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Grave-Digging: The Misuse of History in Aboriginal Rights Litigation

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COMMENT

GRAVE-DIGGING: THE MISUSE OF HISTORY IN ABORIGINAL RIGHTS LITIGATION

I. INTRODUCTION

> Indians in the United States were cut down by the tens of thousands by Winchester repeating rifles and flashing cavalry sabers. But north of the border there were no Indian wars. Natives were simply stripped of their land—always peacefully—assured that the queen loved them like children, then shuffled off to reserves and forgotten.[1]

Loving them like children,[2] the Crown denied the First Nations[3] their autonomy and sovereignty. Loving them like children, the Crown barred the cultural and political maturation of the First Nations.[4] Keeping the First Nations in a state of dependence, the Crown has perpetuated a policy tantamount to the genocide perpetrated by their southern brothers.

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1. Colin Nickerson, *Anger, Despair Deepen for Canada's Indians*, BOSTON GLOBE, Mar. 2, 1997, at A1. This newspaper article points out some of the horrible conditions resulting from reservation living:

> An adolescent Indian in Canada is almost twice as likely to go to jail than to graduate from high school. Some 30 percent of Indian homes lack plumbing or running water, while 60 percent of reserve Indians are unemployed. Children on Canada's reserves suffer from a plethora of afflictions ranging from malnutrition to head lice. In Alberta, Indians make up only 5 percent of the population but nearly 40 percent of the welfare recipients. On the poorest reserves, alcoholism rages at pandemic levels. Rates of serious crime are by far the highest in Canada.

Id. at A1.

2. European officials addressed First Nations' chiefs, "children," and the chiefs called the European, "father." *See, e.g.*, Regina v. Taylor and Williams [1981] 34 O.R. (2d) 360, 363 (Ont. Ct. App.) (recounting a council meeting between chiefs of six tribes and the Deputy Superintendent of Indian Affairs).

3. Discussion of aboriginal peoples of Canada tends to use the term "First Nations." Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 645 (1991).

4. For a comprehensive survey of the history of First Nations in Canada, see OLIVE PATRICIA DICKASON, CANADA'S FIRST NATIONS: A HISTORY OF FOUNDING PEOPLES FROM EARLIEST TIMES (1992).

This psychological, social, and economic genocide—which is by no means limited to Canada—stems in part from the west's failure to read and identify the terms aboriginal and aboriginal rights within a framework that fully and fairly incorporates aboriginal perspectives related to community, property, and history. The very notion of property as fee simple is, of course, foreign to traditional aboriginal concepts of land. Additionally, the historical theories that western courts apply in determining continuous and exclusive possession of land and in construing aboriginal title further distances today's legal decisions from aboriginal perspectives. Specifically, western courts have looked to the hard written facts found in such documentation as treaties and journals kept by European trappers. This approach ignores the many kinds of aboriginal histories, ranging from stories passed down from generation to generation to customs and celebrations.

Some would say that holding aside such histories is inevitable and necessary to preserve the integrity of the Anglo-American legal system. How could oral histories be reliable evidence? How can a court determine title to land without a showing of continuous and exclusive possession as documented by written accounts?

In a series of remarkable opinions, the Supreme Court of Canada has begun to answer these questions in a way that is tending to recognize the independence, autonomy, and integrity of Canada's First Nations.[5] With these opinions, Canadian courts have recognized that they cannot define "aboriginal rights" by means of the traditional English property law paradigm.[6] Instead, they define aboriginal rights as *sui generis*, as a special kind of property created at the moment that Europeans asserted sovereignty over land occupied by First Nations. Even more significantly, Canada's Supreme Court has mandated that special rules of evidence apply to allow the admission of traditionally inadmissible evidence such as oral histories.[7] One of the goals in these opinions has been not so much to overturn

5. *See, e.g.*, Delgamuukw v. The Queen [1997] 3 S.C.R. 1010 (Can.); Van der Peet v. The Queen [1996] 2 S.C.R. 507 (Can.); Sparrow v. The Queen [1990] 1 S.C.R. 1075 (Can.); Guerin v. The Queen [1984] 2 S.C.R. 335 (Can.).

6. *Sparrow* [1990] 1 S.C.R. 1075 (Can.).

7. *Delgamuukw* [1997] 3 S.C.R. at 1075, 1100-1101 (citing *Van der Peet* [1996] 2 S.C.R. at 510).

more than a century of judicial decisions but rather to open up a means of truly incorporating aboriginal perspectives into the work of the courts. As Canada's Supreme Court puts it, the courts must accord due weight to aboriginal perspectives without straining "the Canadian legal and constitutional structure."[8] This approach has begun to engender not only a fresh construction of property law but also a new—if yet unarticulated—theory of history.

This Comment provides a brief account of what Canada's Supreme Court has meant by construing aboriginal title as *sui generis* and explores the significance of this legal theory to the construction of a commensurate historical theory. This Comment does not, however, explore the intricacies of aboriginal histories or dictate a specific complex historiography for courts to follow. Rather, it calls attention to the necessity of courts' taking on a more sophisticated and self-conscious approach to history.

Part II of this Comment provides a starting point for this exploration in that it shows a contemporary court's imposing a traditional western approach to history, an approach that inevitably curtails or even extinguishes aboriginal rights. Part III defines how Canadian courts have established aboriginal title and explains their treatment of aboriginal rights as *sui generis*. Part IV shows how the Canada Supreme Court's interpretation of aboriginal rights as *sui generis* offers a model for writing history more self-consciously and more thoroughly by foregrounding the contiguities and mutualities of First Nations and European histories. Part V considers whether some of this model might be applicable to reservation disestablishment cases in the United States.

Although it is up to the legislatures to shape progressive Indian policy, the courts must approach traditional sources of law in ways that provide a space for the First Nations to continue to develop their autonomy and independence.[9] So long as the

8. *Van der Peet* [1996] 2 S.C.R. at 509.

9. This Comment assumes that courts aim to be governed by jurisprudential rather than political motives, and proposes an alternative view of history that courts can incorporate into their making principled decisions. In fact, for a court to make a principled decision, it must invoke theories of history and narrative that are not politically fixed; as Herbert Wecshler observed: "a principled decision. . .is one that rests on reasons. . .that in their generality and neutrality transcend any immediate result that is involved." HERBERT WECSHLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 27 (1961).

courts continue to view history in terms of treaties, legislative directives, occupation, and use, the court system will fail to adopt a truly alternative property model. By failing to adopt a new historical paradigm along with the alternative property model, the court system is digging the graves of aboriginal rights.

