AS "EVERY SCHOOLBOY KNOWS": GENDER, LAND, AND NATIVE TITLE IN THE UNITED STATES

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I.
INTRODUCTION

This article begins with an obvious but necessary premise: the U.S. state[1] has historically produced itself as sovereign over a specific territorial mass[2] through the violent conquest and continuing occupation of lands to which Native Americans[3] also lay and have laid sovereign claim.[4] At its core, this article

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1. Here, I am using the term "U.S. state" as a reference to the shifting constellations of actors, forces, and representations that support the semiotic materiality of what one might call "the United States." *See generally* JACQUES DERRIDA, WRITING AND DIFFERENCE 278–94 (Alan Bass trans., 1978). According to the political geographer Tim Mitchell, scholars must resist relying on "the state" as a reified, coherent, singular, and unified entity in their writing. Timothy Mitchell, *Society, Economy, and the State Effect*, *in* STATE/CULTURE 76, 95 (George Steinmetz ed., 2000). Mitchell instead suggests that we acknowledge "the state" or "the United States" as a shifting process of state effects. Mitchell suggests that subjects experience certain engagements which are assumed to be the projected effects of the so-called state, which only exists as a backformation out of these supposed state-based experiences. *Id.* at 88–90. At the same time, the living of the conception of the state along with state-claimed institutions and processes, does in fact enact effects into the social world, which then buttress and reproduce the imaginary process of state-becoming. *Id. See generally* ANTHONY GIDDENS, THE NATION-STATE AND VIOLENCE (1987); Pierre Bourdieu, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, 12 SOC. THEORY 1 (1994). Others have argued that emerging forms of global capital flow have eroded and transformed sovereign nation states into non-unitary clusters of legal enactment and potential regulation. *See, e.g.*, Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming* 12 PUB. CULTURE 291, 318–25 (2000).

2. For a more complicated discussion of the constitutive relationship between sovereignty, state forms, and the geographic consolidation of land into territory, see generally JOHN AGNEW & STUART CORBRIDGE, MASTERING SPACE 78–100 (1995); GIDDENS, *supra* note 1, at 172–97; NICOS POULANTZAS, STATE, POWER, SOCIALISM, 99–107 (P. Camiller trans., 1978); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923–26 (2003) (arguing that the United States has recently sought to consolidate both internal and external territorial sovereignty through the assertion of state dignity as a mode by which territorial sovereignty may be enforced through international law); James Scott, *State Simplifications: Nature, Space and People* 3 J. POL. PHIL. 191 (1995).

3. This paper will vary among "Native American," "Indian," and "American Indian" to describe various persons and tribes who claim an indigenous history in relation to the geography of

seeks to ask how a Liberal conception of law[5] legitimates and maintains this foundational violence within its own texts.[6] Additionally, I intend to imply that within that question lies the further question of what academic writing might offer to activist work by making this foundational violence within the law of the United States visible as such.[7]

Put less obtusely, this article will provide a close reading of two Supreme Court cases that continue to shape and ground the nature of sovereign relations between the United States and Native American peoples: *Tee-Hit-Ton Indians v. United States* and *Santa Clara Pueblo v. Martinez*.[8]

Tee-Hit-Ton was decided in 1955, the same year as *Brown v. Board of Education*.[9] In *Tee-Hit-Ton*, the Tlingit Indians protested that they were due com-

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the United States. I will alternate among these terms depending on whether I am speaking in the editorial voice of the paper or speaking in terms of a specific text, in which case I will use that text's lexicon to refer to the people and peoples at issue. For a historical background and discussion of the legal concept of "indigenous peoples" as currently used in mainstream international institutions of law and politics, see RONALD NIEZEN, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY 29–52 (2003).

4. William Bradford, *"Another Such Victory and We Are Undone": A Call To an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 71–72 (2004); Judith Resnik, *Tribes, Wars, and the Federal Courts*, 36 ARIZ. ST. L.J. 77, 134 (2004) (describing federal Indian law as based on military land conquest). *See generally* WARD CHURCHILL, STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE, AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA (1993).

5. In referencing a "Liberal" conception of law, I rely on the glosses of liberalism provided in the following sources: WENDY BROWN, POLITICS OUT OF HISTORY 7–10 (2001) (noting that liberalism's narrative of formal equality abstractly endows universal rights but remains tied to the privilege and primacy of a hegemonic white, straight, bourgeois, Anglo, United States–born, male subject); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 13–14 (1997) (tracing the rule of law and arguing that it serves a legitimating function of a liberal state power). *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996).

6. *See* Earl M. Maltz, Brown *and* Tee-Hit-Ton, 29 AM. INDIAN L. REV. 75, 96–100 (2004) (asking this question directly of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and comparing it with *Brown v. Board of Education*, 347 U.S. 483 (1954)). *See also* Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 13, 21, 27, 33, 36 (Drucilla Cornell, Michael Rosenberg & David Gray Carlson eds., 1992) (examining the many ways in which law employs and relies on foundational types of violence in attempting to govern and to outlaw violence). For a clear discussion of the violence inherent in how racialized structures of gendered and sexed categories enable nation-state construction during expansive moments in European imperialism, see R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY & SOC'Y, 507, 521–30 (1990). For another work cognizing the violence of Liberal state practices, see, e.g., PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 108–09 (1992). For a critique that locates Enlightenment notions of political progress and state sovereignty as dependent on inequality and on restrictions of freedom, see BROWN, *supra* note 5, at 10–14.

7. *See* CHELA SANDOVAL, METHODOLOGY OF THE OPPRESSED 3 (2000) (endorsing methodologies that "reveal[] the rhetorical structure by which the languages of supremacy are uttered, rationalized—and ruptured").

8. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

9. For a recent law review article that explicitly analyzes the blatant racism of the *Tee-Hit-Ton* decision against the promise of equality lodged in *Brown*, see Maltz, *supra* note 6.

pensation under the Fifth Amendment Takings Clause for the liquidation of their traditional lands by the United States government. In order to adjudicate the Takings Clause claim raised by the Tlingit, the Court first had to determine whether the Tlingit were in fact the legal owners of the land at the time of the government taking. Relying on the juridical principle of conquest,[10] the Court held that the Tlingit did not have a right of legal ownership, economic control, or political sovereignty over their traditional lands.[11] This decision both stripped the Tlingit of rights of action in United States courts and denied a place in United States law for the recognition of Native title more broadly.[12]

In *Santa Clara*, a female-designated and woman-designated member of the Santa Clara Pueblo Tribe brought suit against the tribe in United States federal courts. This woman sought to compel her tribe to conform to United States federal laws that prohibited certain forms of discrimination against female-designated persons.[13] The Court denied her claim, holding that, absent congressional limitation, the tribes have sovereignty over "internal matters" and that sex discrimination constitutes such a matter.[14] At the same time, the Court insisted that respect for the "internal" or "cultural" self-determination of Indian tribes did not diminish United States sovereignty over Indian land and capitalist resources.[15]

The bulk of this article will analyze the relationships between gender, property, and sovereignty that *Tee-Hit-Ton* and *Santa Clara* continue to enforce. While much productive work could be done examining why the conquest model of *Tee-Hit-Ton* seemed salient to the Court in the particular historical context of

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10. *See generally* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 278 (1980) ("According to the conquest myth, tribes possess, at first, all of the powers of a sovereign nation. Conquest by the United States renders the tribe subject to federal legislative powers, and effectively terminates the external sovereignty of the tribe. Finally, the balance of internal powers is subject to qualification by treaties and express legislation.").

11. *Tee-Hit-Ton*, 348 U.S. at 279–80.

12. *Id.* In most cases, "Native title" or "aboriginal title" refers to the ability of indigenous peoples to successfully claim rights, legally recognized by United States or Commonwealth courts, to their traditional lands without the use of a treaty, a colonial juridical act, or a colonial form of property ownership to justify that claim. By "successfully claim" I mean the enforcement of Native land relationships in a manner recognized by and made against the legal system of a colonizing nation. Many Commonwealth nations, such as Australia, New Zealand, and Canada recognize some form of Native title, however limited that recognition may be. *See generally* DARA CULHANE, PLEASURE OF THE CROWN: ANTHROPOLOGY, LAW, AND FIRST NATIONS (1998) (surveying the law of aboriginal title in British Columbia); PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE (2005) (surveying the law of aboriginal title in Australia); David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 9–14 (2004) (surveying claims for aboriginal title under United States common law); Jacqueline F. Pruner, *Aboriginal Title and Extinguishment Not So "Clear and Plain": A Comparison of the Current Maori and Haida Experiences*, 14 PAC. RIM L. & POL'Y J. 253 (2005) (surveying the law of aboriginal title in New Zealand and Canada).

13. *Santa Clara*, 436 U.S. at 51.

14. *Id.* at 55–56.

15. *Id.* at 72.

1954–55,[16] or how feminist movements might have shaped the Court's understanding of sex discrimination in 1978,[17] my question concerns what the relevant legal texts themselves suggest about the way in which this conquest model remained active as good law through multiple discursive shifts in acceptable, legitimate modes of state power.[18] While in other contexts it might be necessary to support my conjectures with cultural or historical evidence, this article attempts to support those conjectures through an analysis of the words and logics available in the reasoning of the Court cases themselves.

I follow this methodology not to discount the usefulness or necessity of historical and cultural knowledges as a grounding for scholarship, but rather to create something of a division of labor. There are exquisitely trained anthropologists and historians who are best able to chart the relevant contexts of the court cases that ground this article, and readers would be served by reading their work directly.[19] As a legally trained scholar, I believe that, in this instance, I am best suited to bear witness with regard to the text of the law itself.

As Judith Butler has taught us in *Excitable Speech*, court decisions are words with the power to enact themselves materially in the world.[20] The cases I discuss are texts that enacted the violent redistribution of land and cultural resources from Native peoples to non-Native peoples. At a time when the Bush administration has mobilized the malleable boundaries of truth as weapons of war-production,[21] perhaps it will be useful to ask readers to spend time contemplating the authority of those cases without offering an alibi from elsewhere—that is, without showing how the "real" problem was culture or history. Perhaps, as lawyers and legal scholars, it is our job to grapple with the force and materiality of the words of law itself.[22]

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16. *See* Maltz, *supra* note 6, at 97–100 (arguing that the seemingly opposite outcomes in *Brown* and *Tee-Hit-Ton* were consistent with the American political self-image at the time of the Cold War); John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UMKC L. REV. 1, 29 (2001) (arguing that the anti-Communist sentiments of the Cold War led to an attack on collective cultures, such as "Indian tribalism")

17. *See, e.g.*, JANE MASBRIDGE, WHY WE LOST THE ERA 45–59 (1986).

