1-1-2008

The Supreme Court's Indian Problem

Matthew L.M. Fletcher
Michigan State University College of Law, matthew.fletcher@law.msu.edu

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> [These] matters [are] more likely to arouse the judicial libido—voting rights, antidiscrimination laws, or environmental protection, to name only a few . . . .
>
> —Justice Scalia[1]

> [T]he Supreme Court sort of makes it up as they go along.
>
> —Judge Roger L. Wollman[2]

> This constitutional system floats on a sea of public acceptance.
>
> —Justice Breyer[3]

INTRODUCTION

What "arouse[s] the judicial libido"?[4] Federalism? Race? The environment? The exclusionary rule? How about *federal Indian law*? How can that be? Who understands Indian law? Who wants to? Why would the Supreme Court ever want to hear Indian law cases in a discretionary docket? But they do—an average of two cases per year since 1953[5] and on occasion as many as five cases in a single term,[6] a

* Assistant Professor of Law, Michigan State University College of Law; J.D., University of Michigan Law School. Enrolled Member, Grand Traverse Band of Ottawa and Chippewa Indians. Chi-miigwetch to Todd Aagaard, Larry Catá Backer, Jeannine Bell, Kirsten Carlson, Kristen Carpenter, Richard Delgado, Margareth Etienne, Zeke Fletcher, Kate Fort, Phil Frickey, Luis Fuentes-Rohwer, Ian Gershengorn, Sam Hirsch, Brian Kalt, Riyaz Kanji, Sonia Katyal, John Petoskey, Angela Riley, Wenona Singel, Joe Singer, Alex Skibine, and Kevin Washburn.

1. Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 127 S. Ct. 1534, 1556 (2007) (Scalia, J., dissenting).

2. Audio tape: Oral Argument, Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir. 2004) (comment by Judge Wollman at 14:51) (available at http://www.ca8.uscourts.gov/oralargs/oaFrame.html (follow the "Case Number" link, search for case number 03-3702).

3. Bob Egelko, *Breyer: Public Support Key to Judiciary Future: Supreme Court Justice Uses Historic Rulings as Examples*, S.F. CHRON., Aug. 12, 2007, at B8 (quoting Justice Breyer).

4. *Zuni Pub. Sch. Dist.*, 127 S. Ct. at 1556 (Scalia, J., dissenting).

5. *See* VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 105 (2007) (finding the mean number of cases heard per year by the Supreme Court on Native American law within the issue of discrimination between 1953–2000 to be 1.9).

6. The 1997 Term, for example, featured five cases involving tribal interests. *See* Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998); Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S.

proportion far higher than some other kinds of cases that attract Justice Scalia's "judicial libido."

Judge Wollman's humorous and off-the-cuff remark during oral argument in an Indian law case a few years back epitomizes an area of law that is often confusing, unpredictable, and prone to obfuscation. But it is here in federal Indian law where the rule of law championed by members of the Supreme Court is under constant assault—and stands as a harbinger of what may be coming in other areas that attract the judicial or the academy's or mass media's attention. Perhaps one way to explain what is going on is to imagine the Indian cases in a new way.

This Article asserts a new theory about why and how the Supreme Court accepts and decides its Indian law docket: the Court identifies an important constitutional concern embedded in a run-of-the-mill Indian law certiorari petition, grants certiorari, and then applies its decision making discretion to decide the "important" constitutional concern. Once that portion of the Indian law case is decided, the Court decides any remaining federal Indian law questions in order to reach a result consistent with its decision on the important constitutional concern. From the view of a national decision maker such as a Supreme Court Justice, there is much more to a simple Indian law case than a dispute between Indians, Indian tribes, and the non-Indian individuals, governments, and entities that oppose them. There are questions of equal protection, due process, federalism, jurisdiction, congressional and executive power, and more. Indian law disputes often are mere vessels for the Court to tackle larger questions; often these questions have little to do with federal Indian law. And, since Indian law is not as grounded in the Constitution as the other questions, it is more malleable; prone to inconsistencies and unpredictability.

Perhaps as a result of this modern view of the law, federal Indian law as practiced before the Supreme Court is in serious normative decline—and most likely began to degenerate around the time of the ascension of Chief Justice Rehnquist in 1986[7] and the concomitant trend toward reducing the Supreme Court's docket.[8] By "serious normative decline," I

751 (1998); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998). The 2000 Term featured five cases involving tribal interests as well. *See* Nevada v. Hicks, 533 U.S. 353 (2001); Idaho v. United States, 533 U.S. 262 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001).

7. *See generally* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 7 (1991) ("Chief Justice Rehnquist has made it his policy to chip away at the sovereignty of Indian nations. His policy contradicts not only the will of Congress, but also a long line of Supreme Court decisions affirming inherent tribal sovereignty.").

8. *See* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1672 (2006); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The*

mean a general reduction in Indian law cases decided on the basis of established precedent, an increase in cases decided without a guiding legal theory, and an increase in cases that appear to be decided on the basis of the gut reaction of the Justices. As a corollary, much of the federal Indian law understood as deriving from cases about Indians—cases that explored and defined the rights and responsibilities of tribes and individual Indians; cases that could not have existed but for some unique legal characteristic that only the presence of a tribal interest brought out—is not really about Indians, tribes, or Indian law. What scholars and practitioners should do is look at federal Indian law as though the cases have nothing to do with Indians or Indian tribes. Federal Indian law as the modern Supreme Court reads and understands it begins to make more sense that way.

This Article attempts a fresh look at the Court's Indian cases from more of a "positive rather than normative analysis."[9] This Article's goal is to give "systematic attention to . . . implications for Supreme Court decisionmaking" in the context of federal Indian law.[10] The argument begins with a description of two classic Indian law cases in Part I. These cases represent a vital and dynamic part of Indian law—forming a part of the core of the Indian law canon—but they can be read as something other than an Indian law case. In fact, these cases, while decided in reliance on Indian law principles, include separate, independent reasons—related to constitutional or pragmatic policymaking—for the outcome.

Part II introduces the current state of federal Indian law. The Court makes decisions in the Indian law field not through reliance upon a rule of law or even through much reliance on precedent, but instead with reliance upon its view of the way things "ought to be," as Justice Scalia once wrote in an internal memorandum.[11] The Court's decisions now reflect a "ruthless pragmatism" as a result of this view of Indian law.[12]

Part III offers a fresh view of several of the Court's most important

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Ghost of William Howard Taft, 90 MINN. L. REV. 1363, 1368–76 (2006) (documenting the Supreme Court's shrinking docket); *see also* Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1 (noting that in the October 2006 Term, the Court decided only sixty-nine cases, the lowest number in over a half-century).

9. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 32 (2005).

10. Neal Kumar Katyal, *Comment:* Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 68 (2006). Professor Katyal's paper on the strategies and preparations for litigating *Hamdan v. Rumsfeld* before the Supreme Court should be mandatory reading for tribal attorneys without much experience in Supreme Court litigation.

11. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996) (citing Memorandum from Justice Antonin Scalia to Justice William J. Brennan, Jr. (Apr. 4, 1990)).

12. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436, 460 (2005).

modern era Indian cases by placing the Court's Indian caseload in the context of its larger trends. The most obvious trend is the severe decline in the Court's docket. The decline in the caseload should mean that most of the Court's Indian cases are decided in order to resolve a split in authority in the lower and state courts. But those splits in authority account for few cases. Other Indian law cases appear to reach the Court because they raise or involve questions of important constitutional concern for the Court. It is a possibility that the declining docket means that the Court will hear fewer and fewer (if any) cases on their Indian law-related merits, but instead choose Indian law cases because they present an opportunity to opine on an important constitutional concern outside of Indian law.

Part III also offers a new look at several important Indian law cases from the last few decades, describing how these particular cases make more sense if they are viewed not through a federal Indian law lens, but from the point of the view of the Court and its big picture take on constitutional law. Cases often considered core Indian law cases like *Morton v. Mancari*,[13] *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[14] and *Minnesota v. Mille Lacs Band of Chippewa Indians*,[15] include a powerful undercurrent of non-Indian law; an undercurrent that perhaps included issues more salient to the Court's members than tribal sovereignty or Indian rights.

Part IV recommends that observers of federal Indian law begin to highlight the "important" constitutional questions that may arise in future Indian law cases. This Article does not recommend abandoning the quest for normative analyses and conclusions about Indian law, but instead recommends incorporating a positive aspect to the analysis. Part IV concludes by applying the template to several cases rising through the federal court system that the Court may agree to hear in the coming years. If nothing else, identification of the important constitutional concerns involved in these cases will aid tribal advocates in predicting the relative chances of success before the Court.

Where observers go wrong, this Article asserts, is by ignoring the Supreme Court's broader agenda, an agenda driven by its receding docket. This Article asserts that the Supreme Court grants petitions for writ of certiorari not because the Court wants to decide tribal interests. The Court does not care what happens in Indian Country. To assume the Court does care is unwarranted; there is no evidence whatsoever to suggest that the Court (as a whole) is invested in the concerns and issues in Indian Country, which is as far from the minds of the elite legal

13. 417 U.S. 535 (1974).
14. 485 U.S. 439 (1988).
15. 526 U.S. 172 (1999).

establishment as any issue can be.

What does interest the Court are constitutional questions of congressional and executive power; broader federalism issues unrelated to the place of Indian tribes in the federalism scheme; the legitimacy, sanctity, and authority of federal courts; and larger issues related to race and social issues. There is significant evidence to support these assertions.[16] These areas are now the significant areas of constitutional concern that attracts the Court's attention. The fact that these constitutional concerns arise in Indian Country—both in modern times and throughout the Court's history—often is accidental. But these issues do appear to arise in Indian Country on a consistent basis. That federal Indian law principles do not answer these broader questions is a significant reason why the Court deviates from Indian law principles and even appears to denigrate them. When tribal advocates recognize these broader constitutional concerns in advance of a certiorari petition, the advocacy before the Court on behalf of tribal interests will improve, as will the win rate for tribal advocates.

To be fair to tribal advocates, in at least one recent case, counsel for tribal interests did make an attempt to bring forth to the Court pragmatic reasons outside the realm of federal Indian law justifying a decision in favor of tribal interests.[17] This attempt failed for explainable reasons, but future litigants should use the strategy as a template in future cases.

I. A NEW THEORY OF SUPREME COURT INDIAN LAW DECISIONMAKING

Consider the following fact patterns:

A court of the State of Georgia convicts an Indian man of murder and sentences him to death. The crime took place outside the jurisdiction of the state—on an Indian reservation. The defendant appeals to federal courts, seeking a writ of habeas corpus. The United States Supreme Court grants the petition and issues an order staying the execution. The State of Georgia then executes the man two days later.[18] The Georgia legislature then passes a resolution asserting that the United States Supreme Court does not posses authority to review the decisions of Georgia state courts. The Court then hears a second criminal case raising concomitant issues relating to the Georgia legislature's repeated

16. *See, e.g.*, Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 663–65 (1993); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 585–86 (2003) (providing evidence that the Court is interested in other issues than the concerns of Indians).

17. *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 105–10 (2005).

18. Georgia v. Tassels, 1 Dud. 229, 229 (Ga. 1830); TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 111–15 (2002).

attempts to nullify treaties and other federal law.[19]

An Indian woman sues an Indian tribe in federal court seeking a declaration that a tribal membership ordinance is a violation of the equal protection clause of the Indian Civil Rights Act.[20] The Supreme Court grants certiorari.[21]

The previous fact patterns are simplified versions of two foundational federal Indian law cases. With the exception of the first part of the first fact pattern (a case made moot by the state), the parties to the cases argued and briefed the cases as though they were Indian law cases. Scholars who have critiqued and analyzed the cases have treated them as Indian law cases and they appear in prominent fashion in the two major casebooks on federal Indian law.[22] These two cases are classic cases that form a part of the backbone of federal Indian law.

But it could be argued that neither of these cases are federal Indian law cases.

These cases highlight the possibility that perhaps it is a mistake to think of many of the cases that form the canon of modern Indian law as Indian law cases. In the last twenty years under the Rehnquist Court, for example, it is harder and harder to find Indian law Supreme Court decisions relying upon foundational principles of Indian law, especially those rooted in the Constitution. Such a conclusion should not be so surprising. Prominent constitutional law scholars suggest that there is no such thing as principled constitutional interpretation. For example, Professor Jed Rubenfeld wrote:

> In constitutional law . . . there are no such overarching interpretive precepts or protocols. There are no official interpretive rules at all. In any given case raising an undecided constitutional question, nothing in any current constitutional law stops a judge from relying on original intent, if the judge wishes. But nothing stops a judge from ignoring original intent. Or suppose a plaintiff comes to court asserting an unwritten constitutional right. Under current case law, judges are fully authorized to dismiss the right because the Constitution says nothing about it. Another admissible option, however, is to uphold the right on nontextual grounds. Evolving American values? Judges can consult them or have nothing to do with them.[23]

Indian law scholars have been decrying the lack of principled

19. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519–31, 540–42 (1832).

20. *See* 25 U.S.C. § 1302(8) (2000) (equal protection clause).

21. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

22. *See* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 71–81, 432–39 (5th ed. 2007); DAVID H. GETCHES, JR. ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 112–21, 391–97 (5th ed. 2005) (discussing *Worcester v. Georgia* and *Santa Clara Pueblo v. Martinez*).

23. JED RUBENFELD, REVOLUTION BY JUDICIARY 5 (2006).

decisionmaking about federal Indian law for decades.[24] Nothing stops the Court—no constitutional provision, common law principle, or anything else—from working radical transformations of federal Indian law at any moment.[25] The only constitutional provision mentioning Indian tribes is the Indian Commerce Clause.[26] As with the rest of constitutional interpretation, there are no rules, except one: the Court looks for the familiar, a constitutional concern that attracts its attention.[27]

The first fact pattern, based on *Georgia v. Tassels* [28] and *Worcester v. Georgia*,[29] involves questions of federalism and the supremacy of federal law over conflicting state laws.[30] The State of Georgia issued a resolution

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24. *See, e.g.*, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609–16 (1979); John Petoskey, *Indians and the First Amendment*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 221, 226 (Vine Deloria, Jr. ed., 1985).

25. *Cf.* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (redrawing the map relating to Indian land claims in a single instant); Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005) (dismissing Indian land claims after twenty years of litigation by following the reasoning of *Sherrill*); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006) (containing examples of the Court transforming federal Indian law); Kathryn E. Fort, *The (In)Equities of Federal Indian Law*, FED. LAW., Mar.–Apr. 2007, at 32.

26. *See* U.S. CONST. art. I, § 8, cl. 3; United States v. Lara, 541 U.S. 193, 224–26 (2004) (Thomas, J., concurring); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107–08 (2005). *See generally* Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004) (discussing the background and possible limits of federal power under the Indian Commerce Clause).

27. *Cf.* Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF., Mar./Apr. 2004, at 57, 59.

28. 1 Dud. 229 (Ga. 1830). *See generally* GARRISON, *supra* note 18, at 111–15; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 733–34 (rev. ed. 1926).

29. 31 U.S. (6 Pet.) 515 (1832). *See* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 58–61 (1980); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 118–19 (1982); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 181–83 (1985); PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 46–50 (1991); 1 WARREN, *supra* note 28, at 754–61; G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 731–40 (1988); DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 58–61 (2001); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, at 132–33 (1997); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 521–25 (1969); William Walters, *Review Essay: Preemption, Tribal Sovereignty, and* Worcester v. Georgia, 62 OR. L. REV. 127, 128–36, 139–41 (1983) (reviewing FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds. 1982) [*hereinafter* COHEN'S HANDBOOK 1982 ed.] (containing wide-ranging scholarly commentary on *Worcester*)).

30. *Worcester*, 31 U.S. (6 Pet.) at 559 ("The [C]onstitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); *id.* at 561 ("[Georgia's laws] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our [C]onstitution, are committed exclusively to the government of the union."); CURRIE, *supra* note 29, at 181–83; Burke, *supra* note 29, at 512–13; Gerald N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 905–06 (2003).

proclaiming that the Supreme Court had no jurisdiction or authority to review the decisions of state courts.[31] These cases arose in the larger national debate now known as the Nullification Crisis, where several Southern states argued that they had the authority to nullify federal statutes.[32] Chief Justice Marshall believed these issues would arise in the 1832 Term in the form of a case involving the Second Bank of the United States, a critical focal point of the states' rights debate, or the various attempts by states to declare the unconstitutionality of (or nullify) federal law.[33] Instead, these issues appeared in cases arising out of Indian Country. All the necessary elements of the other cases were present for the Court to announce that federal law was supreme over conflicting state law, the underlying important constitutional concern.

The second fact pattern, probably the most famous, controversial, and important opinion favoring tribal interests issued in the last hundred years—*Santa Clara Pueblo v. Martinez*[34]—could be construed as a mere statutory interpretation case about whether the Indian Civil Rights Act may be read to imply a cause of action[35] and to waive sovereign immunity.[36] It is tempting to focus on the tribal sovereignty aspects of the

31. *See* 1 WARREN, *supra* note 28, at 733–34.

32. *See* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 42 (Sanford Levinson ed., 4th ed. 2005); R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 79–87 (2d ed. 2006); 1 WARREN, *supra* note 28, at 770; David P. Currie, *The Constitution in Congress: The Public Lands, 1829–1861*, 70 U. CHI. L. REV. 783, 785 (2003); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1136 (2001); Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J.S. HIST. 519 (1973); R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland, *and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 876–77 (2000) (providing commentary and background on the Nullification Crisis); Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. REV. 73, 110 (1988); H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1292 (1985); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 945–46 (1985).

33. *See* DAVID LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 357 (1949) ("To Marshall, the tariff issue seemed more dangerous to his principles. For the South . . . was not professing itself willing to obey any protective tariff law."); *id.* at 356 (quoting Marshall's letter to his son in which he states: "This session of Congress is indeed particularly interesting. The discussion on the tariff and on the Bank, especially, will, I believe call forth an unusual display of talents"); *see also* Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 348 (1956) ("While the President saw the Indian problem as a temporary one, the nullification issue presented a basic national crisis.").

34. 436 U.S. 49 (1978). *See generally* CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63–69 (1987); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 593–94 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 702–38 (1989); Rina Swentzell, *Testimony of a Santa Clara Pueblo Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004) (relating the point of view of a Santa Clara Pueblo woman); Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty Five Years of Disparate Cultural Visions*, 14 KAN. J.L. & PUB. POL'Y 49 (2004) (making often intense commentary about the decision).

35. *Martinez*, 436 U.S. at 60–61 (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

36. *Id.* at 58–59.

case—and they are significant—but consider the underlying questions that could have been more salient to the Court: whether sovereign immunity is waived where a civil rights statute does not have a specific cause of action to enforce those rights and, perhaps, whether the Court's nascent sex discrimination jurisprudence ought to be extended or reconsidered. Consider that if the Court construed the Act as implying a cause of action *and* waiving tribal sovereign immunity, the reasoning of such a precedent could be used against both federal and state sovereigns.

These cases are not exceptions. It is a distinct possibility that there are fewer federal Indian law cases decided on the basis of federal Indian law principles over the course of the history of federal Indian law than one would expect. Of course, while those cases do *appear* to rely upon federal Indian law principles, what is becoming clearer to Indian law scholars and tribal advocates with each passing term is that the Court no longer applies a principled federal Indian law. In the last years of the Rehnquist Court, the tendency began to appear as an acute trend.

Practitioners and observers of Indian law should begin to recognize that the Supreme Court's priorities in granting certiorari and deciding Indian law cases might not be related to Indians at all. It appears their priorities are, in order, important constitutional concerns and pragmatic effects of the outcome. As the above historical cases highlight and as other recent cases discussed in Part III below demonstrate, federal Indian law as a consistent and logical legal doctrine is not a priority for the Rehnquist or Roberts Courts.

II. THE DEPLORABLE STATE OF FEDERAL INDIAN LAW

The story begins with the wretched state of federal Indian law. Dean David Getches reported in 2001 that tribal interests have lost over 70% of cases before the Court for the fifteen terms preceding his article and over 80% of cases in the ten terms preceding his article.[37] One case upon which Dean Getches focused—*Strate v. A-1 Contractors*[38]—turned much of federal Indian law on its head.[39] And that was before the 2000 Term in which tribal interests won one and lost three cases, two of which were nothing short of devastating to tribal interests. These two cases, *Nevada v. Hicks*[40] and *Atkinson Trading v. Shirley*,[41] shocked observers of federal

37. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001).