II. THE GITKSAN CASE AND THE OLD HISTORY

One of the most important aboriginal rights claims cases in recent years, *Delgamuukw v. The Queen*, also known as the Gitksan case, exemplifies how courts have failed to adopt a new historical model commensurate with the Supreme Court of Canada's definition of "aboriginal rights."[10] The Supreme Court of Canada overruled the British Columbia court and set forth specific guidelines on how the courts should adapt rules of evidence to the special nature of aboriginal title claims.[11] While the Supreme Court made the essential observation that evidence rules must be modified to be commensurate with this *sui generis* property, its intelligent and bold opinion stopped short of offering a critique of the pervasive western approach to history apparent in the lower court's opinion. It is important to look at the enormous work of the lower court to understand how a court's construction of history shapes its findings and to explode some of the misconceptions of a historical method that purports to be hegemonic.

The case is unusual in many respects, most notably in that individual chiefs, not tribes or officials of the Department of Indian Affairs, were the plaintiffs pressing their claims and presenting the histories of their Houses.[12] In *Delgamuukw*, fifty-one chiefs from two sub-groups of aboriginal peoples, the Gitksan

10. Delgamuukw v. The Queen [1991] 79 D.L.R.(4th) 185 (B.C.), *aff'd in part*, [1993] 104 D.L.R. (4th) 470 (B.C. Ct. App.), *rev'd in part*, [1997] 3 S.C.R. 1010 (Can.). For a discussion of the appellate court's treatment of extinguishment of aboriginal rights, see Bruce Ryder, *Aboriginal Rights and* Delgamuukw v. the Queen, 5 CONST. F. 43 (1994).

11. Delgamuukw v. The Queen [1997] 3 S.C.R. 1010 (Can.). For a discussion of this case and the Supreme Court's modifications of evidence rules in aboriginal rights cases, see Part III, below. *See also* Anthony DePalma, *Canadian Indians Celebrate Vindication of Their History*, N.Y. TIMES, Feb. 9, 1998, at A1.

12. Delgamuukw v. The Queen [1991] 79 D.L.R. (4th) 185, 203 (B.C.). Houses, composed of several clans, are headed by a number of chiefs. For a discussion of the history of the case and Gitksan and Wet'suwet'en perspectives on the litigation, *see* DON MONET AND SKANU'U (ARDYTHE WILSON), COLONIALISM ON TRIAL: INDIGENOUS LAND RIGHTS AND THE GITKSAN AND WET'SUWET'EN SOVEREIGNTY CASE (1992).

and the Wet'suwet'en, claimed ownership and jurisdiction over an area of some 58,000 square kilometers in British Columbia.[13] Although the chiefs conceded that the radical title was held by the Crown, they contended that this title was burdened by aboriginal rights.[14] They sought declaration of their ownership of the land, or, in the alternative, aboriginal rights to use of the territory.[15] They also sought damages for loss of lands and resources transferred to third parties.[16] Additionally, they sought declaration of the right to govern themselves in accordance with their aboriginal laws.[17]

The trial court found that the Indian chiefs failed to demonstrate a claim based on occupancy and held that claims for damages and self-governance should be dismissed.[18] Furthermore, the trial court concluded that all aboriginal rights had been extinguished.[19] The court did, however, concede that the Indians should be entitled to use "vacant Crown land for aboriginal purposes subject to the laws of the province."[20] This last finding was grounded in a "fiduciary obligation" of the Crown, and not in any rights stemming from the tribes' occupation of the territory.[21]

The trial court articulated both the necessity and the difficulty of dealing with several kinds of histories. Justice McEachern explicitly noted his frustration over how to pull together the vast body of information before him, how to determine what evidence to admit, and how to determine what history to believe.[22] He quoted the Ontario Court of Appeals' dictum that "[c]ases on Indian or aboriginal rights can never be determined in a vacuum. It is of importance to consider the history and oral traditions of the tribes concerned, and surrounding circumstances...."[23] McEachern also observed that

13. *Delgamuukw* [1991] 79 D.L.R. (4th) at 202-203.
14. *Id.* at 204. "Radical title" designates the underlying title to the land as held by the Crown. *Id.* at 282.
15. *Id.* at 240-41.
16. *Id.* at 241.
17. *Id.* at 240.
18. *Id.* at 537.
19. *Id.* at 490.
20. *Id.* at 537.
21. *Id.* at 482.
22. *Id.* at 200.
23. Regina v. Taylor [1981] 34 O.R. (2d) 360, 364 (Ont. Ct. App.)

"there are many relevant, interfluent histories."[24] The court attempted to finesse its way around this problem of multiplicity by recognizing a sense of discomfort and ambivalence in its enterprise.

McEachern's ambivalence points toward the necessity of creating an alternative paradigm for viewing history in these land claims cases. His analysis inevitably founders on traditional methods of history, which tend to bind peoples to their past rather than free them for self-determination. Although the trial court is to be commended for its examination of an enormous and various body of evidence, its Herculean efforts nonetheless failed to reach the heart of the matter of Indian land claims. The trial court, like courts before and after, framed its approach to historical evidence in terms of a traditional European model that aims to categorize and delineate events rather than to establish a starting point for present-day tribal self-determination. This traditional approach to history both reflects and circuitously confirms the court's traditional approach to property law, as McEachern noted: "I am sure that the plaintiffs understand that although the aboriginal laws which they recognize could be relevant on some issues, I must decide this case only according to what they call 'the white man's law'."[25]

Although many aspects of the trial court's decision invite analysis in terms of its limited approach to history, this Comment calls attention to only three kinds of historical problems: the court's structural, linguistic, and point-of-view maneuvers that ultimately have frozen the aboriginal rights claims in the past. The trial court stratified the histories of the Gitksan, Wet'suwet'en, and European peoples into periods and atomized history in terms of treaties presented from the colonial perspective.

At the structural level, the court felt compelled to divide the history of the Gitksan and Wet'suwet'en peoples into three divisions: pre-historic, proto-historic, and historic.[26] The judge explained that the difference between these periods is "relevant

24. *Delgamuukw* [1991] 79 D.L.R. (4th) at 211.

25. *Id.* at 201.