18. Again, much historical research could and should be done in order to support the assumptions at play in this statement. For the moment, I will simply refer to a comprehensive and rigorous law review article by David Williams, which describes how, over the past fifty years, conquest has become unacceptable as an explicit legal justification for land and resource controls by the state. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 404–07 (1994).

19. *See, e.g.*, WALTER ROCHS GOLDSCHMIDT & THEODORE H. HAAS, HAA AANÍ, OUR LAND: TLINGIT AND HAIDA LAND RIGHTS AND USE (1998); W.W. HILL, AN ETHNOGRAPHY OF SANTA CLARA PUEBLO, NEW MEXICO (Charles H. Lange ed., 1982).

20. JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 16–17, 96–99 (1997).

21. *See generally* SCOTT RITTER, FRONTIER JUSTICE: WEAPONS OF MASS DESTRUCTION AND THE BUSHWACKING OF AMERICA (2003); Ron Suskind, *Without a Doubt*, N.Y. TIMES MAGAZINE, Oct. 17, 2004, at 44.

22. Here, I am accessing the notion of political alibi explored by Jacques Derrida. Derrida

As such, my retreat to legal texts at the expense of historical or anthropological detail comes from a desire to test[23] the dominant logic available in judicial opinions and enactments themselves in order to show the violence of that logic in its own terms and in its dominant form.[24] I am interested in the impact of assigning responsibility to law itself for its effect. I hope that such textual projects can work alongside historical scholarship to make visible the foundational place that violent conquest holds within United States law as a Liberal, hegemonic state practice.[25] I further hope that if a critical mass of jurists continues to insist on such visibility, then we might begin to limit the legitimate justifications available to courts for enacting such violence within a supposedly Liberal, constitutional system.

Beginning with the analysis of the Court decisions at issue, I use the text of the *Tee-Hit-Ton* and *Santa Clara* cases to show how the U.S. state juridically maintains, performs, and reproduces as legitimate a totalized sovereignty over Native American land and resources by granting Native sovereignty over certain tribal matters, such as sex-classification practices that are marked by the court as internal and cultural. Moreover, I will argue that this process turns on juridical access to a Liberal tradition that separates the workings of the sex/gender system, which become marked as a cultural process, from the workings of resource distribution.[26] By constituting a realm of localized and contingent sovereignty over tribal women, the U.S. state masks and rhetorically dilutes the legality of violent land conquest instituted in *Tee-Hit-Ton*.[27] This move fails, however, to actually dilute either the conquest itself or the U.S. state's maintenance of total sovereignty over tribal lands and resources.[28]

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argues that while sovereignty as "trait" continually displaces itself into division and fable, the sovereignty of the nation-state remains available to deconstruction. While Derrida makes this argument in part to show that the "whole logic of the principle of sovereignty" may be potentially combated and threatened at the same time we recuperate a sovereign, free subject as a resistive tool against the violent nation-state sovereign, Derrida also marks oppressive state sovereignty as particularly vulnerable to the illegitimacy of its own alibi due to the hegemonic mode by which that state maintains and retains the power with which to enact the very violence in question. JACQUES DERRIDA, WITHOUT ALIBI xviii–xx, xxvi–xxviii (2001).

23. For a critical and philosophical exploration of testing as a mode, register, concept, and historical strategy of engagement, see AVITAL RONELL, THE TEST DRIVE (2005).

24. Here, I am accessing a methodology closely associated with deconstructive schools of literary theory. *See* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 116 (1983) ("The tactic of deconstructive criticism . . . is to show how texts come to embarrass their own ruling systems of logic . . . .")

25. *See, e.g.*, BROWN, *supra* note 5, at 14 (arguing that antisubordination efforts are strengthened politically when the foundational narratives of liberalism are challenged or exposed as accomplishing a legitimating function).

26. *See* Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, *in* TOWARD AN ANTHROPOLOGY OF WOMEN 157 (Rayna R. Reiter ed., 1975).

27. For a description of the violence asserted in *Tee-Hit-Ton*, see Bloch, *supra* note 12, at 38–41.

28. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (stating that, regardless of any zones of self-determination granted in the opinion, all aspects of tribal sovereignty are "subject to the superior and plenary control of Congress").

My reading of *Tee-Hit-Ton* and *Santa Clara* also considers how, when taken together as precedent, the two cases legally separate sovereignty of land, capital, and resource distribution from sovereignty over culture and gender.[29] In my reading, sex classification serves as a technology for that separation—the district court in *Santa Clara* imagined sex classification as a local and "delicate" cultural matter, separate from the workings of capitalist property ownership or resource distribution.[30] Though the Court quotes the district court's argument that tribal membership customs may have "economic" import within the tribe, the Court does so only in the context of its larger assertion of the Unites States' full control over the scope of tribal sovereignty.[31] As such, the Court can grant a permitted sovereignty over these supposedly separate cultural issues without threatening or triggering the total sovereignty and conquest over land and resources established in *Tee-Hit-Ton*.[32] Such a separation does not occur innocently but rather maps onto an uneven hierarchy of power between the two sovereignties.[33] The hegemonic strategy of *Santa Clara* belies the violent foundations of the hegemony that become clear in *Tee-Hit-Ton*.[34] The boundaries of sovereignty for Native peoples remain defined and controlled by the power of the U.S. state.[35]

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29. By suggesting that gender marks a space discursively and materially opened to Native American sovereignty as a boundary against United States interference, I run a different course than many who have shown how gender and sexual practices directly enact the managing, regulation, and outright control of colonial bodies and subjects by imperial powers. *See, e.g.*, ANN LAURA STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002). I do not mean to contradict this work, but rather to explore how a different process might be at play in the legal texts that I analyze.

30. *Santa Clara*, 436 U.S. at 53–55 (citing Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18–19 (D.N.M. 1975)).

31. *Id.* at 53–55, 58.

32. *See id.* at 56, 58 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . [T]ribal sovereignty . . . is subject to the superior and plenary control of Congress."); Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 343, 363–65 (2004) (analyzing *Santa Clara* as granting new, specifically cultural sovereignty to the tribe, but noting that the Court explicitly maintains the plenary power of the U.S. state over sovereignty itself).

33. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 282–93 (1994). *See generally* Hope M. Babcock, *A Civic Republican Vision of "Domestic Dependant Nations": Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443 (2005); Bloch, *supra* note 12.

34. *See* Maltz, *supra* note 6, at 82–87 (discussing the violent and oppressive character of the cases preceding and forming the backdrop for the *Tee-Hit-Ton* decision). Kaplan makes specific reference to slavery and Native American conquest as projects of United States nation-state power that were enabled by false notions of "culture as an autonomous sphere that transcends" class conflict and sovereign oppression. AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF U.S. CULTURE 14–15 (2002) (using Said's critique of culture as a weapon of the colonizing nation-state).

35. *See* Bradford, *supra* note 4 (noting both the total sovereignty of the U.S. state at play in previous cases like *Tee-Hit-Ton* and the degree to which the U.S. state's plenary power disables Native sovereignty even in cases that expand Native self-determination). *See generally* HARRING, *supra* note 33, at 282–93.

I use the current legal life of *Tee-Hit-Ton* itself to show the effect of these propositions—that *Santa Clara*'s juridical marking of permitted cultural sovereignty has done nothing to materially undermine within law the concrete sovereign control maintained over Indian lands by the United States government under a legal principle of conquest.[36] Taken together, the *Tee-Hit-Ton* and *Santa Clara* decisions display the gendered legal technologies[37] that solidify, mask, and legitimate the conquest-based control of Indian land, resources, and property by the U.S. state, under a cloak of cultural "self determination" for tribes.[38] I also offer this article as part of a growing literature on how the work of neoliberal capitalist oppression within state systems depends on the exceptionalism of race and gender as "merely cultural."[39]

II.
TEE-HIT-TON

Tee-Hit-Ton mounts an interpretation of the Fifth Amendment Takings Clause that vests property rights in over 350,000 resource-rich land acres and

36. *See generally* Joseph William Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425 (1998); William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003).

37. *See* ANNE BALSAMO, TECHNOLOGIES OF THE GENDERED BODY: READING CYBORG WOMEN 1–16 (1996) (arguing that the social construction of gender as a boundary to the body naturalizes and instantiates particular forms of contingent corporeality that materially produce the possibility of social identity through gendered technologies). Similarly, I argue that the convergence of gender and law act constitutively through capitalist ideology to materially determine the boundaries of Native resource accumulation and collective experience.

38. This sentence elides the argument that because law tends to be read linearly, as precedent, the rhetoric of a decision in 1978 can shape and reconfigure the subject of its rhetoric without challenging previously instituted forms of legal power. By speaking its respect to and of Indian sovereignty in *Santa Clara*, the Court enacted a legal amnesia concerning the still-active and -material denial of Indian sovereignty in *Tee-Hit-Ton*. This amnesia served the aims of post–Cold War hegemonic political legitimacy, which might be unsustainable where sovereignty is denied based on the right of conquest. For work that shows and argues the move recited here regarding law, rhetoric, precedent, and temporality, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000). For a lucid argument regarding the shift in legal/political discourse of Native sovereignty from conquest to hegemonic control, see Williams, *supra* note 18, at 404–07.

39. *See* Judith Butler, *Merely Cultural*, 15 SOC. TEXT 265, 269–70 (1997) (critiquing the tendency to relegate new social movements to the "sphere of the cultural" in such a way as to displace the material working of social and economic power). In developing this notion, I am most closely indebted to and in conversation with Amy Kaplan's deconstructive piece on the historical production of both geopolitical and gendered domesticity as an act of boundary-making necessary to colonial land rule and imperial resource distribution in the United States. Amy Kaplan, *Manifest Domesticity*, 70 AM. LITERATURE 581 (1998). *See also* DAVID KAZANJIAN, THE COLONIZING TRICK: NATIONAL CULTURE AND IMPERIAL CITIZENSHIP IN EARLY AMERICA 31 (2003); ANN LAURA STOLER, CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE (2002).