38. 520 U.S. 438 (1997).

39. *See, e.g.*, Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1216–22 (2001); Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L. J. 267 (2000); Wambdi Awanwicake Wastewin, Strate v. A-1 Contractors: *Intrusion into the Sovereign Domain of Indian Nations*, 74 N.D. L. REV. 711, 733–36 (1998) (describing the impact of *Strate* in Indian Country).

40. 533 U.S. 353 (2001).

Indian law in both the results and the "ruthless[ness]" of their reasoning.[42] If there was any doubt about the Court's sympathies in relation to tribal interests, the 2001 Term resolved those doubts with great clarity—tribal interests would find no quarter in the Supreme Court.[43] Others, such as Professor Alex Skibine, note that the Court has decided forty-eight Indian law cases since 1988 following *California v. Cabazon Band of Mission Indians*,[44] with thirty-three of the cases going against the tribal interests and four being neutral.[45]

The scholarship in the field of federal Indian law focuses on three foundational principles: (1) Indian affairs are the exclusive province of the federal government;[46] (2) state authority does not extend into Indian Country;[47] and (3) Indian tribes retain significant inherent sovereign authority unless extinguished by Congress.[48] These foundational principles no longer (if they ever did) drive the Court's federal Indian law. The large majority of Indian law scholars have concluded that the recent federal Indian law cases—in which tribal interests win perhaps one-quarter of the time, less than convicted criminals[49]—are an abomination, a derogation of tribal sovereignty and Indian interests, and the worst form of judicial activism and assertions of judicial supremacy.[50]

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41. 532 U.S. 645 (2001).

42. *See* Frickey, *supra* note 12, at 460.

43. *See* Joseph William Singer, *Symposium Foreword: Indian Nations and the Law*, 41 TULSA L. REV. 1, 3 (2005) ("In an era when many people support a 'restrained' judiciary willing to defer to Congress on the basis of 'strict construction' of both statutes and constitutional text, it is frustrating to find a Supreme Court that supposedly adheres to that philosophy, yet is so willing to ignore precedent and the text of the United States Constitution, federal treaties, and statutes in the interest of providing equitable treatment to non-Indian interests, while showing a fundamental misunderstanding of both the history of the United States' relations with Indian nations and the basic principles of federal Indian law.").

44. 480 U.S. 202 (1987).

45. Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 781 (2006).

46. COHEN'S HANDBOOK 1982 ed., *supra* note 29, at 2 ("[T]he federal government has broad powers and responsibilities in Indian affairs.") (emphasis omitted).

47. *Id.* ("[S]tate authority in Indian affairs is limited.") (emphasis omitted).

48. *Id.* ("[A]n Indian nation possesses in the first instance all of the powers of a sovereign state.") (emphasis omitted).

49. Getches, *supra* note 37, at 280–81 ("Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82% of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases. It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court. Convicted criminals achieved reversals in 36% of all cases that reached the Supreme Court in the same period, compared to the tribes' 23% success rate.") (footnotes omitted).

50. *See, e.g.*, ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 137–38 (2005); Clinton, *supra* note 26, at 205–35; Frickey, *supra* note 12, at 443–57; Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 468–80 (2003) (representing views from leading scholars about recent federal

Most observers of federal Indian law cases reach the conclusion that—in the words of an Eighth Circuit judge who was reversed by the Court in a major Indian law case[51]—the Supreme Court makes up Indian law as it goes.[52] Legal commentators struggle to reach a conclusion as to what drives the Supreme Court's recent Indian law jurisprudence, with some commentators asserting that the Rehnquist Court's "federalism revolution" in favor of states' rights has seeped into federal Indian law.[53] Others assert that the Court disfavors minority rights and follows an "anti-anti-discrimination" pattern.[54] Others argue that the Supreme Court is engaged in a pattern of race discrimination against tribal interests.[55] Some assert that the Court's Indian law jurisprudence is based on knee-jerk reactions against the notion of a third type of sovereign government existing within the United States.[56] Still other commentators argue that the foundational principles of federal Indian law are so based in racism and stereotype as to have tainted all modern Indian law decisions.[57] Another vein of commentary deplores the inefficiencies resulting from the Court's apparent ad hoc decision making in the field.[58] There is no shortage of criticism of the Court's apparent deviation from the foundational principles of federal Indian law and of an apparent deviation from the Court's role of protecting the nation's minorities from the injustices perpetrated by federal, state, and local governments.[59]

Indian law cases).

51. United States v. Lara, 541 U.S. 193 (2004), *rev'g*, 324 F.3d 635 (8th Cir. 2003) (en banc).

52. Audio tape: Oral Argument, *supra* note 2.

53. *See, e.g.*, Getches, *supra* note 37, at 320–21, 329–30, 344; John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte Young, *Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787, 863–66 (1999). *See generally* MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249–78 (2005); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 129 (2001) (explaining the "federalism revolution").

54. *See, e.g.*, Getches, *supra* note 37, at 318–20. For an argument that the Court follows an "anti-anti-discrimination agenda," see RUBENFELD, *supra* note 23, at 158–83.

55. *See, e.g.*, WILLIAMS, *supra* note 50, at 97–114. *See generally* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003).

56. *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN MODERN CONSTITUTIONAL DEMOCRACY 43 (1987) (arguing that the Court decided at least one major Indian law case based on its "visceral reaction" to the facts, citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

57. *See, e.g.*, WILLIAMS, *supra* note 50; Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

58. *See, e.g.*, Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW., Mar.–Apr. 2005, at 38; Getches, *supra* note 37, at 277–78; Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683, 744–45 (1997). *See generally* Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

59. *See, e.g.*, Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 101–02 (1999); Frickey, *supra* note 12, at 452–60; Angela R.

An additional factor that makes these cases difficult for tribal advocates and Indian law scholars to stomach is the consistently high rate at which the Supreme Court grants petitions for writ of certiorari in cases featuring Indian tribes, tribal organizations, and Indian interests. Since the advent of the "modern era" of federal Indian law in 1959,[60] few terms of the Court have passed without at least one major decision featuring tribal interests. Many terms feature several cases, in some as many as five.[61] Even as Chief Justices Rehnquist and Roberts lead a Court that hears a smaller and smaller docket,[62] tribal interests continue to be decided before the Court at the same proportional rate.[63] Coupling this fact with the low win rate for tribal interests has compelled tribal advocates to avoid appearing before the Court at all. A great victory for Indian Country in the twenty-first century consists of convincing the Court *not* to grant certiorari.[64]

Since the 2000 Term, the Court has decided several other cases against tribal interests. Three are of import for the purposes of this Article—*Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*,[65] *Wagnon v. Prairie Band Potawatomi Nation*,[66] and, perhaps the most important and destabilizing decision in modern federal Indian law, *City of Sherrill v. Oneida Indian Nation*.[67] These cases exemplify the very recent degradation of the foundations of

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Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 118–19 (2005); Singer, *supra* note 55, at 643. *See generally* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004).

60. WILKINSON, *supra* note 56, at 1 (naming Williams v. Lee, 358 U.S. 217 (1959), as the onset of the "modern era of federal Indian law").

61. *See supra* note 6.

62. *See* Posner, *supra* note 9, at 35 ("The number of decisions reviewable by the Supreme Court is growing; the number of decisions reviewed by the Court is declining."); Greenhouse, *supra* note 8 (reporting that the Court decided sixty-eight cases in the October 2006 Term, the lowest number since 1953). *Compare The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 426 (2005) (noting that the Court decided eighty cases in the 2004 Term), *with The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 304 (1986) (noting that the Court decided 159 cases in the 1986 Term).

63. In the 2005 Term, the Court heard *Arizona v. California*, 547 U.S. 150 (2006), and *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). In the 2004 Term, the Court heard *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). In the 2003 Term, the Court heard *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), and *United States v. Lara*, 541 U.S. 193 (2004). In the 2002 Term, the Court heard *Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Community of the Bishop Colony*, 538 U.S. 701 (2003), *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

64. *See* Matthew L.M. Fletcher, Means *Case a Supreme Affirmation of Tribal Sovereignty*, INDIAN COUNTRY TODAY, Oct. 20, 2006, at A3, *available at* http://www.indiancountry.com/content.cfm?id=1096413861.

65. 538 U.S. 701 (2003).

66. 546 U.S. 95 (2005).

67. 544 U.S. 197 (2005).

federal Indian law by the Supreme Court, but they are mere extensions of a longer trend that can be traced back to the appointment of Justice Rehnquist to the Court in 1971 and his elevation to Chief Justice in 1986.[68] While as Chief Justice, he did not write the lead opinions in many Indian law decisions, the doctrinal origins of these cases can be traced back to the damage done by then-Justice Rehnquist in the 1970s and early 1980s to foundational principles of federal Indian law.[69]

Then-Justice Rehnquist's Indian law jurisprudence stretches back to *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*.[70] In that case, Justice Rehnquist rewrote the presumptions and the analytic framework to which the Court had been faithful since the beginning of the modern era, *Williams v. Lee*.[71] Justice Rehnquist's Indian law cases reversed presumptions in favor of tribal immunities to state regulation and taxation,[72] replaced bright-line rules favoring tribal interests with balancing tests favoring states and local governments,[73] eliminated tribal criminal jurisdiction over nonmembers,[74] eviscerated tribal civil jurisdiction over nonmembers,[75] and limited both the federal trust responsibility toward Indian tribes[76] and the canons of construing Indian treaties and statutes to the benefit of Indians and Indian tribes.[77] Then-Justice Rehnquist's efforts in this new Indian law jurisprudence did not appear to provide a reasonable theory for the decisions or the departures from the hallowed foundational principles of federal Indian law. Unfortunately, his attitude about Indians and Indian peoples perhaps can be summed up in his solitary and pithy dissent in *United States v. Sioux Nation of Indians*,[78] where he accused the majority of engaging in "revisionist history" by asserting that the Sioux Indians were backstabbing savages.[79]

These cases formed a base that have made the Court's federal Indian law decisions since the ascension of Chief Justice Rehnquist easy cases for the Court, with many of the most damaging cases being unanimous

68. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005).

69. *See generally* BARSH & HENDERSON, *supra* note 29, at 192–95; WILLIAMS, *supra* note 50, at 97–113; Johnson & Martinis, *supra* note 7.

70. 425 U.S. 463 (1976).

71. 358 U.S. 217 (1959).

72. *See, e.g.*, *Moe*, 425 U.S. at 475–83.

73. *See id.*

74. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195–212 (1978).

75. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

76. *See, e.g.*, United States v. Cherokee Nation, 480 U.S. 700, 707–08 (1987); Nevada v. United States, 463 U.S. 110, 127–28 (1983).

77. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–605 (1977).

78. 448 U.S. 371, 424 (1980) (Rehnquist, J., dissenting); WILLIAMS, *supra* note 50, at 118–22.

79. *See Sioux Nation*, 448 U.S. at 435, 437 (Rehnquist, J., dissenting) (quoting SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 539–40 (1965)).

decisions.[80] While some may now question the Rehnquist Court's success in its so-called "federalism revolution"[81] and other areas where it rolled back the jurisprudence of the Warren Court,[82] there is a strong argument that the Rehnquist Court did accomplish one very clear task—killing federal Indian law.

This Part offers a description of federal Indian law as it once was and how it is now after the end of the Rehnquist Court. These are two very different eras of federal Indian law.

A. FOUNDATIONAL PRINCIPLES OF FEDERAL INDIAN LAW

The true foundation of all of federal Indian law includes the treaties executed by Indian tribes and the federal government, alongside the thousands of acts of Congress relating to Indians and Indian tribes and thousands of federal regulations promulgated by federal agencies administering American Indian policy. In 1941, Felix and Lucy Cohen collected the entire body of treaties, statutes, and regulations and reduced them into one massive comprehensive treatise—the *Handbook of Federal Indian Law*, published by the United States Department of Interior.[83] The *Handbook* remains today the standard-bearer for the collection of federal statutory and treaty law applicable to Indians and Indian tribes, but it also remains the clearest source of the general principles and specific rules of federal Indian law. The *Handbook* and its successors (with one notable exception[84]) constitute one of the most successful treatises in American law.[85]

So much of federal Indian law is the federal law announced by the

80. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998).

81. Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 FORDHAM L. REV. 799, 808 (2006).

82. *See, e.g.*, Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995); Yale Kamisar, *The Warren Court (Was It Really so Defense-Minded?), The Burger Court (Is It Really so Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed., 1983).

83. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) [*hereinafter* COHEN, HANDBOOK 1942 ed.]; *see also* Lucy Kramer Cohen et al., *Felix Cohen and the Adoption of the IRA*, *in* INDIAN SELF-RULE: FIRST-HAND ACCOUNTS OF INDIAN-WHITE RELATIONS FROM ROOSEVELT TO REAGAN 70, 70–72 (Kenneth R. Philp ed., 1986).

84. The 1958 edition was the product of Termination Era Department of Justice attorneys to revise the *Handbook*—often without new or additional precedent—to reach conclusions contrary to (or limiting) the original conclusions favoring tribal sovereignty and Indian rights. *See* Vine Deloria, Jr., Book Review, 54 U. COLO. L. REV. 121, 123–24 (1982); Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1036–37 (1997).

85. The original edition (1942) has been cited by state and federal courts upwards of two hundred times; the 1982 edition has been cited over four hundred times; and the 2005 edition has already been cited several times by federal and state courts. The disgraced (disgraceful) 1958 edition was cited over one hundred times; however, many of these citations were to non-controversial portions of the *Handbook*.

Supreme Court.[86] Much of the basis for federal Indian law derives from what Charles Wilkinson called the Marshall Trilogy of cases[87]—*Johnson v. M'Intosh*,[88] *Cherokee Nation v. Georgia*,[89] and *Worcester v. Georgia*.[90] Chief Justice Marshall's majority opinions in *Johnson* and *Worcester*, alongside his lead opinion in *Cherokee Nation*, declared several critical and longstanding common law principles regarding the relationship between the federal government, states, and Indian tribes, and provided a template for analyzing and interpreting the law in relation to disputes between the three sovereigns.[91] The holdings of the cases, while significant, nonetheless are secondary to the reasoning of the cases, as Justice Baldwin asserted in his *Cherokee Nation* concurrence.[92]

Johnson famously adopted the Doctrine of Discovery as the foundation for land titles in the United States.[93] The Court held that Indian tribes did not own the land upon which they lived and used, but instead the European nations and their American successors acquired fee simple title in the land by virtue of discovering the land.[94] The Court announced that Indian tribes did have the right of possession and use, a right that could be extinguished only by the federal government through purchase or conquest.[95] *Johnson* became the first instance of what the Court now calls "implicit divestiture,"[96] or a finding by the Court that an

86. *See* CHARLES K. BURDICK, THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT § 107, at 313 (1922) ("These [constitutional provisions] leave untouched the general field of constitutional power to deal with Indian affairs, and it has been necessary for the Supreme Court to build up here a very considerable body of unwritten constitutional law." (discussing the Indian Commerce Clause and the Indians Not Taxed Clauses)).

87. WILKINSON, *supra* note 56, at 24.

88. 21 U.S. (8 Wheat.) 543 (1823).

89. 30 U.S. (5 Pet.) 1 (1831).

90. 31 U.S. (6 Pet.) 515 (1832).

91. *See generally* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 648–74 (2006).

92. *Cherokee Nation*, 30 U.S. (5 Pet.) at 32 (Baldwin, J., concurring).

93. *Johnson*, 21 U.S. (8 Wheat.) at 573. The case is a foundational case in most first-year property classes, appearing as one of the first cases excerpted in property casebooks. *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 3–9 (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 4–13 (4th ed. 2006); *see also* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 175–78 (2000).

94. *Johnson*, 21 U.S. (8 Wheat.) at 574. For background on whether the Doctrine of Discovery did confer fee title or a mere preemption right prior to *Johnson*, compare ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY (2006) (asserting fee title), with LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005) (asserting preemption right).

95. *Johnson*, 21 U.S. (8 Wheat.) at 574.

96. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) (defining "implicit divestiture" as "that part of sovereignty which the Indian implicitly lost by virtue of their dependent status"). For commentary on "implicit divestiture," see Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1053–67 (2006); Bethany R. Berger, *"Power over this Unfortunate Race": Race, Politics and Indian Law in* United States v. Rogers, 45 WM.

aspect of tribal inherent sovereignty has been divested[97]—not by an express Act of Congress[98]—but by implication through the lens of federal policy and national necessity[99] or, as the Court later stated, as a result of the dependency of Indian tribes upon the federal government.[100] *Johnson* recognized that history plays an important role in contextualizing Indian cases.[101]

The second case in the Trilogy, *Cherokee Nation*, held that Indian tribes were not "foreign nations" as used in the Constitution for purposes of the Court's original jurisdiction.[102] The opinion held that Indian tribes did retain aspects of nationality and created the label "domestic dependent nations" for Indian tribes,[103] a label that sticks today. The holding itself is very narrow, with Chief Justice Marshall's opinion being curt and somewhat conclusory.[104] Only one other Justice joined his lead opinion. Critical to the holding was the conclusion that Indian tribes are "dependent" on the United States, a conclusion reached through an interpretation of the Cherokee Nation's treaties where they consented to be "dependent" upon the United States for military protection.[105] Two

& MARY L. REV. 1957, 2046–49 (2004); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 371 (1994); Philip P. Frickey, *A Common Law for Our Age of Colonialism: A Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 43–48 (1999); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1160–64 (1990); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393–437, 437 n.243 (1993); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1595–1617 (1996); Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 800–05 (1996); and Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 270–80 (2000).

97. *See Johnson*, 21 U.S. (8 Wheat.) at 574 ("In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; *but were necessarily, to a considerable extent, impaired.*") (emphasis added).

98. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 147 (1982) ("Only the Federal Government may limit a tribe's exercise of its sovereign authority." (citing United States v. Wheeler, 435 U.S. 313, 322 (1978))).

99. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) ("*Tribal powers are not implicitly divested by virtue of the tribes' dependent status.* This Court has found such a divestiture in cases where the exercise of tribal sovereignty *would be inconsistent with the overriding interests of the National Government*, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights.") (emphasis added).

100. *See* United States v. Lara, 541 U.S. 193, 229 (2004) (Souter, J., dissenting) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)); Nevada v. Hicks, 533 U.S. 353, 359 (2001) (quoting Montana v. United States, 450 U.S. 544, 564 (1981)).

101. *See* Fletcher, *supra* note 91, at 677–81.

102. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

103. *Id.* at 17.

104. *See id.* at 15–20; Fletcher, *supra* note 91, at 639–42.

105. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18; Fletcher, *supra* note 91, at 649–54.

Justices wrote stinging concurrences arguing that Indians and Indian tribes were too degraded and insignificant to meet the international law definition of "nation" at all, and agreeing that Indian tribes were dependent.[106] Justice Thompson, joined by Justice Story, later added a dissent that argued for finding that Indian tribes such as the Cherokee Nation are foreign nations, whether understood to be so by the Founders or not.[107] Applying international law principles, the dissent argued that the Cherokee Nation did not lose its status as a foreign nation by virtue of agreeing to be dependent on the United States for military protection any more than (using more contemporary analogs) Monaco or the Vatican loses its status as a nation by virtue of their military dependence on their host countries.[108]

The final piece of the Trilogy is *Worcester*, where Chief Justice Marshall's opinion garnered a five to one majority holding that the laws of the State of Georgia do not extend into Indian Country where they conflict with federal laws or Indian treaties.[109] *Worcester* laid the framework for analyzing disputes involving Indian tribes by looking first and foremost to Indian treaties[110] and then Acts of Congress.[111] The opinion departed from *Cherokee Nation*'s labeling of Indian tribes as "domestic dependent nations" and adopted the reasoning of the dissenters in *Cherokee Nation*, dropping the label "domestic dependent nation" in favor of "distinct, independent political communities."[112] Of course, Chief Justice Marshall retired a few years later and no later opinion adopted this phrase or extended the reasoning. In the last few decades, the Court almost never cites *Worcester* for any proposition other than the undisputed tenet that tribes retain some sovereignty.[113] The Court has long ago departed from the platonic notion that state law has no force in Indian Country.[114]

106. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 23–27 (Johnson, J., concurring); *id.* at 48–51 (Baldwin, J., concurring).

