)

In testimony, DOI noted that, “this section gives the tribes authority over the management of both tribal and ‘individual allotted lands’ and takes away the discretionary authority of the Secretary...”

## **BUT ALSO:**

“[T]his would require allotted land be subject to community goals which would create a Fifth Amendment taking, and also violate the U.S.’ trust responsibility to individual Indian landowners.” (Talton? Source?)



## Former DOI Solicitor John Leshy letter to Sen McCain

“The Department has determined that it should, as **trustee** for both the Nation and the allottees, provide some guidance on the nature and extent of the rights held by each.”



## Former DOI Solicitor John Leshy letter to Sen McCain

Leshy's letter says that "the key issue requiring resolution... is the nature of the rights in, and authority over, settlement water enjoyed by the allottees and the (Tohono O'dham) Nation."

# Leshy Letter

“...a tribe’s regulatory authority is circumscribed by ... the Act. While Section 7 does not directly address tribal authority, it plainly makes the Secretary responsible for protecting the allottees’ interest in agricultural water use. Therefore, the Secretary may... preempt tribal regulation that would thwart allottee interests.”



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# Const or Law FIX

## REAL PROPERTY PROVISION:

All real property interests within the territory, by whomever held, shall be deemed to have originated in a patent issued pursuant to the sovereign authority of the \_\_\_\_\_ Nation. There is hereby established a Land Office which shall maintain a land document registry to record and regulate patents in fee or any lesser interest in real property, including all titles, deeds, wills, trusts, leases, gifts, mortgages, liens, and any other writing used to memorialize interests or transactions in real property. Patents to interests in real property shall be issued only to members of the tribe.

# Fascinating


## About Petoskey, Michigan:

A popular resort nestled in a hillside overlooking Little Traverse Bay, Petoskey (pet-TOSK-ee) is known for its historic Gaslight Shopping District. These downtown shops connect to Waterfront Park, which features a walking path, playground, recreation area, and marina.

\*\*\* Take a drive just north of Petoskey to the lakeside community of Bay View, a summer-only association started by the Methodist church, where homes are passed down within families from generation to generation.”

- <http://mobiltravelguide.howstuffworks.com/petoskey-mi-guide.htm>





# Const or Law Fix (cna Tribes Const.)

## RECORDS PROVISION:

The Office of Records Management within the Department of Administration shall be located at the government headquarters in Concho. The Office of Records Management shall secure and maintain at a minimum the following Records of the Tribes: treaties, compacts, contracts, constitution, codes, resolutions, laws, ordinances, court opinions, elections, executive orders, memos, letters, rules, regulations, policies, bills, financial records, audits, audit letters and reports, budgets, salaries, travel records, grant proposals, grant awards, grant reports, maps, land records, newspapers, reports, studies, and any other documentary, audio, or written records.



# Records (continued)

The Office of Records Management shall develop systems to index and access all Records maintained in the Office of Records Management or any other office. The public shall have the right to inspect any Record and shall have the right to obtain copies of any Record for a reasonable fee as may be set by law.




## PART II



# American Indian Probate Reform Act of 2004

- Passed in 2004, the legislation focuses on a number of interrelated issues by:
  1. Buying back lands once held by tribes or purchasing lands near or on reservations from owners whether Indian or non-Indian (often called land consolidation);
  2. Developing a federal unified and more easily understood probate code for tribes (which must now contend with 33 state codes) and ending the probate backlog;
  3. Clarifying the definition of "Indian", and "eligible heirs" in the context of trusts, public domain allotments, and restricted lands; and
  4. Providing will drafting assistance and estate planning in Indian Country in order to help families plan for the future

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# AIRPA-driven Cultural Value Judgments For Tribes and Indians

- 1) Order of Intestate Descent
- 2) Surviving Spouse
- 3) Life Estate
- 4) “without regard to waste”
- 5) Equal shares

# AIPRA-driven

(continued)

- 6) “Small Fractional Interest”
- 7) Primogeniture (oldest child)
- 8) “Contiguous” owner
- 9) Rights of First Refusal
- 10) Order of Privity
- 11) Opportunities to Waive





# PART III



“The power to regulate, the right to self-government, must include not only the power to decide to enact laws, but also the power to decide not to enact laws on that subject.”

-Justice Heffernan, dissenting, in *County of Vilas v Chapman*, 122 Wis.2d 211 (1985)



## United States ex rel. Standing Bear v. Crook

25 F. Cas. 695 (1879)

“It cannot, therefore, be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, the rightful authority to issue it does not exist. Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-use.”

*-Opinion by Judge Dundy*



# DUE PROCESS



# *Solesbee v. Balkcom*

399 U.S. 9, 16 (1950)

“Due Process is that which comports with the deepest notions of what is fair and right and just.”

*Frankfurter, J., dissenting*



# Garvin v. Ho-Chunk Nation Election Board

Ho-Chunk Nation, CV 05-90

Three typical responses:

- 1) “Due process is a procedure that is inherently foreign to native nations.”
- 2) “It is a procedure that was created by western civilization and has been imposed on native nations.”  
-J. Gouty-Yellow



Dry Creek Lodge, Inc. v.  
Arapahoe & Shoshone  
Tribes

623 F.2d 682

“There must exist a remedy for parties in the position of plaintiffs to have the dispute resolved in an orderly manner. To hold that they have access to no court is to hold that they have constitutional rights but have no remedy.”



# Absolute Defenses

- “One, the Court has never been given subject matter jurisdiction over this kind of an action.
- Two, the Tribal Defendants have sovereign immunity from this lawsuit.
- And Three, the action involves a political question assigned to the legislative branch of government by the Constitution and is therefore non-justiciable.”

# Cheyenne and Arapaho (new constitution)

“Nothing in this Constitution shall be deemed to waive Sovereign Immunity Section 1. Sovereign Immunity. The Tribes shall possess Sovereign Immunity from suit. Only the Legislature and the Tribal Council may authorize a waiver of Sovereign Immunity by law. Any authorization by the Legislature to waive Sovereign Immunity shall be specific, for a limited scope and duration, in writing, and shall be limited to a maximum of one hundred thousand dollars per party. Any authorization by the Tribal Council to waive Sovereign Immunity shall be specific, for a limited scope and duration, and in writing.

Section 2. Immunity from Suit by Parties Outside the Jurisdiction of the Tribes. The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit brought by any party not subject to the Jurisdiction of the Tribes except to the extent waived in accordance with law.

Section 3. Immunity from Suit by Parties Within the Jurisdiction of the Tribes. The Tribes and its Officials and Employees acting in their official capacity or within the scope of their authority shall be immune from suit except for suits in equity filed exclusively in the Courts of the Tribes by any party subject to the Jurisdiction of the Tribes to enforce rights and duties established by law or this Constitution. Any Member of the Tribes may bring a suit exclusively in the Judicial Branch to enforce the terms of this Constitution. Sovereign Immunity shall not extend to Officials and Employees acting outside their official capacity or beyond the scope of their authority.”





Article VI. Sovereign Immunity  
Sec. 4-86. Immunity of Officials,  
Officers, and Tribal Employees

- b. Tribal Employees, Officials, and Officers shall not enjoy immunity from suit in an action for declaratory, injunctive, or other equitable relief brought for the sole purpose of compelling such employee, official or officer to comply with the Constitution or laws of the Tribe provided:
1. that such waiver of immunity shall not extend to the discretionary actions of such employees or any claim or judgment for monetary damages, and
  2. that all available administrative remedies have been exhausted.

(Fort McDowell Code)