150 resource-rich square miles of water to the United States government.[40] These lands were the traditional home of the Tee-Hit-Ton and were essential to the clan's sustainability, sustenance, and spiritual practice.[41] Many scholars have criticized and resisted the juridical structures of *Tee-Hit-Ton*, marking the case as unjust land theft within a Liberal system.[42] I echo these critiques, but I also find useful more-Marxist-oriented logics[43] that support an understanding of the Takings Clause as a specific mechanism through which the U.S. state mounted, enforced, and performed control of the indigenous population and resource flows while also enforcing a specific form of capitalist property notions as ahistorically natural.[44]

Such logic might argue that *Tee-Hit-Ton* accomplishes the totalized sovereign state control of Native territory and resources and that this control leads to the suppression and subjugation of non-capitalist indigenous land and meanings systems.[45] My approach is slightly different: I seek to place the conquest of indigenous land and land systems at the center of that story, while also presenting the Fifth Amendment Takings Clause as the necessary legal tool through which this process occurs in a non-military register.[46]

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40. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273 (1955). Stephen Haycox, Tee-Hit-Ton *and Alaska Native Rights*, *in* LAW FOR THE ELEPHANT, LAW FOR THE BEAVER 127, 127–46 (John McLaren, Hamar Foster & Chet Orloff eds., 1992) (describing the devastating effect of the *Tee-Hit-Ton* takings on the resources and sustainability of the Tee-Hit-Ton Tlingit clan). For an analysis of the destructive impact federal takings have had on Native sustainability in the context of fishing rights and water use, see Bloch, *supra* note 12.

41. WILL THE TIME EVER COME?: A TLINGIT SOURCE BOOK (Andrew Hope III & Thomas F. Thornton eds., 2001).

42. *See, e.g.*, Cross, *supra* note 36, at 470–77 (1998) (discussing Marxism as a method of analyzing tribal movements).

43. *See, e.g.*, Russel Lawrence Barsh, *Contemporary Marxist Theory and Native American Reality*, 12 AM. INDIAN Q. 187 (1988).

44. *See* Eduardo Moises Penalver, *Is Land Special?: The Unjustified Preference for Land Ownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 228–34, 265–68 (2004).

45. *Cf.* Bob Jessop, *Narrating the Future of the National Economy and the National State: Remarks on Remapping Regulation and Reinventing Governance*, *in* STATE/CULTURE: STATE FORMATION AFTER THE CULTURAL TURN 378, 378–80 (George Steinmetz ed., 1999). While Jessop does not specifically engage the question of indigenous land relationships, he does set out a merging of state and economic frames that are enacted and mediated through the category and experience of culture. I would argue for the relevancy of Jessop's work insofar as Native American land relationships are consistently codified and degraded as "culture" by United States courts in relationship to the "hard" forces of state and economy that ensure capitalism as a total and inescapable system.

46. *See supra* note 5 (elaborating on the Liberal conception of law). *See generally* David Callies, *Takings, An Introduction and Overview*, 24 U. HAW. L. REV. 441 (2002). A taking occurs when the United States government either physically invades or, through regulatory limitation, substantially diminishes the economic value of privately owned land or resources. When such a taking occurs, the Fifth Amendment of the Constitution requires that the government remunerate the taking with an economic compensation equivalent to the market value of the loss.

A. *The Requirements of a Taking: Fee Simple and Native Meaning*

Decided in the same year as *Brown v. Board of Education*, *Tee-Hit-Ton* remains uncontroverted law, having been cited extensively over the past fifty years for its central holding, even as recently as 2005.[47] In *Tee-Hit-Ton*, the Supreme Court departed from its previous takings decisions regarding Native American land title with respect to common law (i.e., non-Indian) fee simple,[48] holding that, under the principle of conquest, the U.S. state would not honor or recognize Native American land claims unless such claims were attached to ownership of the land under the Anglo legal system of fee simple or backed by congressional decree.[49] This holding extinguished the viability of "Native title"—a set of claims increasingly recognized by Commonwealth countries in which traditional, Native land relationships are juridically enforced as valid forms of property ownership.[50]

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47. *See, e.g.*, Greene v. Rhode Island, 398 F.3d 45, 50–51 (1st Cir. 2005) (citing *Tee-Hit-Ton* for the principle that tribes do not have rights to Native title in fee simple but can only claim occupancy rights subject to the plenary power of the U.S. state, and holding that the Wamponoag tribe had no permanent legal rights to their traditional lands); Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (citing *Tee-Hit-Ton* to note that even if an act of Congress does explicitly grant permanent occupancy, it grants only permissive occupancy, terminable at will by the United States); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight, 700 F.2d 341, 351–52, 356 (7th Cir. 1983) (citing *Tee-Hit-Ton* for the distinction it draws between treaty-recognized title and aboriginal title and noting that the latter carries no legal rights against the United States); Alabama-Coushatta Tribe of Tex. v. United States, No. 3-83, 2000 WL 1013532, at *34 (Fed. Cl. June 19, 2000) ("[T]he sovereign's right to extinguish aboriginal title is exclusive and supreme."); Zuni Indian Tribe of N.M. v. United States, 16 Cl. Ct. 670, 671–72 (Cl. Ct. 1989) (citing *Tee-Hit-Ton* to explain that aboriginal title affords no right to compensation under the Takings Clause); Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448, 505 (W.D.N.Y. 2002) (citing *Tee-Hit-Ton* to assert that "[a]boriginal title may be extinguished by the United States without creating an obligation to pay just compensation under the Fifth Amendment").

48. *See* United States v. Shoshone Tribe, 304 U.S. 111 (1938). *Shoshone* involved a challenge to the federal government's decision to settle an additional tribe on the Shoshone reservation without Shoshone consent. Congress had explicitly recognized, with full awareness of the land's potential economic value, the rights of the Shoshone over the contest area in the 1868 Fort Bridger Treaty. *Id.* at 114. As such, the Court held that the Shoshone in this case were entitled to compensation for the taking of their treaty land and that the compensation must include the value of all resources, such as timber, found on the land. *Id.* at 115. In making this finding, the Court stated that a congressionally recognized Indian right of occupancy was "as sacred and as securely safeguarded as is fee simple absolute title." *Id.* at 117. *See generally* Cross, *supra* note 36 (tracing the Court's treatment of American Indian land rights from Johnson v. McIntosh, 21 U.S. 543 (1823), through its decision in *Tee-Hit-Ton*).

49. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 274–75 (1955).

50. *See id.* at 274 n.4. By "viability of Native title" I mean the enforcement of Native land relationships against the colonial government in a manner recognized by the colonial legal system. Such claims for title most often ground themselves in the historical, cultural, and at times spiritual connection between indigenous peoples and the land they inhabited both before and after the arrival of colonial regimes. For a discussion of the legal history of Native title in the United States, see Bloch, *supra* note 12, at 9–14. In Australia, Canada, and New Zealand, all of which recognize Native title, *see supra* note 12, if a group of indigenous peoples shows a particular form of historical, pre-colonial connection to disputed lands, domestic law recognizes their legal ownership of that land. *See, e.g.*, Mabo v. Queensland II (1992) 175 C.L.R. 1, 54–63 (Austl.); Guérin v. Canada,

As mentioned above, *Tee-Hit-Ton* involved a claim to just compensation, as guaranteed by the Fifth Amendment, asserted by the Tee-Hit-Ton clan members of the larger Tlingit tribe.[51] Ordinarily, adjudication of this type of claim would involve legal analysis of whether there had been a cognizable taking and the amount of compensation duly required.[52] Such analysis, however, assumes legal ownership of the property in question. Thus, the Court first had to determine whether or not the Tee-Hit-Ton Indians owned the land in dispute under United States law.

The *Tee-Hit-Ton* decision begins with an extraordinarily brief recitation of the factual situation, which, according to the Court, concerned a group of sixty to seventy "American Indians residing in Alaska" claiming compensation due from "a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group."[53] The land at issue measured, according to the Court, some 350,000 land acres and 150,000 water acres.[54] The Court quickly bracketed these details as legally irrelevant, stating that the central issue for judgment was whether the Tee-Hit-Ton possessed any constitutionally cognizable claim for compensation.[55] The Court did not substantively consider what those acres of land meant to the Tee-Hit-Ton but located juridical meaning and stakes directly in the United States property system. For example, the land and water in question is described in the decision only as "located near and within the exterior lines of the Tongass National Forest."[56] This description framed even the geographical existence of the land in relation to the U.S. state, rather than as land intimately connected with Native forms of sacricity, ancestry, and sustenance.[57]

B. From Treaty to Conquest

In framing the legal question, the Court ignored the long history of land and sovereignty negotiations between tribes and the U.S. state that began in the seventeenth and eighteenth centuries with mutual recognitions of sovereignty in the

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[1984] 2 S.C.R. 335 (Can.); Treaty of Waitangi, Feb. 6, 1840 (N.Z.), *available at* http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text. *See also* Tama William Potaka, *The Political Rights and Status of Indigenous Peoples in the Twenty-First Century*, 29 AM. INDIAN L. REV. 267 (2004) (arguing that recognition of Native title is a crucial, albeit incomplete, step towards liberating indigenous peoples from the continuing affects of colonization and conquest).

51. *Tee-Hit-Ton*, 348 U.S. at 273.

52. *See generally* Callies, *supra* note 46.

53. *Tee-Hit-Ton*, 348 U.S. at 273.

54. *Id.*

55. *Id.*

56. *Id.* at 276.