107. *See id.* at 50–53 (Thompson, J., dissenting).

108. *See id.* at 53.

109. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

110. *See id.* at 547 (interpreting the treaty term, "protection"); *id.* at 553–54 (interpreting the treaty term, "manage all their affairs").

111. *See id.* at 540–41 (reviewing the Trade and Intercourse Acts).

112. *Id.* at 557–58.

113. Citations to *Worcester*'s principles now are made more often in dissent. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 147 n.40 (1996) (Souter, J., dissenting); Hagen v. Utah, 510 U.S. 399, 423 n.2 (1994) (Blackmun, J., dissenting); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 791–92, 795 (1991) (Blackmun, J., dissenting); Duro v. Reina, 495 U.S. 676, 705 n.3 (1990) (Brennan, J., dissenting).

114. *See* Nevada v. Hicks, 533 U.S. 353, 361 (2001) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)); *see also* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 762 n.2 (1998) (Stevens, J., dissenting) ("'The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Virginia*, that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent

Critical foundational principles of federal Indian law originated with the Trilogy. First, Indian tribes and individual Indians did not own their traditional and aboriginal territories in fee simple—the United States did.[115] Second, federal authority in the field of Indian affairs is both plenary (by virtue of Indian dependency) and exclusive (by virtue of federal constitutional supremacy).[116] Third, Indian tribes are nations and retain their sovereign authority except as limited by the federal government.[117] Other less significant but important questions originated in the Trilogy as well. For one, the Court held that Indian treaties must be interpreted as the Indians would have understood them.[118] While the Court is not always faithful to this canon of construction—even in the Trilogy[119]—the rule is an important part of federal Indian law and even extends to the interpretation of statutes enacted for the benefit of Indians or Indian tribes.[120] For another, the Court's conclusions about tribal dependency and weakness provided the theoretical basis for the special relationship between Indian tribes and the federal government, a relationship often referred to as a trust relationship.[121] According to the Court, tribal dependency requires the government to treat Indians and tribes with special fairness and consideration.[122] While the Court often refused to condemn federal government actions that appeared to violate this special trust relationship,[123] the concept remains an important part of federal Indian law and federal Indian policy to this day.[124]

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developments, with diverse concrete situations.'" (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)) (internal citations omitted)); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257 (1992) (quoting *Worcester*, 31 U.S. (6 Pet.) at 557, but then asserting: "The 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway"); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 451 nn.1–2 (1988) (Blackmun, J., concurring in the judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 527 (1986) (Blackmun, J., dissenting).

115. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

116. *See Worcester*, 31 U.S. (6 Pet.) at 557–58, 561.

117. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15–20 (1831); COHEN, HANDBOOK 1942 ed., *supra* note 83, § 1, at 122.

118. *See Worcester*, 31 U.S. (6 Pet.) at 546–47.

119. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18 (interpreting the treaty term "protection" to the detriment of the Cherokee Nation).

120. *See* COHEN'S HANDBOOK 1982 ed., *supra* note 29, § 2.02, at 119–28. *But cf.* Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) ("Nor can one say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue.").

121. *See* COHEN'S HANDBOOK 1982 ed., *supra* note 29, § 5.04[4], at 418–23.

122. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886).

123. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (refusing to require the United States to pay just compensation for taking of tribal property); Lone Wolf v. Hitchcock, 187 U.S. 553, 566–68 (1903) (allowing Congress to unilaterally abrogate an Indian treaty).

124. *See* COHEN'S HANDBOOK 1982 ed., *supra* note 29, § 5.04[4][a], at 419 ("Today the trust doctrine is one of the cornerstones of Indian law.").

B. THE EROSION OF THE FOUNDATION

Much like the Contracts Clause jurisprudence of the Marshall Court,[125] the Marshall Court's Indian law jurisprudence has eroded over time, although it took a much longer time. The Court's decisions of the past twenty years, in particular, have been at odds with the foundational principles as articulated by the Marshall Court, but the Court has not gone so far as to overrule any of the cases in the Trilogy.[126] In fact, as some scholars suggest, the Court appears to take the easy way out by simply ignoring those foundational cases.[127] This recent jurisprudence appears sloppy, leading some scholars to suggest that the Rehnquist Court was laden with animus toward Indians and tribes.[128] As the Court itself sometimes recognizes, its decisions in the field are contradictory or even schizophrenic.[129] The Court appears very uncomfortable and suspicious of Indian tribes because the Constitution does not incorporate them into "Our Federalism"[130] and, as a result, the Court's supervisory power over tribal courts is very limited.[131] The Court also appears very

125. Stewart E. Sterk, *The Continuity of Legislatures: Of Contracts and the Contracts Clause*, 88 COLUM. L. REV. 647, 648, 685–86 (1988) (acknowledging that many commentators believed the Contracts Clause was "dead" from the Depression Era until the 1970s or 1980s). *See generally* Horace H. Hagan, *The Dartmouth College Case*, 19 GEO. L.J. 411 (1931); Horace H. Hagan, *Fletcher vs. Peck*, 16 GEO. L.J. 1 (1927).

126. *See* Hope M. Babcock, *A Civic-Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 471.

127. *Cf.* Getches, *supra* note 11, at 1594, 1654.

128. *See generally* WILLIAMS, *supra* note 50, at 131–33 (arguing that at least some of the Court's members are "aversive racists," persons who make racist decisions without ever admitting or even acknowledging their racism).

129. *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring); *see also* Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, The Indian Civil Rights Act, The Clean Water Act, and Justice Thomas's Separate Opinion in* United States v. Lara, 40 TULSA L. REV. 137, 148 (2004) ("It is my opinion, of course, that it is possible to hold two contradictory thoughts in one's mind at one time, and that the complexity of the law requires it. Of course, American Indian law is schizophrenic. So is the Clean Water Act. So is the common law of contracts. So is the war in Iraq."); Skibine, *supra* note 39, at 267 ("With two hundred years worth of un-discarded baggage, and antiquated and often contradictory theories, the Supreme Court's current jurisprudence in the field of federal Indian law has mystified both academics and practitioners.").

130. *See Lara*, 541 U.S. at 218–19 (2004) (Thomas, J., concurring). *See generally* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28 (2006), http://www.harvardlawreview.org/forum/issues/119/dec05/skibine.pdf.

131. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855–57 (1985) (holding that a federal court may have jurisdiction over tribal court cases but only to the extent necessary to decide tribal court jurisdiction); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71–72

uncomfortable with federal plenary and exclusive power over Indian affairs where the single provision in the Constitution that authorizes federal control only relates to commerce with Indian tribes.[132] Perhaps most importantly, as Professor Phil Frickey argues, the Court is uncomfortable with being unable to reconcile federal Indian law with the rest of its constitutional jurisprudence.[133]

One can make a reasonable argument that the Court's decisions in the field from 1832's *Worcester v. Georgia* until 1959's *Williams v. Lee* amounted to little more than an interregnum where the Court announced very little federal Indian law. That period could be best be characterized as a period in which an incredible, rich, and devastating history of federal Indian policy landed on Indian people[134] while the Court stood by and watched like the house by the side of the road (as Ernie Harwell would say), citing to the political question doctrine whenever a difficult Indian law question arose.[135]

But *Williams* offered a dramatic interruption of that period in a short opinion by Justice Black that recognized the exclusive authority of tribal courts to adjudicate matters arising out of Indian Country.[136] The holding in *Williams* was consistent with the Trilogy's foundational principles that state law did not extend into Indian Country and that Indian tribes retain aspects of sovereignty not expressly divested by Congress.[137] The result helped to vitalize the development of tribal courts and tribal governments,[138] a development that continues today at an impressive rate.[139]

In the first part of the modern era, from 1959 to about 1986, a time I

(1978) (holding that the Indian Civil Rights Act did not create a cause of action in federal courts except in criminal cases).

132. *See, e.g.*, *Lara*, 541 U.S. at 215 (2004) (Thomas, J., concurring).

133. *See generally* Frickey, *supra* note 12, at 36.

134. *See* COHEN'S HANDBOOK 1982 ed., *supra* note 29, §§ 1.03[4]–1.06, at 45–96 (describing federal Indian policy from 1815 to 1961).

135. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902); United States v. Kagama, 118 U.S. 375, 383–84 (1886); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865); *cf.* Del. Indians v. Cherokee Nation, 193 U.S. 127, 144 (1904) (holding that a dispute between Indian tribes is a tribal political question not subject to federal court review); Roff v. Burney, 168 U.S. 218, 222 (1897) (holding that a tribal membership dispute is a tribal political question).

136. Williams v. Lee, 358 U.S. 217, 220–21 (1959).

137. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832).

138. *Cf.* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 91 (1995) (noting that tribes have "an enduring responsibility to provide a local forum for adjudication of cases").

139. *See generally* B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998); Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313 (1997).

have called the "permissive modern era,"[140] tribal interests were victorious before the Court in a large majority of cases. Professor Alex Skibine estimated recently that tribal interests won just under 60% of their cases before the Court during this time.[141] While there were significant losses later in the period, such as *Oliphant v. Suquamish Indian Tribe*,[142] *Montana v. United States*,[143] and *Washington v. Confederated Tribes of the Colville Indian Reservation*[144] (all of which were driven by Justice Rehnquist), the Court abided by the Trilogy's foundational principles in large measure. The Court's decisions in the area of taxation—cases such as *Central Machinery v. Arizona Tax Commission*[145] and *Merrion v. Jicarilla Apache Tribe*[146]—recognized the general rule of tribal immunity from state taxation and recognized the inherent sovereign authority of Indian tribes to tax those within their jurisdictions. *United States v. Wheeler* cemented tribal criminal jurisdiction over tribal members in Indian Country.[147] That case also reaffirmed that tribal governments are separate sovereigns.[148] Additionally, Justice Marshall's decision in *National Farmers Union Insurance Cos.* in 1985 provided a framework for the eventual recognition of tribal court judgments in federal court.[149]

Several surprising, even disturbing, lines of cases followed the ascension of Chief Justice Rehnquist in 1986. A superficial review of these decisions is helpful for now.

First, the Court began to reinterpret its 1981 decision, *Montana v. United States*,[150] to expand its meaning far beyond the very narrow factual situation presented in that case.[151] The Court's decisions in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[152] and *South Dakota v. Bourland*[153] served to rewrite the relationship between Indian tribes and nonmembers located within their territorial jurisdiction by adopting a presumption that Indian tribes do not have jurisdiction over

140. Matthew L.M. Fletcher, *The Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 99–101 (2007).

141. *See* Skibine, *supra* note 45, at 781.

142. 435 U.S. 191 (1978).

143. 450 U.S. 544 (1981).

144. 447 U.S. 134 (1980).

145. 448 U.S. 160 (1980).

146. 455 U.S. 130 (1982).

147. 435 U.S. 313, 323–24 (1978).

148. *Id.* at 323.

149. 471 U.S. 845, 857 & n.25 (1985) (citing tribal court cases).

150. 450 U.S. 544 (1981).

151. *See* Judith V. Royster, Montana *at the Crossroads*, 38 CONN. L. REV. 631, 631 (2006) (describing efforts of Justice Souter to expand the *Montana* general rule).

152. 492 U.S. 408 (1989).

153. 508 U.S. 679 (1993).

nonmembers.[154] This is the opposite of the meaning of the *Worcester* case. For some commentators (and the Court), *Montana* is now the foundational case for the current Court, overruling by implication the *Worcester* decision.[155] The Court now treats *Montana* as the criminal jurisdiction parallel to *Oliphant*, creating the expectation that, sometime in the near future, the Court will adopt a bright-line rule eliminating civil jurisdiction over nonmembers, just as it adopted a bright-line rule in *Oliphant* eliminating criminal jurisdiction over nonmembers.[156]

A concomitant result of the expansion of *Montana* is the deterioration of the adjudicatory jurisdiction of tribal courts that the Court is willing to recognize. In *Strate v. A-1 Contractors*,[157] perhaps the most damaging case of all the Rehnquist Court's Indian law decisions,[158] the Court called *Montana* the "pathmarking" case in the field,[159] and sharply limited the exceptions to the *Montana* rule[160]—the so-called *Montana 1* and *Montana 2* exceptions.[161] Tribal advocates had presumed that the Court would invoke the *Montana 2* exception in cases where the clear focus of the case was in Indian Country,[162] but instead the *Strate* Court all but defined the exceptions out of existence. The Court's decision in *Strate* came close to being the case that adopted a bright-line rule eliminating tribal civil jurisdiction over nonmembers, but the Court's decision in *Nevada v. Hicks*[163] came even closer, with Justice Souter's concurring opinion providing an argument that tribal law is "unusually difficult for an outsider to sort out" as justification for adopting the bright-line rule.[164]

Second, in *Duro v. Reina*,[165] the Court attempted to expand its prohibition on tribal criminal jurisdiction over non-Indians, which it had

154. *See* John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting Room Floor*, 38 CONN. L. REV. 731, 744–47 (2006); Royster, *supra* note 151, at 636–37; Skibine, *supra* note 39, at 298.

155. *See, e.g.*, Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 86–87 (2003); Singer, *supra* note 55, at 652. *See generally* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (designating *Montana* as the "pathmarking" case).

156. This is the "open question" as designated by Justice Scalia in *Nevada v. Hicks*, 533 U.S. 353, 358 n.2 (2001).

157. 520 U.S. 438 (1997).

158. *Cf.* Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. L. 357, 384 (2003) ("The Court's opinion in *Strate v. A-1 Contractors* continued the conception of tribal sovereignty as one essentially limited to tribal members.").

159. *Strate*, 520 U.S. at 445.

160. *See id.* at 456–59; LaVelle, *supra* note 154, at 755–59.

161. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

162. *See* Brief of Petitioners at 8–11, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

163. 533 U.S. 353 (2001).

164. *Id.* at 384–85 (Souter, J., concurring).

165. 495 U.S. 676 (1990).

already done in *Oliphant*,[166] by holding that tribes cannot have criminal jurisdiction over nonmember Indians.[167] Congress quickly enacted the "*Duro* Fix,"[168] but the doctrinal damage had been done.[169] *Oliphant* was the first case to utilize the doctrine of implicit divestiture since the Trilogy.[170] Each time the Court finds that an area of tribal sovereign authority has been implicitly divested adds an amount of legitimacy to the doctrine by piling precedent on top of creaky precedent. Ironically, one could argue that the "*Duro* Fix" itself served to codify the practice, leaving the Court to believe that Congress acquiesces in the judicial divestiture of tribal government authority unless it enacts legislation to reverse the decisions.

Third, the Court declared some Indian reservations disestablished, such as in *South Dakota v. Yankton Sioux Tribe*,[171] or diminished, as in *Hagen v. Utah*,[172] and redefined the term "Indian Country" by making the astounding declaration that there was no Indian Country in Alaska in *Alaska v. Native Village of Venetie*.[173] Part and parcel of these cases was the severe devaluation of the canons of construction for Indian treaties and statutes.[174]

Fourth, the Court's Indian taxation jurisprudence, based in part on a balancing test developed in part by then-Justice Rehnquist in *Moe v.*

166. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

167. *Duro*, 495 U.S. at 688.

168. *See* United States v. Lara, 541 U.S. 193, 197–98 (2004). *See generally* Nell Jessup Newton, Commentary, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992); Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

169. After the Supreme Court decided *Duro v. Reina*, 495 U.S. 676 (1990),

> Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe. That new statute, in permitting a tribe to bring certain tribal prosecutions against nonmember Indians, . . . enlarges the tribes' own "'powers of self-government'" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians," including nonmembers.

Lara, 541 U.S. at 197–98 (emphases omitted) (citations omitted).

170. *See* United States v. Wheeler, 435 U.S. 313, 326 (1978). The Court listed three areas in which it recognized implicit divestiture:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. Thus, Indian tribes can no longer freely alienate to non-Indians the land they occupy. They cannot enter into direct commercial or governmental relations with foreign nations. And, as we have recently held [in *Oliphant*], they cannot try nonmembers in tribal courts.

Id. (citations omitted).

171. 522 U.S. 329 (1998).

172. 510 U.S. 399, 421–22 (1994).

173. 522 U.S. 520, 527 (1998). For a powerful dissection of *Venetie*, see Carpenter, *supra* note 59.

174. *See, e.g.*, *Hagen*, 510 U.S. at 424 (Blackmun, J., dissenting) ("Although the majority purports to apply these canons in principle, it ignores them in practice, resolving every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation." (citation omitted)).

Confederated Salish & Kootenai Tribes of the Flathead Reservation,[175] became a muddled mess as the Court, from the point of view of tribal interests, interpreted any factor as against the tribal interests. In this area, the Court looks carefully for hints that tribal interests are "market[ing] the exemption."[176] Whenever the Court sniffs this intent, the tribal interests do not succeed.[177]

Fifth, the Court held in *City of Sherrill v. Oneida Indian Nation* that equitable defenses applied in cases where Indian tribes or the United States made claims related to historical treaty rights or land dispossession.[178] Since that decision, and a lower court decision dismissing long-standing and powerful Indian land claims in New York state,[179] many Indian treaty claims may be subject to dismissal on the basis of equitable defenses. With one casual opinion in a tax case, the Court may have changed the entire face of federal Indian law, adopting a rule that it had been rejecting on a consistent basis for several decades.[180]

In short, the last twenty years have seen the Rehnquist Court go out of its way to roll back federal Indian law jurisprudence, creating a new jurisprudence that benefits states, local governments, and private property owners that come into contact with tribal interests.

III. REVISITING THE INDIAN CASES

This Article offers an argument that perhaps it is now time to recognize that the field of federal Indian law as argued before the Supreme Court is dead. Traditional scholarship and advocacy has failed to persuade the Court that its Indian cases should be decided in a different way. Perhaps at one time, the Court agreed to hear Indian cases on their own merits, but with the Court's shrinking docket, that might no longer be the case. This Article proposes to look at the Indian law decisions of the Rehnquist Court (and now the Roberts Court) with an eye toward finding broader constitutional and pragmatic concerns that interest the Court.

A. THE SHRINKING SUPREME COURT DOCKET

Chief Justice Rehnquist's leadership was almost without precedent

175. 425 U.S. 463, 480 (1976). For a discussion of *Moe*, see BARSH & HENDERSON, *supra* note 29, at 189–96.

176. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980).

177. *See, e.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Dep't of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994).

178. 544 U.S. 197, 217–20 (2005).

179. *See* Cayuga Indian Nation v. Pataki, 413 F.3d 266, 273–80 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006); *see also* Shinnecock Indian Nation v. New York, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006).

180. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 n.27 (1985).

in the history of the Supreme Court. There can be no serious doubt that he brought a great deal of stability and legitimacy to a Court shaken by the erratic leadership of Chief Justice Burger. One of the salient features of the Rehnquist Court was the decline in the Court's docket. In the final Term of the Burger Court, the Court heard and decided 159 cases.[181] By the end of the Rehnquist Court, the Court heard and decided only about eighty cases in the 2004 Term.[182]

The Court's smaller docket is loaded with cases required to resolve a split in authority between jurisdictions, part of its oversight power over federal courts, and a few significant constitutional law cases that attract the Court's interest.[183] According to Judge Posner, there tends to be one kind of case the Court now hears—"rule-imposing decisions" in which the Court attempts to "tidy up a field by announcing a crisp rule or standard."[184] Professor Schauer argues in turn that while the Court's ability to decide cases as it chooses remains viable, the Court's actual "agenda" (if it can be called that) was far from "the public's major issues of concern [and] the nation's first-order policy decisions."[185] While at one time, Judge Posner posits, when the lower courts decided fewer cases, the Court could serve in a supervisory position over the lower courts,[186] "[t]he Court has long emphasized that it is not in the business of correcting the errors of lower courts."[187] Of course, these analyses beg the question—why does the Court grant certiorari in the cases it does?