26. *Id.* at 212-27. It should be noted that this division of history conforms to that set out in earlier cases. *See, e.g.* Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development [1979] 107 D.L.R. (3d) 513, 517-29 (Fed. Ct.).

to the question of determining what are aboriginal as opposed to non-aboriginal practices."[27] An aboriginal right can be protected only if it is proven not to have emerged as a result of European settlement.[28] "Pre-historic" preceded "proto-historic," which the court defined as "the period before actual contact with Europeans, but after European influences began to impact upon aboriginal people."[29] The historic period, according to this model, did not begin until 1822 when a European trader documented the activities of some of the Gitksan.[30]

On another level, the language that the court used to describe how Indians and Europeans migrated and settled in the territory reflects a strong bias toward a particular kind of history. While purporting to respect the religions of the Indian peoples, the court dismisses some Indians' belief that "God gave this land to them at the beginning of time."[31] This could not be, according to the court, because no one could have inhabited the territory covered in ice during the Ice Age, an event that occurred, of course, much after the beginning of time.[32] The court recognized that there was human presence in the area some 6,000 to 3,500 years ago, but concluded that it was sporadic.[33]

The account of the European discovery of America, thanks to documentation, is less speculative. The judge opines with pride: "Early in this continuum other great explorations were underway, principally from Europe west and southward.[34] Magellan's expedition circumnavigated the globe in 1519-22, and Drake sailed into the Pacific landing. . . ."[35] While Magellan's sea journey is called "great," the miraculous foot journey of the Indians gets buried in apologies and the presence of the Canadian judge: "It is my conclusion, doing the best I can without the assistance of very much evidence, that the plaintiffs' ancestors, both Gitksan and Wet'suwet'en, migrated from Asia, probably through Alaska, but not necessarily across the Bering

27. *Delgamuukw* [1991] 79 D.L.R. (4th) at 201.

28. This does not, however, require that the tribes perform these practices just as their ancestors did during the "pre-historic" period. *See id.* at 212-27.

29. *Id.* at 220.

30. *Id.* at 222.

31. *Id.* at 212.

32. *Id.*

33. *Id.* at 213.

34. *Id.* at 215.

35. *Id.*

Strait, after the last Ice Age, and spread south and west into the areas which they found liveable."[36] When set beside the description of the European discovery, the account of the Indian migration seems litotes. Unfortunately, the author of the opinion does not seem to recognize the sad irony.

Although the court recognizes that "there are many relevant, interfluent histories," it nonetheless construes history from the European perspective.[37] The court recites events related to the Europeans: gold rushes, Mormon immigration, small pox epidemics, commercial activity, the arrival of the telegraph, and the various political activities preceding British Columbia's joining the Canadian Confederation.[38] The court establishes no connection between all this European activity and the movement of the Indians, a movement that hurt their chances of showing long-term and exclusive occupation. The court says only: "During all this period the Indians were leaving the distant areas of the territory to live in the villages in the transportation corridor."[39]

Nor does the court mention at this point that Canadian policy as set forth in the 1857 Civilizaton of Indian Tribes Act was assimilation.[40] In the process of delineating essential aspects of "history" that speak to contemporary aboriginal rights, the court gives short shrift to the "interfluence" of the histories. In atomizing the historical events instead of foregrounding the constant relations between Indians and Europeans, the court creates a history of boundaries, which, in turn, ground contemporary relationships in the somewhat arbitrary categories established by the process of writing history and not by the process of cultural development.[41]

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36. *Id.* at 213.

37. *Id.* at 224-30.

38. *Id.* at 224.

39. *Id.* at 227.

40. CAN. STAT., ch. 26 (1857). *See also* Richard H. Bartlett, *The Indian Act of Canada*, 27 BUFF. L. REV. 581, 582 (1978).

41. The trial court concludes the section on "The Historic Period" by quoting a European trapper who recorded in his journal that "he had great difficulty getting the Indians in his area to be as industrious in their trapping as he wished they would be." *Delgamuukw* [1991] 79 D.L.R. (4th) at 223.

III. ABORIGINAL RIGHTS AND THE PROBLEM OF HISTORY

The problem of history begins with a look at the purpose of history in aboriginal rights claims litigation. When Canadian courts have considered whether an aboriginal right to land continues to exist, they have looked to the traditional property model of occupation and use.[42] The right attaches to land occupied and used by aboriginal peoples as their traditional home prior to the assertion of sovereignty."[43] The Supreme Court in *Delgamuukw*, drawing on a tradition that stretches back to *Hamlet of Baker Lake v. Minister of Indian Affairs*, sets forth specific requirements for establishing aboriginal title:

> (1) the land must have been occupied prior to sovereignty;
>
> (2) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and
>
> (3) at sovereignty, that occupation must have been exclusive.[44]

The legal meaning of aboriginal title arose from the Indians' historic occupation and possession of their tribal lands; that is, they emerged from the European articulated possessory rights that Indians held from time immemorial.[45]

Before returning to the role of history in construing aboriginal title, it is necessary to consider the development of the

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42. *Id.* at 542.

43. *Id.*

44. Delgamuukw v. The Queen [1997] 3 S.C.R. 1010, 1097 (Can.). *See* also Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development [1979] 107 D.L.R. (3d) 513, 542 (Fed. Ct.). A similar test applies in the United States. The Sac and Fox Tribe of Indians of Oklahoma v. United States, 315 F.2d 896 (Ct. Cl. 1963)("aboriginal title must rest on actual, exclusive, and continuous use and occupancy for a long time prior to the loss of the property.").

45. Calder v. Attorney General of British Columbia [1973] S.C.R. 313 (Can.). *See also* Guerin v. The Queen [1984] 2 S.C.R. 335, 376-82 (Can.); Amodu Tijani v. Secretary, Southern Nigeria, 2 A.C. 399 (P.C., 1921) (where change in sovereignty did not effect change of presumptive title of inhabitants).

doctrine of this property right as *sui generis*. One of the most obvious ways that aboriginal title differs from traditional common law concepts of property is that it is held collectively as opposed to individually in fee simple.[46] The second major difference lies in how the right was created, essentially by the collision of a European legal culture entering land possessed by the First Nations. At that brief moment, no title existed in the land. As time passed, title was constructed and imposed at the hands of U.S. Supreme Court Chief Justice John Marshall, who developed the notion of two kinds of title: radical title held by the sovereign and a possessory right, held by the First Nations occupying the land at the time of discovery.[47] As Justice Marshall explained in the famous case, *Johnson v. M'Intosh*, "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[48]

The discovery doctrine also reflected the third aspect of the special nature of aboriginal title, its inalienability. First Nations could continue to occupy the land, but discovery vested an "exclusive right to purchase" in the discoverer.[49] This doctrine of discovery emerged to stave off conflicts between European nations, not between Europeans and Indians.[50]

Courts in both Canada and the United States relied on the Royal Proclamation of 1763 to buttress the discovery doctrine.[51] Ostensibly, the Royal Proclamation of 1763 did not aim to affect aboriginal rights; the purpose of the proclamation was to protect the Indians by insulating them from the white settlers.[52] The

46. Delgamuukw v. The Queen [1997] 3 S.C.R. 1010, 1082-83.

47. The doctrine of discovery was first articulated by the Supreme Court of the United States in *Johnson and Graham's Lesee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), and later adopted, with limitation, in Canada's first important Indian claims case, *St. Catherine's Milling and Lumber Co. v. The Queen* [1888] 14 App. Cas. 46 (P.C.). It was not until *Calder* that Canada's courts extended the existence of aboriginal rights to antedate the Royal Proclamation of 1763. *Calder v. Attorney General of British Columbia* [1973], S.C.R. 313.