57. *Cf.* Russel Lawrence Barsh, *Grounded Visions: Native American Conceptions of Landscapes and Ceremonies*, 13 ST. THOMAS L. REV. 127, 128–37 (2000) (discussing the concept of living landscapes and the importance of land to American Indians); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners*, 54 UCLA L. REV. 1061 (2005); A.W. Harris, *Making the Case for Collective Rights: Indigenous Claims to Stocks of Marine Living Resources*, 15 GEO. INT'L ENVTL. L. REV. 379 (2003).

form of international treaties and trade relations,[58] stating: "This is not a case connected with any phase of the policy of the Congress . . . to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians."[59] While the extinguishment to which the Court referred devastated the life-processes of Native tribes in many instances,[60] this prior framework nonetheless accepted the need to address tribes as sovereign actors with land claims premised on authority external to that of the United States courts. In turning towards the law of conquest,[61] the *Tee-Hit-Ton* Court distinguished the dispute at issue from those involving alleged rights to permanent occupancy, such as treaty or guardianship controversies, which allowed the court to mark military conquest as a tool by which legitimate non–United States sovereign authority may be extinguished.[62]

Having dispensed with the facts and narrowed the jurisprudence at issue, Justice Reed, author of the *Tee-Hit-Ton* majority opinion, then marshalled other sources of juridical authority in support of his disposition. According to Justice Reed, the Court of Claims found that the interest in the land at stake prior to the United States' purchase of Alaska in 1867 was one of "original Indian title" or "Indian right of occupancy."[63] Though at first glance this finding seems to strengthen the position of the Tee-Hit-Ton by providing legal recognition of their prior "ownership,"[64] the Court of Claims held that even if this "original" title had survived the purchase of 1867, "such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in petitioner to the land in question."[65] For the Court of Claims, only Congress's recognition could create legal rights to land—native claims to territorial

58. *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 (1997) (tracing the history of legal ideas applied by North American Indians in their relations with the West during the era running from the early sixteenth century through the late eighteenth century). *See also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 48–54 (2002) (outlining the history of the United States government's dealings with American Indian nations in the nineteenth century); Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of 'Universal Recognition' of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481 (2006) (arguing that Native tribes in the United States were recognized as the original and sovereign owners of United States land by early colonists and the nineteenth-century United States government).

59. *Tee-Hit-Ton*, 348 U.S. at 273–74.

60. *See, e.g.*, Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REFORM 277, 277–87 (1993) (discussing how legacies of conquest, juridical land taking, and cultural oppression against Native peoples in the United States closed off their interactions with other communities and nations).

61. *See supra* note 50.

62. *See Tee-Hit-Ton*, 348 U.S. at 277–80.

63. *Id.* at 275 (citing Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202, 203–04, 205 (Ct. Cl. 1954)).

64. I use quotations here to mark prior ownership as a concept enforced on Native peoples by the courts of the United States.

65. *Tee-Hit-Ton*, 348 U.S. at 275.

sovereignty or other modes of territorial inhabitation could not create an actionable claim of possession under United States law. Ultimately, the Supreme Court affirmed the Court of Claims,[66] solidifying the rule that Native title did not and could not confer rights within the legal system of the United States. As a result of this ruling, the government's violent, militarized seizure of Native lands came to be afforded legal protection.

C. *Quieting Title: The Colonizing Force of Fee Simple*

In explaining why it granted certiorari in *Tee-Hit-Ton*, the Court wrote of a general need to determine, once and for all, the fate of land claims brought by Alaskan native tribes, which was the subject of a split between the Court of Claims in this case and the Ninth Circuit in *Miller v. United States*.[67] The Court in *Tee-Hit-Ton* explicitly acknowledged that the urgency surrounding the legal determination of property rights and political control[68] of the land resources at issue stemmed from the significant commercial traffic in fishing and hatcheries burgeoning on Tlingit land at the time.[69] Thus, it seems no great stretch to claim that the Court's legal findings regarding political structure were directly influenced by the concerns of capitalist accumulation and trade.[70]

Returning to the decision itself, the *Tee-Hit-Ton* Court offered only a terse description of the relationship between the Tee-Hit-Ton and the land in dispute[71] before delving into an analysis of the relevant precedent. The Court implicitly framed the case, in part, as testing the notion of whether the Tee-Hit-Ton might be characterized as properly capitalist and thus legally legible as pre-conquest property owners. To do so, the Court started with the Tee-Hit-Ton's claim that "its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well developed social order which included a concept of property ownership . . . ."[72]

While the Court quickly, directly, and completely rejected the petitioner's claim that these property rights had been explicitly recognized by an act of Congress,[73] the Court deferred addressing whether the Tee-Hit-Ton had, at the time of conquest, a relationship to the land comporting with a Western legal notion of

66. *Id.* at 290–91.

67. *Tee-Hit-Ton*, 348 U.S. at 275–76 (citing Miller v. United States, 159 F.2d 997, 1003 (9th Cir. 1947) (holding, in a case involving a Tlingit Indian claim to Native lands in Alaska, that "discovery" granted the United States government full title to all Indian lands, regardless of Indian occupancy, sovereignty, or treaty rights)).

68. Here, I am circumventing an enormous literature on the construction of political and legal personhood through the recognition of property rights. *See, e.g.*, Carolyn Nordstrom, *Shadows and Sovereigns*, 17 THEORY, CULTURE & SOC'Y 35, 35 (2000).

69. *Tee-Hit-Ton*, 348 U.S. at 273.

70. *See generally* Barsh, *supra* note 43.

71. *Tee-Hit-Ton*, 348 U.S. at 273.

72. *Id.* at 277.

73. *Id.* at 278.

property. The Court did not explicitly indicate how a different finding on this issue might have affected its holding, but it stated that, by failing to prove ownership in accordance with Western notions of property rights, the Tee-Hit-Ton had forced the Court to adjudicate the matter as "more a claim of sovereignty than of ownership," thereby preempting compensation for a taking of owned land and triggering the supremacy of congressional plenary power.[74]

In my reading of the written decision's logic, the passage quoted *supra* ("its tribal predecessors have continually claimed . . . .") seems to present a space within the *Tee-Hit-Ton* decision in which the Tee-Hit-Ton claim themselves as subjects possessing the equivalent rights to property as non-Native subjects. In their briefs, as quoted by the Court, the Tee-Hit-Ton sought to prove that they were a civilized and mature society—not just developed but "well-developed" (which reads as properly developed in addition to fully developed)—whose land relationships were conceptually and practically fungible with those of the dominant order.[75] One suspects that the Tee-Hit-Ton engaged in this strategy not because of the truth of the assertion but because presenting themselves in this way strengthened their legal claim to the land as their property.[76]

But the Court did not address whether the Tee-Hit-Ton *should* be required to prove capitalist property relations: the Court could not conceive of systems that fell outside such relations as potential sources of legal authority, nor could tribal land meanings serve as legal authority. Unfortunately, the Tee-Hit-Ton's attempt to frame the issue in terms appreciable by the court—those of capitalist ownership—cost the tribe an opportunity to rely on other, more appropriate legal theories to support its claim.[77]

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74. *Id.* at 287–90.

75. *Id.* at 277. *Cf.* KAZANJIAN, *supra* note 39, at 1–35.

76. *See generally* Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-first Century*, 40 ARIZ. L. REV. 425 (1998) (examining the Court's rulings in the area of Indian takings). Moreover, I should be wary of invoking a trope whereby I expect Native American tribes and persons to remain unchangingly "authentic" by remaining outside of capitalism or outside of traditionally Anglo forms of contemporary property, ownership, and economy. Such a requirement of unchangeability can constrain and limit Native possibility as surely as any Court decision can. *See, e.g.*, VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 90–94 (1969) (discussing the ways in which such pigeonholing has constrained the Oglala Sioux).

77. *See Tee-Hit-Ton*, 348 U.S. at 285–88. A further complication arises when one considers how many tribes have usefully and willingly reinvigorated their communal life through participation in capitalist structures, whether through the trade of crafts, or through casinos, or other emerging strategies. *See* Spencer Clift III, *The Historical Development of Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 1777 (2003). Such tribes may depend on legal rights that are fully constituted and interpolated through the Western tradition and may knowingly employ those rights. *Id.* It would be misguided and patronizing to simply brush away the actions of these tribes within capitalist property structures as false consciousness or internalized oppression. To hold Native tribal cultures to a rigid standard of authenticity and changelessness, to insist that the Other look and act within the unmarked universal's imagined notion of that Other, to demand that Native tribes live always as an outside to the Subject is as much an oppression and a colonization as forcing unwilling tribes to live and speak within the terms of the dominant Western cultural and legal systems. *See* ELIZABETH POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS

D. *Permitted Sovereignty*

The Court determined that the Tee-Hit-Ton's claims to their historic lands, capitalist or otherwise, were insufficient to show legal entitlement to ownership, occupancy, or sovereignty.[78] In doing so, the Court used law as a technology of material and ontological violence, casting its decision not as an act of political oppression, but as a reflection of prior, rational being. The Court wrote, "Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land . . . ."[79] Note that even the grammar of the sentence constructs the "conclusion" as the "it" that acts upon the Indian, constituting a natural belonging as a necessary rational actor at play, with the Court positioned as a mere passive conduit.

Returning to the surface of the Court's legal reasoning, I note that the decision was informed by the Court's theory that land ownership vested only through: (1) a grant of sovereignty or title from Congress or (2) a legally recognized sale, and the Court defined these theories through a set of factual findings that excluded the Tee-Hit-Ton's claims from either of these categories. On a theoretical level, the Court's decision erased any juridical existence of Native land meanings and land relationships.

As the Court wrote, without irony or critique, in support of its holding in *Tee-Hit-Ton*:

> The position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained . . . . [*Johnson v. McIntosh*] confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[80]

Following this categorization of conquest as violence that has been felicitously reclassified as legal authority,[81] the *Tee-Hit-Ton* decision uses the Takings Clause to hold that the historic use and inhabitation of land by Native tribes and nations does not qualify as property ownership or sovereignty under the law. Due to the now-rationalized supremacy of prior conquest by United States mili-

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ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM (2002). For an example of this argument as applied to African Americans post-slavery in the United States, see PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1993) (suggesting that, in part as a response to the critical legal studies movement, moving immediately to a post-colonial critique of rights reproduces material oppressions for those who have not yet gained rights and who do not yet have viable alternatives to rights claims). *See also* EVE DARIEN-SMITH: NEW CAPITALISTS: LAW, POLITICS, AND IDENTITY SURROUNDING CASINO GAMING ON NATIVE AMERICAN LAND (2004).

78. *Tee-Hit-Ton*, 348 U.S. at 287–89.

79. *Id.* at 290–91.

80. *Id.* at 279–80 (quoting Johnson v. McIntosh, 21 U.S. 543 (1823)).

81. BUTLER, *supra* note 20, at 10, 17, 19.

tary forces, Native Americans can only claim as property land that has been explicitly granted to them by the conquering power.