Most commentators and studies suggest that an important constitutional concern drives the Court to vote to grant certiorari in many cases.[188] Professors George and Solimine's study of the Court's decisions to grant certiorari in cases decided by the federal courts of appeals sitting en banc affirmed their hypothesis that a conservative Supreme Court is more likely to hear liberal civil rights decisions by lower courts.[189] Another study hypothesized and then concluded that

181. *See The Supreme Court, 1985 Term—Leading Cases*, *supra* note 62, at 311.

182. *The Supreme Court, 2004 Term—The Statistics*, *supra* note 62, at 430.

183. *See generally* Posner, *supra* note 9; Frederic Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 HARV. L. REV. 4 (2006).

184. Posner, *supra* note 9, at 37.

185. Schauer, *supra* note 183, at 31–32.

186. *See* Posner, *supra* note 9, at 35.

187. *Id.* at 37.

188. *See, e.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 260 (1991); Lee Epstein et al., *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395, 408 (2002); Tracey E. George & Michael E. Solimine, *Supreme Court Monitoring of the United States Courts of Appeals En Banc*, 9 SUP. CT. ECON. REV. 171, 197–98 (2001); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *in* JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963); *cf.* LAURENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 156 (2006) (discussing "issue salience"); *See generally* SUP. CT. R. 10 ("Considerations Governing Review on Certiorari").

189. *See* George & Solimine, *supra* note 188, at 198 ("And our finding that the conservative

"[b]ecause Congress cannot easily override constitutional decisions, . . . the Justices will accept a higher proportion of constitutional cases, as opposed to statutory ones."[190] The same commentators believed that

> [i]n the agenda-setting context, [the Court's] strategizing would take the form of opting out of a statutory mode and into a constitutional one, either by (1) rejecting a petition that requires [it] to interpret a federal act, in favor of one that raises constitutional questions; or (2) focusing on constitutional claims contained in a petition, rather than on those of a statutory nature.[191]

Moreover, the Court may be in a position to "create constitutional rules that are extraordinarily difficult, if not impossible, for Congress to override" because of its certiorari power.[192]

What this seems to suggest is that the Court likely is not going to accept an appeal on an Indian law matter unless there is a circuit split.[193] It would seem that federal Indian law on its own does not rise to the level of importance or significance—as defined by legal and political elites—to justify taking up space on the Court's docket. Even before the Rehnquist Court began to limit the Court's docket, the Justices famously denigrated the importance (to them) of the Indian cases.[194] Moreover, the unusual character of the Indian cases—generating a significant amount of confusion amongst those who are not experienced in the field—would seem to compel the Court to stay away.[195] Finally, with Chief Justice

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Rehnquist Court was much more likely to review liberal circuit rulings is consistent with the attitudinal model and with the strategic account of high court agenda-setting.").

190. Epstein et al., *supra* note 188, at 395.

191. *Id.* at 408 (emphasis omitted).

192. *Id.* at 430.

193. *See, e.g.*, BP Am. Prod. Co. v. Burton, 127 S. Ct. 637, 643 (2006); Cherokee Nation v. Leavitt, 543 U.S. 631, 636 (2005); United States v. Lara, 541 U.S. 193, 198–99 (2004); Negonsott v. Samuels, 507 U.S. 99, 101–02 (1993); *cf.* C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 410–11 (2001); Hagen v. Utah, 510 U.S. 399, 408–09 (1994).

194. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 57–58 (1979) (reporting that Justice Harlan referred to *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), as a "peewee" case); *id.* at 359 (reporting that Justice Brennan referred to *United States v. Antoine*, 420 U.S. 194 (1977), as a "chickenshit" case); *see also* PERRY, *supra* note 188, at 262 (quoting a Supreme Court Justice as saying, "The junior justices always get the crud. As a junior justice, I had my share of Indian cases"); Neil M. Richards, *The Supreme Court Justice's "Boring" Cases*, 4 GREEN BAG 2d 401, 403 (2001) (quoting Justice Brennan's view of *Antoine*). *But cf.* PERRY, *supra* note 188, at 262 (quoting a Supreme Court Justice as saying, "Actually, I think the Indian cases are kind of fascinating. It goes into history and you learn about it, and the way we abused some of the Indians, we, that is the U.S. government").

195. The words of one former Supreme Court clerk could support this theory:

> As a former Supreme Court law clerk, allow me to speculate on what would have happened had Justice Souter asked his law clerks for help in finding out about tribal courts. (I do not know if he asked this question.) When I was a clerk, in 1979–80, our best research tools were the excellent research librarians of the Supreme Court library. If asked by my justice, Thurgood Marshall, to find out all I could about tribal courts—a subject about which I knew nothing—I would have turned over the inquiry to one of them. In a few days, I would have received whatever she or he could locate in the Supreme Court library, the Library of Congress, and wherever else materials could be found. There is no way even to guess what

Rehnquist and Justice O'Connor having been replaced by Chief Justice Roberts and Justice Alito, the personal interest in Indian law of those departed "Westerners" would seem to portend a further decline in Indian law certiorari grants.[196] In relative terms, these cases are rare and affect few people. Only about a quarter of law schools even offer Indian Law as a class.[197] A limited number of law professors know enough about Indian law to be able to discuss the issues in the field with any competence. Every Indian lawyer has an anecdote about a law professor dismissing an Indian law case as being the exception to the rule not worth discussing.[198]

And yet the Court always accepts more Indian cases for review than the field would appear to justify given the Court's limited interest in Indian affairs.[199] Perhaps this is explained by the fact that the Supreme Court's opportunity to make law, as a matter of common law, exists only in admiralty law and federal Indian law.[200] If the Court's current caseload of about eighty cases holds in the Roberts Court, then if the Court accepts two Indian law cases a year,[201] 2.5% of its docket will continue to be Indian law-related. In the 2006 Term, the Court decided two cases involving tribal interests.[202] What attracts the Court to federal Indian law?

> those materials would include. Today, a quarter-century after I was a law clerk, one would speculate that the clerks would also take advantage of computer-assisted research. For example, it would seem likely that they would search for "tribal court" using one or more Internet search engines. And it would be beyond the scope of anyone's imagination what might result from such searches. The task of separating the small amount of wheat from the vast array of chaff would initially fall upon the clerks, who would almost certainly have no expertise to bring to bear.

Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 665 (2006).

196. *See* PERRY, *supra* note 188, at 261 ("And from a Westerner [Supreme Court Justice]: 'We now have three Westerners [Chief Justice Rehnquist and Justices Kennedy and O'Connor] and we are very concerned about Western water rights and Indian cases.'").

197. *See* Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741, 745–46 (2006).

198. *Cf.* Brief of the University of Michigan Asian Pacific American Law Students Ass'n et al. as Amici Curiae in Support of Respondents at 10, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *reprinted in* 10 MICH. J. GENDER & L. 7, 14 (2003).

199. *See, e.g.*, Getches, *supra* note 37, at 292 n.109 ("From 1958 to 2000, about 2.4% (121 of 4,853 cases) of the Court's total decisions on the merits were Indian cases. In the Rehnquist Court (1986–2000 Terms), about 2.7% (41 of 1,510 cases) of the decisions have been in Indian cases. The average number of Indian cases decided has dropped in recent years, but the percentage of Indian cases has remained the same because the overall number of cases decided by the Court has fallen drastically."); *see also id.* at 292–93.

200. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-23, at 157 (2d ed. 1988) (noting that the Constitution authorizes the Court to make federal common law where "the usual federalism concerns are not relevant," such as admiralty). The Author thanks Joe Singer for raising this point.

201. From 1953 to 2000, the Court decided an average of 1.9 Indian law cases per year. *See* BAIRD, *supra* note 5, at 105.

202. *See* BP Am. Prod. Co. v. Burton, 127 S. Ct. 637, 643 (2006); Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ., 127 S. Ct. 1534 (2007).

B. Broader Constitutional Concerns at Play

While the Court will grant certiorari to resolve circuit splits, those cases do not cover the entirety of the Court's Indian law caseload.[203] This Article argues that most Indian law cases reach the Court because there is a constitutional issue embedded in the case that attracts the Court's attention. This Article will refer to these issues as "constitutional concerns." This Article further argues that while the Court may decide concomitant federal Indian law issues as part of the overall decision, the constitutional concern is what drives the Court, not the Indian law questions. As a result, because the constitutional concern is far more important to the Court than the Indian law questions, the Court decides the Indian law questions in line with the broader constitutional concern. Only after deciding the constitutional concern does the Court turn to the remainder of the case—the Indian law portion—that also must be decided. It is in these circumstances that the Indian law doctrines, far less salient to the Court and therefore far more malleable, become more confused and even, as Professor Frickey argued, "ruthlessly pragmatic."[204]

All things must start at the beginning, so we first turn to the Marshall Trilogy. Consider *Worcester v. Georgia*,[205] the critical foundational case of federal Indian law described at the beginning of this Article. Justice Breyer has spoken recently about this case.[206] Although

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203. For example, several Indian law cases in recent Terms did not reach the Court because of a split in authority, but for some other reason. *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005); Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Cmty. of the Bishop Colony, 538 U.S. 701 (2003); Nevada v. Hicks, 533 U.S. 353 (2001); Idaho v. United States, 533 U.S. 262 (2001); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Rice v. Cayetano, 528 U.S. 495 (2000). Two other cases, *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), and *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), while not Indian law cases per se, involved tribal interests and could be included in this listing.

204. Frickey, *supra* note 12, at 460; *see also id.* at 436 (discussing the Court's "ruthless pragmatism").

205. 31 U.S. (6 Pet.) 515 (1832).

206. *See* Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 8–9 (2005) [hereinafter Breyer, *Reflections*]; Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 413–14 (2000). Justice Breyer's remarks are worth reprinting here:

> Consider an important case—one that is often forgotten in courses on constitutional law—from 1832 called *Worcester v. Georgia*. There was a tribe of Indians, the Cherokees, who, under a treaty with the United States, had land in northern Georgia. Now, this tribe had given up hunting and fishing for better or for worse. They were farmers, they had an alphabet, they even had a constitution. Unfortunately for them they found gold. I say unfortunately because the Georgians then took the land. They simply marched in and took it over. They paid no attention to the treaty. They did pay attention to the gold.
>
> Now as I said this particular tribe of Indians was pretty civilized. So what did they do? They did what any civilized American would do; they hired a lawyer. The lawyer was the best lawyer of his day, Willard Wirt, former Attorney General of the United States, and he said, "We are going to bring a lawsuit and we are going to fight it all the way to the Supreme Court." In fact, they brought two.

Justice Breyer is one of few Justices to have visited Indian Country to become more aware of the conditions on the ground,[207] it is doubtful that he incorporated *Worcester* into his public speeches for that reason. *Worcester* is not an Indian law case. Before hearing *Worcester*, the State of Georgia had defied a Supreme Court order staying the execution of a Cherokee man by the state for murder—they executed the man almost as soon as they received the order staying the execution.[208] Strong circumstantial evidence supports the notion that the Court must have had Georgia's defiance in mind when they decided *Worcester*.[209] In *Worcester*, Georgia had convicted four missionaries, and sentenced them to several years of hard labor, for violating a state law that prohibited

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> In the first, called *Cherokee Nation v. Georgia*, they simply sued Georgia, and the Supreme Court eventually found a reason not to hear it. The Court said this is a matter beyond our capability. But then the Georgians passed a law making it a crime to go on the Indian Reservation without the permission of the Georgia legislature. Some missionaries did go on the reservation. A missionary called Worcester was arrested. He was in jail and he brought a lawsuit, in habeas corpus or the equivalent, and said, "I cannot be held here because this land belongs to the Indians, not the Georgians, so Georgia law does not apply." There was no way for the Supreme Court to avoid that. Here is a person, he is held in prison, he says I am not held correctly under the law because there is no law of Georgia that applies, and he asks the Court to order his release. After a lot of procedural detail, which I will spare you, he got to the Court and the Court decided the case. The Court held that he was right, the land belonged to the Indians. In fact, the Court said the Georgians had no basis at all for being there. That is the end of the matter. Release Worcester. Give the land back to the Indians.
>
> The first thing the Georgia legislature did was pass a law that said anyone who comes to Georgia to enforce this ruling of the Supreme Court will be hanged. Andrew Jackson, President of the United States, supposedly said (and he said enough such things that it is probably true): "John Marshall, the Chief Justice, has made his decision. Now let him enforce it." Nobody did a thing.
>
> But then North Carolina, thinking this rather a good idea, said, "We will not give the United States customs duties that we owe them because we prefer to keep them." Andrew Jackson woke up to the problem and he ended up saying to the governor of Georgia, "You must release Worcester." They had a negotiation and Worcester was let out of jail.
>
> But what about the land—the land that the Supreme Court of the United States had said belongs to the Cherokees, not to the Georgians? The President sent troops to Georgia. But did he send them to enforce the ruling of the Supreme Court of the United States? No. He sent troops to evict the Indians. They walked along what is historically known as the Trail of Tears, to Oklahoma, where their descendants live to this day.

Breyer, *Reflections*, *supra*, at 8–9.

207. *See* Danelle J. Daughtery, *Children Are Sacred: Looking Beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. REV. 282, 297 n.133 (2002) (describing Justices Breyer and O'Connor's visit to several tribal courts); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 68 n.129 (2006) (referencing Bruce Bothelo, who, as Attorney General for the State of Alaska, hired John G. Roberts to represent Alaska in *Alaska v. Native Village of Venetie Tribal Government*, 520 U.S. 522 (1998), and brought him to visit an isolated Alaskan Native village prior to the Supreme Court argument). *See generally* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997).

208. *See* GARRISON, *supra* note 18; *see also* Georgia v. Tassels, 1 Dud. 229 (Ga. 1830).

209. *See* Fletcher, *supra* note 91, at 643–44; *cf.* Breyer, *Reflections*, *supra* note 206, at 9 (noting that President Jackson, an ardent states' rights advocate, convinced southern states to comply with federal law).

white men from setting foot in Cherokee Nation territory.[210] The law, part of a whole series of laws aimed at destroying the Cherokee Nation as a viable political presence in Georgia,[211] violated federal treaties between the federal government and the Cherokee Nation.[212] The case had powerful implications for federal Indian law, but those concerns were secondary to the broader constitutional concerns of the supremacy of federal law over conflicting state law and the question of the enforceability of Supreme Court mandates.

Compare *Worcester* to the previous case in the Marshall trilogy, decided only a year before, *Cherokee Nation v. Georgia*.[213] In that case, one member of the Court argued that Indians were worthless savages and Indian tribes were not viable political entities.[214] Another Justice, following Chief Justice Marshall's lead opinion, voted on narrower grounds but agreed that Indians and Indian tribes were weak and dependent.[215] The Marshall Court was badly fractured over the case, a function of the declining influence of the aging Chief Justice and the increasing hostility toward federal authority from the newer appointees to the Court.[216] But a year later, because of the powerful and dangerous potential of the State of Georgia's defiance of federal law in *Worcester*, the Court issued a dramatic reversal of its position on tribal interests.[217] That reversal did not derive from a newfound appreciation of the plight of the Cherokee Nation at all. Perhaps that reversal happened because the Court began to understand the implications of state defiance of federal law that was beginning to happen in the South. Indian law scholars and advocates take from *Worcester* that the Court had affirmed the separate character of tribal sovereignty and the exclusion of state law from Indian Country, but perhaps the bigger question was whether state legislatures could override federal law.[218]

A more acute pattern—with the Court responding to broader

210. *See Worcester*, 31 U.S. (6 Pet.) at 537–41.

211. *See* Joseph C. Burke, *supra* note 30, at 503; Vine Deloria, Jr., *Conquest Masquerading as Law*, *in* UNLEARNING THE LANGUAGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA 94, 98 (Wahinkpe Topa (Four Arrows) ed., 2006).

212. *See Worcester*, 31 U.S. (6 Pet.) at 560.

213. 30 U.S. (5 Pet.) 1 (1831).

214. *See id.* at 25 (Johnson, J., concurring) (referring to the Cherokee Nation as a "petty kraal of Indians").

215. *Id.* at 40 (Baldwin, J., concurring).

216. *See* CURRIE, *supra* note 29, at 195–96.

217. *See* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 87 (1968); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 66–67 (2006).

218. *See* Breyer, *Reflections*, *supra* note 206, at 9; Burke, *supra* note 29, at 530; Gerald N. Magiococca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 550 (2002); Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflections on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 116–17 (1994).

constitutional concerns in its Indian cases—corresponds to some extent with the appointment of Justice Rehnquist to the Supreme Court in 1972.[219]

1. Eleventh Amendment State Sovereign Immunity—Blatchford v. Native Village of Noatak *(1991),* Seminole Tribe v. Florida *(1996), and* Idaho v. Coeur d'Alene Tribe *(1997)*

Many, if not most, Indian law cases arise out of disputes between Indian tribes and states, with taxation,[220] regulatory jurisdiction,[221] economic development,[222] and the increasing encroachment of state authority within Indian Country[223] being the primary sources of antipathy. However, the Court often never reaches the merits, declaring that it has no jurisdiction because the state sovereign has not waived its sovereign immunity from suit, a result it has reached three times in the last two decades.[224] The Court has also held in several cases that Indian tribes possess equivalent immunity from suit.[225]

In this line of cases, the Court's primary constitutional concern is not tribal sovereignty or Indian rights, but clarity in its Eleventh Amendment jurisprudence.[226] The Rehnquist Court articulated a very robust sovereign immunity for states and placed the foundation of that immunity in the Eleventh Amendment.[227] But neither the text of the Constitution nor the Eleventh Amendment offer express authority for state sovereign immunity, forcing the Court to rely upon the history of the Eleventh Amendment's ratification and even extratextual, preconstitutional

219. *See generally* JESSE CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1592 (10th ed. 2006).

220. *See, e.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2004); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

221. *See, e.g.*, *City of Sherrill*, 544 U.S. 197; Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

222. *See, e.g.*, *Wagnon*, 546 U.S. 95; *County of Yakima*, 502 U.S. 251; *Cabazon Band of Mission Indians*, 480 U.S. 202.

223. *See, e.g.*, *Wagnon*, 546 U.S. 95; Nevada v. Hicks, 533 U.S. 353 (2001); Negonsott v. Samuels, 507 U.S. 99 (1993); *County of Yakima*, 502 U.S. 251; *Cotton Petroleum Corp.*, 490 U.S. 163; *Colville Confederated Tribes*, 447 U.S. 134.

224. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); Seminole Tribe v. Florida, 517 U.S. 44 (1996); Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).

225. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754–59 (1998); *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509–11; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58–59 (1978).

226. *See, e.g.*, *Blatchford*, 501 U.S. at 777 ("We are asked once again to mark the boundaries of state sovereign immunity from suit in federal court.").

227. *See generally* MARK TUSHNET, A NEW CONSTITUTIONAL ORDER 51–55 (2004); LaVelle, *supra* note 53, at 867; Merrill, *supra* note 16, at 586.

notions of state sovereignty principles.[228] The Court's reasoning in these cases may have contributed to its cases holding that Indian tribes also possess a robust sovereign immunity.[229]

Each of the three cases discussed here involved critical questions of federal Indian law for which the Supreme Court refused to allow an answer by disclaiming the jurisdiction of the federal judiciary or the power of Congress—or by ignoring the question. In *Blatchford v. Native Village of Noatak*,[230] the State of Alaska's legislature enacted a law providing annual oil revenue-sharing payments to Native village governments.[231] Acting upon the advice of the state attorney general, the legislature then amended the statute to include all unincorporated local governments, reducing the amount of revenue sharing available to each Native village.[232] The Native Villages of Noatak and Circle Village brought suit against the state seeking the original amount promised by the legislature.[233] *Seminole Tribe v. Florida*[234] involved the enforcement provisions of the Indian Gaming Regulatory Act, which authorized Indian tribes to sue States for refusing to negotiate casino-style gaming compacts in good faith.[235] And *Idaho v. Coeur d'Alene Tribe of Idaho*[236] involved the question of whether the banks and submerged lands of Lake Coeur d'Alene were owned by the Coeur d'Alene Tribe or the State of Idaho,[237] requiring an interpretation of an executive order that defined the boundaries of the Tribe's reservation. None of these cases reached a decision on the merits due to the Court's interpretation of the Eleventh Amendment and refusal to apply the doctrine of *Ex parte Young*.[238]

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228. *See* Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) ("Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States."); *cf.* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1725–28 (2004) (discussing *Principality of Monaco*). *See generally* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 463 (2000) ("The question of how we are to ground the Constitution is preconstitutional and extraconstitutional, and so the question of how we are to understand the Constitution is likewise preconstitutional and extraconstitutional.").

