THE NEW FEDERAL INDIAN LAW

Matthew L.M. Fletcher

Abstract

Is federal Indian law dead? Despite a declining docket during the Rehnquist Court, the Supreme Court continued to take a disproportionately high number of Indian law cases – and deciding more than 75 percent of them against tribal interests. While many scholars suggest that the Court's conservative views drive these Indian law decisions and criticize the Court for failing to follow foundational principles of federal Indian law, this Article asserts that the Court's reasons for granting *certiorari* and for deciding against tribal interests in these cases are not Indian law-related. Instead, the Court identifies important, unrelated constitutional concerns that appear to arise more frequently in Indian law cases, decides those matters, and only then turns to the federal Indian law questions. Once the Court disposes of the important constitutional concern in its analysis, the Court's federal Indian law analysis is secondary and often driven by pragmatism. This Article concludes by arguing that advocates for tribal interests must locate an important constitutional concern or a significant pragmatic consideration that will drive the Court's analysis before they will turn around the win-loss ratio.

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Leech Lake Ojibwe novelist David Treuer stirred up controversy in Indian Country by declaring in his new book of literary criticism that "Native American fiction does not exist."[1] The *New York Times* described the book as "a kind of manifesto, which argues that Native American writing should be judged as literature, not as a cultural artifact, or as a means of revealing the mystical or sociological core of Indian life to non-Natives."[2] Treuer uses the trickster story "Wenebozho and the Smartberries" – in which the Anishinaabe trickster Wenebozho[3] tricks a not-so-smart Indian guy into eating small, dried turds by calling them "smartberries"[4] – as the punch line to his argument focusing on Turtle Mountain Band Chippewa writer Louise Erdrich:[5]

> [I]f you insist on believing that *Love Medicine* is a cultural document and that you can reach an understanding of its delicious magic without looking at it as a literary production in relation to other literary productions, and if you really want to use notions of desire instead of from

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[1] DAVID TREUER, NATIVE AMERICAN FICTION: A USER'S MANUAL 191 (2006).

[2] Dinitia Smith, *American Indian Writing, Seen Through a New Lens*, N.Y. TIMES, Aug. 19, 2006, at B9.

[3] Alternate spellings include "Waynaboozhoo," EDWARD BENTON-BENAI, THE MISHOMIS BOOK: THE VOICE OF THE OJIBWE 29 (1979) (Indian Country Press, Inc. 1981), and "Nanabush," JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 17 (2002).

[4] TREUER, *supra* note __, at 50-52 (quoting Rose Foss, *Why Wenaboozhoo Is So Smart*, 4 OSHKAABEWIS NATIVE J. 33-34 (1997)).

[5] *See id*. at 29-68 (criticizing LOUISE ERDRICH, LOVE MEDICINE (1993)).

knowledge as a way to make sense of it, then come with me, over here next to the trail: I've got some smartberries for you to eat.[6]

Drawing from Treuer's example, this Article posits that federal Indian law[7] *does not exist*. Or, to put it in a more accurate way, federal Indian law as practiced before the United States Supreme Court *is in serious decline* [8] – and most likely has been so since the ascension of Chief Justice Rehnquist in 1986[9] and the concomitant reduction of the Supreme Court's docket.[10] And, 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. Scholars and practitioners both believe that federal Indian law –

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[6] David Treuer, *Smartberries: Interpreting Erdrich's* Love Medicine, 29 AMER. INDIAN CULTURE AND RESEARCH J. 21, 36 (2005). This paragraph is reproduced in somewhat altered form in Treuer's book at the end of the chapter called "Smartberries." TREUER, *supra* note __, at 68. The journal article version is starker.

[7] "Federal Indian law" will be used interchangeably with the constitutional common law developed by the Supreme Court and other courts with Judge Canby's definition of "federal Indian law," which is defined as "that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1 (4th ed. 2004). *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1-3 (Nell Jessup Newton et al. eds. 2005) (*hereinafter* COHEN'S HANDBOOK 2005 ED.). "Federal Indian law" includes statutes, treaties, regulations, and other codified law, as well as the federal common law interpreting these statutes, although this Article will focus on the constitutional common law announced in the Court's Indian cases.

Examples of the declaration and application of federal Indian "common" law abound. *E.g.*, County of Oneida, N.Y. v. Oneida Indian Nation of N.Y. 470 U.S. 226, 233-36 (1985) (finding a federal common law cause of action for tribes and the United States to enforce the Trade and Intercourse Acts, 25 U.S.C. § 177); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding as a matter of federal common law that Indian tribes do not have criminal jurisdiction over non-Indians).

[8] This Article, however, does not posit that Indian law as practiced before federal, state, and tribal courts, administrative agencies, and in everyday practice – and that is taught in law schools – is not as robust and dynamic as any cutting edge field of law. It is.

[9] *See generally* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1 (1991).

[10] *See* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1672 (2006) (the "incredibly shrinking docket"); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368-76 (2006). At the same time, the docket appears to be shrinking even further. *See* Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1.

to use Treuer's phrasing – "is a cultural document and that you can reach an understanding of i[t] … without looking at it as a [legal] production in relation to other [legal] products…."[11] What scholars and practitioners should do – even if they do not buy the argument that federal Indian law no longer exists – is look at the last 20 years of federal Indian law through a lens of assuming that 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.

A critical premise of this Article is that the Court applies its decision making discretion to decide the "important" constitutional concern *first* and *then* the Court decides any remaining federal Indian law questions in order to reach a result consistent with its decision on the important constitutional concern. Given that federal Indian law is malleable (according to the way the Court reads Indian law) even in comparison to, for example, the Court's federalism or statutory interpretation jurisprudence, the inconsistencies and seeming intellectual dishonesty in the Indian law side of the decisionmaking is unsurprising.

This Article attempts a fresh look at the Court's Indian cases from more of a "positive rather than a normative analysis…."[12] This Article's goal is to give "systematic attention to … implications for Supreme Court decisionmaking" in the context of federal Indian law.[13] The argument begins with a description of several classic Indian law cases in Part I. Each of these cases represents a vital and dynamic part of Indian law – and form a part of the core of the Indian law canon – but they can be read as something other than

[11] TREUER, *supra* note __, at 68.
[12] Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 32 (2005).
[13] Neal Kumar Katyal, *Comment* – Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 66, 68 (2006). Professor Katyal's paper on the strategies and preparations for litigating *Hamdan v. Rumseld* before the Supreme Court should be mandatory reading for tribal attorneys.

an Indian law case. In fact, each of these cases, while decided in reliance on Indian law principles, includes a separate, independent reason – legal, historical, pragmatic, and so on – for the outcome.

Part II introduces the current state of federal Indian law. Part II establishes that 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.[14] The Court's decisions reflect a "ruthless pragmatism" as a result of this view of Indian law.[15]

Part III offers a fresh view of several of the Court's most important 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 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 offers a new look at the Indian cases with an emphasis on locating an important constitutional concern unrelated to Indian law. A chart describing the Indian

[14] David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1575 (1996).
[15] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 460 (2005); *see also id*. at 436 ("ruthless pragmatism").

law and non-Indian law-related issues decided by the Court in each of the Indian law decisions since 1986 reveals that a large majority of Indian law cases arguably are *not* Indian law cases at all.

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 III 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 or even to put Indians in their place. 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 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, then 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,[17] 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. This attempt failed and 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 habeas corpus. The United States Supreme Court grants the petition and issues an order

[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).
[17] Prairie Band Potawatomi Nation v. Wagnon, 126 S. Ct. 676 (2005).

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 agrees to hear a second case about the concomitant issue relating to the Georgia legislature's repeated attempts to nullify treaties and other federal law.[19]

- An Indian woman sues an Indian tribe in federal court seeking a declaration that the tribal membership ordinance is a violation of the equal protection clause of the Indian Civil Rights Act.[20] The Supreme Court grants *certiorari*.[21]
- A federal district court issues a final order enjoining the State of Washington and its offers and agencies from interfering with Indians exercising fishing rights in accordance with an Indian treaty. The Ninth Circuit affirms the order and the Supreme Court denies *certiorari*. A state court then issues an order, later affirmed by the state supreme court, enjoining the State and its officers from enforcing the federal court order. The United States Supreme Court grants *certiorari* to resolve the split.[22]
- Congress enacts a law prohibiting the harvesting of bald eagles. Anyone found in possession of eagle parts will be in violation of the law and subject to time in jail. Federal officers discover an Indian man in possession of bald eagle parts on an Indian reservation, of which the defendant is a member. He is prosecuted and

[18] *See* Georgia v. Tassels, 1 Dud. 229 (Ga. 1930).
[19] *See* Worcester v. Georgia, 31 U.S. 515 (1832).
[20] 25 U.S.C. § 1302(8).
[21] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[22] *See* Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (*Fishing Vessel*).

convicted in federal court. On appeal to the United States Supreme Court, the man argues that he was exercising rights guaranteed to his tribe and its member in accordance with an Indian treaty ratified long before the Congressional prohibition.[23]

- A federal court enjoins the State of Minnesota and its agencies and political subdivisions from interfering with the off-reservation hunting, fishing, and gathering rights of an Indian tribe. On appeal to the United State Supreme Court, the State argues that the President had nullified the treaty by issuing an Executive Order.[24]

The previous fact patterns are simplified versions of cases that the Supreme Court has reviewed throughout American history. A quick review of the fact patterns would compel the reader to believe that they are federal Indian law cases. And, 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.[25] In fact, these cases appear in prominent fashion in the two major casebooks on federal Indian law.[26] These are classic cases that form a part of the backbone of federal Indian law.

But it could be argued that none of these cases are federal Indian law cases.

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[23] *See* United States v. Dion, 476 U.S. 734 (1986).
[24] *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (*Mille Lacs*).
[25] *See supra* **notes __ to __**.
[26] *See* ROBERT N. CLINTON, CAROLE E. GOLDBERG, AND REBECCA TSOSIE, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 76-85 (rev. 4th ed. 2005) (*Worcester*); *id*. at 204-12 (*Mille Lacs*); *id*. at 469-75 (*Dion*); *id*. at 482-89 (*Martinez*); *id*. at 1249-61 (*Fishing Vessel*); DAVID H. GETCHES, CHARLES F. WILKINSON, AND ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 112-21 (5th ed. 2005) (*Worcester*); *id*. at 323-39 (*Dion*); *id*. at 391-97 (*Martinez*); *id*. at 863-72 (*Fishing Vessel*); *id*. at 880-88 (*Mille Lacs*).

These cases highlight the possibility that federal Indian law does not exist and that perhaps it is a mistake to think of these cases 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, if a judge wishes. 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.[27]

Indian law scholars have been decrying the lack of principled decisionmaking about federal Indian law for decades.[28] Nothing stops the Court – no constitutional provision, common law principle, or anything else – from working radical transformations of

[27] JED RUBENFELD, REVOLUTION BY JUDICIARY 5 (2006).
[28] *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 (1979); John Petoskey, *Indians and the First Amendment*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 221 (Vine Deloria, Jr., ed. 1985).

federal Indian law at any moment.[29] The only constitutional provision mentioning Indian tribes is the Indian Commerce Clause.[30] 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.[31]

The first fact pattern, based on *Georgia v. Tassels* [32] and *Worcester v. Georgia*,[33] involved questions of federalism and the supremacy of federal law over conflicting state laws.[34] In that case, the State of Georgia issued a resolution proclaiming that the Supreme

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[29] Consider *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), which redrew the map relating to Indian land claims in a single instant. *See* Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2nd Cir. 2005) (dismissing Indian land claims after 20 years of litigation by following the reasoning of *Sherrill*); Matthew L.M. Fletcher & Wenona T. Singel, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005).

[30] CONST. art. I, § 8, cl. 3. For more discussion of the background and possible limits of federal power under the Indian Commerce Clause, please see 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); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUNDATION RESEARCH J. 1; Clinton, *There is No Supremacy Clause*, *supra* note __; Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

[31] *Cf*. Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF., March/April 2004, at 57, 59.

[32] 1 Dud. 229 (Ga. 1830). For background material, please see TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 111-15 (2002); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 733-734 (red. ed. 1926).

[33] 31 U.S. 515 (1931). For wide-ranging scholarly commentary on this very important case, please 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); TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 175-90 (2002); PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 46-50 (1991) (Berg Publishers 1993); 1 WARREN, *supra* note __, at 754-61; G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 731-37 (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 (1999). 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 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds. 1982) (*hereinafter* COHEN'S HANDBOOK 1982 ED.).