The *Tee-Hit-Ton* decision thus performs a twofold logic. It naturalizes capitalist modes of property relation, and it rationalizes violent military conquest. In a sense, Native title was lost at the very moment of its petition—the presence of the Tee-Hit-Ton allowed the court the opportunity to evacuate Native meaning.[82] Moreover, the description by the Tee-Hit-Ton of its land claims as firmly within a tradition of capitalist property ownership shows the hegemonic trap of the litigation as a juridical scene: the Tee-Hit-Ton supplicate to the Court not in the voice of the Other, but as already constituted as legible through the terms of Western hegemony.[83]

The legibility of Tee-Hit-Ton land relationships as Anglo-legal property, however, promises access to forms of material power and control about which the Tee-Hit-Ton care desperately. The passage in question shows the Tee-Hit-Ton asserting rights to property not through the invocation of justice or legal reasoning, but through a claim to an identity and equivalence with the property law of the colonizer.

Still more might underlie these power dynamics. In order to fit within available legal precedent[84] at the time of the case, the Tee-Hit-Ton had to argue that their land claim had already been congressionally recognized.[85] To come to court, they had to accept and submit to the principle of congressional supremacy over Indian sovereignty with respect to land and hence the legitimacy of United States sovereignty over traditional Native lands. The relevant jurisprudence left no room for an argument that Congress should not have supreme authority to dictate land relationships or that the system under which the Tee-Hit-Ton understood their land claims and relations could impact the power of the U.S. state project as articulated in court. To become legible within the United States legal system in the wake of *Tee-Hit-Ton*, the tribes had no option but to submit to the

82. By entering federal court on the court's own terms, the Tee-Hit-Ton implicitly acknowledged their status as a sort of colony of the U.S. state. *Cf.* Robert B. Porter, *A Proposal to the Hanoaoganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 916–17 (1998) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–17 (1831) (recounting a case where the Court concluded that it could not exercise original jurisdiction over the Cherokee Nation because the Nation was not a foreign nation or state but a "domestic dependent nation").

83. *See generally* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 90–100 (2002) (discussing the relationship of Native sovereignty to United States law and hegemony). For a framing of an entrance into legal discourse as structurally an act of subjection, see WENDY BROWN, STATES OF INJURY (1995). For a theoretical framing of entrance into legibility as subjection, see JUDITH BUTLER, THE PSYCHIC LIFE OF POWER (1997); BUTLER, *supra* note 20. Finally, for an application of this argument directly to the situation of indigenous peoples and their interactions with dominant, Anglo legal systems, see POVINELLI, *supra* note 77, at 151–85.

84. Here, one might consider the logic and enforcement of legal precedent itself as a specific structure of power distribution. *See generally* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1991).

85. *Tee-Hit-Ton*, 348 U.S. at 277–78.

totality of that system and to surrender the possibility of arguing from outside.

The Court considered whether the statutes interpreted by the *Miller* court constituted congressional recognition of "Indian ownership."[86] Using language broad enough to sweep aside the careful parsing accomplished in *Miller*, and without accounting for the logical steps of their statutory interpretation, the Court simply stated that they had "examined these statues and the pertinent legislative history and found nothing to indicate any intention by Congress to grant the Indians any permanent rights in the lands of Alaska occupied."[87]

Having made this determination upon which the case's holding would eventually rest, the Court nonetheless continued to construct a particular legal narrative of Indian land rights, consistently conflating "Indian title" with "permission from the whites to occupy."[88] At this point the Court reworked sovereignty discourse into an explicit conquest model that breaks with the hegemonic processes this article has so far discussed. Citing no case or previous authority, the Court stated:

> After conquest [the tribes] were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[89]

Here, conquest became the active operation that allows the legal categorizations and power distributions of land and sovereignty. The so-called sovereignty of the occupying Indians existed in name only, as it was a sovereignty *permitted* by the absolute power of the U.S. state, a permission that did not extend to property rights or territorial sovereignty. Under the sign of permitted sovereignty, the Tee-Hit-Ton were divested of all economic and political control over resources and territory.

This move marks the shared logic of *Tee-Hit-Ton* and *Santa Clara*—any sovereignty granted or invoked for Native Americans came only as a permitted sovereignty. Even at a technical level, the *Santa Clara* decision involves the interpretation of a federal statute as applied to Indian tribes, with cultural values and sex classification implicitly carved out as spaces granted to tribal authority by the federal statute.[90] Tribal authority in this system exists only at the mercy

86. *Id.* at 278.

87. *Id.* at 278–79. Note that by using the word "occupied," the Court linguistically divests the Tee-Hit-Ton of any property rights or territorial sovereignty, as the legal meaning of "occupied" necessarily postulates that the land is owned or controlled by an entity other than the occupying entity.

88. *See id.* at 279.

89. *Id.*

90. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978).

and recognition of federal authority. By the Indian plaintiff's submission to the adjudication of United States courts, any tribal sovereignty becomes dependent on recognition by the dominant imperial legal system, leading to the question of whether this "sovereignty" functions as such. Through law and courts, the very granting of "sovereignty" becomes an act of conquest.

E. Non-Justiciability and the Erasure of Native Testimony

Though Justice Reed clearly telegraphed the result of the Court's decision throughout the opinion, it is only at the end that he fully revealed the juridical logic by which the Court's holding actually applied to the Tee-Hit-Ton. Throughout the case, the Tee-Hit-Ton had argued to the Court that the previous jurisprudence, as applied to tribes within the continental United States, did not apply to the Tee-Hit-Ton, both because the Tee-Hit-Ton had at the time of the Alaskan treaty and purchase a Western system of individualized property and because the Tlingit were never meaningfully conquered by the United States as were tribes in the continental states.[91]

The Court responded by categorically refusing the credibility of testimony concerning their property system, claiming that the Tee-Hit-Ton land system was, like those of "nomadic tribes" of the contiguous states, communal and non-exclusive, rendering it ineligible to be recognized as a system of property relations.[92] Additionally, the Court found that Russia held sovereignty over the Tlingit in a manner comparable to that of United States sovereignty over tribes in the continental United States[93] and that this sovereignty transferred to the U.S. state with the sale of Alaska.

In closing, the Court wrote:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[94]

This appeals to an extralegal common sense, to Indians as bad capitalists and to cultural truths supposedly transparent to the reader that some substantial undercurrent runs afoot, a project whose weight cannot be borne by legal reasoning alone. The Court swallowed up documented histories of treaty and economic transfer into the overwhelming trope of a conquest-based sovereignty and used

91. *Tee-Hit-Ton*, 348 U.S. at 277, 285–87.

92. *Id.* at 285–88.

93. *Id.* A whole separate paper might be written about why the Court privileged Russian sovereignty over Indian sovereignty, granting Russia a status equal to that of the United States while denying it to the Tee-Hit-Tons. Surely considerations of the Cold War, imperialism, and colonialism would have to be discussed. What would have changed if the Court had understood Indian nations themselves as having acted historically in ways that could be coded as imperialistic?

94. *Id.* at 289.

this as a basis for a legitimizing legal project, even as this exercise of power was disavowed and displaced by the courts in their invalidation of Indian ownership claims.[95]

The Court's finding that only Congress can grant land title to lands not held in fee simple positioned Congress as the ultimate post-conquest authority over Indian lands. The Court disavowed issues of Native American land title and claims as essentially extralegal, even as it ruled materially, effectively, and extensively on the legal status of those lands.[96] By making recourse to Congress, the Court elided the force of legal adjudication in constructing imperial and colonial regimes.

F. Contemporary Consequences of Tee-Hit-Ton

Tee-Hit-Ton continues to function as uncontroverted law, structuring and determining the outcome of tribal land claims. In this section, I will analyze the most salient of the post–*Tee-Hit-Ton* decisions.

In *Edwardsen v. Morton*, the Arctic Slope Native Association sued the Secretary of the Interior for unlawful transfers of land claimed under aboriginal title by Alaskan natives and for issuing purported authorizations of third-party trespass on the lands and waters in question.[97] The court found that, due to the Alaska Native Claims Settlement Act of 1971, the plaintiffs had no basis on which to claim title against the United States government and that the transfer approvals were to be regarded as the explicit extinguishment of any aboriginal title in these lands.[98] The court refused, however, to grant the defendants' motion for summary judgment with regard to the tribes' claims to compensation for trespasses occurring before the Alaska Native Claims Settlement Act, based on violation of use rights and occupancy rights protected by the Fifth Amendment.[99] The plaintiffs invoked *Shoshone*,[100] arguing that Congress had taken action, as per *Johnson*,[101] to recognize their native title in the land, yielding them valid rights in the land based on use and occupancy.[102] In its decision, the court looked directly to *Tee-Hit-Ton* to reject these claims, citing the holding as dispositive without a subsequent gloss or interpretation. The court, on interpreting the factual record, seized upon a provision in *Tee-Hit-Ton* favorable to the plaintiffs: "[A]lthough Native possessory rights are thus vulnerable to uncompensated extinction, it is clear from the opinion in *Tee-Hit-Ton* . . . that *only Congress* may

95. *See id.* at 286–89.
96. *Id.*
97. Edwardsen v. Morton, 369 F. Supp. 1359, 1362 (D.D.C. 1973).
98. *Id.* at 1376–78.
99. *Id.* at 1378–79.
100. United States v. Shoshone Tribe, 405 U.S. 111 (1938). *See supra* note 48.
101. Johnson v. McIntosh, 21 U.S. 543 (1823).
102. *See Edwardsen*, 369 F. Supp. at 1365–66.

extinguish such rights."[103] The court then found that such extinguishment had not occurred, holding that "until Congress has acted to extinguish Native title in land claimed on the basis of use and occupancy, any third parties coming onto the land without consent of those rightfully in possession are mere trespassers."[104] The court therefore denied the defendant's motion and allowed plaintiffs to proceed with their claims based on use and occupancy.