229. *See Blatchford*, 501 U.S. at 782 ("We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.").

230. 501 U.S. 775 (1991).

231. *See id.* at 777–78.

232. *See id.* at 778.

233. *See id.*

234. 517 U.S. 44 (1996).

235. *See* 25 U.S.C. § 2710(d) (2000); *id.* at 48–52; KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY 91–94 (2006); G. WILLIAM RICE, TRIBAL GOVERNMENTAL GAMING LAW: CASES AND MATERIALS 311–35 (2006).

236. 521 U.S. 261 (1997).

237. *See id.* at 264–65.

238. *See id.* at 268 ("Were we to abandon our understanding of the Eleventh Amendment as reflecting a broader principle of sovereign immunity, the Tribe's suit . . . might proceed."); *id.* at 281

While these cases reached the Supreme Court styled as federal Indian law cases, in actuality none of them were Indian law cases. Perhaps of all the cases discussed in this Article, *Seminole Tribe* is the most obvious example of a major Indian law-related fact and legal pattern hijacked by the Supreme Court's interest in deciding important constitutional concerns. The critical legal question identified by Chief Justice Rehnquist was "whether Congress has acted 'pursuant to a valid exercise of power,'"[239] in its attempt to waive state sovereign immunity under the Eleventh Amendment. In that case, Congress had attempted to exercise its authority under the Indian Commerce Clause.[240] Rather than delve into the Court's precedents about the scope of congressional authority under the Indian Commerce Clause or even the Framers' views about the Clause, Chief Justice Rehnquist's majority opinion offered no discussion whatsoever about congressional authority under the Clause. Instead, the opinion focused on precedents (and some legal history) relating to the Interstate Commerce Clause, first noting that the Court had recognized congressional authority to abrogate Eleventh Amendment immunity in only two circumstances—in accordance with Section 5 of the Fourteenth Amendment and in accordance with the Interstate Commerce Clause.[241] The opinion glossed over congressional authority under the Indian Commerce Clause, treating that rich and varied history as all but irrelevant,[242] choosing instead to focus on the lone Interstate Commerce Clause case that had recognized congressional authority to abrogate Eleventh Amendment immunity—*Pennsylvania v. Union Gas Co.*[243] Chief Justice Rehnquist's opinion overruled that case, attacking the rationale of Justice Brennan's plurality opinion on numerous grounds.[244] At that point, given that the Court denied Congress authority under the Interstate Commerce Clause to abrogate Eleventh Amendment immunity (for that Clause was one conceivable source of

("[T]his suit, we decide, falls on the Eleventh Amendment side of the line [of the *Ex parte Young* doctrine], and Idaho's sovereign immunity controls." (citing *Ex parte* Young, 209 U.S. 123 (1908))); *Seminole Tribe*, 517 U.S. at 47 ("We hold that . . . the Indian Commerce Clause does not grant Congress [the power to abrogate state Eleventh Amendment sovereign immunity]. . . . We further hold that the doctrine of *Ex parte Young* . . . may not be used to enforce [the gaming act] against a state official."); *Blatchford*, 501 U.S. at 782 (holding that the Eleventh Amendment bars suit against a state by an Indian tribe). The dispute over Lake Coeur d'Alene did reach resolution (and in the Tribe's favor) after the United States intervened on behalf of the Tribe. *See* Idaho v. United States, 533 U.S. 262 (2001).

239. *Seminole Tribe*, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

240. *See id.* at 60.

241. *See id.* at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 453 (1976) (Section 5 of the Fourteenth Amendment)); *id.* (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 19 (1989) (plurality opinion) (Interstate Commerce Clause)).

242. *See id.* at 60–61.

243. 491 U.S. 1 (1989).

244. *See Seminole Tribe*, 517 U.S. at 63–73.

congressional authority to deal with Indian gaming), the logical next question would be whether the Indian Commerce Clause supplied Congress that authority.

Put simply, the Court refused to analyze that question. The Court did conclude (without citation or analysis) that "[i]f anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[245] But then the Court refused to disclose just how much or what kind of authority Congress had under the Indian Commerce Clause vis-à-vis the Eleventh Amendment, asserting: "[T]he plurality opinion in *Union Gas* allows no principled distinction between the Indian Commerce Clause and the Interstate Commerce Clause."[246] This is a classic non sequitur.

If the Court were serious about focusing on the Indian Commerce Clause instead of overruling an irrelevant precedent, it could have engaged in a serious analysis of the scope of congressional power under the Indian Commerce Clause. A quick review of the Constitutional Convention provides evidence that the Indian Commerce Clause should be interpreted in a manner different than both the Interstate and Foreign Commerce Clauses—the Framers drafted the Indian Commerce Clause for different reasons than the other two Commerce Clauses[247] and, perhaps as a result, added the Clause to the Constitution much later in the Convention.[248]

The provision for regulation of commerce with foreign nations and among the several states had been published by the committee of detail two weeks, and definitely approved by the convention two days, before the subject of the Indian trade was introduced on the floor of the convention. It was not until several days later that the latter reported out of committee, still encumbered with some of the qualifications attached to it in the articles; and less than two weeks before the close of the convention that it was finally incorporated with the rest of the Commerce Clause and approved in the form with which we are familiar. By this

245. *Id.* at 62; *see also id.* ("This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.").

246. *Id.* at 63.

247. *See* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 467–68 (1941). Professor Abel focused on a notorious proviso reserving some state authority in the Indian Affairs Clause of the Articles of Confederation that so infuriated James Madison. *See* THE FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter ed., 1961) (referring to the proviso as "absolutely incomprehensible"); 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (James Madison) (Max Farrand rev. ed., 1937) (Yale University Press 1966) ("By the federal articles, transactions with the Indians appertain to [Congress]. Yet in several instances, the States have entered into treaties & wars with them.").

248. *See* 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 247, at 324 (James Madison).

time, the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to Indian trade.[249]

Professor Abel, after listing the evidence, concluded: "Whatever regulation of commerce might mean in connection with transactions with the Indians, it was so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause."[250] Moreover, the Framers intended that Congress's authority over Indian Commerce extend beyond mere "commerce." As Professor Robert Stern argued, the Framers intended the Constitution to serve as a "fix" on the problem of the Articles of Confederation, which had allowed the states to muddy the waters of federal Indian affairs policy.[251] Stern asserted that "the whole spirit of the proceedings indicates that . . . the draughtsmen meant commerce to have a broad meaning with relation to the Indians."[252] In fact, Stern acknowledged that "[t]he exigencies of the time may have called for a more complete system of regulating affairs with the Indians than of controlling commerce among the states."[253] Unfortunately, no party to the matter and not even any of the numerous amici noted this important historical information.

In short, *Seminole Tribe*'s outcome—and the fate of an important provision in the Indian Gaming Regulatory Act—rested with the Court's treatment of a case interpreting the Interstate Commerce Clause, not the Indian Commerce Clause.

In a similar vein, the Court in *Blatchford* and in *Coeur d'Alene Tribe* focused on two areas related to Eleventh Amendment immunity: (1) the requirement that Congress must express its power to abrogate sovereign immunity "by a clear legislative statement";[254] and (2) the *Ex parte Young* "exception" to sovereign immunity.[255] In *Blatchford*, the tribal interests had argued that 28 U.S.C. § 1362, recognizing federal subject matter jurisdiction over claims brought by Indian tribes, served as a waiver of Eleventh Amendment immunity.[256] In *Coeur d'Alene Tribe*, the Tribe sued officials of the State of Idaho under *Ex parte Young*, asserting that their assertion of state jurisdiction over the disputed territory constituted "an ongoing violation of its property rights in contravention of federal

249. Abel, *supra* note 247, at 467–68.

250. *Id.* at 468.

251. *See* Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1342 (1934).

252. *Id.* at 1342.

253. *Id.* at 1342 n.27.

254. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991) (citing Dellmuth v. Muth, 491 U.S. 223, 227–28 (1989)).

255. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281–82 (1991); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) (rejecting the potential application of *Ex parte Young*).

256. *See Blatchford*, 501 U.S. at 786.

law and [sought] prospective injunctive relief."[257] The Court rejected the Tribe's application to take advantage of the *Ex parte Young* exception because to authorize the suit would constitute a de facto quiet title action against the State itself.[258] As with *Seminole Tribe*, these cases offer little or no discussion of foundational federal Indian law principles.[259]

2. *Individual Civil Rights Claims*—Morton v. Mancari *(1975)*, Santa Clara Pueblo v. Martinez *(1978)*, Nevada v. Hicks *(2001)*, *and* Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony *(2003)*

Several alleged Indian law cases of the past three decades have involved individual or tribal civil rights claims against the federal or state government or their officials. While the underlying subject matter of these cases had federal Indian law at their core, the Court's primary concern in these cases appears to be the jurisprudence relating to the liability of federal and state governments to civil rights claims under § 1983 and the Fifth Amendment. The four cases discussed in this subpart split down the middle, with two major wins for tribal interests (*Morton v. Mancari* [260] and *Santa Clara Pueblo v. Martinez*[261]), one major loss (*Nevada v. Hicks*),[262] and one split decision (*Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*),[263] although this discussion will focus on the portion of the *Inyo County* case that the tribal interests lost.

Consider first *Morton v. Mancari*. In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) challenged a federal regulation awarding preferential treatment to American Indians in BIA employment promotion and demotion decisions.[264] The BIA's employment preference complied with congressional policy first articulated in the Indian Reorganization Act and extended in various other congressional enactments.[265] Most of the Court's attention focused on the "'cardinal rule . . . that repeals by implication are not favored.'"[266] The challengers argued that the 1972 statute banning employment discrimination in most areas of the federal government had served to

257. *Coeur d'Alene Tribe*, 521 U.S. at 281.

258. *See id.* at 282.

259. To be fair, Justice Scalia's *Blatchford* opinion does offer a neat and tidy federal Indian law syllogism: "But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes." *Blatchford*, 501 U.S. at 782.

260. 417 U.S. 535 (1974).

261. 436 U.S. 49 (1978).

262. 535 U.S. 533 (2001).

263. 538 U.S. 701 (2003).

264. *See Mancari*, 417 U.S. at 538.

265. *See id.* at 542–45 (citing 25 U.S.C. §§ 44–47, 274 (2000)).

266. *Id.* at 549–50 (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)) (alteration in original).

repeal the Indian preference policy.[267] The Court noted that while federal anti-discrimination policy had changed to favor federal employees, Congress had bolstered federal policy in relation to Indian preference in employment within months of the 1972 statute.[268] The Court was able to apply two of its canons of statutory construction: (1) that a specific statute will control over a general statute;[269] and (2) that two statutes that are not irreconcilable should be interpreted to preserve both.[270] The Court held that the 1972 general prohibition on discrimination in federal employment did not serve to repeal Congress's continued authorization of Indian preference in employment in certain federal agencies.[271] This holding of the *Mancari* Court—a non-federal Indian law issue—continues to be the most important holding of the case, with numerous Supreme Court decisions citing to this opinion.[272]

The *Mancari* Court also held that the Fifth Amendment's due process clause did not bar the BIA from offering a preference in employment to American Indians.[273] Relying on foundational federal Indian law and policy, the Court noted that the Indian preference in employment was an important element of modern federal Indian policy that would seek to avoid the history of "overly paternalistic" Indian policy.[274] The Court focused on the plenary power of Congress to effectuate Indian affairs policy,[275] as well as the serious problem of the vulnerability of an entire title of the United States Code (Title 25—Indians) should congressional legislation affecting Indians be classified as race-based legislation.[276] In short, the Court held, Indian preferences

267. *See id.* at 547 (referencing 42 U.S.C. § 2000e-16(a)). A three-judge panel of the district court had ruled on this basis in favor of the non-Indian challengers. *See* Mancari v. Morton, 359 F. Supp. 585, 590 (D.N.M. 1973).

268. *See Mancari*, 417 U.S. at 548.

269. *See id.* at 550–51.

270. *See id.* at 551 (citing United States v. Borden Co., 308 U.S. 188, 198 (1939)).

271. *See id.* at 547–51.

272. *See, e.g.*, Branch v. Smith, 538 U.S. 254, 293 (2003); J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 141–42 (2001); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); Watt v. Alaska, 451 U.S. 259, 281 (1981); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190–91 (1978); Radzanower v. Touche Ross & Co., 426 U.S. 148, 155 (1976); *see also* Karen Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 508 n.97 (2004) ("According to online citation services, as of this Comment's publication date, around 800 subsequent opinions cited *Morton v. Mancari*, most for its holding regarding implied repeal.").

273. *See Mancari*, 417 U.S. at 553–55 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). Importantly, given the importance of the implied repeals portion of the case, the three-judge district court panel never reached this question. *See* Mancari v. Morton, 359 F. Supp. 585, 591 (D.N.M. 1973).

274. *Mancari*, 417 U.S. at 553.

275. *See id.* at 551–52 (citing U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause)).

276. *See id.* at 552–53 ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination,

were not race-based classifications, but classifications based on the political status of Indians and Indian tribes, negating any equal protection violation under the Fifth Amendment.[277] But this holding can be construed as more than a vindication of federal Indian policy favoring Indian people—in fact, as some scholars arguably have implied,[278] the *Mancari* Court's equal protection holding should be placed in the greater context of the viability of the *Bolling v. Sharpe* holding that an Equal Protection Clause should be implied by the Fifth Amendment's Due Process Clause.[279] Consider further that the Burger Court's prime directive from the Nixon Administration, assuming such a directive was persuasive to the individuals on the Burger Court, was to roll back or at least contain the Warren Court's expansive reading of implied constitutional rights.[280] Perhaps *Mancari* was a place where some of the Warren Court holdovers could agree with some of the Nixon conservatives that the *Bolling* holding could be limited because the limit benefited a discrete minority—American Indians. Surely, federal Indian law played an important part in this decision, but it appears likely that much more salient constitutional concerns were at play as well.

Consider next *Santa Clara Pueblo v. Martinez*,[281] perhaps the most powerful Supreme Court precedent of the modern era favoring Indian tribes. In *Martinez*, a female member of the Santa Clara Pueblo brought suit on behalf of herself and her children under a provision in the Indian Civil Rights Act requiring Indian tribes to guarantee the equal protection of the law.[282] The petitioner claimed that the Santa Clara membership ordinance discriminated against her and her children on the basis of sex because it granted membership status to children of male members of the community and female nonmembers while simultaneously denying membership to children of female members of the community and male nonmembers.[283] In rejecting the claim, the *Martinez* Court affirmed that

an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." (citing Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966))).

277. *See id.* at 553–54, 554 n.24.

278. *See, e.g.*, Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 544–45, 545 n.33 (1996) (characterizing *Mancari* as an equal protection case); Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1762 n.33 (1997) (questioning whether there is an equal protection element to the Fifth Amendment); *cf.* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 729 (2001) (arguing that *Mancari*'s weakness is *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1997)).

279. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954).

280. *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 23–25 (2007).

281. 436 U.S. 49 (1978).

282. *See id.* at 51 (citing 25 U.S.C. § 1302(8) (2000)).

283. *See id.*

the Supreme Court would recognize the sovereign immunity of Indian tribes from suit on the same basis as federal and state immunity.[284] The Court held that the Indian Civil Rights Act, while a valid act of Congress imposing rigorous duties on tribal government,[285] did not operate to waive the immunity of Indian tribes from suit in federal court, noting that congressional waivers of immunity from suit must be express, not implied.[286] While this holding has been critical to Indian tribes and serves as a foundation of modern Indian law, it is important to note for our purposes that the Court borrowed from non-Indian law sovereign immunity cases in its reasoning,[287] apparently bringing tribal sovereign immunity cases into a sort of doctrinal consistency with federal and state immunity cases.[288] Nevertheless, this aspect of *Martinez* is a critical Indian law holding.

Like *Mancari*, however, *Martinez* can be read as a case limiting the kind of "judicial activism" linked with the Warren Court (garnering the votes of some Nixon conservatives) that still upheld the rights of a discrete minority (garnering the vote of some Warren Court holdovers). As with *Mancari* and the doctrine of implied repeals, the proxy for this unusual alignment could have been the Court's disfavor in recognizing an implied private cause of action in a civil rights statute.[289] The Indian Civil Rights Act's sole cause of action to enforce its provisions was the authorization to petition for a writ of habeas corpus for those convicted of a crime in tribal court.[290] The Court noted that there were two critical (and competing) purposes in the Act: "In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'"[291] The Court asserted that congressional intent to further tribal self-government would be defeated to some extent by opening the federal courts to individuals seeking to enforce the Act,[292] holding that Congress's failure to provide a general cause of action was "deliberate."[293]

There is no doubt that Justice Marshall's majority opinion offered a

284. *See id.* at 58.

285. The Court noted and the Pueblo conceded that Congress had plenary power to alter the sovereign powers of Indian tribes. *See id.*

286. *See id.* (citing United States v. Testan, 424 U.S. 392, 399 (1976)).

287. *See id.*

288. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 738 (1999); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999); Lane v. Pena, 518 U.S. 187, 192 (1996); United States v. Mitchell, 445 U.S. 535, 538 (1980); Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 305 n.5 (1973) (Brennan, J., dissenting).

289. *See Martinez*, 436 U.S. at 60.

290. 25 U.S.C. § 1303 (2000).

291. *Martinez*, 436 U.S. at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

292. *See id.* at 59–60, 63–64.

293. *Id.* at 61.

substantial defense of tribal sovereignty, imputing, for example, in the Indian Civil Rights Act a congressional intent to assist in the development of tribal dispute resolution forums, including tribal courts.[294] The majority found this intent to exclude most cases from federal court jurisdiction despite contradictory legislative history suggesting that Congress intended for the Act to correct at least five pre-1968 federal court cases denying a civil rights remedy to plaintiffs.[295] This evidence reveals a powerful recognition of tribal sovereignty and federal Indian policy favoring tribal governments played an important role in the Court's reasoning on one hand, but the Court still denied a federal forum for individuals to vindicate their civil rights. It is possible to conclude that while individual Justices may have voted in favor of the Pueblo out of concern for tribal sovereignty, others may have voted in favor of the Pueblo as a means to deny the creation of yet another implied cause of action in a civil rights case.

The final two cases in this section concern the Court's § 1983 jurisprudence. Specifically, *Nevada v. Hicks* concerns the ability of individuals to sue state law enforcement officials in tribal courts,[296] while *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* concerns the standing of Indian tribes to bring § 1983 claims against state officials.[297] In *Hicks*, a tribal member's on-reservation home was the subject of a pair of search warrants issued by Nevada courts (one of which had been domesticized in the reservation tribal court), authorizing state officers to search for evidence that the tribal member had taken a California bighorn sheep in violation of state law.[298] The tribal member, Floyd Hicks, brought suit in tribal court, claiming that the state officers (and others, including tribal officers) had violated his civil rights and sought relief under § 1983.[299] The Court rejected the claims on the twin theories that the tribal court did not have jurisdiction over the state officers under principles of federal Indian law and that the tribal court could not have jurisdiction over § 1983 claims.[300] Justice O'Connor, concurring in the result, noted that state sovereign immunity

294. *See id.* at 59–60.

295. *See* Respondents' Brief at 15, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (No. 76-682) (citing S. Rep. No. 90-841, at 9–10 (1967)). The five cases were *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959), *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959), *Martinez v. S. Ute Tribe*, 249 F.2d 915 (10th Cir. 1957), *cert denied*, 356 U.S. 960 (1958), *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956), and *Toledo v. Pueblo de Jemez*, 119 F. Supp. 429 (D.N.M. 1954).

296. Nevada v. Hicks, 533 U.S. 353, 366–69 (2001).

297. Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Cmty. of the Bishop Colony, 538 U.S. 701, 708–12 (2003).

298. *Hicks*, 533 U.S. at 356–57.

299. *Id.* at 357.