[34] *See Worcester*, 31 U.S. at 559 ("The constitution, 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 constitution, are committed exclusively to the government of the union."); CURRIE, *supra* note __, at 181-

Court had no jurisdiction or authority to review the decisions of state courts.[35] The case 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.[36] 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.[37] Instead, these issues appeared in a case 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 100 years – *Santa Clara Pueblo v.*

83; Burke, *supra* note __, at 512-13; Gerald N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L. J. 875, 905-06 (2003).

[35] *See* 1 WARREN, *supra* note __, at 733-34.

[36] For commentary and background on the Nullification Crisis, please see ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 42 (2nd ed. Sanford Levinson, ed.); R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 88 (1968); 1 WARREN, *supra* note __, 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. SOUTHERN HIST. 519 (1973); 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 (1985); Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N. D. L. REV. 73, 110 (1988); R. Kent Newmyer, *John Marshall,* McCulloch v. Maryland*, and the Southern States' Rights Tradition*, 33 JOHN MARSHALL L. REV. 875, 876 (2000).

[37] *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 letter to his son; "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.").

Martinez [38] – is a mere statutory interpretation case about whether the Indian Civil Rights Act may be read to imply a cause of action[39] and to waive the sovereign immunity of a sovereign.[40] It is tempting to focus on the tribal sovereignty or sex discrimination aspects of the case – and they are significant – but consider the underlying questions that interested the Court: whether sovereign immunity is waived where a civil rights statute does not have a specific cause of action to enforce those rights. Consider that if the Court construed the Act as implying a cause of action *and* waiving tribal sovereign immunity, such a precedent could be used against both federal and state sovereigns.

The third fact pattern, based on *Washington v. Washington Commercial Passenger Fishing Vessel Association*,[41] included a major question relating to the granting of full faith and credit of federal court orders in state courts,[42] a question about

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[38] 436 U.S. 49 (1978). For often intense commentary about the decision, see for example CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63-69 (1987); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Gloria Valencia-Weber, Santa Clara Pueblo v. Martinez*: Twenty Five Years of Disparate Cultural Visions*, 14 KAN. J. L. & PUB. POL'Y 49 (2004-2005). For the point of view of a Santa Clara Pueblo woman, please see Rina Swentzell, *Testimony of a Santa Clara Pueblo Woman*, 14 KAN. J. L. & PUB. POL'Y 97 (2004-2005).

[39] *See Martinez*, 436 U.S. at 60-61 (citing Cort v. Ash, 422 U.S. 66 (1975)).

[40] *See id*. at 58-59.

[41] 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); CHARLES F. WILKINSON, MESSAGES FROM FRANK'S LANDING: A STORY OF SALMON, TREATIES, AND THE INDIAN WAY (2000).

[42] *See generally Fishing Vessel*, 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.") (citing Tulee v. Washington, 315 U.S. 681 (1942); United States v. Winans, 198 U.S. 371 (1905)); *id*. at 672 n. 19 ("[T]he reason for our recent grant of certiorari on the question remains because the state courts are—and, at least since the State Supreme Court's decision in *Department of Game v. Puyallup Tribe*, 86 Wash.2d 664, 548 P.2d 1058 (1976), have been—on record as interpreting the treaties involved differently from the federal courts."); *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.") (citing United States v. Washington, 459 F. Supp. 1020 (W.D. Wash.), *aff'd*, 573 F.2d

the supremacy of federal law.[43] 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. Of course, this problem implicated the Court's supervisory responsibility.

The fourth fact pattern, based on *United States v. Dion*,[44] is a question about Congressional power to abrogate treaties with later-enacted legislation,[45] not to mention the serious national worry that Bald Eagles and other kinds of eagles were near extinction at the time.[46] The final fact pattern, based on *Minnesota v. Mille Lacs Band of Chippewa*

1123 (9th Cir. 1978); *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.") (citing Washington v. United States, 439 U.S. 909 (1978).

[43] CONST. art. IV, § 1 (requiring state courts to give full faith and credit to each other's decisions); CONST. art. VI, ¶ 2 (Supremacy Clause); 28 U.S.C. § 1738 (requiring state courts to give full faith and credit to federal courts and vice versa).

[44] 476 U.S. 734 (1986). For commentary, please see Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RESOURCES J. 859, 862-868 (1991); Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 566-67 (1991); Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 26 U. C. DAVIS L. REV. 85, 93-95, 99-101 (1991).

[45] *See Dion*, 476 U.S. 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), and citing Goldwater v. Carter, 444 U.S. 696 (1979)).

[46] *See* United States v. Fryberg, 622 F.2d 1010, 1016 (9th Cir. 1980) ("[T]he broad purpose of the Act [was] to protect the bald eagle and prevent its extinction."); Roberto Iraola, *The Bald and Golden Eagle Protection Act*, 68 ALB. L. REV. 973, 974 n. 9 (2005) (citing Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940)). *See generally Dion*, 476 U.S. at 740-44 (discussing legislative history of the statutes as applied to Indians); Kevin J. Worthern, *Eagle Feathers and Equality: Lessons on Religious Exemptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 1004 (2005) ("Just as the federal government has a compelling interest in preventing the extinction of bald eagles and other endangered species, it could well have a compelling interest in preserving endangered cultures, especially those whose roots and current manifestations exist only in the United States.").

Indians,[47] is a similar question about Executive power to abrogate treaties.[48] The constitutional concern in each case 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 is all but irrelevant.

And these five 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 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.

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 percent of cases before the Court for the fifteen Terms preceding his article and over 80 percent of cases in the ten Terms preceding his article.[49] One case upon which Dean Getches focused – *Strate v. A-1*

[47] 526 U.S. 172 (1999). For background and commentary, 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); Harvard Law Review Association, *State Sovereignty—Compatibility with Indian Treaty Rights*, 113 HARV. L. REV. 389 (1999).

[48] *See Mille Lacs*, 526 U.S. 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)); *id*. at 196 (citing El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 167 (1999), a case describing means of interpreting foreign treaties).

[49] Getches, *Beyond Indian Law*, *supra* note __, at 280.

Contractors [50] – turned much of federal Indian law on its head.[51] 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. These two cases, *Nevada v. Hicks* and *Atkinson Trading*, shocked observers of federal Indian law in both the results and the "ruthless[ness]" of their reasoning. 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. Others, such as Professor Alex Skibine, note that the Court has decided 44 cases since 1988 following *California v. Cabazon Band of Mission Indians*,[52] with 33 of the cases going against the tribal interests.[53]

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;[54] (2) state authority does not extend into Indian Country;[55] and (3) Indian tribes retain significant inherent sovereign authority unless extinguished by Congress.[56] 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

[50] 520 U.S. 438 (1997).
[51] For a description of the impact of *Strate* in Indian Country, see, for example, Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1216-1222 (2001); Skibine, *The Court's Use of the Implicit Divestiture Doctrine*, *supra* note __; Wambdi Awanwicake Wastewin, Strate v. A-1 Contractors*: Intrustion into the Sovereign Domain of Indian Nations*, 74 N.D. L. REV. 711 (1998).
[52] 480 U.S. 202 (1987).
[53] *See* Alex Tallchief Skibine, **North Dakota Syposium article (2006).**
[54] COHEN'S HANDBOOK 2005 ED., *supra* note __, at 2 ("[T]he federal government has broad powers and responsibilities in Indian affairs.") (emphasis omitted).
[55] *Id*. ("[S]tate authority in Indian affairs is limited.") (emphasis omitted).
[56] *Id*. ("[A]n Indian nation possesses in the first instance all of the powers of a sovereign state.") (emphasis omitted).

convicted criminals[57] – are an abomination, a derogation of tribal sovereignty and Indian interests, and the worst form of judicial activism and assertions of judicial supremacy.[58] 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[59] – the Supreme Court makes up Indian law as it goes.[60] 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.[61] Others assert that the Court disfavors minority rights and follows an "anti-anti-discrimination" pattern.[62] Others argue that the Supreme Court is engaged in a pattern of race discrimination against tribal interests.[63] 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

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[57] *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001) ("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).

[58] For representative views from leading scholars, please see ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113 (2002); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); 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 (2003).

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

[60] Oral Argument of Appellant, Prescott v. Little Six, Inc., 387 F.3d 753 (8th Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005) (quoting Judge Wollman at 14:51 of oral argument – "[T]he Supreme Court sort of makes it up as they go along.").

[61] *E.g.*, Getches, *Beyond Indian Law*, *supra* note __, 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, 863-64 (1997). On the "federalism revolution," 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) (coining the phrase).

[62] *E.g.*, Getches, *Beyond Indian Law*, *supra* note __, at 318-20. For an argument that the Court follows an "anti-anti-discrimination agenda," see RUBENFELD, REVOLUTION BY JUDICIARY, *supra* note __, at 158-83.

[63] *E.g.*, WILLIAMS, LIKE A LOADED WEAPON, *supra* note __; Singer, *Canons of Conquest*, *supra* note __.

United States.[64] 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.[65] Another vein of commentary deplores the inefficiencies resulting from the Court's apparent *ad hoc* decision making in the field.[66] 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.[67]

An additional factor that makes these cases difficult for tribal advocates and Indian law scholars to stomach is the consistent 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,[68] 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.[69] Even as Chief

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

[65] *E.g.*, WILLIAMS, LIKE A LOADED WEAPON, *supra* note __; 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 Jurisprudence*, 1986 WIS. L. REV. 219.

[66] *E.g.*, Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW., March/April 2005, at 38; Getches, *Beyond Indian Law*, *supra* note __, 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. 1201 (1990).

[67] *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, *(Native) American Exceptionalism*, *supra* note __, at 452-60; Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 118-19 (2005); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003). *See generally* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333 (2004).

[68] WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, *supra* note __, at 1 (naming Williams v. Lee, 358 U.S. 217 (1959), as the onset of the "modern era" of federal Indian law).

[69] The 1997 Term, for example, featured five cases involving tribal interests. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Alaska v. Native Village of Venetie, 522 U.S. 520 (1998); Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998); Kiowa Tribe of Oklahoma v. Manufacturing Technologies,

Justices Rehnquist and Roberts lead a Court that hears a smaller and smaller docket,[70] tribal interests continue to be decided before the Court at the same rate.[71] 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 21st century consists of convincing the Court *not* to grant *certiorari*.[72]

Since the 2000 Term, the Court has decided several other cases against tribal interests. Three are of import for purposes of this Article – *Inyo County v. Bishop Paiute*,[73] *Prairie Band Potawatomi Nation v. Wagnon*,[74] and, perhaps the most important and destabilizing decision in modern federal Indian law, *City of Sherrill v. Oneida Indian Nation*.[75] These cases exemplify the very recent degradation of the foundations of 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

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Inc., 523 U.S. 751 (1998); Cass County, Minn. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998). And the 2000 Term featured five cases involving tribal interests as well. *See* Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001); C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001); Idaho v. United States, 533 U.S. 262 (2001); Nevada v. Hicks, 533 U.S. 353 (2001).

[70] *Compare The Statistics*, 119 HARV. L. REV. 415, 426 (2005) (noting that the Court decided 80 cases in the 2004 Term), *with Leading Cases*, 100 HARV. L. REV. 100, 304 (1986) (noting that the Court decided 159 cases in the 1986 Term); *see also* Posner, *supra* note __, at 35 ("The number of decisions reviewable by the Court is growing; the number of decisions reviewed by the Court is declining.").

[71] In the 2005 Term, the Court heard *Arizona v. California*, 126 S. Ct. 1543 (2006), and *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676 (2005). In the 2004 Term, the Court heard *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), and *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005). In the 2003 Term, the Court heard *South Fla. Water Mgmt. Dist. v. Seminole Tribe of Fla.*, 541 U.S. 95 (2004), and *United States v. Lara*, 541 U.S. 193 (2004). In the 2002 Term, the Court heard *Inyo County, Cal. v. Pauite-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).

[72] *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.

[73] 538 U.S. 701 (2003).

[74] 126 S. Ct. 676 (2005).

[75] 544 U.S. 197 (2005).

elevation to Chief Justice in 1986.[76] 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.[77]

Then-Justice Rehnquist's Indian law jurisprudence stretches back to *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation*.[78] 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*.[79] Justice Rehnquist's Indian law cases reversed presumptions in favor of tribal immunities to state regulation and taxation;[80] replaced bright-line rules favoring tribal interests with balancing tests favoring states and local governments;[81] eliminated tribal criminal jurisdiction over nonmembers;[82] eviscerated tribal civil jurisdiction over nonmembers;[83] and limited both the federal trust responsibility toward Indian tribes[84] and the canons of construing Indian treaties and statutes to the benefit of Indians and Indian tribes.[85] Then-Justice Rehnquist 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.*

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[76] *See* GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, AND PAMELA S. KARLAN, CONSTITUTIONAL LAW lxxiii (5th ed. 2005).
[77] *See generally* BARSH & HENDERSON, *supra* note __, at 192-95; WILLIAMS, LIKE A LOADED WEAPON, *supra* note __, at 97-113; Johnson & Martinis, *supra* note __.
[78] 425 U.S. 463 (1976).
[79] 358 U.S. 217 (1959).
[80] *E.g.*, *Moe*, 425 U.S. at 475-83.
[81] *E.g.*, *id*.
[82] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[83] *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).
[84] *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).
[85] *E.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-605 (1977).