Edwardsen presents a fascinating deviation from the material effect and theoretical model of *Tee-Hit-Ton*, even as the former reproduces the juridical logic and force of the latter. *Edwardsen* resulted in a potentially beneficial ruling for the tribe, even as it supported and enacted a world in which Congress holds supreme authority over Native land claims. Instead of constructing a scene of Congress's noblesse oblige in granting recognition (and hence enforcing the power order in which that recognition is Congress's to grant), the Court instead turned the case into a dramatic struggle over illegitimate authority usurped by other branches of the United States government. *Edwardsen* translated the conquest model of *Tee-Hit-Ton* into a standard separation-of-powers narrative, deflecting the violence of conquest even as it was reabsorbed and reaffirmed within legal hegemony.[105]

Though *Edwardsen* presented places within the *Tee-Hit-Ton* jurisprudence where tribes may still successfully pursue takings compensation, the discursive and practical universe of *Edwardsen* has been implicitly and explicitly rejected by most other decisions citing *Tee-Hit-Ton*. *Inupiat Community of the Arctic Slope v. United States* repudiated the holding of *Edwardsen* directly.[106] In *Inupiat*, the court found that, under *Tee-Hit-Ton*, use and occupancy rights not recognized as property or title rights by Congress could not furnish the basis of a claim for takings based on trespass.[107] The court cited *Tee-Hit-Ton* as transforming the concept of Native title into "a right of occupancy which [the United States] sovereign grants and protects."[108] From there the court engaged in a factual analysis, finding that Congress did not act to recognize property rights so as to grant a basis for the tribe's takings claim in this case.[109] Since *Edwardsen* provides no language with which to counter the absolute assertion of sovereignty cited from *Tee-Hit-Ton*, the plaintiffs had little room to argue once the legal issues in the former were framed by the precedent of the latter. While plaintiffs may argue against *Tee-Hit-Ton* itself, precedent-based legal arguments inside this framing are few as long as *Tee-Hit-Ton* remains uncontroverted law.[110]

To further show how *Tee-Hit-Ton* remains alive in the contemporary

103. *Id.* at 1371 (emphasis added).
104. *Id.*
105. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).
106. Inupiat Community of the Arctic Slope v. United States, 600 F.2d 122 (Ct. Cl. 1982).
107. *Id.* at 129.
108. *Id.* (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955)).
109. *Id.*
110. *See supra* note 47.

jurisprudence, I would like to point to decisions actively citing *Tee-Hit-Ton* within the past five years. Though the civil rights paradigm remains ascendant in contemporary jurisprudence,[111] the courts, in these cases, continue to frame Native land claims not as an issue of systematic group oppression through resource theft by the U.S. state, or even as group discrimination, but rather as a matter fully contained within the logic of the legal protection of individualized, capitalist property.

Though a long list of recent cases cite *Tee-Hit-Ton* with approval, two cases in particular, *Karuk Tribe of California v. Ammon*[112] and *Alabama-Coushatta Tribe v. United States*,[113] demonstrate the ways in which courts continue to use *Tee-Hit-Ton* to legitimate the U.S. state's ongoing conquest of Native lands.

In *Karuk*, the Karuk Tribe, along with other tribes and individuals, brought a Fifth Amendment takings action against the United States government, claiming that the 1988 Hoopa-Yurok Settlement Act, which partitioned the Hoopa Valley Reservation, constituted a Fifth Amendment taking of property for which compensation was due.[114] Citing directly to *Tee-Hit-Ton*, the court found that the plaintiffs had no cognizable property right in the land taken by the act because no treaty or explicit act of Congress created that right and the plaintiffs' claim to the land rested primarily on the grounds of Native use and occupancy.[115] Without a recognized legal property right in the land vested in the plaintiffs, the court held that the government's actions did not constitute a taking under the Fifth Amendment.[116] The court stated that under *Tee-Hit-Ton*, it could not consider the impact of a continuous, permanent occupancy of the land by the plaintiffs since before the European colonization and conquest as constructive of a legal property right in the land.[117] At the same time, the court acknowledged that if the plaintiffs did have a property right in the land, then the case would present a clear instance of a taking under the Fifth Amendment.[118]

Thus, in *Karuk*, a court of appeals decision in 2000, the words and holding of *Tee-Hit-Ton* continue to determine who owns land and what rights may be granted to the permanent, historical, and continuous occupants of that land. While this may seem like a simple point, it relates to the ascendancy of multicultural liberalism as a legitimating force underwriting oppressive forms of state

111. ROBERT C. POST, K. ANTHONY APPIAH, JUDITH BUTLER, THOMAS C. GREY & REVA SIEGEL, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTI-DISCRIMINATION LAW 51–53 (2001).

112. Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000).

113. Alabama-Coushatta Tribe of Tex. v. United States, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000).

114. *Karuk*, 209 F.3d at 1366–67.

115. *Id.* at 1374–76 (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278–79, 289 (1955)).

116. *Id.* at 1380.

117. *Id.* at 1376–79.

118. *Id.* at 1377.

power.[119] Any reader familiar with this analysis might be drawn to the electricity circuiting through the conquest model of sovereignty at an historical moment in which the United States president actively pursues military conquest justified by salvation rhetoric in which the United States military must save brown men from bad brown leaders and brown women from bad brown men.[120] Similarly, the continued judicial reliance on *Tee-Hit-Ton* legitimizes United States government control of access to rights and ontology for non-whites. From there, I am further attempting to evoke a connection between the ideology underlying *Tee-Hit-Ton* and the current world in which the United States government incarcerates, bombs, tortures, assaults, and disparages non-whites without good cause and without the boundaries of rights and due process. As the court stated in *Karuk* during its application of *Tee-Hit-Ton*: "The conduct of the United States . . . further demonstrates that [Congress's legislation] did not create any compensable property interests for the Indians."[121]

Alabama-Coushatta, which was decided in a different court by a different panel of judges, cites *Tee-Hit-Ton* in a manner strikingly similar to *Karuk*.[122] *Alabama-Coushatta* concerned a cause of action *not* stated under the Fifth Amendment, with the Native American plaintiffs requesting a judicial recommendation recognizing their right to monetary compensation for the federal government's failure to fulfill its fiduciary duty to protect the tribe's right to occupy ancestral lands.[123] In the course of its analysis, the court cited *Tee-Hit-Ton* approvingly and as good law for the proposition that "Indians held only an equitable possessory interest, but not a property interest, in their aboriginal lands."[124] This illustrates a point well known to those working on the history of slave law in the United States—the dominant systems of law and culture in the United States have forged deep links between legal humanity and recognition as a subject capable of owning property and possessing personhood.[125]

As I argue above, the continued enforcement of *Tee-Hit-Ton* has resulted in the United States government's continued theft of Native land. In addition to these material consequences, the act of appearing before courts places tribes such as the Tee-Hit-Ton, the Karuk, or the Coushatta in an untenable space, where rights to land or economic compensation may only be pursued through an

119. *See generally* Raymond Geuss, *Liberalism and its Discontents*, 30 POL. THEORY 320 (2002); BROWN, *supra* note 5, at 1–30, 138–75.

120. *See* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

121. *Karuk*, 209 F.3d at 1376.

122. Alabama-Coushatta v. United States, No. 3-83, 2000 WL 1013532, at *1 (Fed. Cl. June 19, 2000). Since *Alabama-Coushatta* is a 180-page case with over 100 pages of facts, I will not offer a full summary.

123. *Id.* at *1, *3.

124. *Id.* at *62 (Gibson, Senior J., dissenting). *See also id.* at * 34 (majority opinion) (citing *Tee-Hit-Ton* with approval for the proposition that "the sovereign's right to extinguish aboriginal title is exclusive and supreme").

125. *See generally* MARK WEINER, BLACK TRIALS (2004).

argument that Native ways of life look like those of white folks.[126] The Tee-Hit-Ton, in making any claim to the Court, had to reject non-capitalist, non-Liberal systems of communal relationship to land and argue that their land relationships had always looked just like individualistic, Liberal, capitalist property ownership under United States law.[127] Even as the *Tee-Hit-Ton* decision trumpets the foundational right of military conquest, it enacts a deeply hegemonic scene composed of Native American subjects of United States legal power. Having considered this grounding, I will now move to explore how this hegemonic scene changes and shifts in the discourse of *Santa Clara*.

III.
SANTA CLARA

Twenty-three years after the decision in *Tee-Hit-Ton*, a female-designated and woman-designated member of the Santa Clara Pueblo Tribe brought suit against the tribe in United States courts. This woman sought to compel the tribe to conform to United States federal laws that prohibited certain forms of discrimination against female-designated persons.[128] In deciding whether a Native woman could use the constitutional rights of United States citizenship to constrain tribal practice,[129] the Court insisted on respect for the self-determination of Indian tribes[130] while also making clear that such respect did not diminish United States sovereignty over Indian land and capitalist resources.[131] As such, I wish to consider how, in *Santa Clara*, gender became both a localized space of sovereignty against a colonial power[132] and a screen behind which territorial control of capitalist resources is maintained.

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126. *See id.*

127. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273 (1955).

128. Here, I am purposefully bypassing an extensive conversation on the conflict between mainstream United States–Anglo feminism and "human rights." *See generally* Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 99 (1995). For work that explicitly navigates the tensions between feminist rights and tribal sovereignty in *Santa Clara*, see generally Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004); Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 KAN. J.L. & PUB. POL'Y 103 (2004).

129. The claimed rights were codified in the Federal Indian Civil Rights Act, a statute guaranteeing equal protection under the law, as defined by the Fifth and Fourteenth Amendments of the United States Constitution, to Native Americans. *Santa Clara*, 436 U.S. at 56–58 (citing 25 U.S.C. §§ 1301–1303).

130. *Santa Clara*, 436 U.S. at 62–64.

131. *Id.* at 72.

132. A broader project might also consider these questions with regard to the authority of tribal government in the United States over non-members of the tribe, especially with regard to criminal jurisdiction. Both Congress and the courts have systematically eroded such authority over the past twenty years, fashioning a "consent paradigm" by which tribes only have authority over "consenting" members. L. Scott Gould, *The Consent Paradigm*, 96 COLUM. L. REV. 809, 814 (1996). While such a paradigm speaks the language of Liberal rights legitimation, it ignores the crucial insult to sovereignty effected by such a consent limitation—after all, the U.S. state enforces its sovereignty and authority over land considered to be within the political boundaries of the

A. *The Plenary Limits of Internalized Sovereignty*

Later extensions of *Santa Clara* have insisted that such self-governing authority must be limited to "internal tribal matters." For example, in *Penobscot Nation v. Fellencer*, the First Circuit, pulling language from the Maine Implementing Act to analyze the Maine Indian Claims Settlement Act, stated that: "The critical phrase to analyze in determining the scope of tribal sovereignty is 'internal tribal matters.'"[133] More disturbingly, *Penobscot* suggests that the Penobscot should welcome a statute divesting the tribe of their native and traditional lands because of the accompanying judicial recognition of tribal sovereignty over internal matters. As the court quoted from House and Senate reports:

> While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, . . . the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs . . . the settlement strengthens the sovereignty of the Maine Tribes.[134]

Though the congressional reports claim to support tribal sovereignty, the opinion fails to mention that both federal courts and Congress retain and maintain full sovereignty to judicially and legislatively determine what constitutes an internal tribal affair.