300. *Id.* at 357–69.

principles should have controlled the outcome, asserting that the majority's discussion of federal Indian law principles was unnecessary and damaging to tribal sovereignty.[301] In the context of this Article, which alleges that the Court's members are more likely to vote in accordance with important constitutional concerns and *not* federal Indian law principles, *Hicks* is an important anomaly. Justice Scalia's majority opinion begins with an analysis of federal Indian law principles—and, in dramatic fashion, reworks those principles in broad strokes *against* tribal interests.[302] The opinion undermines the principle of federal Indian law that state laws do not have (much) force in Indian Country by expanding for the first time the so-called *Montana* rule into tribal reservation and trust lands.[303] Justice Scalia justified the unprecedented state law intervention into Indian Country on the basis that state law enforcement interests simply outweighed the tribe's interest in governing itself.[304] The majority's next point, that Congress never intended or authorized tribal courts to assume jurisdiction over § 1983 claims,[305] could have (and should have) disposed of the issue without reference to federal Indian law principles about the jurisdiction of Indian tribes or tribal courts. If a tribal court could not assume jurisdiction over a § 1983 claim against a state law enforcement officer, then that court would not be able to assert it under federal Indian law, either. The Court could have remanded the federal Indian law question back to the lower courts for a determination of whether some independent federal Indian law principle would justify or authorize the tribal court to take jurisdiction over § 1983 claims.

The *Hicks* opinion could have looked more like the short opinion in *Inyo County*, which held that Indian tribes are not "persons" as defined by § 1983.[306] In *Inyo County*, the state had raided a tribal business enterprise and confiscated employment records in accordance with a state search warrant, but without tribal authorization.[307] The Court reached the unusual conclusion that, although the definitions of "persons" under the Sherman Act and the False Claims Act allows states and foreign nations to sue to vindicate rights under those statues, § 1983's definition of "person" does not include Indian tribes.[308] The tribe

301. *See id.* at 397–401 (O'Connor, J., concurring).

302. *See id.* at 360–65 (majority opinion).

303. *See id.* at 361–62. Justice Ginsburg's short concurrence disputed the majority's conclusion that the tribal or non-tribal character of the land was irrelevant. *See id.* at 386 (Ginsburg, J., concurring) (citing Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997)).

304. *See id.* at 363–64 (majority opinion).

305. *See id.* at 366–67.

306. Inyo County v. Paiute-Shoshone Indians of the Bishop Indian Cmty. of the Bishop Colony, 538 U.S. 701, 712 (2003).

307. *Id.* at 705.

308. *See id.* at 711–12. *But see id.* at 713 (Stevens, J., concurring in the judgment) ("It is demeaning to Native American tribes to deny them the same access to a § 1983 remedy that is available to any

had also relied upon the federal Indian law principle of tribal sovereign immunity and other federal common law principles to avoid the search warrant, issues the Court remanded.[309]

Of the four cases discussed in this part, *Inyo County*, perhaps, is the case that implicates federal Indian law principles the least. Each case, however, could have been decided on grounds utterly unrelated to federal Indian law. It is a strong possibility in each case that some members of each Court (perhaps a significant plurality) signed on to a majority opinion focused on federal Indian law principles because that opinion also vindicated a non-Indian law-related constitutional concern important to them. Consider that each of the four cases includes an important element of what Professor Jed Rubenfeld refers to as the Rehnquist Court's "anti-anti-discrimination agenda."[310] As Professor Rubenfeld puts it, "[t]he anti-anti-discrimination agenda would be especially hostile to claims that a person has been 'discriminated against' when he has merely been asked to abide by the same laws everyone else must."[311] The more recent cases, *Hicks* and *Inyo County*, fit this category, with the Court implying that Indians and tribes are not special; that they can and should seek to vindicate whatever rights they might have in some other manner besides civil rights laws. Professor Rubenfeld identified hostility from the Rehnquist Court toward "any other laws extending the concept of discrimination beyond the confines that the Court itself has laid down."[312] The claims in *Mancari* and *Martinez* appear to fit this category, with the Court refusing to find implied substantive rights or causes of action in either the Fifth Amendment or the Indian Civil Rights Act.

3. Indian Treaty Rights—Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n *(1979)*

Indian treaty rights cases form a significant portion of the core of federal Indian law, but the foundational case discussed in this subpart also demonstrates that non-Indian law-related constitutional concerns drove the Court's decisions. In *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*,[313] the Court affirmed the foundation of the famous "Boldt decision" recognizing Indian treaty fishing rights in

other person whose constitutional rights are violated by persons acting under color of state law.").

309. *Id.* at 712 (majority opinion).

310. *See* RUBENFELD, *supra* note 24, at 176–79.

311. *Id.* at 176.

312. *Id.*

313. 443 U.S 658 (1979). For commentary on the case, please see RUSSEL L. BARSH, THE WASHINGTON FISHING RIGHTS CONTROVERSY: AN ECONOMIC CRITIQUE 77–103 (1979); FAY G. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986); and CHARLES F. WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000).

the Puget Sound area.[314] However, the case included a major question relating to the granting of full faith and credit of federal court orders in state courts,[315] a question about the supremacy of federal law.[316] This case can be seen as a rehash of *Worcester*. In this case, the culmination of dozens of lawsuits and federal and state court decisions, the Court was confronted with the fact that a state supreme court had interpreted a treaty in ways that conflicted with federal court interpretations. Moreover, lower state courts and state officials had a long history of violating federal court orders throughout the larger dispute over treaty fishing rights. Of course, this problem implicated the Court's supervisory responsibility.[317]

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314. *Fishing Vessel Ass'n*, 443 U.S. at 684–85.

315. *See Fishing Vessel Ass'n*, 443 U.S. at 669 n.14 ("The impact of illegal regulation and of illegal exclusionary tactics by non-Indians in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians assumed they were securing by initialing the treaties in the middle of the last century." (citations omitted)); *id.* at 672 n.19 ("[T]he reason for our recent grant of certiorari on the question remains because the state courts are . . . on record as interpreting the treaties involved differently from the federal courts." (citation omitted)); *id.* at 673 ("When Fisheries was ordered by the state courts to abandon its attempt to promulgate and enforce regulations in compliance with the federal court's decree—and when the Game Department simply refused to comply—the District Court entered a series of orders enabling it, with the aid of the United States Attorney for the Western District of Washington and various federal law enforcement agencies, directly to supervise those aspects of the State's fisheries necessary to the preservation of treaty fishing rights."); *id.* at 674 ("Because of the widespread defiance of the District Court's orders, this litigation has assumed unusual significance. We granted certiorari in the state and federal cases to interpret this important treaty provision and thereby to resolve the conflict between the state and federal courts regarding what, if any, right the Indians have to a share of the fish, to address the implications of international regulation of the fisheries in the area, and to remove any doubts about the federal court's power to enforce its orders.").

316. *See* U.S. CONST. art. IV, § 1 (requiring state courts to give full faith and credit to each other's decisions); *id.* art. VI, cl. 2 (Supremacy Clause); 28 U.S.C. § 1738 (2000) (requiring state courts to give full faith and credit to federal courts and vice versa).

317. Another case, *United States v. Dion*, 476 U.S. 734 (1986), poses a question about Congressional power to abrogate treaties with later-enacted legislation, *see id.* at 738 ("It is long settled that 'the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty' with a foreign power." (quoting Fong Yue Ting v. United States, 149 U.S. 698, 720 (1893))) (alteration in original), despite the serious national worry that bald eagles and other kinds of eagles were near extinction at the time. *See* Roberto Iraola, *The Bald and Golden Eagle Protection Act*, 68 ALB. L. REV. 973, 974 & n.9 (2005).

One final case, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), presents a similar question about Executive power to abrogate treaties. *See id.* at 188–89 ("'The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952))); *see also id.* at 196 (describing means of interpreting foreign treaties). For background and commentary on this important case, please see JAMES M. MCCLURKEN ET AL., FISH IN THE GREAT LAKES, WILD RICE AND GAME IN ABUNDANCE: TESTIMONY ON BEHALF OF MILLE LACS OJIBWE HUNTING AND FISHING RIGHTS (2000); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1102–03 (2005); Robert Laurence, *Antipodean Reflections on American Indian Law*, 20 ARIZ. J. INT'L & COMP. L. 533, 542–43 (2003); and *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 389–99 (1999).

4. Religious Freedom—Lyng v. Northwest Indian Cemetery Protective Ass'n *(1988)*

In the two major Indian religious freedom cases in the modern era, tribal interests went down in humiliating defeat. In the first, *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[318] the tribal interests attempted to prevent the United States Forest Service from constructing a road through an area in northern California sacred to the Yurok, Karuk, and Tolowa Indians.[319] Conceding that the construction of the road would be "devastating" to the religion[320] (but doubting that it would "doom" the religion),[321] Justice O'Connor's majority opinion focused on two points. First, the land at issue was owned by the federal government and the Court disfavored outsider attempts to control federal land projects.[322] Second, the *Lyng* majority was concerned that the Court would be forced to choose one religion over another,[323] second-guess the salience of religious belief,[324] or interpret the religious tenets of unfamiliar religions.[325] The Court noted that its validation of the tribal claim would result in a situation where "government . . . [would be] required to satisfy every citizen's religious needs and desires."[326] But

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The constitutional concern in these cases has little to do with tribal interests. The Court's interest was the extent of Congressional and Executive authority to abrogate treaties. The fact that they were Indian treaties was all but irrelevant.

318. 485 U.S. 439 (1988).

319. *See id.* at 442–45.

320. *Id.* at 451 ("The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the 'high country.' Individual practitioners use this area for personal spiritual development; some of their activities are believed to be critically important in advancing the welfare of the Tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible.").

321. *Id.* ("To be sure, the Indians themselves were far from unanimous in opposing the G-O road, . . . and it seems less than certain that construction of the road will be so disruptive that it will doom their religion. Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.").

322. *See id.* at 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."); *id.* at 452 ("The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs.").

323. *See id.* at 457 ("We would accordingly be required to weigh the value of every religious belief and practice that is said to be threatened by any government program.").

324. *See id.* at 449 ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here . . . and accordingly cannot weigh the adverse effects . . . on the Indian respondents.").

325. *See id.* at 457–58 ("In other words, the dissent's approach would require us to rule that some religious adherents misunderstand their own religious beliefs.").

326. *Id.* at 452; *see also id.* ("A broad range of government activities—from social welfare

foundational federal Indian law principles would have required the Court to address the possibility that in the case of the California Indians, the United States may have agreed via treaty that these specific Indian religious practices or these Indian lands must be protected from federal interference. That might have required the Court to address the sticky question of the Treaty of Guadalupe Hildalgo[327] and the subsequent unratified California Indian treaties of the 1850s.[328] This, of course, the Court did not do. The difficult hypothetical questions that concerned Justice O'Connor would not have arisen in this context, nor would this case have constituted a precedent for any other kind of religious freedom cases.[329]

5. *Reparations*—City of Sherrill v. Oneida Indian Nation *(2005)*

In *City of Sherrill v. Oneida Indian Nation*,[330] the Supreme Court held that the "settled expectations" of non-Indian property owners and state and local governments justified the application of equitable defenses such as laches, impossibility, and acquiescence, to Indian claims

programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion.").

327. *See generally* Frederico M. Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hildago*, 33 UCLA L. REV. 1364 (1986); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hildago*, 26 N.M. L. REV. 201 (1996); Guadalupe T. Luna, *Legal Realism and the Treaty of Guadalupe Hildago: A Fractionalized Legal Template*, 2005 WIS. L. REV. 519.

328. *See* Steve Talbot, *California Indians, Genocide of*, *in* 1 ENCYCLOPEDIA OF AMERICAN INDIAN HISTORY 226, 230–31 (Bruce E. Johansen & Barry M. Pritzker eds. 2007) (discussing the eighteen "lost treaties"); *see also* ROBERT F. HEIZER, EIGHTEEN UNRATIFIED TREATIES OF 1851–1852 BETWEEN THE CALIFORNIA INDIANS AND THE UNITED STATES GOVERNMENT (1972).

329. Another Indian religious freedom case, *Employment Division v. Smith*, 494 U.S. 872 (1990), appears to be a classic case of tribal interests being hijacked by the jurisprudential agenda of the Court and by the social policy of the federal government. In *Smith*, two employees (who were members of the Native American Church) of a private drug rehabilitation organization were fired for ingesting peyote as a sacrament (a bad fact pattern if there ever was one). *See Smith*, 494 U.S. at 874. After their termination, they sought unemployment benefits but were denied because state law categorized the use and possession of peyote as a crime. *See id.* at 876 (citing Employment Div. v. Smith, 763 P.2d 146, 148 (Or. 1988)). Justice Scalia's majority opinion extended the reach of *Lyng*, over Justice O'Connor's objection, *see id.* at 892–97 (O'Connor, J., concurring in the judgment), by eviscerating a First Amendment balancing test that required the Court to apply a form of strict scrutiny to governmental programs that substantially burdened a religious practice. *See id.* at 882–89 (discussing Sherbert v. Verner, 374 U.S. 398 (1963)). Congress reacted to the *Smith* decision by enacting the Religious Freedom Restoration Act. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act). Moreover, the events in the case arose at the same time that the Nation was engaged in the infamous "War on Drugs." *See, e.g.*, Gun S., Inc. v. Brady, 711 F. Supp. 1054, 1056–57 (N.D. Ala. 1989). Given this confluence of non-Indian law related factors, the petitioners in *Smith* had no chance.

330. 544 U.S. 197 (2005).

to sovereignty.[331] The Second Circuit then applied the broadest reading of the reasoning of the *Sherrill* Court to dismiss Indian land claims on appeal in which the Cayuga Indian Nation had *won* at the trial court level over $200 million in damages and interest against the State of New York and several of its political subdivisions.[332] In other words, *any* older claim to land, treaty rights, or sovereignty—no matter its merit—could be subject to equitable defenses favoring non-Indian property or governmental interests.

What is very interesting about *City of Sherrill* is the breadth of its reasoning. Given the existence and potential of massive claims for reparations winding their way through federal courts,[333] Justice Ginsburg's reasoning in *City of Sherrill* could apply with equal force to non-Indian reparations claims in which any "settled" property interests are at risk. The opinion serves, in some ways, as the legal implementation of philosophical objections to ancient claims.[334] *City of Sherrill* may be the first shot off the bow in a larger reparations debate—and could be a signal that massive reparations are not forthcoming from this Supreme Court.

6. Remaining Post-1986 Cases

This pattern repeats in numerous other cases involving tribal interests after 1986. Fifth Amendment takings drove the Court's decisions in *Hodel v. Irving* and *Babbitt v. Youpee* that invalidated attempts by Congress to remedy the serious problem of fractionating heirships on Indian lands.[335] The Court held that damage to private property rights from the federal government's exercise of its navigational servitude over riverbeds is not compensable under the Fifth Amendment in *United States v. Cherokee Nation.*[336] The contours of federal agency discretion drove the Court's decisions in *Cherokee Nation v. Leavitt*,[337] *United States v. Navajo Nation*,[338] and *Lincoln v. Vigil.*[339] State compliance with the Fifteenth Amendment drove the Court's decision in *Rice v.*

331. *See id.* at 218–21. *See generally* Singer, *supra* note 26.

332. *See* Cayuga Indian Nation v. Pataki, 413 F.3d 266, 274 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021 (2006).

333. *See generally* Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003).

334. *See generally* Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View from the Common Law*, 31 U. TOL. L. REV. 1 (1999); Samuel T. Morison, *Prescriptive Justice and the Weight of History*, 38 CREIGHTON L. REV. 1153 (2005); Jeremy Waldron, *Redressing Historical Injustice*, 52 U. TORONTO L.J. 135 (2002); Jeremy Waldron, *Superceding Historical Injustice*, 103 ETHICS 4 (1992).

335. *See* Babbitt v. Youpee, 519 U.S. 234, 243–45 (1998); Hodel v. Irving, 481 U.S. 704, 715–18 (1987).

336. 480 U.S. 700, 703–04 (1987).

337. 543 U.S. 631, 636–47 (2005).

338. 537 U.S. 532, 506–14 (2003).

339. 508 U.S. 182, 190–99 (1993).

Cayetano.[340] The policy behind the Freedom of Information Act drove *Department of the Interior v. Klamath Water Users Protective Ass'n*.[341] Rejections of the intergovernmental tax immunity doctrine and the argument that state taxes must be reasonably related to state services to taxpayers drove *Cotton Petroleum Corp. v. New Mexico*.[342] The case where the Court held that tribes cannot have criminal jurisdiction over nonmembers—*Duro v. Reina*—focused on congressional authority to subject American citizens to criminal prosecution in jurisdictions that do not provide American-style criminal procedure protections.[343] *Montana v. Crow Tribe of Indians* relied on the principle that nontaxpayers cannot sue to recover the taxes paid by another.[344] *Amoco Production Co. v. Southern Ute Indian Tribe* held that in federal land patents to private landowners reserving federal rights to coal under the surface, the patents granted rights to coal bed methane gas to the patentees and was not reserved by federal law.[345] *Chickasaw Nation v. United States* was a simple statutory interpretation case involving the application of canons of tax immunity interpretations.[346] *South Florida Water Management District v. Miccosukee Tribe of Indians* held that the Clean Water Act reaches to point sources that do not generate pollution.[347] Note that all of the above cases are losses for tribal interests.

There are several Indian law cases decided by the Court where it appears that the outcome was decided through the application of Indian law principles, but these cases are few and far between after the early 1990s and almost all of them are tax cases. Thirteen of these cases were losses for tribal interests,[348] while five were wins.[349]

340. 528 U.S. 495, 511–17 (2000).

341. 532 U.S. 1, 8–16 (2001).

342. 490 U.S. 163, 174–76, 189–91 (1989).

343. 490 U.S. 676, 693–94 (1990).

344. 523 U.S. 696, 713 (1998).

345. 526 U.S. 865, 874–80 (1999).

346. 534 U.S. 84, 86–91 (2001).

347. 541 U.S. 95, 104–05 (2004) (construing 33 U.S.C. § 1362(12) (2000)).

348. *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999); Cass County v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998); Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520 (1998); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Dep't of Taxation & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Hagen v. Utah, 510 U.S. 399 (1993); South Dakota v. Bourland, 508 U.S. 679 (1993); Negonsott v. Samuels, 507 U.S. 99 (1993); County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

349. *See* United States v. Lara, 541 U.S. 193 (2004); United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003); Idaho v. United States, 533 U.S. 262 (2001); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

C. CONCLUSIONS FROM THE SURVEY

The previous survey may lead to some conclusions that might surprise observers of federal Indian law. As would be true with any theory, it is impossible to prove with any certainty what motivates the Justices in their voting preferences, but in several modern era cases that commentators label "federal Indian law" cases, there are significant alternative holdings or reasons unrelated to federal Indian law principles that could be used to justify the decision. Moreover, as the years advanced, it could be argued that the Court decided the cases less and less on federal Indian law principles. Three of the six Indian law decisions in the 2003 to 2005 Terms have no Indian law issues whatsoever.[350] In the last ten years, only one case arguably had no non-Indian law components to it[351]—and every other case (again, arguably) had a non-Indian law issue that might have been dispositive of the entire case. Take, for example, *United States v. Navajo Nation*,[352] a case vilified by commentators because the Court ruled that an apparent arbitrary decision by the Secretary of the Interior (in favor of a personal friend's client) was not precluded by federal statute.[353] The Court's decision rested in part on a preference for deferring to administrative agencies—which perhaps could have been the crux of the entire decision.[354] Or take *Nevada v. Hicks*,[355] a case ostensibly about the civil jurisdiction of tribal courts,[356] that could just as easily be characterized as a decision vindicating the sovereign immunity of states and their officers in foreign courts.[357] Or *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*,[358] a case about whether tribal sovereign immunity can prevent a state government officer from raiding a tribal casino facility to enforce a state civil law, which turned on whether the tribe or any sovereign entity was a "person" under the

350. *See* Gonzales v. O Centro Espiria Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211 (2006); Cherokee Nation v. Leavitt, 543 U.S. 631 (2005); *Miccosukee Tribe*, 541 U.S. at 95.

351. *See Leech Lake Band*, 524 U.S. 103.

352. 537 U.S. 488 (2003).