Sioux Nation,[86] where he accused the majority of engaging in "revisionist history" by asserting that the Sioux Indians were backstabbing savages.[87]

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 decisions.[88] While some may now question the Rehnquist Court's success in its so-called "federalism revolution"[89] and other areas where it rolled back the jurisprudence of the Warren Court,[90] 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

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[86] 448 U.S. 371, 424 (1980) (Rehnquist, J., dissenting); WILLIAMS, LIKE A LOADED WEAPON, *supra* note __, at 118-22.

[87] *Sioux Nation*, 448 U.S. at 435 (Rehnquist, J., dissenting); *id*. at 437 (quoting SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 539-40 (1965)).

[88] *E.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 (1998).

[89] *E.g.*, Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism after the Rehnquist Court*, 75 FORDHAM L. REV. 799, 800 (2006).

[90] *E.g.*, 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); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. J. 1 (1995).

massive comprehensive treatise – the *Handbook of Federal Indian Law*, published by the United States Department of Interior.[91] 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[92]) constitute one of the most successful treatises in American law.[93]

So much of federal Indian law is the federal law announced by the Supreme Court.[94] Much of the basis for federal Indian law derives from what Charles Wilkinson called the Marshall Trilogy of cases[95] – *Johnson v. M'Intosh*,[96] *Cherokee Nation v. Georgia*,[97] and *Worcester v. Georgia*.[98] Chief Justice Marshall's majority opinions in *Johnson* and *Worcester*, alongside his lead opinion in *Cherokee Nation*, both declared several critical and longstanding common law principles regarding the relationship between the federal government, states, and Indian tribes *and* provided a template for

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[91] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (*hereinafter* COHEN, HANDBOOK 1942 ED.); *see also* Lucy Kramer Cohen, *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).

[92] 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 opposite 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) (reviewing COHEN'S HANDBOOK 1982 ED.); Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1036-37 (1997).

[93] The original edition (1942) has been cited by state and federal courts upwards of 200 times; the 1982 edition has been cited over 400 times; and the 2005 edition has already been cited at least ten times by federal and state courts. The disgraced 1958 edition was cited over 100 times; however, many of these citations were to inoffensive portions of the *Handbook*.

[94] *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."; citing the Indian Commerce Clause and the Indians Not Taxed Clauses).

[95] WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, *supra* note __, at 24.

[96] 21 U.S. 543 (1823).

[97] 30 U.S. 1 (1831).

[98] 31 U.S. 515 (1832).

analyzing and interpreting the law in relation to disputes between the three sovereigns.[99] 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.[100]

Johnson famously adopted the Doctrine of Discovery as the foundation for land titles in the United States.[101] 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.[102] 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.[103] *Johnson* became the first instance of what the Court now calls "implicit divestiture,"[104] or

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[99] *See generally* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. __, __ (2006).

[100] *Cherokee Nation*, 30 U.S. at 32 (Baldwin, J., concurring).

[101] *Johnson*, 21 U.S. 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. *E.g.* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 3-9 (6th ed. 2006); JOSEPH WILLIAM SINGER, PROPERTY __-__ (4th ed. __). *See also* JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 175-78 (2000).

[102] *Johnson*, 21 U.S. at 574. For background on whether the Doctrine of Discovery did confer fee title or a mere preemption right prior to *Johnson*, please compare **Miller** with **Robertson**.

[103] *Johnson*, 21 U.S. at 574.

[104] *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," please 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. & 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, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 393-437 n. 243 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1160-64 (1990); 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 ad the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 800-05 (1996); 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).

a finding by the Court that an aspect of tribal inherent sovereignty has been divested[105] – not by an express Act of Congress[106] – but by implication through the lens of federal policy and national necessity[107] or, as the Court later stated, as a result of the dependency of Indian tribes upon the federal government.[108] *Johnson* recognized that history plays an important role in contextualizing Indian cases.[109]

The second case in the Trilogy, *Cherokee Nation*,[110] held that Indian tribes were not "foreign nations" as used in the Constitution for purposes of the Court's original jurisdiction.[111] The opinion held that Indian tribes did retain aspects of nationality and created the label "domestic dependent nations" for Indian tribes, a label that sticks today.[112] The holding itself is very narrow, with Chief Justice Marshall's opinion being curt and somewhat conclusory.[113] 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.[114] Two

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[105] *See Johnson*, 21 U.S. 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).

[106] *See* Merrion v. Jicarilla Apache Tribe, 445 U.S. 130, 148 (1983) ("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)).

[107] *See* Washington v. Colville Confederated Tribes, 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).

[108] *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)).

[109] *See* Fletcher, *The Iron Cold*, *supra* note __, at __.

[110] 30 U.S. 1 (1831).

[111] *Cherokee Nation*, 30 U.S. at 20.

[112] *Cherokee Nation*, 30 U.S. at 17.

[113] *See Cherokee Nation*, 30 U.S. at 15-20; Fletcher, *The Iron Cold*, *supra* note __, at __.

[114] *See Cherokee Nation*, 30 U.S. at 17-18; Fletcher, *The Iron Cold*, *supra* note __, at __.

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.[115] 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.[116] 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 a more contemporary analog) Monaco or the Vatican loses its status as a nation by virtue of their military dependence on their host countries.[117]

The final piece of the Trilogy is *Worcester*,[118] where Chief Justice Marshall's opinion garnered a 5-1 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. *Worcester* laid the framework for analyzing disputes involving Indian tribes by looking first and foremost to Indian treaties[119] and then Acts of Congress.[120] 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."[121] 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*

[115] *See Cherokee Nation*, 30 U.S. at 20 (Johnson, J., concurring); *id*. at 31 (Baldwin, J., concurring).
[116] *See Cherokee Nation*, 30 U.S. at 50 (Thompson, J., dissenting).
[117] *See Cherokee Nation*, 30 U.S. at 53 (Thompson, J., dissenting).
[118] 31 U.S. 515 (1832).
[119] *See Worcester*, 31 U.S. at 547 (interpreting the treaty term, "protection"); *id*. at 553-54 (interpreting the treaty term, "manage all their affairs").
[120] *See Worcester*, 31 U.S. at 540-41 (reviewing the Trade and Intercourse Acts).
[121] *Worcester*, 31 U.S. at 557-58.

for any proposition other than the undisputed tenet that it recognizes that tribes retain some sovereignty.[122] In the Court's phrasing, it has long ago departed from the "platonic notion" that state law has no force in Indian Country.[123]

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.[124] 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).[125] Third, Indian tribes are nations and retain their sovereign authority except as limited by the federal government.[126] 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.[127] While the Court is not always faithful to this canon of construction – even in the Trilogy[128] – the rule is an important part of federal Indian law and even extends to the interpretation of

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[122] Citations to *Worcester*'s principles now are made more often in dissent. *E.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 149 n. 40 (1996) (Souter, J., dissenting); Hagen v. Utah, 510 U.S. 399, 423 n. 2 (1994) (Blackmun, J., dissenting); Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 791, 792, 795 (1991) (Blackmun, J., dissenting); Duro v. Reina, 495 U.S. 676, 705 n. 3 (1990) (Brennan, J., dissenting).

[123] Nevada v. Hicks, 533 U.S. 353, 361 (2001) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980), and *Worcester*, 31 U.S. at 561); *see also* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 762 n. 2 (1998) (Stevens, J, dissenting) ("The general notion drawn from Chief Justice Marshall's opinion in *Worchester* …, 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 developments, with diverse concrete situations.") (quoting Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962); other citations omitted); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 256 (1992) (quoting *Worcester* 31 U.S. at 556-57, but then asserting, "The platonic notions of Indian sovereignty that guided Chief Justice Marshall have, over time, lost their independent sway.") (quotation marks and citations omitted); *Brendale*, 492 U.S. at 451 nn. 1-2 (Blackmun, concurring and dissenting); South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 527 (1986) (Blackmun, J., dissenting).

[124] *See Johnson*, 21 U.S. at 574.

[125] *See Worcester*, 31 U.S. at 557-58, 561.

[126] *See Cherokee Nation*, 30 U.S. at 15-20; COHEN, HANDBOOK 1942 ED., *supra* note __, at 122

[127] *See Worcester*, 31 U.S. at 546-47.

[128] *See Cherokee Nation*, 30 U.S. at 17-18 (interpreting the treaty term "protection" to the detriment of the Cherokee Nation).

statutes enacted for the benefit of Indians or Indian tribes.[129] 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.[130] According to the Court, tribal dependency requires the government to treat Indians and tribes with special fairness and consideration.[131] While the Court often refused to condemn federal government actions that appeared to violate this special trust relationship,[132] the concept remains an important part of federal Indian law and federal Indian policy to this day.[133]

B. The Erosion of the Foundation

Much like the Contracts Clause jurisprudence of the Marshall Court,[134] 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 20 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.[135] In fact, as some scholars suggest, the Court appears to take the easy way out by simply ignoring those foundational

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[129] *See* COHEN'S HANDBOOK 2005 ED., *supra* note __, § 2.02, at 119-128. *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.").
[130] *See* COHEN'S HANDBOOK 2005 ED., *supra* note __, § 5.04[4], at 418-23.
[131] *E.g.*, United States v. Kagama, 118 U.S. 375, 384 (1886).
[132] *E.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (refusing to require the United States to pay just compensation for taking of tribal property); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (allowing Congress to unilaterally abrogate Indian treaty).
[133] *See* COHEN'S HANDBOOK 2005 ED., *supra* note __, § 5.04[4][a], at 419 ("Today the trust doctrine is one of the cornerstones of Indian law.").
[134] *See generally* Horace H. Hagan, *Dartmouth College Case*, 19 GEO. L. J. 411 (1931); Horace H. Hagan, *Fletcher v. Peck*, 16 GEO. L. J. 1 (1927); 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).
[135] *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.

cases.[136] This recent jurisprudence appears sloppy, leading some scholars to suggest that the Rehnquist Court was laden with animus toward Indians and tribes.[137] As the Court itself sometimes recognizes, its decisions in the field are contradictory or even schizophrenic.[138] The Court appears very uncomfortable and suspicious of Indian tribes because the Constitution does not incorporate them into Our Federalism[139] and, as a result, the Court's supervisory power over tribal courts is very limited.[140] The Court also appears very 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.[141] As Professor Phil Frickey argues, the Court is uncomfortable with being unable to reconcile federal Indian law with the rest of its constitutional jurisprudence.[142]

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[136] *Cf.* Getches, *Conquering the Cultural Frontier*, *supra* note __, at 1594, 1654.
[137] *See generally* WILLIAMS, LIKE A LOADED WEAPON, *supra* note __, at __.
[138] *Cf.* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring). *See generally* 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, *The Court's Use of the Implicit Divestiture Doctrine*, *supra* note __, 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.").
[139] *See*, *e.g.*, United States v. Lara, 541 U.S. 193, 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, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28 (2005); 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).
[140] *See*, *e.g.*, National Farmers Union Ins. Cos v. Crow Tribe, 471 U.S. 845 (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 (1978) (holding that the Indian Civil Rights Act did not create a cause of action in federal courts except in criminal cases).
[141] *See*, *e.g.*, United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).
[142] *See generally* Frickey, *(Native) American Exceptionalism*, *supra* note __.

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[143] 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.[144]

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.[145] The holding in *Williams* was consistent with the

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[143] *See* COHEN'S HANDBOOK 2005 ED., *supra* note __, §§ 1.03[4]-1.06, at 45-96 (describing federal Indian policy from 1815 to 1961).