48. *Johnson v. M'Intosh*, 21 U.S. at 573.

49. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832). *See also* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV., 481, 490 (1994).

50. *See Johnson v. M'Intosh*, 21 U.S. at 572-74, 596-97; *Worcester v. Georgia*, 31 U.S. at 544. *See also* Singer, *supra* note 49, at 490.

51. The first and most famous case to explore this relationship was *Johnson v. M'Intosh*. *See Johnson v. M'Intosh*, 21 U.S. at 572-74, 596-97

52. *Id.*

document itself suggests this purpose; the preamble recognized that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians."[53] The Proclamation proscribed British subjects from making purchases, taking possession, or making settlements of reserved lands.[54] After European discovery and the Royal Proclamation, the kind of property right remaining in the First Nations is "a right held by a collective, a right that cannot be alienated other than by the Crown, that is, held at the pleasure of the Crown."[55]

The issue of aboriginal rights in Canada took on new significance in 1982 when Canada "recognized and affirmed" the "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada."[56] Although this legislation did not establish new rights, it provided constitutional protection of any rights that could be proven to exist prior to the adoption of the Act.[57] Those wishing to assert claims based on aboriginal rights had to prove (1) that the aboriginal rights existed in 1982 when this Act was adopted into the Constitution, and (2) what those aboriginal rights were.[58]

The courts in Canada have struggled to find some harmony in the coexistence of aboriginal rights and Canadian radical

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53. Royal Proclamation of 1763, R.S.C., app. II, No. 1 (Can. 1985). The Proclamation reserved for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest" (that is, stretching from southern Ontario to the Gulf of Mexico, from the Appalachian Mountains west to the Mississippi River). *Id.*

54. *Id. See also* PETER A. CUMMING & NEIL H. MICKENBERG, NATIVE RIGHTS IN CANADA, 70, 71 (2d ed. 1971). Within twenty years of the Proclamation, however, the white population was on the increase, and the British government purchased lands from the Indians for settlement and military establishments. By the 1830s, Canada was stripping the indigenous peoples of their land and installing them on reservations, purportedly to help Indians assimilate to the white culture. *See* Johnson, *supra* note 3, at 667-69.

55. St. Catherine's Milling and Lumber Co. v. The Queen [1888]14 App. Cas. 46, 54 (P.C.). *See also* Smith v. The Queen [1983] 1 S.C.R. 554, 561-63.

56. CAN. CONST. (Constitution Act, 1982) R.S.C., app. II, No. 44, Sec. 35(1)(1985).

57. *Id.* For discussions of the effects of the 1982 act, see Noel Lyon, *An Essay on Constituional Interpretation*, 26 OSGOODE HALL L.J. 95 (1988); William Pentney, *The Rights of Aboriginal Peoples in Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee*, 22 U.B.C. L. REV. 207 (1987); Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 726 (1987).

58. Aboriginal rights play a much more significant role in Canada litigation than in the United States because the United States land settlement relied much more heavily on treaties, which delineated the rights and responsibilities of the respective parties. *See* Johnson, *supra* note 3, at 683.

title.[59] On the one hand, the courts have found a consistency of radical title burdened by aboriginal rights; they cite the famous Australian case, *Mabo v. Queensland*:

> Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).[60]

On the other hand, and more importantly, the courts have wrestled with ways to construe aboriginal title so that it does not conflict with radical title; the courts rescue the coexistence of title by trying to define aboriginal rights as a form of property outside the bounds of traditional property theory.[61]

Even as the courts try to stretch outside of traditional law to account for aboriginal rights, they are forced to find some legal pigeonhole in which to house these rights so that, at the very least, the judicial system can generate a legal position to determine and grant compensatory damages.[62] While construing aboriginal rights as legal, the Supreme Court in *Guerin* set forth two aspects of Indian title: (1) that it is a personal interest, inalienable other than to the Crown, and (2) that it also consists of a fiduciary obligation on the part of the Crown.[63] Six years later in *Sparrow*, the Supreme Court upheld *Guerin's* characterization of aboriginal title as *sui generis*.[64] In neither

59. *See* Sparrow v. The Queen [1990] 1 S.C.R. 1075 (Can.); Guerin v. The Queen [1984] 2 S.C.R. 335 (Can.); Calder v. Attorney General of British Columbia [1973] S.C.R. 313 (Can.).

60. Mabo v. Queensland, 107 A.L.R. 1 (Austl. 1992), *quoted in* Delgamuukw v. The Queen [1993] 104 D.L.R. (4th) 470, 493 (B.C. Ct. App.).

61. *See Sparrow* [1990] 1 S.C.R. 1075; *Guerin* [1984] 2 S.C.R. 335.

62. *Guerin* in particular confronts this problem. The Supreme Court of Canada was careful to construe the Crown's fiduciary obligation to the First Nations as a private trust, not a public one, so that the aboriginal rights claim at issue fell within the legal system's ambit. *Guerin* [1984] 2 S.C.R. at 375-89. The Court took this stand to counter the Government's argument that the trust was political and therefore properly dealt with in political fora. *Id.* at 375-76, 384-85. The Court identifies the sources of the "political trust" doctrine: *Kinlock v. Secretary of State for India in Council*, 7 App. Cas. 619 (H.L., 1882), and *Tito v. Wadell* (No. 2), 3 All E.R. 129 (Ch., 1977). *Id.* at 375-79.

63. *Guerin* [1984] 2 S.C.R. at 382.

64. *Sparrow* [1990] 1 S.C.R. 1075.

Guerin nor *Sparrow*, however, did the Court have to determine what conditions established aboriginal title over land.[65] *Guerin* and *Sparrow* required later courts to recognize the special nature of aboriginal rights, but neither case established a set of rules or even observations to guide later courts in determining whether aboriginal rights over land existed. Thus a later court, such as the British Columbia court analyzing the Gitksan claims, returned to *Baker Lake* and its traditional occupation-and-use definition of property rights.[66]

Today, Canadian courts regard "aboriginal rights," which include the more specific "aboriginal title," as "rights arising from ancient occupation or use of land, to hunt, fish, take game animals, wood, berries and other foods and materials for sustenance and generally to use the lands in the manner they say their ancestors used them."[67] As the court in *Sparrow* pointed out, these rights are "held by a collective and are in keeping with the culture and existence of that group."[68] As this definition implies, "aboriginal rights" were not explicitly accounted for in treaties, and were not thwarted by European claims of sovereignty.[69] Aboriginal title is, according to the Supreme Court, "grounded both in the common law and in the aboriginal perspective on land."[70] As such, both the aboriginal perspective and the common law must be considered in determining whether aboriginal title exists.[71]

Accordingly, the Supreme Court in *Van der Peet* laid down two principles that aim to give due weight to aboriginal perspectives without straining "the Canadian legal and constitutional structure."[72] The two principles are:

> (1) trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and

65. In *Guerin*, the land involved was part of an Indian reserve in Vancouver. *Guerin* [1984] 2 S.C.R. at 339-40. In *Sparrow*, the issue turned on aboriginal rights to fish. *Sparrow* [1990] 1 S.C.R. 1075, 1076.