353. *See, e.g.*, *Supreme Court Deals a Win and a Lesson*, INDIAN COUNTRY TODAY, Mar. 14, 2003, http://www.indiancountry.com/content.cfm?id=1047662515. For a more nuanced view, see Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369, 390–97 (2003), and Raymond Cross, *Reconsidering the Original Founding of Indian and Non-Indian America: Why a Second American Founding Based on Principles of Deep Diversity Is Needed*, 25 PUB. LAND & RESOURCES L. REV. 61, 80–83 (2004).

354. *See Navajo Nation*, 537 U.S. at 513–14 (citing Mich. Citizens for Indep. Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir. 1989), *aff'd by an equally divided Court*, 493 U.S. 38 (1989) (per curiam)).

355. 533 U.S. 353 (2001).

356. *See* LaVelle, *supra* note 154, at 759–76; Kimberly Radermacher, Case Comment, *The Ongoing Divestiture by the Supreme Court of Tribal Jurisdiction over Nonmembers, on and off the Reservation*—Nevada v. Hicks, 78 N.D. L. REV. 125 (2002).

357. *See Hicks*, 533 U.S. at 364–65.

358. 538 U.S. 701 (2003).

meaning of federal civil rights statutes.[359] *Minnesota v. Mille Lacs Band of Chippewa Indians*[360] is a strong example of an Indian law dispute posing an important constitutional question for the Court to decide. While the origins of the dispute involved the treaty rights of the Mille Lacs Band,[361] the important constitutional concern that may have been more salient for the individual Justices' voting preferences was the question of whether the president can abrogate a treaty without express permission of Congress.[362] One could speculate that at least some or all of the five Justices that voted for the Mille Lacs Band voted because they believed the president did not have authority to unilaterally abrogate treaties—while not having a salient opinion on the treaty interpretation questions that followed.

Much more empirical work is possible here, for example, to determine whether the Court's certiorari decisions are influenced by a non-Indian law-related constitutional concern; whether lower federal and state courts follow this pattern; whether the apparent pattern recurs further back in Supreme Court history; and, in general, to provide further evidence on the claims made in this Article.

The purpose of the survey is to provide a means for discussing the possibility that the Rehnquist Court's decisions where tribal interests were at stake were not federal Indian law decisions. This possibility is not so much as raised in the scholarship analyzing these cases, with the glaring exceptions of Dean David Getches' and Professor Phil Frickey's work.[363] It is a distinct possibility that the Indian law principles discussed, analyzed, and applied by the Court are no more than window dressing to the broader constitutional concerns attracting the Court's attention. If this is plausible, then the way Indian law scholars and practitioners read and analyze the Court's recent federal Indian law decisions must be reexamined.

IV. IDENTIFYING THE CONSTITUTIONAL AND PRAGMATIC CONCERNS IN THE INDIAN CASES

Lawrence Lessig's compelling article, "*How I Lost the Big One*," discussing his advocacy before the Supreme Court in *Eldred v. Ashcroft*,[364] should offer important tips to tribal advocates.[365] Lessig lost

359. *See id.* at 709–12.

360. 526 U.S. 172 (1999).

361. *See id.* at 196–200.

362. *See id.* at 188–95.

363. *Cf.* RUBENFELD, *supra* note 23, at 158–83 (asserting that an "anti-anti-discrimination" principle drives the Court's civil rights docket). *See generally* Frickey, *supra* note 12 (arguing that the Supreme Court is in the process of remolding the foundational principles of federal Indian law to fit within general public law); Getches, *supra* note 37 (arguing that states' rights, mainstream values, and colorblind justice drive the Court's Indian law decisions).

364. 537 U.S. 186 (2003).

the case but provided powerful insights into Supreme Court litigation:

> Our case had been supported from the very beginning by an extraordinary lawyer, Geoffrey Stewart, and by the law firm he had moved to, Jones, Day, Reavis & Pogue. There were three key lawyers on the case from Jones Day. Stewart was the first; then, Dan Bromberg and Don Ayer became quite involved. Bromberg and Ayer had a common view about how this case would be won: We would only win, they repeatedly told me, if we could make the issue seem "important" to the Supreme Court. It had to seem as if dramatic harm were being done to free speech and free culture; otherwise, the justices would never vote against "the most powerful media companies in the world."[366]

Lessig's mention of an "important" issue planted the seed, in many respects, for this Article. Scholars had long scoured Supreme Court opinions, papers of the Justices, and anecdotal evidence from Justices, clerks, and litigants to discover the "important" issues that, first, make cases "certworthy," or worthy of certiorari, and second, compel a member of the Court to vote in a certain way. Lessig's story is a reminder that the "important" issue sometimes is not obvious unless we are willing to look in a different direction at the same questions. Indian law advocates need to do the same thing.

Further consider Professor Lessig's review of the opinion in his case:

> I first scoured the majority opinion, written by Ginsburg, looking for how the court would distinguish the principle in this case from the principle in [*United States v. Lopez*, 514 U.S. 549 (1995)]. The reasoning was nowhere to be found. The case was not even cited. The core argument of our case did not even appear in the court's opinion. I couldn't quite believe what I was reading. I had said that there was no way this court could reconcile limited powers with the commerce clause and unlimited powers with the progress clause. It had never even occurred to me that they could reconcile the two by not addressing the argument at all.[367]

Lessig's review of his own case sounds terrifyingly familiar to tribal advocates reading their own cases. Critical arguments made by tribal interests that may have had powerful sway with lower court judges sometimes go nowhere with Supreme Court Justices—or are simply ignored.

Tribal advocates are starting to learn the game, but sometimes there is just not enough to work with. For example, early in the 2005 Term, the Supreme Court heard arguments in *Wagnon v. Prairie Band Potawatomi Nation*, a dispute between the Nation and the State of Kansas over whether Kansas's motor fuel tax on retailers—which was paid by the

365. *See* Lessig, *supra* note 27.
366. *Id.* at 59.
367. *Id.* at 62.

Nation when the retailers passed the tax through to their customers—was preempted by federal law and tribal sovereignty.[368] Justice Souter asked the first question in both the state and tribal arguments—effectively contextualizing the case against the tribal interests in the first moments of the argument—of whether the tribe was acting as a government or as a business.[369] In fact, the Nation made a powerful argument that every dollar of a tax it intended to collect once the state tax was lifted would go toward highway repairs and maintenance—a governmental function.[370] The Court all but ignored that argument, refusing to apply the preemption test at all.[371] In essence, the Court refused to even apply federal Indian law principles on the theory that the state levied the tax outside of Indian Country.[372] Indian law did not even apply in *Wagnon*.

What concern did the Court have when it decided *Wagnon*? One possibility was that the Court was worried that the states and the federal government might adapt the Nation's theory for their own purposes. In critiquing the Nation's arguments, the Court appeared to imply that these federal Indian law principles might translate to state and federal tax questions.[373] Perhaps the Court was worried that states would demand a refund for money they paid in accordance with government contracts to construction contractors based out of state where that money could be traced to another state's taxation (a circumstance that occurs with regularity in tribal construction projects[374]). Regardless, what is clear

368. 546 U.S. 95, 99–101 (2005).

369. *See* Transcript of Oral Argument at 4, *Wagnon*, 546 U.S. 95 (No. 04-631) ("Justice Souter: 'My question is, Do we know, from the record, whether the tax that is assessed on the distributor is, in fact, passed through to the tribe so that, in economic effect, the tribe is collecting, via pass-through, the State tax and imposing its own tax and still selling at market prices?'"); *id.* at 25 ("Justice Souter: 'Then what's [the Nation's] gripe? It wants a bigger profit? . . . [I]f the tribe is collecting its tax, and it does not have a claim to greater taxation or greater profit, then how is its sovereign right as a taxing authority being interfered with?'").

370. *See* Brief for Respondent at 2, *Wagnon*, 546 U.S. 95 (No. 04-631) ("The state tax thus interferes directly with a core attribute of tribal sovereignty—the Tribe's power to impose a fuel tax to finance the construction and maintenance of reservation roads and bridges. The State's studied ignorance of the Tribe's sovereign interest in taxation to support its infrastructure is ironic at best, as the power to tax is the very attribute of its own sovereignty that the State purports to vindicate. Despite the State's contentions, this case is not about economic advantage, but about how to accommodate the competing interests of two legitimate sovereigns. The State's solution is to deny the Tribe's interest in its entirety."); *see also Wagnon*, 546 U.S. at 130 (Ginsburg, J., dissenting) ("In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas' collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation's tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.").

371. *See Wagnon*, 546 U.S. at 113–14 (majority opinion) (refusing to apply the preemption test); *id.* at 115 (refusing to consider the road maintenance cost argument).

372. *See id.* at 113–15.

373. *See id.* at 107–09.

374. *See* Matthew L.M. Fletcher, *The Power to Tax, The Power to Destroy, and the Michigan*

from *Wagnon* is that there was no important constitutional concern supporting the tribal interests, nor were there secondary pragmatic reasons significant enough to vote for the Prairie Band.

Tribal advocates are at a serious disadvantage in constitutional litigation before the Supreme Court. As Justice Thomas pointed out, there is nothing in the Constitution that reserves tribal sovereignty.[375] While this might be the equivalent of Justice Black refusing to vote for mandatory busing for public schools in order to implement desegregation orders because the word "bus" doesn't appear in the Constitution,[376] Justice Thomas raised an important question that the Constitution does not answer. Since the Constitution does not assist tribal interests as much as, for example, the Tenth Amendment assists states,[377] tribal interests may have to look to other, more pragmatic concerns and consequences that will persuade the Court. Tribal advocates in the *Wagnon* case did attempt to persuade the Court by identifying considerable consequences that would arise from a ruling in favor of the State of Kansas, but these concerns did not persuade the Court in that instance.

This Part discusses four areas of federal Indian law that are strong candidates for Supreme Court review and suggestions for identifying important constitutional concerns or considerable pragmatic concerns that will both compel a grant of certiorari and garner enough votes to win a case here and there.

A. TRIBAL CRIMINAL AND CIVIL JURISDICTION OVER NONMEMBERS

1. *Tribal Criminal Jurisdiction*

One area of difficulty for tribal advocates will be the area of tribal criminal jurisdiction. As the following discussion shows, there are several constitutional concerns that weigh against tribal interests, but there may be some room to persuade the Court that tribal criminal jurisdiction is important for pragmatic reasons.

The Supreme Court recently decided not to hear *Means v. Navajo Nation*[378] and a companion case, *Morris v. Tanner*,[379] impressive victories for tribal advocates. Means, a member of the Oglala Sioux Tribe, faced prosecution before the Navajo tribal courts for allegedly assaulting his family members.[380] He had argued that the Navajo Nation could not have jurisdiction over him because he was not a member of that tribe—he was

Tribal-State Tax Agreements, 82 U. DET. MERCY L. REV. 1, 27 (2004).

375. *See* United States v. Lara, 541 U.S. 193, 218–19 (2004) (Thomas, J., concurring).

376. *See* ROSEN, *supra* note 217, at 157.

377. *See, e.g.*, New York v. United States, 505 U.S. 144, 166 (1992); Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1135–36 (Cal. 2006).

378. 432 F.3d 924 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 381 (2006).

379. 160 Fed. App'x 600 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 379 (2006).

380. *See* Means v. Dist. Court of the Chinle Judicial Dist., 2 Navajo Rptr. 528, ¶ 21 (1999).

a nonmember Indian.[381] In 1990, Means' attorney, John Trebon, had successfully argued before the Supreme Court that Indian tribes cannot prosecute nonmember Indians in *Duro v. Reina*[382] and was attempting to re-establish that rule by asking the Court to strike down the "*Duro* Fix," upheld in *United States v. Lara* in a seven to two decision.[383] *Lara* seemed to answer the question of whether tribes could prosecute nonmember Indians, but two of the seven Justices in the majority—Chief Justice Rehnquist and Justice O'Connor—are no longer on the Court. Of the remaining five members in the majority, one of them—Justice Kennedy—said that under a different procedural posturing (an appeal of the tribal court conviction), they might have voted to strike down the "*Duro* Fix."[384] Justice Thomas stated that he is waiting for the Court to come to its senses in the entire body of federal Indian law and is willing to reopen federal Indian law principles that have been settled for centuries.[385] Both the *Means* and the *Morris* cases were appeals of tribal court convictions. That left only three Justices in the majority, with new Chief Justice Roberts and Justice Alito the remaining uncertain votes. In short, a seven to two *Lara* decision could have turned into a six to three decision the other way. But the Court denied the petition for writ of certiorari.[386]

Counsel for Means and Morris could not have expected to win any of their appeals in the tribal courts and lower federal courts because of the decisiveness of the recent *Lara* decision. But they brought the cases in a manner strategically designed to attract the Court's attention, gambling that the Court was willing to entertain a challenge to the "*Duro* Fix"—and all tribal court prosecutions—because Indian tribes are not

381. *See* Means v. Navajo Nation, 432 F.3d 924, 930-31 (9th Cir. 2005), *cert. denied*, 127 S. Ct. 381 (2006).

382. 495 U.S. 676, 695-96 (1990).

383. 541 U.S. 193 (2004).

384. *See id.* at 214 (Kennedy, J., concurring) ("The present case, however, does not require us to address these difficult questions of constitutional dimension. Congress made it clear that its intent was to recognize and affirm tribal authority to try Indian nonmembers as inherent in tribal status. The proper occasion to test the legitimacy of the Tribe's authority, that is, whether Congress had the power to do what it sought to do, was in the first, tribal proceeding. There, however, Lara made no objection to the Tribe's authority to try him. In the second, federal proceeding, because the express rationale for the Tribe's authority to try Lara—whether legitimate or not—was inherent sovereignty, not delegated federal power, there can be no double jeopardy violation.").

385. *See id.* at 224 (Thomas, J., concurring) ("I do, however, agree that this case raises important constitutional questions that the Court does not begin to answer. The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs.' At one time, the implausibility of this assertion at least troubled the Court, and I would be willing to revisit the question." (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)) (citations omitted)).

386. *See* Means v. Navajo Nation, 127 S. Ct. 381 (2006); Morris v. Tanner, 127 S. Ct. 379 (2006).

required by federal statute to appoint counsel for indigent defendants.[387] Justice Breyer's majority opinion in *Lara* seemed to keep the question open.[388] Moreover, nonmember Indians are unlikely to be able to vote in tribal elections or are not eligible to sit on tribal court juries.[389] Justice Kennedy, the force behind *Duro v. Reina*,[390] was particularly concerned about tribes that prosecute people without providing these criminal process rights.[391]

Even if the Court does not acknowledge an important constitutional concern favoring tribal interests, important and significant pragmatic concerns are present in these types of cases. Intermarriage between tribes and increased tribal employment opportunities are longstanding facts in most tribal communities, guaranteeing the presence of a significant population of nonmember Indians on most reservations.[392] Taking away federal recognition of and respect for the convictions of nonmember Indians—like the Court did in *Duro*—created a significant loophole in tribal law enforcement that even a lumbering bear like Congress understood needed quick corrective action.[393] The consequences of creating yet another loophole in the tribal-federal-state law enforcement jurisdictional scheme in Indian Country—the first major loophole being the refusal of the Court to recognize tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*[394]—could be significant to Indian Country. If tribal advocates can provide empirical research that shows there was an increase in crime (both qualitatively and quantitatively) by non-Indians after *Oliphant*,[395] it might persuade a law-and-order Justice that the constitutional concerns are not

387. *See* 25 U.S.C. § 1302 (2000).

388. *See Lara*, 541 U.S. at 207–08.

389. *Cf. id.* at 208–09 (rejecting Lara's due process and equal protection arguments).

390. 495 U.S. 676 (1990); *see also* Oliphant v. Schlie, 544 F.2d 1007, 1014 (9th Cir. 1976) (Kennedy, C.J., dissenting) (arguing that Indian tribes should not have criminal jurisdiction over nonmembers), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

391. *See Lara*, 541 U.S. at 212 (Kennedy, J., concurring) ("The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both. Here, contrary to this design, the National Government seeks to subject a citizen to the criminal jurisdiction of a third entity to be tried for conduct occurring wholly within the territorial borders of the Nation and one of the States. This is unprecedented. There is a historical exception for Indian tribes, but only to the limited extent that a member of a tribe consents to be subjected to the jurisdiction of his own tribe. The majority today reaches beyond that limited exception." (citations omitted)).

392. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1143–44 (1994); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 714–15 (2004).

393. *See generally* Newton, *supra* note 168; Skibine, *supra* note 168.

394. 435 U.S. 191 (1978).

395. *See generally* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697 (2006).

dispositive.

Of course, Indian tribes are not states or the federal government.[396] State and federal law enforcement come from a long history and practice of coercing confessions from suspects[397] (one of the reasons to guarantee an attorney and a jury of peers) that is missing from most tribes. In fact, the conviction rate of Indians in federal courts is astronomically high because Indian defendants are far more likely to confess to crimes, a result (it is said) of the Indian tradition to admit mistakes in order to allow community healing to begin.[398] Moreover, Indian tribes often do not have the resources to fund a public defender system;[399] but neither do tribal courts sentence the guilty to jail as a matter of course.[400]

There were reasons why the Court did not agree to hear the *Means* and *Morris* cases. First, the Court doesn't like to reverse a seven to two decision so quickly after announcing it. With the recent turnover on the Court, quick reversals makes the Court look too much like a political body, subject to the political whims of its members.[401] Second, neither the *Means* nor the *Morris* case met the list of due process factors that concerns Justice Kennedy. Both defendants were not indigent and were represented by counsel in tribal court.[402] Navajo law even provides for nonmember Indians like Means to participate in tribal politics (which he

396. *See, e.g.*, Talton v. Mayes, 163 U.S. 376, 382–83 (1896) (holding that the Bill of Rights does not apply to tribal governments because they are not arms of the federal government); Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1050–51 (2007).

397. *See generally* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 473 (1996).

398. *See, e.g.*, CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 244 (2004) (citing RUPERT ROSS, DANCING WITH A GHOST: EXPLAINING INDIAN REALITY 13–14 (1992)) (discussing a "cultural requirement to full disclosure").

399. *See* Robert T. Anderson, *Criminal Jurisdiction, Tribal Courts and Public Defenders*, 13 KAN. J.L. & PUB. POL'Y 139, 144–45 (2003).

400. *See, e.g.*, COHEN'S HANDBOOK 1982 ed., *supra* note 29, § 9.09, at 769 ("Precontact tribal traditions often regulated conduct by sanctions which Anglo-American law does not consider penal."); *id.* § 4.01[1][a], at 204–05 (noting that tribes often depended on "mockery, ostracism, ridicule, and religious sanctions" for criminal violations instead of imprisonment); WATSON SMITH & JOHN M. ROBERTS, ZUNI LAW: A FIELD OF VALUES 50–51 (1954) (noting that murder in traditional Zuni communities was considered a private offense—not public, similar to a tort—and not subject to public punishment).

401. *See* ROSEN, *supra* note 217, at 233 (quoting Chief Justice Roberts: "People don't want the Court to seem to be lurching around because of changes in personnel").

402. *See* Morris v. Tanner, 16 Fed. App'x 652, 653–54 (9th Cir. 2001) (describing motions made by Morris); Means v. Dist. Court of the Chinle Judicial Dist., 2 Navajo Rptr. 528, ¶ 49 (1999) ("The petitioner's attorney was asked whether Navajo Nation law affords criminal defendants all the rights guaranteed by the Sixth Amendment to the United States Constitution during oral argument, and he evaded the question. Although such is not required by the Indian Civil Rights Act of 1968, criminal defendants in the Navajo Nation court system are entitled to the appointment of counsel if they are indigent, and they are entitled to a jury composed of a fair cross-section of Navajo Nation population, including non-Indians and nonmember Indians. The petitioner has all the rights he would have in a state or federal court.").

did) and even sit on juries (he refused to register).[403] But the next case in the pipeline to the Court might include those factors.

What tribal advocates and policymakers should now be on the lookout for are appeals of tribal court convictions of nonmember Indians who are indigent, unrepresented, cannot sit on tribal court juries, and who are sentenced to even a single day of jail. Russell Means arguably now faces the justice of the Navajo Nation because he did not meet those requirements. Forward-looking tribes are thinking about funding public defender offices and appointed counsel procedures and adopting rules that allow for criminal trial juries to include defendants' peers, and they are wise to do so.

2. Tribal Civil Jurisdiction

In this area, there is not the same importance to the Court's constitutional concerns as there is in the criminal jurisdiction area, but the same questions are present.