[144] *E.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945); Oklahoma Tax Commission v. United States, 319 U.S. 598, 623 (1943) (Murphy, J., dissenting); Board of Commissioners of Creek County v. Seber, 318 U.S. 705, 717-19 (1943); United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 347 (1941); Sisseton and Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424, 436 (1930); United States v. Title Insurance & Trust Co., 265 U.S. 472, 485 (1927); Johnson v. Gearlds, 234 U.S. 442, 446-47 (1914); Perrin v. United States, 232 U.S. 478, 482-84 (1914); United States v. Sandoval, 231 U.S. 28, 45-48 (1913); Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911); Dick v. United States, 208 U.S. 340, 357 (1908); In re Heff, 197 U.S. 488, 499 (1905); United States v. Rickert, 188 U.S. 432, 443, 445 (1903); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902); State of Minnesota v. Hitchcock, 185 U.S. 373, 393 (1902) (quoting Cooper v. Roberts, 59 U.S. 173, 179 (1855)); Barker v. Harvey, 181 U.S. 481, 487 (1901); United States v. Choctaw Nation, 179 U.S. 494, 532-36 (1900); Stephens v. Cherokee Nation, 174 U.S. 445, 483-84 (1899); Thomas v. Gay, 169 U.S. 264, 271 (1898); United States v. Sandoval, 167 U.S. 278, 293 (1897); United States v. City of Santa Fe, 165 U.S. 675714 (1897); Stoneroad v. Stoneroad, 158 U.S. 240, 248, 251-52 (1895); United States v. Old Settlers, 148 U.S. 427, 468 (1893); Boyd v. State of Nebraska, 143 U.S. 135, 161 (1892); United States v. Kagama, 118 U.S. 375, 383 (1886); Beecher v. Weatherby, 95 U.S. 517, 525 (1877); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876); Holden v. Joy, 84 U.S. 211, 247 (1872); The Cherokee Tobacco, 78 U.S. 616, 621 (1870); Wilson v. Wall, 73 U.S. 83, 89 (1867); In re Kansas Indians, 72 U.S. 737, 756 (1866); License Tax Cases, 72 U.S. 462, 469 (1866); United States v. Holliday, 70 U.S. 407, 419 (1865); People of State of New York ex rel. Cutler v. Dibble, 62 U.S. 366, 371 (1858); Marsh v. Brooks, 49 U.S. 223, 228 (1850); United States v. Rogers, 45 U.S. 567, 572 (1845); Mitchel v. United States, 34 U.S. 711, 740 (1835). *Cf*. Heckman v. United States, 224 U.S. 413, 437 (1912) (holding that the United States may sue to recover tribal property from states); Delaware Indians v. Cherokee Nation, 193 U.S. 127, 144 (1904) (holding that dispute between Indian tribes is 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).

[145] 358 U.S. 217, 220-21 (1959).

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.[146] The result helped to vitalize the development of tribal courts and tribal governments,[147] a development that continues today at an impressive rate.[148]

In the first part of the modern era from 1959 to about 1986, a time I have called the "permissive modern era,"[149] 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 percent of their cases before the Court during this time. While there were significant losses later in the period, such as *Oliphant v. Suquamish Indian Tribe*,[150] *Montana v. United States*,[151] and *Washington v. Colville Confederated Tribes* [152] (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* [153] and *Merrion v. Jicarilla Apache Tribe* [154] – 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

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[146] *See* Worcester v. Georgia, 31 U.S. 515, 560-61 (1832).
[147] *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").
[148] *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).
[149] Matthew L.M. Fletcher, *The Legal Culture War against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. __ (forthcoming 2007), manuscript at 4-6, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882831.
[150] 435 U.S. 191 (1978).
[151] 450 U.S. 455 (1981).
[152] 447 U.S. 134 (1980).
[153] 448 U.S. 160 (1980).
[154] 455 U.S. 130 (1982).

Country.[155] That case also reaffirmed that tribal governments are separate sovereigns.[156] And Justice Marshall's decision in *National Farmers Union Ins. Cos*. in 1985 provided a framework for the eventual recognition of tribal court judgments in federal court.[157]

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*,[158] to expand its meaning far beyond the very narrow fact situation presented in that case.[159] The Court's decisions in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Reservation* [160] and *South Dakota v. Bourland* [161] 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 nonmembers.[162] This is the opposite of the meaning of the *Worcester* case. For some commentators, *Montana* is now the foundational case for the current Court, overruling by implication the *Worcester* decision.[163] The Court now treats *Montana* as the criminal jurisdiction parallel to *Oliphant*, creating the expectation that, sometime in the near

[155] 435 U.S. 313, 323-24 (1978).
[156] *Wheeler*, 435 U.S. at 323.
[157] 471 U.S. 845, 857 & n. 25 (1985) (citing tribal court cases).
[158] 450 U.S. 455 (1981).
[159] *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).
[160] 492 U.S. 408 (1989).
[161] 508 U.S. 679 (1993).
[162] *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 __, at 636-37; Skibine, *The Court's Use of Implicit Divestiture*, *supra* note __, at 298.
[163] *E.g.*, Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 86-87 (2003); Singer, *Canons of Conquest*, *supra* note __, at 652. *See generally* Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997) (designating *Montana* as the "pathmarking" case).

future, the Court will adopt a bright-line rule eliminating civil jurisdiction over nonmembers, just as it adopted a bright-line rule in *Oliphant*.[164]

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*,[165] perhaps the most damaging case of all the Rehnquist Court's Indian law decisions,[166] the Court called *Montana* the "pathmarking" case in the field[167] and sharply limited the exceptions to the *Montana* rule[168] – the so-called *Montana 1* and *Montana 2* exceptions.[169] 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,[170] 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* [171] case 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.[172]

Second, in *Duro v. Reina*,[173] the Court attempted to expand its prohibition on tribal criminal jurisdiction over non-Indians, which it had already done in *Oliphant*,[174] by

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[164] This is the "open question" as designated by Justice Scalia in Nevada v. Hicks, 533 U.S. 353, 358 n. 2 (2001).
[165] 520 U.S. 438 (1997).
[166] *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.").
[167] *Strate*, 520 U.S. at 445.
[168] *See Strate*, 520 U.S. at 456-59; LaVelle, *Outtakes*, *supra* note __, at 755-59.
[169] *See* Montana v. United States, 450 U.S. 455, 465-66 (1981).
[170] *See* Brief of Petitioners 8-11, Strate v. A-1 Contractors, 520 U.S. 438 (2001) (No. 95-1872).
[171] 533 U.S. 353 (2001).
[172] *Hicks*, 533 U.S. at 384-85 (Souter, J., concurring).
[173] 495 U.S. 676 (1990).

holding that tribes cannot have criminal jurisdiction over nonmember Indians.[175] Congress quickly enacted the "*Duro* Fix,"[176] but the doctrinal damage had been done. *Oliphant* was the first case to utilize the doctrine of implicit divestiture since the Trilogy.[177] 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 declaring some Indian reservations disestablished, such as in *South Dakota v. Yankton Sioux Tribe*,[178] or diminished, as in *Hagen v. Utah*,[179] and redefining the term "Indian Country" by making the astounding declaration that there was no Indian Country in Alaska in *Alaska v. Native Village of Venetie*.[180] Part and parcel of these cases was the severe devaluation of the canons of construction for Indian treaties and statutes.[181]

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[174] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[175] *Duro*, 495 U.S. at 688.
[176] *See* United States v. Lara, 541 U.S. 193, 197-98 (2004); Nell Jessup Newton, *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).
[177] *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) (listing three areas in which the Court 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. [*Johnson*.] They cannot enter into direct commercial or governmental relations with foreign nations. [*Worcester*; *Cherokee Nation*.] And, as we have recently held, they cannot try nonmembers in tribal courts. [*Oliphant*.]") (other citations omitted).
[178] 522 U.S. 329 (1998).
[179] 510 U.S. 399 (1994).
[180] 522 U.S. 520 (1998). For a powerful discussion of *Venetie*, see Carpenter, *Interpreting Indian Country*, *supra* note __.
[181] *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,

Fourth, the Court's Indian taxation jurisprudence, based in part on a balancing test developed in part by then-Justice Rehnquist in *Moe v. Confederated Salish & Kootenai Tribes*,[182] 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 "marketing the exemption."[183] Whenever the Court sniffs this intent, the tribal interests do not succeed.[184]

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.[185] Since that decision, and a lower court decision dismissing long-standing and powerful Indian land claims in New York state,[186] almost every Indian treaty claim may be subject to dismissal on the basis of equitable defenses. With one casual opinion in a tax case, the Court has changed the entire face of federal Indian law, adopting a rule that it had been rejecting on a consistent basis for several decades.[187]

In short, the last 20 years has seen the Rehnquist Court go out of its way to roll back federal Indian law jurisprudence, a new jurisprudence that benefits states, local governments, and private property owners that come into contact with tribal interests. There has been no shortage of legal scholarship criticizing these cases.

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where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation.").

[182] 425 U.S. 463 (1976). For a discussion of *Moe*, see BARSH & HENDERSON, *supra* note __, at 189-96.

[183] Washington v. Colville Confederated Tribes, 447 U.S. 134, 155 (1980).

[184] *E.g.*, Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005); Dept. of Taxation and Finance of N.Y. v. Milhelm Attea & Bros. Inc., 512 U.S. 61 (1994).

[185] *See* 544 U.S. 197, 217-220 (2005).

[186] *See* Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006); *see also* Shinneock Indian Nation v. New York, 2006 WL 3501099 (E.D. N.Y., Nov. 28, 2006).

[187] *E.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 n. 27 (1985).

III. Revisiting the Indian Law Canon – Since 1986

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 (but not necessarily in lower federal courts, state or tribal courts, and in other venues). 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 concerns that interest the Court.

A. The Shrinking Supreme Court Docket

Chief Justice Rehnquist's leadership was almost without precedent 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.[188] By the end of the Rehnquist Court, the Court heard and decided only 78 cases in the 2004 Term.[189]

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.[190] According to Judge

[188] *See Leading Cases*, 100 HARV. L. REV. 100, 311 (1986).
[189] *See The Statistics*, 119 HARV. L. REV. 415, 430 (2005).
[190] *See generally* Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); Frederic Schauer, *Foreword: The Court's Agenda – And the Nation's*, 120 HARV. L. REV. 4 (2006).

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."[191] Professor Schauer argues in turn that, while's 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…."[192] 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,[193] the Court "has long emphasized that it is not in the business of correcting the errors of lower courts…."[194] 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.[195] 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.[196] Another study hypothesized and then concluded that "[b]ecause Congress cannot easily

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[191] Posner, *supra* note __, at 37 (citing Roper v. Simmons, 125 S. Ct. 1183 (2005), and United States v. Booker, 125 S. Ct. 738 (2005)).
[192] Schauer, *supra* note __, at 32.
[193] *See* Posner, *supra* note __, at 35.
[194] *Id*. at 37.
[195] *E.g.*, H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 260 (1991); 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); Lee Epstein, Jeffrey Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); 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"). *Cf.* SUPREME COURT RULE 10.
[196] *See* George & Solimine, *supra* note __, at 198 ("And our finding that the conservative 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.").

override constitutional decisions, the authors hypothesize that the justices will accept a higher proportion of constitutional cases, as opposed to statutory ones…."[197] 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 her 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."[198] Moreover, the Court may be in a position to "create constitutional rules that are extraordinary difficult, if not impossible, for Congress to override" because of its *certiorari* power.[199]

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.[200] 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.[201] Moreover, the unusual character of the

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[197] Epstein, Segal & Victor, *supra* note __, at 395.

[198] Epstein, Segal & Victor, *supra* note __, at 408 (citing Kevin T. McGuire & Barbara Palmer, *Issue Fluidity of the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 (1995); S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 322 (Stephen D. Halpern & Charles M. Lamb eds., 1982)).

[199] Epstein, Segal & Victor, *supra* note __, at 430.

[200] *E.g.*, BP America Production v. Burton, 127 S. Ct. 637, 643 (2006); United States v. Lara, 541 U.S. 193, 198-99 (2004); Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 641 (2005); C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001); Hagen v. Utah, 510 U.S. 399, 409 (1994); Negonsott v. Samuels, 507 U.S. 99, 102 (1993).

[201] 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); PERRY, *supra* note __, at 262 (quoting a Supreme Court Justice: "The junior justices always gets 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 __, at 262 (quoting a Supreme Court Justice: "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….") (ellipses in original).

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.[202] Finally, with Chief Justice 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.[203] 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.[204] Only 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.[205]

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.[206] Perhaps this

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

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

[204] *See* **Gloria Valencia-Weber UND Pedagogy Symposium article**.

[205] *Cf.* Brief of the University of Michigan Asian Pacific American Law Students Association et al. 10, 539 U.S. 306 (2003) (No. 02-241), *reprinted at* 10 MICH. J. GENDER & L. 7 (2003).

[206] *See*, *e.g.*, Getches, *Beyond Indian Law*, *supra* note __, at 292-93 & n. 109 ("From 1958 to 2000, about 2.4% (121 of 4853 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 1510 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.") (citations omitted).

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.[207] If the Court's current caseload of about 80 cases holds in the Roberts Court, then if the Court accepts two Indian law cases a year, 2.5 percent of its docket will continue to be Indian law-related. In the 2006 Term, the Court has already accepted two cases.[208] What attracts the Court to federal Indian law?

