Tom Cruise and the Indian Subprime Crisis

BY STEVEN PAUL MCSLOY

It always was, and always is, about the land.

Every so often, articles in *The Wall Street Journal* and sometimes even the pages of *This Week From Indian Country Today* tout the advantages of private property for Indian people, not to mention decisions coming from the Supreme Court such as *Carcieri* and *U.S. v. Navajo Nation*, remind Indian country of what has, and always will, give Indian law its shape: property rights.

As the Supreme Court said in the 1955 *Tee-Hit-Ton Indians v. U.S.* case—and these are not the words of some left-wing activist, but of the United States Supreme Court—"the dominant purpose of the whites in America was to occupy the land." And, if we are going to talk about land, we have to talk about Thomas Jefferson.

Why Thomas Jefferson? Because Jefferson's idea of America was that everyone would be a yeoman farmer with private property, and that would promote private virtue and patriotism.

He worried that, without private property as a social anchor, the republic would decay in time and become like Europe, with its aristocracies and feudalism. His philosophical solution to the problem of decay in time was to expand the republic in space, even to empire, so that society would not turn inward and feudally compound itself. It is easy to see the effects of that policy: Louisiana. Alaska. Manifest Destiny. *Tee-Hit-Ton*.

And if we are going to understand Thomas Jefferson, we have to talk about Tom Cruise.

Why Tom Cruise? He is our biggest movie star and thus our biggest teller of the myths America tells itself, myths which can be powerful and difficult to root out from society and from the law.

One of Cruise's lesser works, the 1992 film *Far and Away*, opens with Cruise as a young man in Ireland, as English soldiers have come to take his family's land. His father is dying of a heart attack during the foreclosure, and he grabs Cruise by the lapels and tells him, "Hold onto the land." Cruise then goes to America.

To digress for a moment, Ireland was the practice run for the New World. Elizabethan England sharpened its legal knives about dispossession in rationalizing their conquest of Ireland, characterizing the Irish as tribal, pagan, matriarchal and without a fixed conception of individual property. As the "discovering" sovereign and with the good fortune of reading John Locke on property ("Whatsoever then he removes out of the state that nature hath provided… he hath mixed his labor with, and joined to it something that is his own, and [he] thereby makes it his property."), the English had legal arguments to dispossess the Irish, and this idea was carried in ships to America.

Far and Away ends with Cruise at the starting line of a land rush, about to race forward and claim some land in Oklahoma, following the guideposts laid forth by Jefferson. Indian land had been opened as part of the Allotment process, and he is going to fulfill his father's dying wish by taking Indian land, irony notwithstanding.

The dramatic image of Cruise at the starting line, ready to bring progress to the continent, is easy to imagine upon reading Supreme Court Chief Justice John Marshall's 1823 opinion in Indian law's foundational case, *Johnson v. M'Intosh:*

> *"Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim."*

History was Marshall's vehicle for holding the "Indian inhabitants" as "merely as occupants," without the ability to "transfer absolute title to others." Marshall adopted the defendant's arguments that the Indians no more owned the land than the fisherman owns the sea, that natural law required holding against their rights, as their lands "were not used by them in such a manner as to prevent their being appropriated by a people of cultivators." He concluded, "to leave them in possession of their country was to leave the country a wilderness."

Johnson is a great read, as history, as literature, as the best and worst of the lawyer's art. In the end, though, *Johnson* simply embraces what we are taught is the genius of the common law, the implicit capitalist impulse of the highest and best use. While Marshall, as a federalist, was often opposed to his distant cousin Jefferson, when it came to land, however, they were in agreement.

Felix Cohen, the godfather of Indian law, pointed out in a 1947 law review article the factual inaccuracies of conventional American history:

> *"Every American schoolboy is taught to believe that the lands of the United States were acquired by purchase or treaty from Britain, Spain, France, Mexico and Russia…the historic fact is that practically all of the real estate acquired by the United States since 1776 was purchased…from its original Indian owners."*

However, it was in pointed rebuttal to Cohen that the Supreme Court in *Tee-Hit-Ton* refused to let the myth per-

ish, and countered Cohen's facts with its own version of the myth:

> *"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."*

Tee-Hit-Ton is a 1955 Supreme Court case turning on whether the lands of the Tlingit Tee-Hit-Tons were sufficient to constitute "property" under the Fifth Amendment's Takings Clause. The case's outcome is clear right off the bat when the court calls *Johnson* a "great case" and states the question presented as whether "between 60 and 70 individuals" can lay claim to "over 350,000 acres of land."

Tee-Hit-Ton holds that "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." The Court sets the intention of the Indians aside, as in *Johnson*, and held that it "[finds] nothing to indicate any intention by Congress (the sovereign) to grant to the Indians any permanent rights in the lands of Alaska." Property is what the sovereign will recognize.

In a footnote, the Court distinguishes the 1907 *Cariño* case, which arose during the United States' occupation of the Philippines. There, Cariño made a successful claim to property, "in which tribal custom and tribal recognition of ownership played a part." Cariño's claim, though, was to a "370-acre farm which his grandfather had fenced some 50 years before." So there it is. Someone had translated John Locke into Spanish, or Tagalog, and instructed Cariño's grandfather on the importance of fences.

Johnson and *Tee-Hit-Ton* thus set up the poles of what is Indian property and what isn't.

The General Allotment Act of 1887 was the tool for the transformation of Indian lands from one to the other, from a protected right to use that isn't property to an unprotected fee simple that is. It was supposed to take 25 years, one generation, to make the transition—dad and mom won't get it, but their kids will—just like every other immigrant family whose parents speak a native language at home while the kids speak perfect English. However, we know the results: 90 million acres lost between 1887 and Allotment's end in 1934. As President Theodore Roosevelt put it, in a metaphor redolent of canal-building and "big sticks," Allotment was a "mighty pulverizing engine to break up the tribal mass."

The famous Meriam Report in 1928 and the 1934 Indian Reorganization Act, the so-called "Indian New Deal," attempted to pick up the pieces left after Allotment. As the Meriam Report put it:

> *"It almost seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor, but unfortunately this policy has for the most part operated in the opposite direction."*

The Meriam Report thus holds that disastrous results may extend from overemphasis—or at least a misplaced trust—on individualized property ownership. In other words, the General Allotment Act and its aftermath were really just the subprime crisis of the 19th century. The past is always prologue, and we are condemned to repeat it.

As the U.S. Department of Housing and Urban Development (HUD) put it even before the Great Recession:

> *"Just as more Americans owned their homes than ever before, 'predatory lenders' targeted those which were 'house rich but cash poor.' This '[dislodges] long-standing residents and [provides] an opportunity for resale at a high profit.'"*

"Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force."

In the end, we have *The Wall Street Journal* and a purist view of property on one hand and, on the other, the Meriam and HUD reports and those fighting the subprime crisis by saying that we cannot rely on markets alone to justly run a society, that the premise of free market economics, of perfect information and equal access to it, is almost never an actual fact.

To conclude with Tom Cruise, attempting to ensure a free market while the government is obligated to protect those to whom it owes both treaty obligations and self assumed trust duties is a path that has ultimately proved a Mission Impossible. When forced to choose, the latter is the better path. Leaving Indian property rights—like subprime borrowers—to the whims of the market is indeed Risky Business. Indian nations should do as Cruise's fictional father advised and "hold onto the land."

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