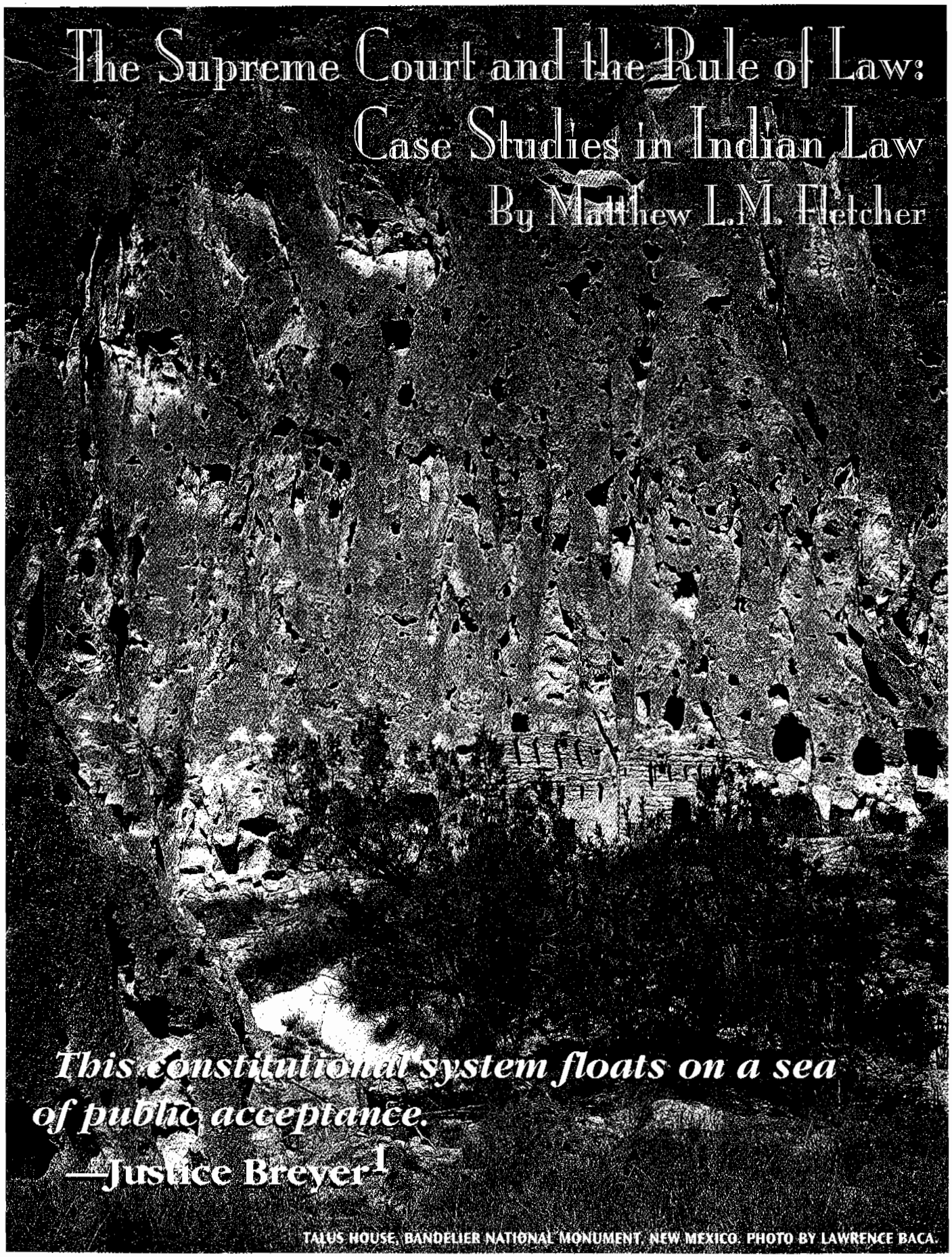
The Supreme Court and the Rule of Law: Case Studies in Indian Law

By Matthew L.M. Fletcher



This constitutional system floats on a sea of public acceptance.