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.[209] This Article argues that most Indian law cases reach the Court because there is an issue embedded in the case that attracts the Court's attention. This Article will refer to these issues as "constitutional concerns." This Article 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

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[207] Thanks to Joe Singer for raising this point.

[208] *See* BP America Production v. Burton, 127 S. Ct. 637, 643 (2006); Zuni Public School District v. United States Dept. of Education (No. 05-1508).

[209] For example, several Indian law cases in recent Terms did not reach the Court because of a split in authority. *See* Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005); Inyo County, Cal. v. Pauite-Shoshone Indians of the Bishop Indian Community of the Bishop Colony, 538 U.S. 701 (2003); Nevada v. Hick,s 533 U.S. 353 (2001); Idaho v. United States, 533 U.S. 262 (2001); Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001); Rice v. Cayetano, 528 U.S. 495 (2000). Two other cases, Dept. of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1 (2001), and South Florida Water Management Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004), while not an Indian law cases *per se*, involved tribal interests and should be included in this listing.

doctrines, far less salient to the Court and therefore far more malleable, become more confused and even, as Professor Frickey argued, "ruthlessly pragmatic."[210]

All things must start at the beginning, so we first turn to the Marshall Trilogy. Consider *Worcester v. Georgia*,[211] the critical foundational case of federal Indian law described at the beginning of this Article. Justice Breyer has spoken recently about this case.[212] Although Justice Breyer is one of few Justices to have visited Indian Country to

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[210] Frickey, *(Native) American Exceptionalism*, *supra* note __, at 460; *see also id*. at 436 ("ruthless pragmatism").

[211] 31 U.S. 5154 (1832).

[212] *See* Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 8-9 (2005); 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.
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> 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.
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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.
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> 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."

become more aware of the conditions on the ground,[213] 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.[214] Strong circumstantial evidence supports the notion that the Court must have had Georgia's defiance in mind when they decided *Worcester*.[215] In *Worcester*, Georgia had convicted four missionaries, and sentenced them to several years of hard labor, for violating a state law that prohibited white men from setting foot in Cherokee Nation territory.[216] The law, part of a whole

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> 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.

[213] *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, 298 n. 133 (2002) (describing Justices Breyer and O'Connor's visit to several tribal courts); Native American Rights Fund, *Case Updates: Two U.S. Supreme Court Justices Visit Tribal Courts*, 26 NARF LEG. REV. No. 2 (Summer/Fall 2001), *available at* http://www.narf.org/pubs/nlr/nlr26-2.htm (same). *Cf.*, Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. J. 1 (1997); Matthew L.M. Fletcher, *Same-Sex Marriage, Indian Tribes, and the Constitution*, 61 U. MIAMI L. REV. 53, 58 n. 129 (2006) (referencing Bruce Bothelo, Mayor of Juneau, Alaska and former Alaska Attorney General, Address before the Federal Bar Association's Indian Law Conference, Albuquerque, NM (April 6, 2006), who, as Attorney General for the State of Alaska, hired John G. Roberts to represent Alaska in *Alaska v. Native Village of Venetie*, 520 U.S. 522 (1998), and brought him to visit an isolated Alaskan Native village prior to the Supreme Court argument).

[214] *See* TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 111-29 (2002); *see also* Georgia v. Tassel, 1 Dud. 229 (Ga. 1830).

[215] *See* Fletcher, *Iron Cold*, *supra* note __, at __. *Cf.* Breyer, *Reflections*, *supra* note __, at 9 ("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 [*Worcester*] 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.").

[216] *See Worcester*, 31 U.S. at 537-41.

series of laws aimed at destroying the Cherokee Nation as a viable political presence in Georgia,[217] violated federal treaties between the federal government and the Cherokee Nation.[218] 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*.[219] In that case, one Member of the Court argued that Indians were worthless savages and Indian tribes were not viable political entities.[220] Another Justice, following Chief Justice Marshall's lead opinion, voted on narrower grounds but agreed that Indians and Indian tribes were weak and dependent.[221] 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.[222] 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.[223] 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

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[217] *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503 (1969); Vine Deloria, Jr., *Conquest Msquerading as Law*, *in* UNLEARING THE LANGAUGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA 94, 98 (Wahinkpe Topa (Four Arrows), ed. 2006).
[218] *See Worcester*, 31 U.S. at 560.
[219] 30 U.S. 1 (1831).
[220] *See Cherokee Nation*, 30 U.S. at 25 (Johnson, J.) (referring to the Cherokee Nation as a "petty kraal of Indians").
[221] *Id*. at 40 (Baldwin, J., concurring).
[222] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 195-96 (1985).
[223] *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).

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.[224]

This pattern – with the Court responding to broader constitutional concerns in its Indian cases – began to recur with the advent of the modern era. Consider the following quick survey of the Rehnquist Court's decisions from the 1986 to 2005 Terms. The holdings of the cases are stated in a manner that attempts to eliminate or reduce the import of the federal Indian law questions presented in those cases. In all but a few cases, it appears that there is a non-Indian law question sufficient to decide the case.

The following chart attempts to highlight the holdings or reasoning in each of the Indian law cases decided by the Supreme Court since the 1986 Term began. If possible, the "Indian law question" – a holding or analytical reason for a holding that is derived from Indian law principles, statutes, or treaties – is separated from the "non-Indian law question" – a holding or analytical reason for a holding that could be argued is not based in Indian law principles, statutes, or treaties. In some cases, the non-Indian law question may be based on a significant fact situation that is unrelated to Indian law that the Court does not discuss in detail in its holding or reasoning, but which may nevertheless be a driving factor behind the decision.

Term	Case	Indian Law Questions	Non-Indian Law Questions
1986	Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987)	Holding that non-Indian defendants in tribal court matters must exhaust all	(1) Rejecting claims from non-Indian tribal court defendants that principles of diversity jurisdiction –

[224] *See* Breyer, *Reflections*, *supra* note __, at 9; Burke, *supra* note __, 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).

		tribal court remedies – including appeals – before they may challenge the tribal court's jurisdiction in federal courts;[225]	local bias or incompetence – counsel in favor of a non-tribal forum;[226] (2) Relying upon a policy of requiring federal courts to "show respect for courts of other jurisdictions."[227]
	California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	(1) Holding that P.L. 280 does not authorize state to enforce civil/regulatory bingo laws over Indian bingo facilities;[228] (2) Holding that federal Indian law preemption doctrine prevents state from enforcing its bingo laws in Indian Country;[229]	None.
	United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987)	Holding that the federal government's trust responsibility does not create tribal property rights;[230]	Holding 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.[231]
	Hodel v. Irving, 481 U.S. 704 (1987)	None.	Holding that a statute requiring the escheat of fractionated interests in Indian lands constitutes an unconstitutional taking of property in violation of the Fifth Amendment.[232]
1987	Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)	(1) Holding that the First Amendment did not prohibit the destruction of a tribal sacred site by a federal government construction project;[233] (2) Holding that the American Indian Religious Freedom Act did not create a cause of action allowing Indians or tribes to sue the federal government;[234]	Holding that the federal government has the right as a property owner to do what it wants with its own property, regardless of an impact upon religious practices of certain citizens.[235]
1988	Mississippi Band of Choctaw Indians v.	Holding that Indian Child Welfare Act precludes state	Holding that Congress does not, in general, intend for ambiguous

[225] *Iowa Mutual*, 480 U.S. 9, 18 (1987).
[226] *Id*. at 20.
[227] *Id*. at 21 (citing Juidice v. Vail, 430 U.S. 327, 335-36 (1977)).
[228] *Cabazon Band*, 480 U.S. 202, 212 (1987).
[229] *Id*. at 216-21.
[230] *Cherokee Nation*, 480 U.S. 700, 707-08 (1987).
[231] *Id*. at 703-04.
[232] *Irving*, 481 U.S. 704, 712-18 (1987).
[233] *Lyng*, 485 U.S. 439, 447-48 (1988).
[234] *Id*. at 455.
[235] *Id*. at 451-52.

	Holyfield, 490 U.S. 30 (1989)	court jurisdiction where the domicile of the Indian child is Indian Country;[236]	statutes to be interpreted in accordance with state law.[237]
	Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989)	(1) Holding that preemptive effect of federal legislation over state law in Indian Country is governed by more flexible approaches that consider tribal sovereignty;[238] but that federal law did not preempt these state taxes of non-Indian business activities;[239] (2) Holding that rules that prevent multiple states from taxing the same transaction do not apply when one of the sovereigns is an Indian tribe;[240]	(1) Holding that the intergovernmental immunity doctrine was no longer viable;[241] (2) Holding that the due process clause does not require that state taxes be reasonably related to state services provided to the taxpayer.[242]
	Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1992)	Holding that tribes do not have zoning authority over lands owned by non-Indians;[243]	Asserting via dicta that the power to zone is critical to defining the character of a community;[244]
	Wyoming v. United States, 492 U.S. 406 (1989)	None. Affirmed by an equally divided Court.[245]	None. Affirmed by an equally divided Court.
1989	Duro v. Reina, 495 U.S. 676 (1990)	Holding that Indian tribes do not have criminal jurisdiction over nonmember Indians.[246]	Holding that there are limitations on Congress's ability to subject American citizens to criminal prosecution in jurisdictions that do not provide American-style criminal procedure protections.[247]
	Employment Division v. Smith, 494 U.S. 872 (1990)	None.	Holding that government regulations that impact religious practices are presumptively valid under the First Amendment.[248]
1990	Oklahoma Tax	(1) Holding that tribal	Asserting in dicta that tribal

[236] *Holyfield*, 490 U.S. 30, 48-53 (1988).
[237] *Id*. at 43 (citing Jerome v. United States, 318 U.S. 101, 104 (1943), other citations omitted).
[238] *Cotton Petroleum*, 490 U.S 163, 176-77 (1989).
[239] *Id*. at 186-87.
[240] *Id*. at 188-89.
[241] *Id*. at 174-76 (citing James v. Dravo Contracting Co., 302 U.S. 134 (1937)).
[242] *Id*. at 189-91.
[243] *Brendale*, 492 U.S. 408, 428-32 (1992) (plurality opinion) (White, J.).
[244] *Id*. at 433-34 (Stevens, J.) (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 388 (1926)); *see also id*. at 458 (Blackmun, J., concurring and dissenting) (quoting Village of Belle Terre v. Boras, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).
[245] *Wyoming*, 492 U.S. 406, 406 (1989). *See generally* Getches, *Conquering the Cultural Frontier*, *supra* note __, at 1640-41 (discussing Justice O'Connor's draft opinion, withdrawn when she recused herself from the case).
[246] *Duro*, 495 U.S. 676, 688 (1990). Congress overturned the result in *Duro* in 1991. *See* United States v. Lara, 541 U.S. 193, __ (2004).
[247] *Id*. at 693-94 (citing Reid v. Covert, 354 U.S. 1 (1957)).
[248] *Smith*, 494 U.S. 872, 890 (1990).