66. *See* Delgamuukw v. The Queen, [1991] 79 D.L.R. (4th) 185, 455 (B.C.).

67. *Id.*; *see also* Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development [1979] 107 D.L.R. (3d) 513 (Fed. Ct.); JACK WOODWARD, NATIVE LAW (1990).

68. *Sparrow* at 1112.

69. *See* Calder v. A.-G. B.C. [1973] S.C.R. 313, 390 (Can.)(J. Hall, dissenting).

70. Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010, 1099-1100.

71. *Id.*

72. *Id.* at 1066 (quoting Van der Peet v. The Queen [1996] 2 S.C.R. 507, 509 (Can.)).

> (2) trial courts must interpret that evidence in the same spirit.[73]

In reviewing the Gitksan case, the Court applied these principles to how the trial court valued—or undervalued, by giving them no independent weight—the oral histories of the Gitksan and the Wet'suwet'en.[74] The Supreme Court went to great lengths to explain the uniqueness and evidentiary significance of these oral histories, quoting the *Report of the Royal Commission on Aboriginal Peoples*:

> The Aboriginal tradition in the recording of history is neither linear nor steeped in the same notion of social progress and evolution [as in the non-Aboriginal tradition]. Nor is it usually human centered in the same way as in the western scientific tradition, for it does not assume that human beings are anything more than one—and not necessarily the most important—element of the natural order of the universe. . . .[T]here are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.[75]

The Court held that rules of evidence must be adapted so that such evidence can have "an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[76] With this equal footing requirement in mind, the Court ordered a new trial to overcome the trial court's errors in failing to assess oral histories properly.[77]

As remarkable and useful as are the Supreme Court's principles mandating admission and weighty consideration of oral histories, they are limited in that they focus only on the oral histories and perspectives of the First Nations. For a truly *sui generis* history commensurate with the *sui generis* nature of aboriginal rights, courts must also reflect on how they read

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73. *Delgamuukw* [1997] 3 S.C.R. at 1066 (citing Cramer v. United States 261 U.S. 219 (1923)).

74. *Delgamuukw* [1997] 3 S.C.R. at 1073.

75. *Id.* at 1067-68 (quoting LOOKING FORWARD LOOKING BACK, 1 REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 33 (1996)).

76. *Delgamuukw* [1997] 3 S.C.R. at 1069.

77. *Id.* at 1079.

traditional western sources of history. These courts must at least consider importing to some extent the historical theory lying beyond oral histories, that is, a multiplicity of histories that serve to define identity and how peoples express their uniqueness.

IV. THE INCOMMENSURATENESS OF *SUI GENERIS* TITLE AND TRADITIONAL MODES OF HISTORY

A. *The Problem of History in Construing Aboriginal Rights*

Although the Supreme Court of Canada generated the beginnings of a non-traditional approach to aboriginal rights, its approach stumbles on the question of land claims for at least two reasons. First, defining aboriginal rights as outside of traditional property law and within the realm of a fiduciary relationship does not help a court determine whether a First Nation has a legal claim to land. Secondly, the Supreme Court has laid out no model for how to use history in construing aboriginal rights. This combination of weaknesses has left the judicial system to return to traditional, European property rights as set forth in *Baker Lake* and to traditional, European methods of history.[78] In turn, this traditional approach entangles contemporary courts in the colonial pattern of Europeans' laying down borders that indicate the rights and place of the First Nations.[79] The courts end up packaging histories of peoples in clearly demarcated containers for the purpose of delineating tidy borders.

Following the lead of the U.S. courts and the four factors set forth in *Baker Lake*, Canadian courts have relied on historical

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78. *See, e.g.*, Hamlet of Baker Lake v. Minister of Indian Affairs & Northern Development [1979] 107 D.L.R. (3d) 513, 517-29 (Fed. Ct.).

79. One of the plaintiffs' attorneys in the Gitksan case, Michael Jackson, decried the Court's choosing history on the basis of "economic imperatives":

> the economic imperatives of European colonization give rise to legal imperatives in which Indian rights are extinguished without Indian consent and without compensation. Whereas the Gitksan and Wet'suwet'en sought to place their court cast in the larger context of history, the judgment of the Chief Justice dissociates itself from that history, asserting that events and treaties made elsewhere with other First Nations peoples bear no relationship to what happened 'on the ground' in British Columbia.

MONET & SKANU'U, *supra* note 12, at xi. While recognizing this aspect of the Chief Justice's failure to consider all the history making up the Gitksan and Wet'suwet'en claims, this Comment is limited to how the Court viewed particular facts.

analysis to determine whether aboriginal rights continued to exist prior to the 1982 constitutional amendment. Thus, the courts' assessments of history have determined whether tribes will win their claims to property, either in land or rights. The courts' assessments of history have determined whether the tribes will gain property that the western legal system construes as fundamental to liberty and autonomy. It has been the courts' very construction of history, however, that sometimes perpetuates the deprivation of liberty and autonomy that previous generations had wrought on the First Nations.

History is narrative, and in the legal system the fact-finder is the narrator, the creator of the narrative.[80] History itself is but legend that "provides the imaginary dimension that we need so that the elsewhere can reiterate the very here and now."[81] Given the nature of history, the fact-finder, either consciously or unconsciously, inevitably bumps into trouble in trying to distinguish its perspective from the materials that it analyzes. Inevitably, any history is but an iteration of the present, and its narrative "has eliminated otherness and its dangers in order to retain only those fragments of the past which are locked into the puzzle of present time."[82] Given the disparity between contemporary and colonial perspectives, between aboriginal and European perspectives, it is virtually impossible for anyone, no matter how well-meaning, to create a competent historical narrative.

But try the courts must, and one approach starts with the courts' reconsideration of the purposes of history within aboriginal claims litigation. The central issue in these claims is property rights. Although "property rights" were non-existent for the ancestors of today's First Nations, property rights are fundamental to western views of liberty as specifically articulated in both Canadian and U.S. courts.[83] Despite some efforts—both judicial and academic—to foster a notion of liberty distinct from property rights, the right to private property, "in respect of which the State is neutral, is fundamental to moral development and dignity."[84] Given property's primacy in relation

80. MICHEL DE CERTEAU, THE WRITING OF HISTORY 287 (Tom Conley, trans., 1988).
81. *Id.*
82. *Id.*
83. *See, e.g.*, Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).
84. Vis-à-vis aboriginal rights, Professor Trakman has summarized contemporary

to liberty, aboriginal rights claims—that is, claims to property that could never have been imagined by the first Native Americans—inevitably reflect First Nations' belated attempts to secure liberty and sovereignty within the western negative rights regime.[85] Thus, one purpose of the claims is to assert liberty and sovereignty; one purpose of the narrative of history is to determine whether those First Nations are entitled to liberty and sovereignty.