Moreover, *Santa Clara* left undisturbed the United States government's plenary power over Indian tribes.[135] This logic is explicit in the recent citation to *Santa Clara* in *Kahawaiolaa v. Norton*, a Ninth Circuit case.[136] In that case, a group of Native Hawaiians urged that the refusal of the United States government to recognize them as members of an Indian tribe with regard to federal law violated their Fifth Amendment due process right under the United States Constitution.[137] Applying a rational basis test, the Ninth Circuit denied the claims of the Native Hawaiians, noting the recurrent inability of courts or legislators to define an "Indian tribe."[138] Despite this admitted incompetence, however, the court spent much of the decision asserting absolute juridical control over any permitted Native sovereignty. Citing to *Santa Clara*, the court reiterated the

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United States regardless of citizenship or consent. For examples of instances in which Congress regulated and even took Native lands without tribal consent, see *id.* at 812, 828–29, 874, 890, 892.

133. *Penobscot Nation v. Fellencer*, 164 F.3d 706, 708 (1st Cir. 1999) (referencing ME. REV. STAT. ANN. tit. 30, §§ 6201–14 and 25 U.S.C. §§ 1721–1735).

134. *Id.* (quoting S. REP. NO. 96-957, at 14 (1980); H.R. REP. No. 96-1353, at 14–15 (1980)).

135. *Santa Clara*, 436 U.S. at 56.

136. Kahawaiolaa v. Norton, 386 F.3d 1271, 1276 (9th Cir. 2004) (quoting South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998)).

137. *Id.* at 1272.

138. *Id.*

doctrines of plenary power and political question as the technologies grounding and legally supporting such control. As the court wrote:

> There is a "textually demonstrable constitutional commitment" to Congress "[t]o regulate Commerce . . . with the Indian Tribes." Thus, the Supreme Court has often declared that, based on this and other provisions of the Constitution, "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." Pursuant to this plenary power, "Congress has the power, both directly and by delegation to the President, to establish the criteria for recognizing a tribe." Thus, it is quite correct to say that a suit that sought to direct Congress to federally recognize an Indian tribe would be nonjusticiable as a political question. For the same reason, as courts have recognized, "'the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review.'"[139]

The court effectuated sovereign power over Native lives and resources by disavowing judicial power through the doctrine of non-justiciability. The court doubled this move by tying its hands over again though the plenary power doctrine, which institutes the supremacy of the state project over juridical regimes of even Liberal rights.[140] Though *Santa Clara* may allow for tribal regulation of membership, as shown in *Kahawaiolaa*, the U.S. state defines and determines what constitutes a tribe and retains full jurisdiction over any challenges to the scope and content of the permitted tribal self-regulation. The above quotation shows the extent to which courts mobilize precedent as a mechanism of legitimating authority. Rather then relying on the violent visibility of conquest in *Tee-Hit-Ton*, the Court grounded its totalization of power on a foundation, *Santa Clara*, that supposedly evades and opposes such totalization.

In *Santa Clara*, the Supreme Court held that courts could not enforce a federal gender-equality law by hearing private suits against the tribe.[141] The Supreme Court paraphrased the District Court's explanation that the sex-classification rule in question "reflect[ed] traditional values of patriarchy still significant in tribal life."[142] The Court then cited the District Court's reference to these values as of "vital importance" to the tribe's interests, as well as a "mechanism of social . . . self-definition."[143] From there, the Court reasoned (through a quotation of the District Court) that the Indian Civil Rights Act—the

139. *Id.* at 1275–76 (citations omitted).

140. For a more general discussion of the extension of United States control over Native Americans through interpretation of constitutional law doctrines, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories and the Nineteenth Century Origins of Plenary Power of Foreign Affairs*, 81 TEX. L. REV. 1, 77–81 (2002).

141. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72 (1978).

142. *See id.* at 53–54.

143. *Id.* (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18 (D.N.M. 1975)).

statute under which the plaintiff claimed that United States constitutional rights were supreme to the rules of tribal practice with regard to sex discrimination—could not be "'construed in a manner which would require or authorize the Court to determine which traditional values will promote cultural survival . . . . Such a determination should be made by the people of Santa Clara . . . because they can best decide what values are important . . . .'"[144]

That self-determination did not include the right to define land relationships and control through Native meaning systems or Native title. This exclusion, limitation, and undoing of self-determination arrives directly through the *Santa Clara* decision, as the Court takes great care in making sure that *Santa Clara* explicitly preserve and strengthen the legal doctrines of *Tee-Hit-Ton*, such as that of the U.S. state's supreme plenary power over Indian affairs, as exercised through Congress.[145]

B. Culture, Patriarchy, Capital

As I have begun to show through the quotations in the previous section, the Court in *Santa Clara* marked female-designated gender/sex systems as uniquely the domain of culture and thus exterior to capitalist resource management.[146] For example, even as the federal courts and Congress assert juridical control over the rules of tribal membership for the purposes of land distribution or casino profits, *Santa Clara* and its active progeny exceptionalize "cultural" sex classification from that control. The crucial move made by the text of *Santa Clara* resulted in this rhetorical and legal separation of gender-as-woman from capital.[147] Not only did such separation reproduce the economic grounding of patriarchy,[148] but it served as a hegemonic technology of juridical reproduction

144. *Id.* at 55 (quoting *Martinez*, 402 F. Supp. at 18–19).

145. *See id.* at 56–59.

146. In *Manifest Domesticity*, Kaplan persuasively marks how imperial/colonial cultural systems produced woman-designated persons as outside commerce and capitalism. Kaplan, *supra* note 39. For a general legal history of how United States and European law systemically disenfranchised women as economic actors, see CAROL PATEMEN, THE SEXUAL CONTRACT (1988).

147. Here, one might consider what various feminist interventions or queer readings might offer. To begin, one might note that the courts become especially defensive of tribal sovereignty when such sovereignty denies a female-designated person constitutional recourse against sex-based oppression. Without an active appreciation for the intersectionality of anti-subordination work, one might become stuck in the legal framework in which feminist concerns and the project of tribal self-determination necessarily run in tension. For work that renegotiates the tensions between identity as a "woman" and identity as a tribal member in *Santa Clara*, see Shefali Milczarek-Desai, *(Re)Locating Other/Third World Women: An Alternative Approach to* Santa Clara Pueblo v. Martinez*'s Construction of Gender, Culture and Identity*, 13 UCLA WOMEN'S L.J. 235, 276–84 (2005). For a seminal work on intersectionality and anti-subordination, see Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). *See also* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

148. *See generally* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 1–59, 175–264 (1998).

by which the limited space of cultural self-determination erected in *Santa Clara* carried clear reiteration of the legal principles that denied Native title and land control claims in *Tee-Hit-Ton*.[149] The respect for tribal authority in *Santa Clara* portrayed law as both non-violent and tolerant, characteristics that are highly valued by legal liberalism and that are mobilized as proof of the legitimacy of the United States juridical order as just according to its own (Liberal) logic.[150]

The conquest principle of *Tee-Hit-Ton* stands as the legal technology for United States government hegemonic control, and *Santa Clara* is its reproductive technology. Yet, as scholars of Michel Foucault have shown, mere control does not establish the legitimacy by which the U.S. state has maintained hegemonic order over a population engaged in a republican form of government.[151] Although the Court retains the power to enforce *Tee-Hit-Ton*, a quasi-Foucaultian analysis would argue that such power must be continually reproduced and solidified through a discourse of legitimation that operates outside the logic of conquest and violence.[152] The Court's decision in *Santa Clara* continues to function as a necessary component of that legitimation. Why then do sex/gender systems remain available to the workings of such legitimation? How

149. *See Santa Clara*, 436 U.S. at 56–59.

150. *See id.* at 53–56 (discussing the ways in which Native political and cultural sovereignty continue to operate, framed by congressional plenary power over the tribes). *See also* KALMAN, *supra* note 5, at 1–10. For critical literature concerning hegemony as a question of political theory, see Judith Butler, *Restaging the Universal*, *in* CONTINGENCY, HEGEMONY, AND UNIVERSALITY: CONTEMPORARY DIALOGUES ON THE LEFT 11, 12–13 (2000). Butler glosses hegemony as a project of incompletion, by which excluded forces return to transform the hegemonic order as a strategy for the maintenance of dominance and control. Such transformations disable revolutionary resistance through their performance of inclusion, while simultaneously reproducing control and domination as conditions of possibility for subjects and populations. Butler suggests that hegemony "denotes the historical possibilities for articulation that emerge within a given political horizon," noting that such possibilities emerge from both integral structural limits and horizons of revision. *Id.* at 13. While Butler goes on to consider the performativity of universalism as a technology through which dominance retains its structural content in the face of transformation, I would argue for a more concrete attention to the use of juridical legitimacy by the U.S. state as a means by which to reproduce the violence of conquest under cover of bowing to the demands of the excluded Other. *Id.* at 35, 39, 41. *See also id.* at 28 (concerning dominance in the form of bowing to the Other); *id.* at 41 (pushing a theorization of repetition and the risk of repetition as necessary to hegemonic consolidation). Butler also notes the cultural register by which legitimacy must be assimilated in these terms, harking to my contention that *Santa Clara* mobilizes a constructed realm of "culture" as the place where oppression ends and legitimate justice occurs vis-à-vis Native–United States relations.

151. *See, e.g.*, LISA DUGGAN, THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY (2003); NASSER HUSSAIN, JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 133 (2003); Arif Dirlik, *Culturalism as Hegemonic Ideology and Liberating Practice*, 6 CULTURAL CRITIQUE 13 (1987).

152. *See, e.g.*, JACQUES DERRIDA, *Force of Law: The "Mystical Foundation of Authority*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 6, 13, 14 (Drucilla Cornell, Michel Rosenfeld & David Gray Carlson eds., 1992); Bradford, *supra* note 36, at 52–55, 95–96; Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1982–83, 1986–87 (2000).

might an analysis of this question through the *Tee-Hit-Ton–Santa Clara* relationship provide insight into the reproductions of Native oppression?