	Commission v. Citizen Band Potawatomi Indian Nation of Oklahoma, 498 U.S. 505 (1991)	sovereign immunity is not waived when a tribe sues, seeking an injunction against a state government action;[249] (2) Holding that tribal sovereign immunity does not impermissibly burden state taxation administration;[250] (3) Holding that land held in trust by the federal government for the benefit of Indian tribes is reservation land;[251] (4) Holding that tribe must assist the state in collecting valid state taxes;[252]	officials may be sued to recover damages to the state.[253]
	Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775 (1991)	Holding that 28 U.S.C. § 1362, authorizing Indian tribes to bring suits in federal courts, does not waive state sovereign immunity;[254]	(1) Holding that state sovereign immunity bars suits from foreign sovereigns;[255] (2) Holding that Congressional abrogation of Eleventh Amendment immunity must be clear and express.[256]
1991	County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251 (1992)	Holding that federal statute removing restrictions on alienation on certain Indian lands renders the lands taxable by states;[257]	Holding that repeals of statutes by implication are not favored.[258]
1992	Negonsott v. Samuels, 507 U.S. 99 (1993)	Holding that the Kansas Act conferred state jurisdiction over criminal acts by Indians in Kansas Indian Country;[259]	Holding that the plain meaning of a statute must be given effect.[260]
	Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114 (1993)	Holding that state taxes within Indian Country are presumably preempted by federal or tribal law.[261]	None.
	Lincoln v. Vigil, 508 U.S. 182 (1993)	Holding that the trust relationship between the federal government and Indian tribes does not cabin	Holding that the allocation of funds from a lump-sum Congressional appropriation is committed entirely to agency discretion and is therefore

[249] *Citizen Band Potawatomi*, 498 U.S. 505, 509-10 (1991).
[250] *Id*. at 510.
[251] *Id*. at 511.
[252] *Id*. at 512-13.
[253] *Id*. at 514 (citing Ex parte Young, 209 U.S. 123 (1908)).
[254] *Blatchford*, 501 U.S. 775, 783-85 (1991).
[255] *Id*. at 780 (citing Principality of Monaco v. Mississippi, 292 U.S. 313 (1934)).
[256] *Id*. at 786 (citing Dellmuth v. Muth, 491 U.S. 223 (1989)).
[257] *County of Yakima*, 502 U.S. 251, 263 (1992).
[258] *Id*. at 262 (citing Posadas v. National City Bank, 296 U.S. 497, 503 (1936)).
[259] *Negonsott*, 507 U.S. 99, 106 (1993).
[260] *Id*. at 104-06 (citing Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); Moskal v. United States, 498 U.S. 103, 109-10 (1990)).
[261] *Sac & Fox Nation*, 508 U.S. 114, 127 (1993).

		the discretion of federal agencies;[262]	not subject to administrative review.[263]
	South Dakota v. Bourland, 508 U.S. 679 (1993)	Holding that Indian tribes do not have authority to regulate non-Indian activities on non-Indian owned lands;[264]	Holding that Congressional taking of Indian lands, with a concomitant delegation of agency authority to administer that property, excluded other sovereigns from regulating those lands.[265]
1993	Hagen v. Utah, 510 U.S. 399 (1993)	Holding that Congress intended to diminish the Uintah Indian Reservation;[266]	(1) Holding that Congressional intent in restoring lands to the "public domain" extinguished the previous federal use or purpose;[267] (2) Holding that the Court will not rely upon the views of subsequent Congresses in order to determine the intent of earlier Congressional Acts.[268]
	Department of Taxation and Finance of New York v. Milhelm Attea & Bros, Inc., 512 U.S. 61 (1994)	Holding that states have interest in enforcing their tax schemes sufficient to require tribes to assist in collection of those taxes;[269] Indian trader statute does not preempt state tax enforcement scheme.[270]	None.
1994	Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995)	Holding that a categorical rule applies denying state authority to tax within Indian Country;[271]	(1) Holding that tax administration requires predictability and not "economic reality," and adopting legal incidence of tax as guiding factor to apply;[272] (2) Affirming "reasonable" interpretation of state law by lower federal court;[273] (3) Holding that states may tax all the income of its residents, even income earned outside the state's jurisdiction;[274] (4) Rejecting claim that employees of one sovereign are exempt from taxes of another sovereign.[275]

[262] *Lincoln*, 508 U.S. 182, 194-95 (1993).
[263] *Id*. at 192-94.
[264] *Bourland*, 508 U.S. 679, 687-89 (1993).
[265] *Id*. at 689-90 (citing 16 U.S.C. § 460d).
[266] *Hagen*, 510 U.S. 399, 410-21 (1994).
[267] *Id*. at 412-13.
[268] *Id*. at 420 (quoting United States v. Philadelphia National Bank, 374 U.S. 321, 348-49 (1963)).
[269] *Milhelm Attea*, 512 U.S. 61, 73-74 (1994).
[270] *Id*. at 77-78.
[271] *Chickasaw Nation*, 515 U.S. 450, 458 (1995).
[272] *Id*. at 459-60.
[273] *Id*. at 461.
[274] *Id*. at 462-63 (citing New York ex rel. Cohn v. Graves, 300 U.S. 308, 312-13 (1937)).
[275] *Id*. at 466 (citing Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480 (1939)).

1995	Seminole Tribe of Florida of Florida v. Florida, 517 U.S. 44 (1996)	Holding that the Indian Commerce Clause does not authorize Congress to abrogate state sovereign immunity in federal courts;[276]	Holding that the doctrine of *Ex parte Young* may not be used to sue state officials;[277] Congressional power to abrogate state sovereign immunity must derive from a constitutional power that grants Congress the power to abrogate.[278]
1996	Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)	None.	Holding that state officers may not be sued under *Ex parte Young* except in order to enjoin plainly *ultra vires* under state law.[279]
	Babbitt v. Youpee, 519 U.S. 234 (1997)	None.	(1) Holding that escheat provision of Indian Land Consolidation Act violates the Just Compensation Clause of the Fifth Amendment;[280] (2) dissenting Justice argued that there was federal government interest in "removing legal impediments to the productive development of real estate."[281]
	Strate v. A-1 Contractors, 520 U.S. 438 (1997)	Holding that *Montana v. United States*, 450 U.S. 455 (1981), is "pathmarking" case in federal Indian law;[282]	Holding that a highway running through an Indian reservation in accordance with a federal easement that is patrolled by state law enforcement and maintained by the state is not Indian land.[283]
1997	South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)	Holding that land surplus act diminished Indian reservation;[284]	Holding that the state had jurisdiction to regulate a solid waste landfill to the exclusion of both tribal and federal environmental regulatory authority;[285]
	Alaska v. Native Village of Venetie, 522 U.S. 520 (1998)	Holding that "dependent Indian communities" does not include lands owned by Alaskan Native corporations in accordance with the Alaskan Native Claims Settlement Act;[286]	Holding that state construction contractors building a school in the village using state funds cannot be taxed by other sovereigns.[287]

[276] *Seminole Tribe*, 517 U.S. 44, 47 (1996).
[277] *Id*. at 47.
[278] *Id*. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).
[279] *Coeur d'Alene Tribe*, 521 U.S. 261, 270-71 (1997) (citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 102-03 n. 11 (1984)).
[280] *Youpee*, 519 U.S. 234, 243-45 (1997).
[281] *Id*. at 246 (Stevens, J., dissenting) (citing Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982)).
[282] *Strate*, 520 U.S. 438, 445 (1997).
[283] *Id*. at 450-56.
[284] *Yankton Sioux Tribe*, 522 U.S. 329, 342 (1998).
[285] *Id*. at 341.
[286] *Venetie*, 522 U.S. 520, 527 (1998).
[287] *Cf. id*. at 525.

	Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998)	None.	Holding that a nontaxpayer may not sue for the refunds of another.[288]
	Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998)	Holding that tribal sovereign immunity extends to commercial activities outside of Indian Country;[289]	(1) Holding that a sovereign's immunity extends outside the bounds of its territory and even extends to the business activities of the sovereign;[290] (2) Both the majority and the dissent expressed reservations as to whether foreign sovereigns should have immunity in outside jurisdictions when conducting business activities.[291]
	Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998)	Holding that when Congress makes Indian law alienable, that land becomes subject to state and local taxation.[292]	None.
1998	Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999)	None.	Holding 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;[293]
	Arizona Department of Revenue v. Blaze Construction Co., Inc., 526 U.S. 32 (1999)	Rejecting application of federal Indian law preemption test to state tax on federal government contractor doing business in Indian Country;[294]	Upholding state taxation of federal contractor and rejecting intergovernmental immunity claim.[295]
	Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)	Holding that treaty was not intended by tribe to abrogate off-reservation hunting and fishing rights;[296]	Holding that no Act of Congress or Constitutional provision authorized President to abrogate treaty.[297]
1999	Rice v. Cayetano, 528 U.S. 495 (2000)	None.	Striking down voting rules benefiting Native Hawaiians that violated the Fifteenth Amendment.[298]

[288] *Crow Tribe*, 523 U.S. 696, 713 (citing Furman Univ. v. Livingston, 136 S.E.2d 254, 256 (S.C. 1964); Krauss Co. v. Develle, 110 So.2d 104, 106 (La. 1959); Kesbec, Inc. v. McGoldrick, 16 N.E.2d 288, 290 (N.Y. 1938)).
[289] *Kiowa Tribe*, 523 U.S. 751, 754-61 (1998).
[290] 523 U.S. 751, 754-61 (1998).
[291] *See id*. at 759-60 (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983); Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604, 1605, 1607)); *id*. at 760-61 (Stevens, J., dissenting) (citing Schooner Exchange v. McFaddon, 7 Cranch 116, 136 (1812)).
[292] *Cass County*, 524 U.S. 103, 115 (1998).
[293] *Amoco Production*, 526 U.S. 865, 874-80 (1999).
[294] *Blaze*, 526 U.S. 32, 37 (1999).
[295] *Id*. at 34-39 (following United States v. New Mexico, 455 U.S. 720 (1982)).
[296] *Mille Lacs*, 526 U.S. 172, 196-200 (1999).
[297] *Id*. at 188-95 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).
[298] *Rice*, 528 U.S. 495, 512-17 (2000) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

2000	Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001)	None.	Holding that documents prepared in anticipation of litigation that are exchanged between an Indian tribe and the federal government are not exempted from the Freedom of Information Act.[299]
	C & L Enterprises v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001)	Holding that arbitration award enforcement clause in form construction contract is sufficient to waive tribal sovereign immunity from suit;[300]	Holding that form contract that incorporates a state-law binding arbitration provision operates to waive a sovereign's immunity.[301]
	Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001)	(1) Holding that tribal civil authority over nonmembers is invalid unless it meets one of the two *Montana* exceptions;[302] (2) Holding that nonmember business's enjoyment of tribal governmental services does not meet *Montana* exceptions;[303]	Holding that where state and tribal public safety departments both provide services to businesses, the tribal sovereign is entitled to charge for those services but may not have general taxation authority over the business or its constituents.[304]
	Idaho v. United States, 533 U.S. 262 (2001)	None.	(1) Reaffirming that tribal government ownership of lands is critical to territorial jurisdiction;[305] (2) Holding that Congress intended to (and did) reserve interests in submerged lands when it extended statehood to the State of Idaho.[306]
	Nevada v. Hicks, 533 U.S. 353 (2001)	Holding that tribal courts do not have jurisdiction over civil rights complaints against state officers;[307]	Limiting state liability for civil rights violations in order to protect the operations of state governments.[308]
2001	Chickasaw Nation v. United States, 534 U.S. 84 (2001)	Holding that Congress did not intend to extend a tax exemption to tribal gaming operations;[309]	Holding that canons of interpreting statutes do not trump the taxation canon that tax exemptions are to be clearly expressed by Congress.[310]
2002	United States v. White	Holding that a federal statute	(1) Holding that a federal statute

[299] *Klamath Water Users*, 532 U.S. 1, 8-16 (2001).
[300] *C & L Enters*, 532 U.S. 411, 418 (2001).
[301] *Id*. at 418-23.
[302] *Atkinson Trading*, 532 U.S. 645, 649-54 (2001) (citing United States v. Montana, 450 U.S. 455, 465-66 (1981)).
[303] *Id*. at 654-59.
[304] *Id*. at 654-55 & nn. 6-8.
[305] *Idaho*, 533 U.S. 262, 272 (2001) (citing Montana v. United States, 450 U.S. 455, 565-66 (1981); United States v. Alaska, 521 U.S. 1 (1997); other citations omitted).
[306] *Id*. at 272-81 (citing United States v. Alaska, 521 U.S. 1, 5 (1997)).
[307] *Hicks*, 533 U.S. 353, 364-65 (2001).
[308] *Id*. at 364-65 (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987); Tennessee v. Davis, 100 U.S. 257, 263 (1879)).
[309] *Chickasaw Nation*, 534 U.S. 84, __ (2001).
[310] *Id*. at 95 (citing United States v. Wells Fargo Bank, 485 U.S. 351, 354 (1988); Squire v. Capoeman, 351 U.S. 1, 6 (1956); United States Trust Co. v. Helverling, 307 U.S. 57, 60 (1939)).