B. The Dominant Property Model: Liberalism and Individual Rights

Fundamental to western ideas of liberty and selfhood has been the enduring concept of private property, that bastion over which the individual exercises exclusive control, that stake that both motivates and enables a man to participate in the body politic.[86] The right to own property has thus been viewed as basic to a person's social and moral identity.[87] According to the liberal, deontological view of property, "a right to private property, in respect of which the State is neutral, is fundamental to moral development and dignity."[88] Given the primacy of property to selfhood in western thought, it follows that a First Nation might gain dignity and autonomy in the western world by finding a place in the western property system. In a sense, that is just what some of the courts, plaintiffs, and legislators have been trying to do in Canada.

To find a place for the First Nations in the western property system, the First Nations and the judicial system must take on the fossilized western approach to history. Although plaintiffs in

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views of property and has called for "reconceiving. . .Western liberal conceptions of rights in light of responsibilities." Leon E. Trakman, *Native Cultures in a Rights Empire Ending the Dominion*, 45 BUFF. L. REV. 189, 195 (1997).

85. It should be noted that the Chiefs in the Gitksan case sought to establish self-governance and sovereignty. *See* Delgamuukw v. The Queen [1991] 79 D.L.R. (4th) 185, 240.

86. *See* Trakman *supra* note 84. *See also* John Lawrence Hill, *Law and the Concept of the Core Self: Toward a Reconciliation of Naturalism and Humanism*, 80 MARQ. L. REV. 289 (1997); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

87. *See, e.g.*, Hill, *supra* note 86.

88. Trakman, *supra* note 84, at 200. *See also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d ed. 1967). For a survey of the liberal views of property, see also LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977); ALAN RYAN, PROPERTY AND POLITICAL THEORY (1986).

the Gitksan case attempted to introduce the western court to a different worldview and approach to history by presenting their own kinds of histories, their cause failed in that the court refused to interpret those histories in ways other than the traditional western schoolboy approach.[89] Courts cannot continue to apply an old model of history to a new interpretation of property. Much as the courts moved away from trying to define aboriginal rights in terms of occupation and use, the courts may and should move away from an historical theory that aims to demarcate borders, spaces, and rights.

C. Property, Liberty, and History

Although the Canadian courts have recognized aboriginal rights as a *sui generis* property right, these courts continue to apply traditional historical models to determine just what those non-Western aboriginal rights are. Just as the courts have taken to rejecting "exclusivity" as a prerequisite for establishing aboriginal rights, so should they reject exclusivity's historical corollary, that is, demarcating history in terms of treaties, political directives, and territorial boundaries. A more fruitful and just approach lies in examining histories, both aboriginal and European, in terms of their expressions of developing autonomous or sovereign wills. The courts need to reconstruct histories from a forward-looking present position, one that will enable each nation and people to choose and shape its telos in relationship to other nations.

The Supreme Court of Canada has itself opened the door to an alternative mode of constructing history when it defined aboriginal rights as *sui generis*, as somehow existing outside the strictures of traditional property law.[90] Although it redefines these rights, the Supreme Court nonetheless manages to place aboriginal rights within the traditional property scheme by emphasizing the fiduciary relationship of the Crown to the First Nations. Likewise, the courts can and should place aboriginal history within their historical reconstructions so that judicial

89. In his opening statement, counsel for plaintiffs, Stuart Rush, challenged the court "to hear all this evidence, in all its complexity, in all its elaboration, as the articulation of a way of looking at the world which pre-dates the Canadian Constitution by many thousands of years." MONET & SKANU'U, *supra* note 12, at 26.

90. *See* discussion *supra*, Part III.

assessment of aboriginal claims reflects the same policy that the fiduciary obligation espouses.

History potentially provides an apt vehicle for affirming liberty and sovereignty through property litigation. Even while the history that the court narrates ultimately determines property, that same history can transcend the property issue to point toward elements of liberty and sovereignty that existed separate from, and perhaps antecedent to, the existence of property in the western world. The creation of the historical narrative takes on two goals, not only that of determining property but also that of determining liberty and sovereignty. Adoption of two principles of historical interpretation would help the courts to assess aboriginal rights more equitably in terms of liberty and sovereignty: (1) apply by analogy the fiduciary relationship resulting from organic aboriginal rights to the activity of historical interpretation and (2) foreground the contiguities and mutualities of the Canadian government's history and the histories of the First Nations.

The *Guerin* and *Sparrow* courts' elaboration of the government's fiduciary obligation to First Nations provides a parallel for how the judicial system might attempt to read the histories concerning these same aboriginal rights. According to the *Guerin* court, the source of the Crown's fiduciary obligation lies in the "*sui generis* nature of Indian title and the historic powers and responsibility assumed by the Crown."[91] *Sparrow* foregrounded "the special trust relationship and the responsibility of the government vis-à-vis aboriginal people" as "the first consideration in determining whether the legislation [extinguishing aboriginal rights] can be justified."[92] Just as the Supreme Court mandated that the courts must consider the First Nations' perspective on aboriginal rights,[93] so must the courts consider history from the First Nations' point of view and interweave that perspective with the European view of history.

A reconsideration of the Gitksan trial court's approach to history can demonstrate this approach to the relationship between Canada's legislation and aboriginal rights. For example, when the trial court looked at evidence to decide whether the

91. Sparrow v. The Queen [1990] 1 S.C.R. 1075, 1108 (Can.).
92. *Id.* at 1079.
93. *Id.* at 1112; *see* discussion *supra*, Part III.

Gitksan and Wet'suwet'en peoples had inhabited any area continuously and exclusively, the court observed that the Indians were migrating into the villages.[94] If the court were to follow the logic of the imperatives laid down in *Guerin* and *Sparrow*, the court should evaluate the impact of European movement and legislation on the First Nations and how the First Nations maintained aspects of their sovereignty while accommodating the European intrusions.

Looking at the interrelationship of the European and aboriginal histories would also obviate the problems stemming from dividing history into three periods (pre-historical, proto-historical, and historical). Instead of construing aboriginal rights almost purely in terms of pre-European aboriginal existence, the courts need to be more open to observing the relationship of the Crown's policies to First Nations' development and settlement. For example, at the time that the First Nations were migrating to the villages, Canada was doggedly pursuing a policy of assimilation.[95] The purpose of this assimilation was "to introduce indigenous people to the dominant society's form of government, and inculcate a spirit of individuality in place of the communal life and hereditary leadership of the traditional past."[96] As the 1983 Special Committee on Indian Self-Government noted, in all the history of Indian Affairs in Canada, a policy of self-determination was never seriously considered.[97] In effect, Canada's government was attempting to annihilate all incidents of First Nations' sovereignty. Even in this environment, however, certain aspects of First Nations' sovereignty and identity survived.