C. *Lisa Duggan and the Wild Wiles of Neoliberalism*

Lisa Duggan's recent work highlights neoliberalism as a system of violent domination that cloaks itself in fabrics of reproduction and hegemony.[153] In *The Twilight of Equality?*, Duggan defines neoliberalism as a globalizing cultural and economic system with great complexity, focusing centrally on the characteristic of upward redistribution of resources matched with a cultural-political-legal strategy of non-redistributive "equality."[154] Duggan then argues that neoliberalism insists on the constitution and subordination of raced and gendered experiences and subjects, even as it dismisses and separates such nodes as "merely cultural"[155] and unrelated to "objective," "natural," and "technical" economic "reality."[156] Duggan further shows that actors who promote neoliberalism rely on race and sex as menacing threats against which those actors can consolidate democratic and cultural support for economic policies that redistribute resources away from the very people who support the policies in question.

As an example, Duggan describes how in 1995 New York Governor George Pataki went on a lesbian witch hunt as a justification for cutting funding to public universities. As Alisa Solomon wrote of the incident in *The Village Voice*, "When there's scant support for your campaign to downsize public institutions, seek out the sex—especially when it's female or gay."[157]

Duggan eloquently lays bare the logic and resource interests of this double move of showing the upward and limiting redistribution effected by neoliberalism as tied to the simultaneous insistence on and disavowal of located historical positionalities such as sex, gender, and race. As she writes:

> [D]espite their overt rhetoric of separation between economic policy on the one hand, and political and cultural life on the other, neoliberal politicians and policymakers have never actually separated these domains in practice. In the real world, class and racial ethnic boundaries are the channels through which money, political power, cultural resources, and social organization flow. The *economy* cannot be transparently abstracted from the *state* or the *family*, from practices of racial apartheid, gender segregation, or sexual regulation.[158]

My reading of *Santa Clara* adds crucially to Duggan's analysis by showing how the categorization of sex/gender as "merely cultural" and the subsequent

153. *See* DUGGAN, *supra* note 151, at xiv.
154. *Id.* at xii.
155. *See* Butler, *supra* note 39.
156. DUGGAN, *supra* note 151, at xiv.
157. *Id.* at 31.
158. *Id.* at xiv.

separation of "culture" from economic resource distribution (in this case, land ownership) reproduces a legal framework in which Native tribes remain divested from their land rights and dependent on the total sovereignty of the U.S. state. By zooming out spheres of "cultural" self-determination with regard to Native American life, the law uses its own promise of freedom as an inoculation against the saliency of claims for material freedom—as a disabling of Native American claims for the total sovereignty enforced by the U.S. state.[159] Law binds its subjects to subordination in and through the moment it grants a space of freedom from that subordination.

D. Manifest Domesticity

In another take on this tangle, in her article *Manifest Domesticity*, Amy Kaplan also casts the double move similarly explicated by Duggan.[160] She writes about how femininity as embodied by woman-identified persons allowed for a national imagination of "home" during moments of imperial tension or expansion.[161] According to Kaplan's research, the actors motivating such moments relied on this notion of "home" as animating a cultural experience of and support for "domestic" unity against "foreign" others and as support for colonizing projects that were meant to "civilize[]" those foreign others, even as the actual impetus of colonization concerned radical resource redistribution violently enacted against highly complex nations and societies.[162] Kaplan writes:

> Domestic discourse both redresses and reenacts the contradictions of empire through its own double movement to expand female influence beyond the home and the nation while simultaneously contracting woman's sphere to police domestic boundaries against the threat of foreignness both within and without.[163]

While Kaplan's article does not focus on the specificity of legal processes as participants in this double movement, Kaplan's analysis helps to elucidate why the United States courts stopped enforcement of federal law on Native peoples at the door of sex/gender and how this stoppage configures gender-as-woman as

159. *See* Jacques Derrida, *Autoimmunity, Real and Symbolic Suicides*, *in* PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA 85–137 (Giovanna Boradorri ed., 2004).

160. AMY KAPLAN, THE ANARCHY OF EMPIRE IN THE MAKING OF UNITED STATES CULTURE 23–50 (2002). Kaplan uses historical inquiry to show that racialized colonial history cannot be separated from a gendered colonial history in the "domestic" space of both the nation and the home. In Kaplan's analysis, gender as a social system of subjectivity works to produce the conceptual possibility of "nation" and "home" even as dominant cultural and political narratives work to position gender as a natural effect of nation and home in fixed historical being. Unlike many theorists of sexual difference who conflate "gender" with "woman," Kaplan explores gender in its masculine, feminine, and ambivalent forms.

161. *Id.*

162. Kaplan, *supra* note 39, at 582. *See generally* R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY AND SOC'Y 507 (1990).

163. Kaplan, *supra* note 39, at 585.

problematically outside the materiality of capitalist resources and land management.

Moreover, Kaplan's tracing of "woman" as the engine of domesticity and the identification of that domesticity as an engine for the elision of colonialism as violent economic and geographical conquest[164] reminds us of yet another articulation at play in *Tee-Hit-Ton* and *Santa Clara*—the production of the "local" as opposed to the "national." While United States courts may refer to Native American tribal nations as "nations," the U.S. state wields the jurisprudence of sovereignty to ensure that only the U.S. state occupies the ground of The National or of The Domestic in the political-legal sense of domestic.

The *Tee-Hit-Ton* Court considered sex/gender classification to be a purely local matter for tribes and therefore within their national sovereignty, but the Court considered land distribution to fall into the realm of "The National" or the domestic territorial sovereignty of the United States as the exclusive domestic Nation occupying the soil in question.[165] For example, in reciting the notion that tribes are "'distinct, independent communities retaining their natural rights,'"[166] the Court explicitly states that these attributes attach only to "local self-government" and "internal matters" and that tribes "no longer possess[] . . . the full attributes of sovereignty."[167] One might even see this in the ordinary legal detail whereby even as the Court repeatedly notes the exception status of Indian tribes in United States law, it also analogizes Indian tribal government to state or municipal governments for the purpose of interpreting the rights in question. In *Santa Clara*, the Court held that federal law cannot interfere with sex-classification policies for tribal membership because such interference would conflict with a type of self-determination similar to that enjoyed by state governments.[168]

As the Supreme Court wrote the year after *Santa Clara:*

> The *Martinez* Court determined that the strong presumption against implication of federal remedies where they might interfere with matters "traditionally relegated to state law" was equally applicable in circumstances where the federal remedies would interfere with matters traditionally relegated to the control of semisovereign Indian tribes.[169]

Again, the Court imposes its own traditions of state law relegation as the justification for any contemporary respect afforded to Native traditions. I would also argue that the "traditionally relegated to state law" test only strengthens the legal claim of the U.S. state to land stolen by conquest, as sovereign land claims,

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164. *See id.* at 588.

165. William Bradford, *supra* note 4.

166. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (quoting Worcester v. Georgia, 31 U.S. 515, 519 (1832)).

167. *Id.* at 55–56.

168. *See id.* at 62–63, 74.

169. Cannon v. Univ. of Chicago, 441 U.S. 677, 693 n.13 (1979) (citation omitted).

Native title, and Native occupancy have been a traditionally National issue of domestic territory. The means by which tribes obtain sovereign authority over sex classification reproduces the very means by which those tribes are forcibly deprived of their traditional land.

IV.
CONCLUSION

There is nothing new in saying United States law is hegemonic, or that it does not conform to its own stated logic. Rather, I am interested in the political value of tracing the legal technologies of control over land, gender, and Native American being. By what strategies might I assist in the struggle for recognition of Native land in the United States and in broader struggles of liberation and anti-subordination? I believe that the juridical recognition of Native title might be a productive strategy, and I believe that papers such as this one might eventually be useful to litigation that attempts recognition. I believe in that usefulness for two reasons.

First, I read the Supreme Court's recent decision in *Lawrence v. Texas*[170] as an indication of the Court's willingness to consider historical evidence from humanities scholarship. The majority in *Lawrence* seems especially receptive to arguments that show how law acts against its own logic of justice—the *Lawrence* Court seems willing to amend such violent inconsistencies if they can be shown on the law's own terms. Second, the U.S. state often markets itself to its subjects on the strength of a brand name—that of Liberal justice.[171] As such, that state makes itself vulnerable to charges that it fails to deliver that justice within its own terms.[172] In an attempt to exploit that vulnerability, I argue above that the *Tee-Hit-Ton* and *Santa Clara* decisions display the legal technologies that solidify, mask, and legitimate the conquest-based control of Indian land, resources, and property by the U.S. state, even as and perhaps because this same discourse offers sex/gender as a site of tribal self-determination. In *Santa Clara*, gender becomes a localized space of sovereignty against a colonial power

170. Lawrence v. Texas, 539 U.S. 538 (2003).

171. *See* IMMANUEL WALLERSTEIN, AFTER LIBERALISM 93–107 (1995) (tracing the history of liberalism and its legitimation of nation-states from the French Revolution through the Persian Gulf conflict).

172. This claim has been made in other fields concerning the effectiveness of anti-corporate brand activism. *See generally* Steve Fletcher, Sticking it to the Man: Brand Identity as a Lever for Social Justice Movements (2005) (unpublished manuscript, on file with author). *See also* ANDREW ROSS, LOW PAY, HIGH PROFILE, 54–55, 172–73 (2004) (discussing the tactics of effective anti-sweatshop activists); MICHEL CHEVALIER & GERALD MAZZALOVO, PRO LOGO: BRANDS AS A FACTOR OF PROGRESS 11–15 (2004) (arguing that brands are a non-legal but culturally and materially significant contract with the consumer and that the consumer can enforce that contract when one of its provisions is broken; such provisions could concern the quality of the good, the notion that the good was produced without sweatshop labor, or that the good was made with minimal environmental impact; brands thus become vulnerable to their own myths).

and also a screen behind which territorial control of capitalist resources are maintained.

Second, by drawing attention to the workings of legal frameworks of enforcement and understanding at play in these dynamics, I hope to expand on showing how that exposes neoliberalism as a bad brand—as an oppressive force that depends on tools contrary to its own construction of legitimacy. While this may raise serious questions about whether the "master's tools" can dismantle the "master's house,"[173] and while it may over-invest in the saliency of a popular liberal narrative of power, it also might offer a potentially productive vector in the multi-pronged struggle for anti-subordination.

173. *See* AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (1984).