	Mountain Apache Tribe, 537 U.S. 465 (2003)	mandated compensation from the federal government for spoliation of tribal trust property;[311]	does not create a cause of action for money damages against the government unless it can fairly be interpreted as mandating compensation;[312] (2) Holding that federal agency liable when it allows spoliation of trust property.[313]
	United States v. Navajo Nation, 537 U.S. 488 (2003)	Holding that a federal statute did not mandate compensation from the federal government for breach of fiduciary duty;[314]	(1) Holding that property interest that is not under the control of alleged trustee is not trust property;[315] (2) Holding that an agency head with discretion to review an agency determination may set aside or modify any subordinate's decision.[316]
	Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, 538 U.S. 701 (2003)	None (leaving open the question of whether the tribe's sovereign immunity precluded the State's action[317]);	Holding that a sovereign may not be a person as defined under 42 U.S.C. § 1983.[318]
2003	United States v. Lara, 541 U.S. 193 (2004)	Holding that Congress may ratchet up or down tribal sovereignty;[319]	Holding that Congressional power in Indian affairs is a "preconstitutional" power that is a "necessary concomitan[t] of sovereignty."[320]
	South Fla. Water Mgmt. Dist. v. Seminole Tribe of Fla., 541 U.S. 95 (2004)	None	Holding that the Clean Water Act reaches to point sources that do not generate pollution.[321]
2004	Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005)	None	Holding that all federal contracts obligations are enforceable where there are sufficient appropriated funds to cover the costs, necessary to "provide a uniform interpretation of similar language used in comparable statutes, lest legal uncertainty undermine contractors' confidence that they will be paid, and in turn increase the cost to the

[311] *White Mountain*, 537 U.S. 465, 473-74 (2003).
[312] *Id*. at 472-73 (citing United States v. Testan, 424 U.S. 392, 400 (1976)).
[313] *Id*. at 475-76 (citing Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 572 (1985); United States v. Mason, 412 U.S. 391, 398 (1973)).
[314] *Navajo Nation*, 537 U.S. 488, 506-11 (2003).
[315] *Id*. at 506-08.
[316] *Id*. at 513-14 (citing Michigan Citizens for Independent Press v. Thornburg, 868 F.2d 1285 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989) (per curiam)).
[317] *Inyo County*, 538 U.S. 701, 712 (2003).
[318] *Id*. at 709-12 (citing Will v. Michigan Department of State Police, 491 U.S. 58, 66 (1989)).
[319] *Lara*, 541 U.S. 193, 199-207 (2004).
[320] *Id*. at 201 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-22 (1936)).
[321] *South Fla. Water Management Dist.*, 541 U.S. 95, 104-05 (2004) (construing 33 U.S.C. § 1362(12)).

			Government of purchasing goods and services."[322]
	City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005)	Holding that claims to "ancient" Indian sovereignty are subject to equitable defenses;[323]	Holding that land or boundary claims for relief by one sovereign against another may be barred by equitable defenses.[324]
2005	Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005)	Holding that federal Indian law preemption test does not apply to state taxes where taxes are levied outside of Indian Country;[325]	Holding that the tax liability of a fuel distributor is incurred upon sale or delivery of the fuel to the distributor;[326] Dissenters argued that the result undermined the possibility of inter-sovereign cooperative tax agreements to resolve these kinds of disputes.[327]
	Gonzales v. O Centro Espiria Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211 (2006) ("*UDV*")	None.	Holding that federal prosecution of persons using a hallucinogenic drug as part of religious ceremonies was prohibited by the Religious Freedom Restoration Act.[328]

C. Preliminary 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 all but a few cases decided since 1986 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 pure federal Indian law. Three of the six Indian law decisions made in the 2003 to 2005 Terms have no Indian law issues

[322] *Cherokee Nation*, 543 U.S. 631, 644 (2005) (citing Franconia Associates v. United States, 536 U.S. 129, 142 (2002); United States v. Winstar Corp., 518 U.S. 839, 884-85 & n. 29 (1996) (plurality opinion); *id*. at 913 (Breyer, J., concurring); Lynch v. United States, 292 U.S. 571, 580 (1934)).
[323] *City of Sherrill*, 544 U.S. 197, __ (2005).
[324] *Id*. at 218 (2005) (citing Ohio v. Kentucky, 410 U.S. 641, 651 (1973) (land); Massachusetts v. New York, 271 U.S. 65, 95 (1926) (land); California v. Nevada, 447 U.S. 125, 131 (1980) (boundary)).
[325] *Wagnon*, 126 S. Ct. 676, 688 (2005).
[326] *Id*. at 684-85 (citing KAN. STAT. ANN. § 79-3408(a)).
[327] *See id*. at 698-99.
[328] *UDV*, 126 S. Ct. 1211, 1225 (2006).

whatsoever.[329] In the last ten years, only one case arguably had no non-Indian law components to it[330] – and every other case (again, arguably) had a non-Indian law case with an issue that might have been dispositive of the entire case. Take, for example, *United States v. Navajo Nation*,[331] a case vilified by commentators because the Court ruled that an apparent arbitrary decision by the Secretary of Interior (in favor of a personal friend's client) was not precluded by federal statute.[332] The Court's decision rested in part – and perhaps could have been the crux of the entire decision – on a preference for deferring to administrative agencies.[333] Or take *Nevada v. Hicks*,[334] a case ostensibly about the civil jurisdiction of tribal courts,[335] could just as easily be characterized as a decision vindicating the sovereign immunity of states and their officers in foreign courts.[336] Or *Inyo County v. Bishop Paiute Community*,[337] 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, turned on whether the tribe or any sovereign

[329] *See* Gonzales v. O Centro Espiria Beneficiente Uniao Do Vegetal, 126 S. Ct. 1211 (2006); Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005); South Fla. Water Mgmt. Dist. v. Seminole Tribe of Fla., 541 U.S. 95 (2004).
[330] *See* Cass County, Minnesota v. Leech Lake Band of Chippewa Indians, 524 U.S. 103 (1998).
[331] 537 U.S. 488 (2003).
[332] *E.g.*, Editorial, *Supreme Court Deals a Win and a Lesson*, INDIAN COUNTRY TODAY, Mar. 14, 2003, available at http://www.indiancountry.com/content.cfm?id=1047662515 (last visited January 23, 2007); 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); 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).
[333] *See Navajo Nation*, 537 U.S. at 513-14 (citing Michigan Citizens for Independent Press v. Thornburg, 868 F.2d 1285 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989) (per curiam)).
[334] 533 U.S. 353 (2001).
[335] *See* LaVelle, *Outtakes*, *supra* note __, at 759-76; Kimberly Radermacher, Case Comment, *Constitutional Law—Indian Law: 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).
[336] *See Hicks*, 533 U.S. at 364-65 (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987); Tennessee v. Davis, 100 U.S. 257, 263 (1879)).
[337] 538 U.S. 701 (2003).

entity was a "person" under the meaning of federal civil rights statutes.[338] *Minnesota v. Mille Lacs Band* [339] is perhaps the clearest 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,[340] 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.[341] 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 are at stake *are 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.[342] It is a distinct possibility that the Indian law principles discussed, analyzed, and

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[338] *See id*. at 709-12.
[339] 526 U.S. 172 (1999).
[340] *See id*. ay 196-200.
[341] *See id*. at 188-95 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952)).
[342] *See generally* Frickey, *(Native) American Exceptionalism*, *supra* note __ (arguing that the Supreme Court is in the process of re-molding the foundational principles of federal Indian law to fit within general public law); Getches, *Beyond Indian Law*, *supra* note __ (arguing that states' rights, mainstream values,

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 Concerns in Future Indian Cases

Lawrence Lessig's compelling article, "*How I Lost the Big One*," discussing his advocacy before the Supreme Court in *Eldred v. Ashcroft*,[343] should offer important tips to tribal advocates.[344] Lessig lost 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."[345]

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and colorblind justice drive the Court's Indian law decisions). *Cf*. RUBENFELD, *supra* note __, at __-__ (asserting than an "anti-anti-discrimination" principle drives the Court's civil rights docket).

[343] 537 U.S. 186 (2003).

[344] *See* Lessig, *supra* note __.

[345] *Id*. at 59.

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, 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 *Lopez*. 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.[346]

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 – and are simply ignored.

Tribal advocates are starting to learn the game, but sometimes there's just not enough to work with. For example, early in the 2005 Term, the Supreme Court heard

[346] *Id*. at 62.

arguments in *Wagnon v. Prairie Band Potawatomi Nation*,[347] a dispute between the Nation and the State of Kansas over whether Kansas's motor fuel tax on retailers – which was paid by the Nation when the retailers passed the tax through to their customers – was preempted by federal law and tribal sovereignty.[348] Justice Souter asked the first question in both the state and tribal arguments – effectively contextualizing the case – of whether the tribe was acting as a government or as a business.[349] 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.[350] The Court all but ignored that argument, refusing to apply the preemption test at all.[351] 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.[352] Indian law didn't even apply in *Wagnon*.

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[347] 126 S. Ct. 676 (2005).
[348] *Wagnon*, 126 S. Ct. at 680-81.
[349] *See* Oral argument at 4, Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005) (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: "The 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?").
[350] *See* Brief for Respondent 2, Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005) (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."); *Wagnon*, 126 S. Ct. at 698 (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.").
[351] *See Wagnon*, 126 S. Ct. at 688 (refusing to apply the preemption test); *id*. at 689 (refusing to consider to roads argument).
[352] *See Wagnon*, 126 S. Ct. at 688 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)).

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.[353] 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[354]). Regardless, what is clear from *Wagnon* is that there was no important constitutional concern supporting the tribal interests, nor were there significant pragmatic reasons 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.[355] While this might be the equivalent of Justice Black refusing to vote for mandatory busing of public schools in order to implement desegregation orders because the word "bus" doesn't appear in the Constitution,[356] 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,[357] 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 with identifying considerable consequences that

[353] *See Wagnon*, 126 S. Ct. at 685-86 (citing 26 U.S.C. § 1; North American Oil Consol. v. Burnet, 386 U.S. 417, 424 (1932)).
[354] *See* Matthew L.M. Fletcher, *The Power to Tax, The Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 27 (2004).
[355] *See* United States v. Lara, 541 U.S. 193, 218-19 (2004) (Thomas, J., concurring).
[356] *See* ROSEN, *supra* note __, at 157.
[357] *E.g.*, New York v. United States, 505 U.S. 144, 166 (1992); Agua Caliente Band of Cahuilla Indians v. Superior Court, __ P.3d __, __, 52 Cal. Rptr. 3d 569, __ (Cal. 2006).

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* [358] and a companion case, *Morris v. Tanner*,[359] impressive victories for tribal advocates. Means, a member of the Oglala Sioux Tribe, faces prosecution before the Navajo tribal courts for allegedly assaulting his family members.[360] He had argued that the Navajo Nation could not have jurisdiction over him because he was not a member of that tribe – he was a nonmember Indian.[361] In 1990, Means' attorney, John Trebon, had successfully argued before the Supreme Court that Indian tribes cannot prosecute nonmember Indians in *Duro v. Reina* [362] and was attempting to re-establish that rule by asking the Court to strike

[358] 432 F.3d 924 (9th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 381 (2006) (hereinafter *Means II*).
[359] No. 03-35922, 160 Fed. Appx. 600 (9th Cir., Dec. 22, 2005), *cert. denied*, 127 S. Ct. 379 (2006).
[360] *See* Means v. District Court of the Chinle Judicial District, No. SC-CV-61-98, VersusLaw No. 1999.NANN.0000013, at ¶ 21 (Navajo Nation Supreme Court, May 11, 1999), *available at* http://www.tribal-institute.org/opinions/1999.NANN.0000013.htm (hereinafter *Means I*).
[361] *See Means*, 432 F.3d at 930-31.
[362] 495 U.S. 676 (1990).

down the "*Duro* Fix," upheld in *United States v. Lara* in a 7-2 decision.[363] *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. And, of the remaining five members in the majority, one of them – Justices 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.[364] Justice Thomas stated that he's 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.[365] 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 7-2 *Lara* decision could have turned into a 6-3 decision the other way. But the Court denied the petition for writ of *certiorari*.[366]

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

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[363] 541 U.S. 193 (2004).

[364] *See Lara*, 541 U.S. 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.").

[365] *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."' … [quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)]. At one time, the implausibility of this assertion at least troubled the Court, *see*, *e.g.*, United States v. Kagama, 118 U.S. 375, 378-379 (1886) (considering such a construction of the Indian Commerce Clause to be 'very strained'), and I would be willing to revisit the question. *Cf.*, *e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); id., at 584-593 (THOMAS, J., concurring).").

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

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 required by federal statute to appoint counsel for indigent defendants.[367] Justice Breyer's majority opinion in *Lara* seemed to keep the question open.[368] Moreover, nonmembers Indians are unlikely to be able to vote in tribal elections or are not eligible to sit on tribal court juries.[369] Justice Kennedy, the force behind *Duro v. Reina*,[370] was particularly concerned about tribes that prosecute people without providing these criminal process rights.[371]

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.[372] 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

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[367] *See* 25 U.S.C. § 1302.
[368] *See Lara*, 541 U.S. at 207-08.
[369] *Cf. Lara*, 541 U.S. 208-09 (rejecting Lara's due process and equal protection arguments).
[370] 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).
[371] *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. See U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838-839 (1995) (KENNEDY, J., concurring). 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. See Duro, *supra*, at 693…. The majority today reaches beyond that limited exception.").
[372] *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC. REV. 1123, 1143-44 (1994); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 714-15 (2004).

that even a lumbering bear like Congress understood needed quick corrective action.[373] The consequences of creating yet another loophole in the tribal-federal-state law enforcement jurisdictional scheme in Indian Country (sometimes referred to as a "maze,"[374]) – the first major loophole being the refusal of the Court to recognize tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*[375] – 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*,[376] it might persuade a law-and-order Justice that the constitutional concerns are not dispositive.