To incorporate the First Nations' perspective, the courts need to map a better plan for analyzing and weighing aboriginal histories such as the chiefs' presentation of their ada'ox in the Gitksan trial. Ada'ox, roughly translated, are collections of "histories, the origins of names, maps, sagas, symbols, myths, laws, geneologies, social rank and duties."[98] For example, during the trial, Chief Tenimgyet presented an account of a lion's

94. Delgamuukw v. The Queen [1991] 79 D.L.R. (4th) 185, 227 (B.C.).

95. *See* Johnson, *supra* note 3.

96. *Id.* at 668-69. *See also* Bartlett, *supra* note 40.

97. Canada House of Commons, Special Committee on Indian Self-Government, Indian Self-Government in Canada 13, 42 (1983).

98. *Land-claims Testimony Proves Private Ordeal for Native Chief*, VANCOUVER SUN, Mar. 23, 1988.

journey up the Skeena River until it "devoured a weeping woman and threatened the countryside until it was chased into the river and was drowned."[99] This ada'ox laid out important geographical histories of the Gitksan settlements.[100] Equally important, however, is the ada'ox demonstration of longheld aboriginal conceptions of land. Although the trial court admitted ada'ox, it had little means of interpreting it in a way that could buttress or diminish aboriginal rights claims. The Supreme Court has begun to remedy this situation, but the courts need to continue to develop theories and standards of how to use aboriginal histories such as ada'ox.

V. A MODEL THAT THE UNITED STATES COULD FOLLOW?

The U.S. Supreme Court practices a more subtle and yet even more damning historiography.[101] While acknowledging the uglier sides of broken promises, broken treaties, and ham-fisted negotiation, the Supreme Court ultimately wrings its hands, shrugs its shoulders, and laments: "although '[s]ome might wish [Congress] had spoken differently, we cannot remake history.'"[102] The expression of regret concludes a decision in which the Court reversed the Eighth Circuit's recognition of the original boundaries of the Yankton Sioux Reservation according to the 1858 Treaty, despite intervening allotment and domination by non-Indian settlers.[103] At issue was whether state or stricter federal environmental regulations applied to the construction of a waste disposal site on land located within the 1858 Reservation boundaries. The state of South Dakota argued that the Reservation had been diminished by Congressional ratification of an agreement by which the Sioux allowed the United States to sell surplus Reservation land that had not been allotted to individual Indians. Certainly Article I of the Agreement specified that the Sioux "hereby cede, sell, relinquish, and convey

99. *Id.*

100. *Id.*

101. *See* Milner Ball, *Constitution, Court, and Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3 (1987), Rennard Strickland, *Dances With Lawyers: Wolves, Judges, and Other Medicine Men*, 69 TEX. L. REV. 995 (1991); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST (1990).

102. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 357 (1998) (quoting DeCoteau v. District County Court for Tenth Judicial District, 420 U.S. 425, 449 (1975)).

103. *See* Yankton Sioux Tribe Southern Missouri Waste Management District, 99 F.3d 1439 (1995).

to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of the reservation."[104] And Article II stipulates that the United States would pay $600,000 to the tribe.[105] The Agreement concludes, however, with an affirmation of the 1858 Treaty that had established the Reservation:

> Nothing in this agreement shall by construed to abrogate the treaty of April 19th, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.[106]

The Supreme Court determined that this "savings clause" was mere affirmation that the Indians would continue to receive their annuities, and that the more specific language of Articles I and II governed the general terms of the savings clause.[107] Having made such a finding, the Court was then able to conclude that the language of the Agreement, the historical context surrounding its ratification, and subsequent circumstances indicated that Congress had intended to diminish the Reservation.

In reaching this conclusion, the Supreme Court said that it could not "remake history," but we cannot but hear a note of disingenuousness or misleading naivete. Of course, on the most basic level, the Supreme Court "remakes history" on a regular basis every time it hears a case and writes its own "factual" narrative.[108] And inevitably each Justice brings a different reading horizon to each case, reading and hearing each case through the lens of his or her own experiences and perspectives.[109] It is dangerous for the Court to ignore or forget

104. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. at 337.

105. *Id.*

106. *Id.* at 338.

107. *Id.* at 347-48.

108. *See, e.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUPR. CT. REV. 119 (1965); CHARLES MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

109. Without recourse to sophisticated readership theory, it is not difficult to understand that an audience, as much as a narrator or author, creates the text. For

the significant role of their own perspectives. It is disingenuous for them to say that they have no power to make a text.

Ironically, the *Yankton Sioux* case itself begins with such a creative moment: the Court says that it must determine Congressional intent with respect to disestablishment of the 1858 Reservation boundaries even though the 1894 Congress clearly had never contemplated disestablishment when it ratified any of the surplus land sales of Indian Reservations. At the time of the General Allotment Act of 1887,[110] Congress had two or three goals: to acquire land for white settlers moving west, to assimilate the Indians so that the "Indian problem" would go away, or to assimilate the Indians so that they would become just like their white neighbors by holding land in fee and farming.[111] The land sales following the General Allotment Act of 1887 reflected these goals. Indian fees were scattered patchwork throughout the former Reservations, ostensibly with the purpose of benefiting the Indians by close contact with non-Indians,[112] but in reality this division of land hampered Indians' maintaining traditional ways or uniting as a group to challenge white migration. The division of the Yankton Reservation was no different. As one of the U.S. Commissioners to the Agreement negotiations reported—and as the Supreme Court quoted in its opinion—"now that [members of the Tribe] have been allotted their lands in severalty and have sold their surplus land—the last property bond which assisted to hold them together in their tribal interest and estate—their tribal interests may be considered a thing of the past."[113] Congress envisioned an assimilation of Indians and non-Indians, an assimilation that would render Reservation boundaries irrelevant. That assimila-

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example, the beauty of Tolstoy is lost on a reader with little experience of human relationships; the sophisticated reader, on the other hand, consciously or unconsciously draws on his experiences to create a rich text full of stunning nuance. Thus the intellect and imagination of the reader is as important as the imagination and skill of the writer; together, author and reader create texts. *See* WOLFGANG ISER, THE ACT OF READING (1978).

110. The General Allotment Act, or Dawes Act, as it is also known, was passed in 1887 and authorized the Secretary of the Interior to deed parcels of reserve land to individual Indians and arrange the sale of "surplus land," that is, the remaining reserve land that had not been allotted to Indians. *See* Johnson, *supra* note 3, at 658-61.

111. *Id.*

112. *Id.* at 658-60.

113. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 353 (1998).

tion, however, did not take place as imagined. Congressional intent was ultimately foiled.