—Justice Breyer[1]

TALUS HOUSE, BANDELIER NATIONAL MONUMENT, NEW MEXICO. PHOTO BY LAWRENCE BACA.

Federal Indian law has had a strange history that dates back to the foundational cases known as the Marshall Trilogy. Even though observers subject federal Indian law to rightful criticisms about the use of law to legitimize a colonial state, the dispossession of Indian lands, the destruction of tribal cultures, and the exploitation of Indian people, many Indian law cases—at least until the last few decades—are simple decisions upholding a clear rule of law. Classic cases involved recognizing tribal treaty rights, invalidating state and local governments' actions to tax tribal lands in blatant violation of federal law, and, more recently, acknowledging the federal government's awesome failure to account for individual Indian trust accounts. These cases stand for the proposition that political power, wealth, and influence do not always run roughshod over the rights of weaker and poorer individuals and groups—a pillar of our democracy and a staple of our judicial system's respect for the rule of law.[2]

The long history of the cases involving Indian law heard by the U.S. Supreme Court has seen the development of a settled common law of federal Indian law. The foundational principles that guided the Marshall Court remain the same principles that form the basis for Indian law today. Justice Antonin Scalia's praise of predictability and certainty as a hallmark of the rule of law in this context is noteworthy. The main actors in federal Indian law—Indian tribes, the United States, and the states—have long litigated their disputes in the context of these famous foundational cases.

But Indian law stands in an awkward place in this moment of the Supreme Court's history. Even as Justice Breyer accepted the 2007 American Bar Association's "Rule of Law" Award after a Supreme Court term that saw the overruling or severe degradation of several precedents in the areas of abortion rights, standing to sue, and school desegregation,[3] the rule of law in federal Indian law had been under siege for more than two decades. The recent decisions that appear to be a shock to some observers pale in comparison to the Supreme Court's decades-long assault on the rule of law in federal Indian law cases. This article offers a description of the most egregious instances in which the Court has run roughshod over tribal sovereignty and Indian rights, with nary a peep of warning or objection from the larger legal establishment.

The first part of this article deals with *Worcester v. Georgia*, 31 U.S. 515 (1832) and describes how federal Indian law is based on a rule of law significant enough, at one time, to all but save the Union. A brief history of the cases that helped to define the rule of law in Indian law through the 1980s follows. This part also explains, in general terms, how the Supreme Court's Indian law jurisprudence has degraded into a jumble of confusion and obfuscation since the late 1980s. At least since 1988, the Court has ruled against tribal interests about 75 percent of the time. The second part of this article highlights several important cases and details the way the Supreme Court has ignored the rule of law in its Indian law jurisprudence.

The Rule of Law in Federal Indian Law

Application of the Rule of Law to Save the Union: Worcester v. Georgia

Worcester v. Georgia, 31 U.S. 515 (1832), was a critical foundational case of federal Indian law that established the Supreme Court's recognition of tribal sovereignty, treaty rights, and the exclusion of state law from Indian country. Justice Breyer has been outspoken about this all-but-unknown case; he is also one of only three living current or former justices (including Justice O'Connor and Chief Justice Roberts) to have visited Indian country. It appears, however, that Justice Breyer's real reason for mentioning *Worcester* might have been to expound on the fragile character of judicial supremacy in the federal system of the United States.[4]

The facts of the case in the context of the national politics of 1832 illuminate Justice Breyer's discussion. Legal historians agree that the Court must have had Georgia's historic defiance of the Supreme Court and federal law in mind when they decided *Worcester*. A year before the events leading to *Worcester* occurred, the state of Georgia had defied a Supreme Court order staying the execution of a Cherokee man, George Corn Tassel, by the state for murder by executing the man almost as soon as they received the order staying the execution, thus rendering the case academic. The state legislature then ordered the governor and state officers to disregard future Supreme Court orders implicating state sovereignty.[5]

Worcester v. Georgia, the case that arose immediately thereafter, involved four missionaries whom Georgia had convicted and sentenced to several years of hard labor for violating a state law that prohibited white men from setting foot in Cherokee Nation territory. The law, part of a whole series of laws aimed at destroying the Cherokee Nation as a viable political presence in Georgia, violated federal treaties between the federal government and the Cherokee Nation. 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.