Of course, Indian tribes are not states or the federal government.[377] State and federal law enforcement come from a long history and practice of coercing confessions from suspects[378] (one of the reasons to guarantee an attorney and a jury of peers[379]) that is missing from most tribes. In fact, the conviction rate 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

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[373] *See generally* Newton, *Permanent Legislation*, *supra* note __; Skibine, *Power Play*, *supra* note __.
[374] *See* Robert N. Clinton, *Criminal Jurisdiction Over Indian Land: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).
[375] 435 U.S. 191 (1978).
[376] *Cf.* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 638 (2006).
[377] *See*, *e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (holding that the Bill of Rights does not apply to tribal governments because they are not arms of the federal government).
[378] *See*, *e.g.*, NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW-ENFORCEMENT (1931); EMANUEL H. LAVINE, THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSE OF POLICE BRUTALITY (1930); Note, *The Third Degree*, 43 HARV. L. REV. 617 (1930), *cited in* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 473, n. 501 (1996).
[379] *See* Miranda v. Arizona, 384 U.S. 436, 477 (1966) ("The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.").

begin.[380] Moreover, Indian tribes often do not have the resources to fund a public defender system;[381] but neither do tribal courts sentence the guilty to jail as a matter of course.[382]

There were reasons why the Court didn't agree to hear the *Means* and *Morris* cases. First, the Court doesn't like to reverse a 7-2 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.[383] 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.[384] And Navajo law even provides for nonmember Indians like Means to participate in tribal politics (which he did) and even sit on juries (he refused to register).[385] But the next case in the pipeline to the Court might include those factors.

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[380] *See*, *e.g.*, CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 244 (2004) (discussing a "cultural requirement to full disclosure") (citing RUPERT ROSS, DANCING WITH A GHOST: EXPLAINING INDIAN REALITY13-14 (1992)).

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

[382] *Cf.*, *e.g.*, COHEN'S HANDBOOK 2005 ED., *supra* note __, § 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).

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

[384] *See Means I*, 1999.NANN.0000013, at ¶ 49 n. 11 ("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. *See* Navajo Rules of Criminal Procedure (1990)."); Morris v. Tanner, No. 99-36007, 16 Fed. Appx. 652, 653-54 (9th Cir., July 24, 2001) (describing motions made by Morris, presumably by counsel).

[385] *See Means I*, 1999.NANN.0000013, at ¶¶ 47-49.

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 didn't 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 over Nonmembers

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.[386] However, the opinion acknowledged an open question – "We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[387] In a concurring opinion, Justice Souter raised several questions as to whether tribal courts should ever have jurisdiction over nonmember defendants.[388] 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.[389] There seems to be a worry that tribal laws are "unusually difficult for an outsider to sort out."[390] 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

[386] 533 U.S. 353, 364 (2001).
[387] *Hicks*, 533 U.S. at 358 n. 2.
[388] *See Hicks*, 533 U.S. at 375-86 (Souter, J., concurring).
[389] *See Hicks*, 533 U.S. at 384-85.
[390] *Hicks*, 533 U.S. at 385.

flawed.[391] Others argue that respect for tribal sovereignty should compel the Court to recognize tribal court jurisdiction over nonmembers.[392] 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.[393]

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,[394] 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.[395] Federal employment rights statutes such as the Fair Labor Standards Act[396] and the National Labor Relations Act[397] 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,[398] explicitly exclude Indian tribes while others, such as certain criminal[399] and environmental[400]

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[391] *E.g.*, LaVelle, *Outtakes*, *supra* note __.
[392] *E.g.*, Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L. J. 147 (2000).
[393] *E.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUSTON L. REV. 701-741 (2006).
[394] *E.g.*, National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, __ (1985); Williams v. Lee, 358 U.S. 217, __ (1959).
[395] *See generally* COHEN'S HANDBOOK 2005 ED., *supra* note __, § 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. MEMPHIS L. REV. 1365 (1995); Singel, *Labor Relations*, *supra* note __.
[396] *See* Reich v. Great Lakes Indian Fish & Wildlife Commission, 4 F.3d 490 (7th Cir. 1993).
[397] *See* NLRB v. Pueblo of San Juan, 276 F.3d 1186 (10th Cir. 2002).
[398] *See* Charland v. Little Six, Inc., 198 F.3d 249 (8th Cir. 1999) (Title VII).
[399] *See* Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission, 327 F.3d 1019 (10th Cir. 2003) (Johnson Act).

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 the federal statute of general applicability will apply.[401]

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. National Labor Relations Board*,[402] for example. Tribal advocates have 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.[403] But the case may come down to non-Indian law principles: first, whether Congress originally intended the Act to apply to tribal businesses in 1935;[404] 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 field 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

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[400] *Cf. generally* James M. Grijalva, *The Origins of EPA's Indian Program*, 15 KAN. J. L. & PUB. POL'Y 191 (2006).
[401] *See*, *e.g.*, Singel, *Labor Relations*, *supra* note __, at 702-03 nn. 87 & 94 (listing cases from different circuits that follow conflicting approaches).
[402] Nos. 05-1392 & 05-1432 (D.C. Cir.).
[403] *See* Petitioners' Opening Brief at 21-34 (D.C. Cir.) (Nos. 05-1392 & 05-1432).
[404] *See* Singel, *Labor Relations*, *supra* note __, at 719-25 (arguing that Congress did not).

no stake in the federal-tribal relationship,[405] 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.[406] 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.[407] 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.[408] The question that the Court could decide soon is whether the Tenth Amendment is important enough to limit certain exercises of tribal sovereignty.

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 with upset the "settled

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[405] *See* Seminole Tribe of Florida 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."); Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 234 (1985); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1307-08 (W.D. N.Y. 1983); Mohegan Tribe v. State of 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 __, at 107-08.

[406] *E.g.*, Carcieri v. Norton, 290 F. Supp. 2d 167, 189 (D. R.I. 2003), *on appeal*, (No. 03-2647) (1st Cir.) (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 Communities 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).

[407] *See Carcieri*, 290 F. Supp. 2d at 189-90; *City of Roseville*, 219 F. Supp. 2d at 154.

[408] *See* Agua Caliente Band of Cahuilla Indians v. Superior Court, __ P.3d __, __, 52 Cal. Rptr. 3d 569, __ (Cal. 2006).

expectations" of private landowners and state and local governments.[409] But, if there are significant constitutional concerns, they are property rights that should favor of the tribal and federal interests.[410] 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*,[411] 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[412] – states and local governments opposing tribal sovereignty and Indian tribes to raise equitable defenses.[413] In other words, the Court held that the Nation (and the United States) waited too long to bring their claims.[414] Although *City of Sherrill* did not adjudicate an Indian land claim (it had already been settled),[415] the Second Circuit relied upon the decision as the basis for dismissing land claims in *Cayuga Indian Nation v. Pataki*,[416] claims valued at hundreds of millions of dollars.[417] The State of New York and its subdivisions now argue in every land claims pleading that too much time has passed to restore tribal sovereignty and Indian lands.[418] 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

[409] City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 218 (2005).
[410] *Cf*. Babbitt v. Youpee, 519 U.S. 234 (1998); Hodel v. Irving, 481 U.S. 704 (1987).
[411] 544 U.S. 197 (2005).
[412] The last time was *Felix v. Patrick*, 145 U.S. 317 (1892).
[413] *See City of Sherrill*, 544 U.S. at 213-14.
[414] *See id*. at 217-19.
[415] *See id*. at 202.
[416] 413 F.3d 266 (2nd Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).
[417] *See id*. at 268 ($248 million).
[418] And with success. *See* Shinnecock Indian Nation v. New York, 2006 WL 3501099 (E.D. N.Y., Nov. 28, 2006).

disappear. States 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 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,[419] 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.

Consider an older case. In 1968, the Supreme Court decided *Menominee Tribe of Indians v. United States*.[420] 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.[421] The State of Wisconsin, appearing as *amicus curiae*, was the only party arguing in favor of reversal.[422] The case arose when Congress enacted the Menominee

[419] 28 U.S.C. § 2415(b).
[420] 391 U.S. 404 (1968).
[421] *See id*. at 407 (citing Menominee Tribe of Indians v. United States, 388 F.2d 998 (Ct. Cl. 1967)).
[422] *See id*.

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.[423] 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.[424] 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. The Court of Claims held that the Tribe wasn't entitled to compensation because the treaty rights had *not* been abrogated,[425] 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.

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.[426] In the case of land claims arising out of treaty provisions, the claims are based on a treaty provision that places an

[423] *See id*. at 408.
[424] *See id*. at 407-08 (citing State v. Sanapaw, 124 N.W.2d 41 (Wis. 1963)).
[425] *See id*. at 407.
[426] *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).

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.[427] 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,[428] the equitable defense applies against the government for failure to act. In effect, the federal government is at fault and therefore culpable.[429]

Moreover, before any tribe can proceed with a claim under Section 2415, the federal government must exercise discretion in determining whether or not to prosecute the claim on behalf of the tribe.[430] In other words, each Section 2415 claim places a strict duty on the federal government. Since 1983, when the government published the land claims in the Federal Register,[431] the Department of Justice has chosen to take up only a few.[432] Over two decades have passed since the government published the land claims. Given the harshness of the equity rules announced by federal courts, it may already be

[427] *E.g.*, Ewert v. Bluejacket, 259 U.S. 129 (1922).
[428] *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 Village of Noatak and Circle Village, 501 U.S. 775, 783-85 (1991) (rejecting tribal suit against state on basis of state sovereign immunity).
[429] 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. No. 97-954, at 6 (1982) (citing Covelo Indian Community v. Watt, 551 F. Supp. 366 (D. D.C. 1982), *aff'd*, 1982 U.S. App. LEXIS 23138 (D.C. Cir., Dec. 21, 1982)).
[430] *See* 28 U.S.C. § 2415 (b) ("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).
[431] *See* 48 FED. REG. 13698 (Mar. 25, 1983).
[432] *E.g.*, Bay Mills Indian Cmty. v. W. United Life Assurance Co., No. 2:96-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 Community v. State, 626 N.W.2d 169 (Mich. App. 2001), *cert. denied*, 122 S. Ct. 1303 (2002).

too late for the federal government to recover. Federal government liability may be accruing this moment.

Conclusion

What remains of federal Indian law in Supreme Court jurisprudence? 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 Bob Woodwards' book *The Brethren* about how Supreme Court Justice Brennan once referred to *Antoine v. Washington*,[433] 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* [434] as a "peewee" case. Indian law advocates chuckle because, as Colorado Law School dean David Getches has written, the Supreme Court accepts far more Indian law cases for review than would be expected. In the 1997 and 2000 Terms, the Court heard five Indian law cases, a remarkable percentage. On average, the Court has accepted between two and four cases every year during the Rehnquist Court era, beginning in 1986. This number doesn't seem particularly significant, until one considers that the

[433] 420 U.S. 194 (1975).
[434] 397 U.S. 598 (1970).

number of the cases the Court heard in the 1985 Term – the last year of the Burger Court – was about 160 cases and the caseload has been declining ever since. In the 2005 Term – Chief Justice Roberts' first year – the Court decided only 80 cases.

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," or worthy being granted *certiorari*. In Perry's book, *Deciding to Decide: Agenda Setting in the United States Supreme Court*, 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. 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…." 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. 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 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've 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* – and that case had been granted cert. during the 2004 Term when all three Westerners remained on the Court.

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*,[435] where the Second Circuit Court of Appeals struck down Cayuga land claims amounting to more than $200 million; (2) *South Dakota v. Department of Interior* [436] and *Utah v. Shivwits Band of Paiute Indians*,[437] 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* [438] and *Morris v. Tanner*,[439] 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. For the eight non-Westerners on the Court, perhaps Indian law simply isn't "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* [440] (on behalf of the State of Alaska) and *Rice v. Cayetano* [441] (on behalf of the State of Hawaii), both of which were devastating losses for Indian

[435] 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2022 (2006).
[436] 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006).
[437] 428 F.3d 966 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006).
[438] 432 F.3d 924 (9th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 381 (2006).
[439] No. 03-35922, 160 Fed. Appx. 600 (9th Cir., Dec. 22, 2005), *cert. denied*, 127 S. Ct. 379 (2006)..
[440] 520 U.S. 522 (1998).
[441] 528 U.S. 495 (2000).

Country – so we know he is 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*.

Regardless, Indian law might be dead after all. The principles that guided the Court over the first 200 years of its Indian law jurisprudence are shadows of their former selves. And, with the decline in the Court's docket, there are fewer and fewer cases that attract the Court's constitutional interest in a way that would allow tribal advocates to roll back some of the decisions disfavoring tribal interests.

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