Although the Supreme Court recognized that the *Yankton* case "presented [Congress] with questions that [the Allotment Acts] architects could not have foreseen," it nonetheless insisted on dredging up some kind of Congressional intent with respect to disestablishment.[114] In a series of cases, the Court erected a legal fiction of Congressional intent regarding disestablishment that could be determined by considering three factors: (1) the language of the Congressional Act ratifying the Agreement at issue, (2) the historical context of the passage of the statute, and (3) the subsequent treatment of the area in question and the pattern of settlement there.[115]

As noted above, the Court decided that the statute ratifying the Yankton Agreement plainly indicated Congressional intent to diminish. In reaching this conclusion, the Court looked behind the face of the document to figure out how to reconcile Articles I and II, seemingly a complete cession of rights, with the saving clause of Article XVIII, which seemed to preserve the rights of the 1858 Treaty. To understand—or to explain—the conflict, the Court produced some history of the negotiations to the Agreement. The records of the negotiations indicated that the U.S. delegation threatened to take away the annuities of money, food, clothing, and weapons, a threat especially powerful as floods alternated with droughts, and hunger and disease were spreading throughout the Reservation.[116] These annuities had been guaranteed by the 1858 Treaty. The Indians wanted the United States to honor its previous promises, and it is natural to assume that in the face of broken promises and threats of more broken promises the Yankton would repeatedly seek reassurances. Ultimately these concerns became part of the 1852 Agreement, which included a guarantee that their annuities would continue to be paid, thus explicitly reiterating part of the 1858 Treaty.

Part of the 1858 Treaty—the boundaries—apparently received no mention in the negotiation records. The Supreme

114. *Id.* at 343-44. Congress assumed that the notion of the reservation would fade and did not contemplate that ownership of tribal land would not be coextensive with reservation status. *Id.* at 343.

115. *Id.* at 344 (quoting Hagen v. Utah, 510 U.S. 399, 411 (1994)).

116. *South Dakota v. Yankton Sioux Tribe* 522 U.S. at 346-47.

Court read this lacuna as meaning that the Indians had little concern about those boundaries. But such a reading is too simplistic. This gap could have any number of explanations, the only clear one being that the boundary question appears not to have been an issue, or at least not an issue to the U.S. delegation's reporter. If the boundaries were not at issue, it seems more likely that the boundaries were assumed not to have changed, that the Reservation would remain intact. Such a reading seems as likely, or more likely, than the Supreme Court's reading, especially considering the subsequent treatment of the Reservation land: on some U.S. maps and in some statutes written after the Agreement, it was still called the Yankton Reservation.[117] Regardless of why the boundaries were not mentioned in the Agreement negotiation records, the Court must be cognizant of its imputing a certain narrative onto the events of 1892. Only with this self-consciousness can it legitimately write its histories.

What theory should the Supreme Court use when it is dealing with the complicated and vexing issues of disestablishment? Like the Canadian Supreme Court, it should look to the special nature of the law that it is applying and generate a commensurate theory of history. In the United States, there is, of course, no *sui generis* aboriginal right, and the Supreme Court is wedded to the idea of individual rights as opposed to group rights, but the Court can nonetheless observe the special nature of Indian land claims in the United States. As discussed above, courts around the world have recognized the coexistence, seemingly irrational, of radical title and aboriginal title. These courts have derived and developed their law of aboriginal rights from the foundation that U.S. Supreme Court Chief Justice John Marshall laid down in the early nineteenth century: the discovery doctrine gave conquering Europeans radical title while allowing Indians to maintain their possessory interest.[118]

This dual nature of title should provide fodder for determining a theory of history that intelligently embraces two kinds of title. Courts in the United States might be wise to consider the work begun by Marshall and picked up by courts

117. *Id.* at 351-56.

118. *See* discussion *supra*, Part III.

around the world, most notably the Supreme Court of Canada, to devise a theory of history that more accurately and fairly represents the histories of tribes, land sales, and treaties. Although it is unlikely that the United States will soon recognize group rights or suspend rules of hearsay to admit such evidence as oral histories, it can develop more appropriate theories of history to deal with Indian land issues. Already the U.S. Supreme Court says that it must construe ambiguities in treaties in favor of the Indians.[119] Traditionally, the Court has grounded this rule of construction in favoring the party whose native language was not the English of the agreements. This rule of construction should also be grounded on an assumption that, where silent, the parties to these sales agreements intended to maintain the status quo and the long tradition of recognizing the coexistence of radical and possessory titles. Such an approach to law and the histories underlying it would allow courts to exercise equity in a way that might prevent alternative nightmares from happening: either harsh deprivation of Indian rights or harsh deprivation of land rights that descendents of Europeans have come to rely on. Discounting Indian histories or laying them out only to lament a sad but inevitable situation serves neither justice nor the long-term needs of all citizens of the United States.

At least one district court has indicated that it will not tolerate history-making dependent on gap-filling when the United States is the only one holding the records. In February, 1999, Judge Royce C. Lamberth of the Federal District Court in Washington, held the Secretaries of the Treasury and Interior in contempt for failing to produce records of trust funds generated from oil, gas, and timber leases for the benefit of some members of the Blackfeet Nation.[120] According to government officials, the records have been lost, or, in the case of some Albuquerque documents, "contaminated with rat feces that could contain the hantavirus."[121] What the court will do if the documents fail to be produced remains to be seen, but it is apparent that this court "cannot tolerate any more empty promises."[122] Perhaps Judge

119. *South Dakota v. Yankton Sioux Tribe* 522 U.S. at 344 (citing *Hagen* 510 U.S. 399 (1994)).

120. Timothy Egan, *Indians Win Round in Fight on Trust Funds*, N.Y. TIMES, Feb. 23, 1999, at A1.

121. *Id.*

122. *Id.*

Lamberth will find himself carving out new theories of history in order to apply trust law with fairness and justice.

VI. CONCLUSION

The historical approach of the courts in Canada and the United States has been limited in that it inscribes clear boundaries on events, seeks concrete evidence in the form of written documentation often kept only by the non-aboriginal parties, and fails to emphasize the dynamism of relations between First Nations and non-aboriginal people. Ultimately, this approach renders us all servants to the past, objects of history rather than subjects of our present. By construing histories in terms of relationships between peoples, the courts might both affirm the sovereignty of First Nations and show the western system an alternative view of liberty. The judiciary's failure to become self-conscious about its historical project is dangerous for both First Nations and people of European descent. As Friedrich Nietzsche has observed: "when history serves past life so as to undermine further and especially higher life, when the historical sense no longer preserves life but mummifies it: then the tree dies unnaturally, beginning at the top and slowly dying toward the roots—and in the end the root itself generally decays."[123]

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123. FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE (Peter Preuss trans., 1980).

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