Justice Breyer's comments highlighted the apparent disconnect between the story of *Worcester* as commonly told and the likely political reality of the aftermath of the case. The common story is that the Marshall Court's decision in *Worcester* was a shock to the nation's leaders, especially President Andrew Jackson, the so-called Indian Fighter who was well known for his opposition to Indian rights. President Jackson was said to have uttered, "John Marshall has made his decision, now let him enforce it." Perhaps the President said this, perhaps he did not. What is clear from the historical record, as Justice Breyer pointed out, is that, even though President Jackson had no duty to force the state of Georgia to comply, he informally requested Georgia's governor to follow the Supreme Court's order. Why? Other Southern states (in particular, South Carolina) had chosen to follow Georgia's lead in refusing to comply with both Supreme Court orders and acts of Congress. This refusal was an act that even Presi-

dent Jackson, the ardent states' rights advocate and Southerner, could not countenance. Later, in correspondence to Justice Story, Chief Justice Marshall remarked, with no small amount of relief and with a little gallows humor, that President Jackson had become the ultimate nationalist—an honorary Federalist: "Imitating the Quaker who said the dog he wished to destroy was mad, they said Andrew Jackson had become a Federalist, even an ultra-Federalist. To have said he was ready to break down and trample on every other department of the government would not have injured him, but to say that he was a Federalist—a convert to the opinions of Washington, was a mortal blow under which he is yet staggering."[6]

Justice Breyer has observed that the Indian law questions forming the basis for *Worcester* required the Supreme Court to confront two difficult questions. First, to uphold the plain meaning of the 1785 Treaty of Hopewell, the Court had to apply the Supremacy Clause to strike down Georgia statutes and court decisions conflicting with the treaty. This is a simple application of the Constitution and, hence, the rule of law. Second, once the Court issued this controversial ruling, the state of Georgia had to comply with the order. And, with President Jackson's behind-the-scenes actions backing the Court, the ultimate outcome in *Worcester* was an amazing triumph for the rule of law in the face of powerful political opposition. It is no wonder that Justice Breyer is infatuated with the case.

The Rule of Law Holds ... Until the Rehnquist Court

The instances of the Supreme Court's application of federal Indian to uphold the rule of law are numerous, although much of the whole field from 1832 to 1959 is obfuscated by poorly reasoned decisions and racism, exemplified by cases such as *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), and *United States v. Kagama*, 118 U.S. 375 (1886). Several important cases still form important pillars of Indian law and demonstrate the precedence of the rule of law over powerful political interests.

The first case in the so-called modern era of federal Indian law is *Williams v. Lee*, 358 U.S. 217 (1959), in which the Court held that tribal courts had exclusive jurisdiction over civil disputes arising in Indian country involving tribal members as defendants. This mild decision gave rise to some shock waves because of its resurrection of foundational Indian law principles that modern legal commentators thought had somehow dissipated.[7] Other cases followed the *Williams* decision, such as *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), in which the Court held that tribes' treaty rights survived congressional termination of a tribe. In another case, *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), the Court ruled that federal Indian law pre-empts levying state taxes on business activities in Indian country. The Court decided other important cases involving Indian law: for example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), recognizing the immunity of tribal sovereignty immunity, and *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), acknowledging independent power of tribes to impose taxes. The number of important cases upholding the rule of law in this period is too substantial to recount here. According to Professor Alex Skibine, from 1968 to 1987, "[a]ll in all, tribes lost some significant cases, but they won substantially more than they lost." Since 1987, however, Professor Skibine writes that tribes have won only 11 of the 48 Indian law cases decided by the Court, with four being neutral and 33 being losses.[8]