Justice Scalia's majority opinion in *Nevada v. Hicks* held that tribal courts do not have jurisdiction over federal civil rights claims by tribal members against state officers for actions that occurred in Indian Country.[404] However, the opinion acknowledged an open question: "We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[405] In a concurring opinion, Justice Souter raised several questions as to whether tribal courts should ever have jurisdiction over nonmember defendants.[406] Justice Souter's opinion suggests that at least some members of the Court worry that subjecting nonmembers to the processes and laws of Indian tribes might be a violation of due process.[407] There seems to be a worry that tribal laws are "unusually difficult for an outsider to sort out."[408] As a response, Indian law scholars have critiqued the very notion of implicit divestiture, arguing that the Court's authority in the area is questionable and flawed.[409] Others argue that respect for tribal sovereignty should compel the Court to recognize tribal court jurisdiction over nonmembers.[410] Still others have argued that the tribal law that might be confusing to an outsider never applies to outsiders, and that tribal courts apply Anglo-American law to nonmembers.[411]

403. *See Means*, 2 Navajo Rptr. 528, ¶¶ 47-49 (1999).

404. 533 U.S. 353, 364 (2001).

405. *Id.* at 358 n.2.

406. *See id.* at 375–86 (Souter, J., concurring).

407. *See id.* at 384–85.

408. *Id.* at 385.

409. *See, e.g.*, LaVelle, *supra* note 154.

410. *See generally* Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147 (2000).

411. *See, e.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common*

At one point, the Court acknowledged a concern that divesting tribal courts of jurisdiction would be detrimental to tribal self-government and the development of tribal institutions,[412] but the Court does not appear to be concerned with these questions any longer. Tribal advocates should develop pragmatic reasons that would persuade the Court that preserving tribal civil jurisdiction over nonmembers is important.

B. Federal Statutes of General Applicability

Another area of difficulty is the question of whether federal laws that do not state on their face that they apply to Indian tribes actually do apply to Indian tribes.[413] Federal employment rights statutes such as the Fair Labor Standards Act[414] and the National Labor Relations Act[415] are silent as to whether they apply to Indian tribes as employers. Other federal statutes, such as Title VII of the Civil Rights Act of 1964,[416] explicitly exclude Indian tribes while others, such as certain criminal[417] and environmental[418] statutes, explicitly include Indian tribes. The federal circuit courts of appeal have adopted differing—and one could argue, conflicting—common law tests to determine whether or not federal statutes of general applicability will apply.[419]

Whether the Court—assuming it agrees to hear a case in this area (it has not done so yet)—decides that a federal statute of general applicability will apply to Indian tribes most likely will depend far more on the federal policy annunciated by Congress in the statute than on foundational principles of tribal sovereignty. Consider a D.C. Circuit case, *San Manuel Indian Bingo and Casino v. NLRB*,[420] for example. Tribal advocates argued forcefully that foundational principles of tribal sovereignty and federal Indian law compel the court to find that the National Labor Relations Act does not apply to Indian tribes or their business interests,[421] arguments all but ignored by the D.C. Circuit

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Law, 43 Hous. L. Rev. 701, 739 (2006).

412. *See, e.g.*, Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985); Williams v. Lee, 358 U.S. 217, 223 (1959).

413. *See generally* Cohen's Handbook 1982 ed., *supra* note 29, § 2.03, at 128–32; William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. Mem. L. Rev. 1365 (1995); Singel, *supra* note 392.

414. *See* Reich v. Great Lakes Indian Fish & Wildlife Comm'n, 4 F.3d 490, 493 (7th Cir. 1993).

415. *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002).

416. *See* Charland v. Little Six, Inc., 198 F.3d 249 (8th Cir. 1999) (per curiam).

417. *See* Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm'n, 327 F.3d 1019, 1022 (10th Cir. 2003) (discussing the Johnson Act).

418. *See generally* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 Kan. J.L. & Pub. Pol'y 191 (2006).

419. *See, e.g.*, Singel, *supra* note 392, at 702 n.87, 703 n.94 (listing cases from different circuits that follow conflicting approaches).

420. 475 F.3d 1306 (D.C. Cir. 2007).

421. *See* Petitioners' Opening Brief at 21–34, *San Manuel*, 475 F.3d 1306 (No. 05-1392).

panel.[422] The case could have come down to non-Indian law principles: first, whether Congress originally intended the Act to apply to tribal businesses in 1935;[423] and, second, if not, whether the Act's scope can change over decades to encompass the relatively recent phenomenon of successful tribal business operations employing numerous nonmembers. The second issue, even if the D.C. Circuit does not reach it, might become an important constitutional reason for the Court to grant certiorari in an appeal from either side.

C. TENTH AMENDMENT

A recent addition to the discussion of federal Indian law is the Tenth Amendment. Long considered to be part of the recognition of the historical fact that the states have little or no stake in the federal-tribal relationship,[424] the Rehnquist Court's buttressing of states' rights appears to have emboldened states' claims based on the Tenth Amendment against tribal interests in recent years.[425] There are two major areas in which the states are making Tenth Amendment claims. First, states are arguing that the Department of Interior's authority to take land into trust for the benefit of Indian tribes—and the concomitant immunity from state tax and regulatory authority—violates states' reserved rights under the Tenth Amendment.[426] Second, in one state supreme court, tribal political activities that appear to interfere with state political activities have triggered the Tenth Amendment in a manner sufficient to abrogate tribal sovereign immunity.[427] The question that the Court could decide soon is whether the Tenth Amendment is important enough to limit certain exercises of tribal sovereignty.

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422. *See San Manuel*, 475 F.3d at 1314–19.

423. *See* Singel, *supra* note 392, at 719–25 (arguing that Congress did not).

424. *See* Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985); Carcieri v. Kempthorne, 497 F.3d 15, 39–40 (1st Cir. 2007) (en banc); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1307–08 (N.D.N.Y. 1983); Mohegan Tribe v. Connecticut, 528 F. Supp. 1359, 1368–69 (D. Conn. 1982) (quoting National League of Cities v. Usery, 426 U.S. 833, 852 (1976)); AMAR, *supra* note 26, at 107–08.

425. *See, e.g.*, Carcieri v. Norton, 290 F. Supp. 2d 167, 189 (D.R.I. 2003), *aff'd sub nom.* Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007) (en banc); City of Roseville v. Norton, 219 F. Supp. 2d 130, 154 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied sub nom.* Citizens for Safer Cmtys. v. Norton, 541 U.S. 974 (2004); *In re* A.B., 663 N.W.2d 625, 636–37 (N.D. 2003), *cert. denied sub nom.* Hoots v. K.B., 541 U.S. 972 (2004).

426. *See Carcieri*, 290 F. Supp. 2d at 189–90; *City of Roseville*, 219 F. Supp. 2d at 154.

427. *See* Agua Caliente Band of Cahuilla Indians v. Superior Court, 148 P.3d 1126, 1135–39 (Cal. 2006).

D. INDIAN LAND CLAIMS

One final area worth discussing here is the question of longstanding Indian land claims. Here, the Court appears to recognize no constitutional concerns that weigh in favor of Indian tribes, but there are significant pragmatic concerns. The Court is very worried that Indian land claims and other claims to sovereignty will upset the "settled expectations" of private landowners and state and local governments.[428] But, if there are significant constitutional concerns, they are property rights that should favor tribal and federal interests.[429] However, these cases are examples of where pragmatic concerns appear to trump any constitutional concerns.

In 2005's *City of Sherrill v. Oneida Indian Nation*,[430] the Supreme Court rewrote the rules on "ancient" tribal claims to sovereignty by allowing—for the first time in recent memory and with the last time benefiting private property owners[431]—state and local governments opposing tribal sovereignty and Indian tribes to raise equitable defenses.[432] In other words, the Court held that the Nation (and the United States) waited too long to bring their claims.[433] Although *City of Sherrill* did not adjudicate an Indian land claim (it had already been settled),[434] the Second Circuit relied upon the decision as the basis for dismissing land claims in *Cayuga Indian Nation v. Pataki*;[435] claims valued at hundreds of millions of dollars.[436] The State of New York and its subdivisions now argue in every land claim pleading that too much time has passed to restore tribal sovereignty and Indian lands.[437] It seems certain that tribes bringing land claims and other long-standing claims to sovereignty must traverse this new (and hostile) world of equitable defenses in order to prevail. The very notion of an Indian land claim may soon disappear. State and local governments may have found their trump card in dealing with the troublesome tribal claims to land and sovereignty.

But the opponents of tribal land claims may be too smart for their own good. The dismissal of Indian land claims on the basis that too much time has passed since the transactions in which Indian land ownership

428. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 218 (2005).

429. *Cf.* Babbitt v. Youpee, 519 U.S. 234 (1998); Hodel v. Irving, 481 U.S. 704 (1987).

430. 544 U.S. 197 (2005).

431. The last time was *Felix v. Patrick*, 145 U.S. 317 (1892).

432. *See City of Sherrill*, 544 U.S. at 213–14.

433. *See id.* at 217–19.

434. *See id.* at 202.

435. 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).

436. *See id.* at 268 (stating that claims were worth $248 million).

437. And with some success. *Compare* Shinnecock Indian Nation v. New York, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) (dismissing land claims), *with* Oneida Indian Nation v. New York, No. 574-CV-187, 2007 WL 1500489 (N.D.N.Y. May 21, 2007) (preserving land claims).

passed into the hands of non-Indians and non-tribal governments may reduce state and local government liability, but the liability could shift to the federal government. Thousands of Indian land claims involving millions upon millions of acres now lay dormant, preserved in accordance with a 1982 federal statute,[438] waiting to be activated and prosecuted by the Department of Justice. Many, if not the vast majority, of these land claims are based upon events that transpired long ago and could be subject to the equitable defenses the *City of Sherrill* Court held could be applied to "ancient" tribal claims. If these claims are barred by the passage of time, it will be because of the failure of the United States to prosecute the land claims. As a result, the United States will be liable to the Indian tribes who lost out on their land claims. Tens of billions of dollars—and perhaps hundreds of billions of dollars—are at risk as a direct result of the *City of Sherrill* and *Cayuga Indian Nation* cases.[439]

Consider an older case. In 1968, the Supreme Court decided *Menominee Tribe of Indians v. United States*.[440] The posture of the case was most unusual in that both the named parties—the Tribe and the Government—asked the Court to affirm a Court of Claims ruling.[441] The State of Wisconsin, appearing as amicus curiae, was the only party arguing in favor of reversal.[442] The case arose when Congress enacted the Menominee Termination Act of 1954, disbanding the tribal government and transferring the Tribe's assets to a private corporation owned and operated by the tribal members.[443] Menominees continued to exercise their hunting and fishing rights guaranteed by the 1854 Treaty of Wolf River, however, and the State began to enforce its laws and regulations on them, culminating in a Wisconsin Supreme Court decision holding that the 1954 termination act had abrogated the 1854 treaty rights.[444] The Tribe then turned to the federal claims courts and sought just compensation under the Fifth Amendment against the United States for the loss of the treaty-protected hunting and fishing rights.[445] The Court of Claims held that the Tribe was not entitled to compensation because the treaty rights had not been abrogated,[446] leading to the unusual posture of the argument before the Supreme Court, with the United States hoping to avoid liability by convincing the Court to strike down the Wisconsin Supreme Court's decision.

438. 28 U.S.C. § 2415(b) (2000).

439. *See* Matthew L.M. Fletcher, *The Land Claims Time-Bomb*, INDIAN COUNTRY TODAY, Jan. 19, 2007, *available at* http://www.indiancountry.com/content.cfm?id=1096414372.

440. 391 U.S. 404 (1968).

441. *See id.* at 407.

442. *See id.*

443. *See id.* at 408.

444. *See id.* at 407–08 (citing State v. Sanapaw, 124 N.W.2d 41, 46 (Wis. 1963)).

445. *Id.* at 407.

446. *See id.*

There are reasons to believe that same scenario could play out in the context of Indian land claims barred by equitable defenses—and perhaps it will play out that way in hundreds or even thousands of cases. First, in these cases, the basis for bringing a land claim is a violation of a federal statute or an Indian treaty provision. The New York land claims, for example, arise under the Trade and Intercourse Acts, where the federal government had a duty to prevent—and if not prevent, then to seek a reversal of—the underlying transactions leading to the land claims.[447] In the case of land claims arising out of treaty provisions, the claims are based on a treaty provision that places an affirmative mandate upon the federal government to prevent the dispossession of Indian lands. In many, many circumstances, federal government officials participated in the acts of dispossession—clear acts of illegality.[448] Second, given that the federal government often is the only party capable of suing to recover Indian lands or to seek compensation because of state sovereign immunity,[449] the equitable defense applies against the government for failure to act. In effect, the federal government is at fault and therefore culpable.[450]

Moreover, before any tribe can proceed with a claim under U.S.C. § 2415, the federal government must exercise discretion in determining whether or not to prosecute the claim on behalf of the tribe.[451] In other words, each § 2415 claim places a strict duty on the federal government. Since 1983, when the government published the land claims in the Federal Register,[452] the Department of Justice has chosen to take up only a few.[453] Over two decades have passed since the government published

447. *See generally* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17 (1979).

448. *See, e.g.*, Ewert v. Bluejacket, 259 U.S. 129 (1922).

449. *See, e.g.*, Idaho v. United States, 533 U.S. 262 (2001) (suit by United States on behalf of Indian tribe against state); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 783–85 (1991) (rejecting tribal suit against state on basis of state sovereign immunity).

450. In fact, Congress enacted the Indian Claims Limitation Act of 1982, Pub. L. 97-394 (1982), in part, due to concerns that the United States faced massive liability for failure to prosecute tribal land claims. *See* H.R. Rep. No. 97-954, at 6 (1982) (citing Covelo Indian Cmty. v. Watt, 551 F. Supp. 366 (D.D.C. 1982), *aff'd*, 1982 U.S. App. LEXIS 23138 (D.C. Cir. Dec. 21, 1982)).

451. *See* 28 U.S.C. § 2415(a) (2000) ("That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) *one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim* or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.") (emphasis added).

452. *See* 48 FED. REG. 13698 (Mar. 25, 1983).

453. *See, e.g.*, Bay Mills Indian Cmty. v. W. United Life Assurance Co., No. 96-CV-275, 1998 U.S. Dist. LEXIS 20782 (W.D. Mich. Dec. 11, 1998), *aff'd*, 208 F.3d 212 (6th Cir. 2000); Bay Mills Indian Cmty. v. State, 626 N.W.2d 169 (Mich. App. 2001), *cert. denied*, 122 S. Ct. 1303 (2002).

the land claims. Given the harshness of the equity rules announced by federal courts, it may already be too late for the federal government to recover. Federal government liability may be accruing this moment.

CONCLUSION . . . AND A CAVEAT

What remains of federal Indian law in Supreme Court jurisprudence? What remains of the rule of law in this entire field? The foundational principles that resonated with the Marshall, Warren, and Burger Courts have not been persuasive to the Rehnquist or Roberts Courts. Given the Court's unwillingness to trace these foundational principles to the Constitution, it would appear that these principles no longer carry the day. Did these principles ever carry the day in the Supreme Court, even for the Courts that created and cemented them? Is "ruthless pragmatism" the guiding principle of the Roberts Court's Indian law cases? Perhaps federal Indian law is dead, if it ever existed.

Observers of federal Indian law often chuckle when they read in *The Brethren* about how Supreme Court Justice Brennan once referred to *Antoine v. Washington*,[454] a 1975 case about the prosecution of a pair of Colville tribal members, as a "chickenshit" case. Or how Justice Harlan referred to 1970's *Tooahnippah v. Hickel*[455] as a "peewee" case. Indian law advocates chuckle because the Supreme Court accepts far more Indian law cases for review than would be expected, given the decreasing opportunities to "arouse the judicial libido."

In 1991, H.W. Perry interviewed several Supreme Court Justices and some of their former clerks in a study to determine what makes a case "certworthy." One of the Justices, who identified him or herself as a "Westerner," referred to Indian law cases as "crud cases" worthy of assignment only to junior Justices.[456] But in the same breath, the Westerner Justice said, "Actually, I think the Indian cases are kind of fascinating. It goes into history and you learn about it, and the way we abused some of the Indians, we, that is the U.S. government."[457] That justice then noted that, in the Rehnquist Court, there were three Westerners and they all had a special interest in western water law and in Indian law.[458] Chief Justice Rehnquist and Justice O'Connor are both from Arizona and Justice Kennedy is from California. Given that the Supreme Court's "Rule of Four" states that it takes the vote of four of the nine Justices to grant certiorari in any given case, it would appear that in many Indian law cases, the three Westerners needed only one more vote to grant "cert." Perhaps this helped to explain why the Court

454. 420 U.S. 194 (1975).
455. 397 U.S. 598 (1970).
456. PERRY, *supra* note 188, at 262.
457. *Id.*
458. *Id.* at 261.

heard so many Indian law cases during the Rehnquist Court era.

But Chief Justice Rehnquist and Justice O'Connor are no longer on the Court. They have been replaced by Chief Justice Roberts and Justice Alito, neither of whom could be called Westerners. The only Westerner Justice that remains is Justice Kennedy. Two Indian law cases have been accepted this term already, but upon closer reflection, one realizes they are not cases about federal Indian law principles, but rather are cases about statutory interpretation and administrative law. In the 2005 Term, the Court heard only one Indian law case, *Wagnon v. Prairie Band of Potawatomi Indians*[459]—and that case had been granted certiorari during the 2004 Term when all three Westerners remained on the Court.[460]

Is Indian law no longer a favorite of Supreme Court certiorari decisions? Consider the cases that the Roberts Court has refused to hear: (1) *Cayuga Indian Nation v. Pataki*,[461] where the Second Circuit Court of Appeals struck down Cayuga land claims amounting to more than $200 million; (2) *South Dakota v. Department of the Interior*[462] and *Utah v. Shivwits Band of Paiute Indians*,[463] two claims from states arguing that the federal law allowing the Bureau of Indian Affairs to take land into trust for Indian tribes was unconstitutional; and (3) *Means v. Navajo Nation*[464] and *Morris v. Tanner*,[465] two cases arguing that the federal statute affirming that tribes have criminal jurisdiction over nonmember Indians was unconstitutional. While there were plausible reasons for the Court to deny cert. in these cases, perhaps the sole Westerner remaining on the Court can no longer garner the votes.[466] For the eight non-Westerners on the Court, perhaps Indian law simply is not "certworthy." We'll see how the Roberts Court develops. As many observers know, the Chief Justice argued two Indian law cases before the Supreme Court—*Alaska v. Native Village of Venetie Tribal Government*[467] (on behalf of the State of Alaska) and *Rice v. Cayetano*[468] (on behalf of the State of Hawaii), both of which were devastating losses for Indian Country—so we know he is

459. 546 U.S. 95 (2005).

460. 543 U.S. 1185 (2005).

461. 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).

462. 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006).

463. 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006).

464. 432 F.3d 924 (9th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 381 (2006).

465. No. 03-35922, 160 Fed. App'x 600 (9th Cir., Dec. 22, 2005), *cert. denied*, 127 S. Ct. 379 (2006).

466. *See* Posting of Matthew L.M. Fletcher to For the Seventh Generation Blog, http://tribal-law.blogspot.com/2007/04/s-cts-new-indian-law-agenda.html (Apr. 4, 2007) (noting that the Roberts Court accepted no new Indian law cases in the October 2006 Term). *But see* Plains Commerce Bank v. Long Family Land & Cattle Co., Inc., 491 F.3d 878 (8th Cir. 2007), *cert. granted*, 128 S. Ct. 829 (2008).

467. 520 U.S. 522 (1998).

468. 528 U.S. 495 (2000). Roberts also served as counsel of record for the petitioner in *Roberts v. United States*, 529 U.S. 1108 (2000) (No. 99-1174). *See also* Posting of Matthew L.M. Fletcher to Turtle Talk Blog, http://turtletalk.wordpress.com/2007/10/30/chief-justice-roberts-federal-indian-law/ (Oct. 30, 2007).

knowledgeable about some aspects of Indian law. One question yet to be answered is whether the Chief Justice transforms his professional expertise and experience in federal Indian law questions into votes for certiorari.

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