Since the October 1996 Supreme Court term, a party opposing tribal interests that loses at the lower court level but files a petition for certiorari with the Supreme Court has a 16.2 percent chance of having that decision reversed by the Supreme Court (that is, there have been 17 victories in the Supreme Court out of 105 certiorari petitions). A party representing tribal interests that loses at the lower court level and files a petition for certiorari has a 3.3 percent chance of convincing the Court to reverse the lower court's adverse judgments (or four winning Supreme Court rulings out of 121 certiorari petitions). Convincing the Supreme Court to hear a case is almost the entire battle, given the fact that the Court reverses the lower court in the vast majority of cases it hears. But Indian tribes are able to convince the Court to grant a petition for certiorari only about 4 percent of the time, whereas state governments can do so 32 percent of the time.[9] These numbers show a striking contrast.

Since the publication of Felix S. Cohen's *Handbook of Federal Indian Law* in the 1940s, the field of federal Indian law has focused on three foundational principles:

- Indian affairs are the exclusive province of the federal government;
- state authority does not extend into Indian country; and
- Indian tribes retain significant inherent sovereign authority unless it is extinguished by Congress.

These principles serve as a broad statement of the rule of law in federal Indian law. Since the late 1980s, most of the Supreme Court's Indian law decisions have ignored these foundational principles. According to an Eighth Circuit judge who was reversed by the Court in a major Indian law case, *United States v. Lara*, 541 U.S. 193 (2004), the Supreme Court makes up Indian law as it goes. The situation has gotten so bad for tribal advocates that a great victory for Indian country in the 21st century consists of convincing the Court *not* to grant certiorari.[10] What changed?

Federal Cases Involving Indian Law

The degradation of federal Indian law has come in fits and starts since the late 1980s. Several cases are worth mentioning as examples of cases in which the majority opinion in a Supreme Court decision involving Indian law has deviated in an often outrageous manner from the rule of law. The disregard for the rule of law in the Court's Indian cases can be categorized as follows: (1) ignoring the rule of law and (2) eliminating the rule of law.

Ignoring the Principles of Indian Law

The first category of cases includes those in which the majority decision of the Court failed to address relevant Indian law principles altogether. Professor Lawrence Lessig's short article, *How I Lost the Big One*, in which he discusses his advocacy before the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), offers an example of how the Supreme Court can ignore seemingly applicable principles. Professor Lessig wrote, "I first scoured the majority opinion, written by Ginsburg, looking for how the [C]ourt would distinguish the principle in this case from the principle in [*United States v. Lopez*, 514 U.S. 549 (1995)]. The reasoning was nowhere to be found. The case was not even cited. The core argument of our case did not even appear in the court's opinion."[11] The cases discussed below are similar to *Eldred*.

Seminole Tribe v. Florida, 517 U.S. 44 (1996)

Of all the cases discussed in this article, perhaps *Seminole Tribe v. Florida* is the most obvious example of a major Indian law decision that ignored the rule of law in Indian law. The case involved Congress' attempt to use its power under the Commerce Clause to try to abrogate sovereign immunity, as provided by the Eleventh Amendment, in the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.). The critical legal question identified by Chief Justice Rehnquist was whether Congress had the authority to waive state sovereign immunity under the Eleventh Amendment. In the Indian Gaming Regulatory Act, Congress had attempted to exercise its authority under the Indian Commerce Clause. Rather than delve into the Court's precedents about the scope of congressional authority under the Indian Commerce Clause or even the framers' views of the clause, Chief Justice Rehnquist's majority opinion offered no discussion whatsoever about congressional authority under the *Indian* Commerce Clause. Instead, the opinion focused on precedents (and some legal history) relating to the *Interstate* Commerce Clause, first noting that the Court had recognized Congress' authority to abrogate Eleventh Amendment immunity in only two circumstances—in accordance with § 5 of the Fourteenth Amendment and in accordance with the Interstate Commerce Clause. The opinion glossed over congressional authority under the Indian Commerce Clause, treating that rich and varied history as all but irrelevant and choosing, instead, to focus on the lone Interstate Commerce Clause case that had recognized congressional authority to abrogate Eleventh Amendment immunity: *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Chief Justice Rehnquist's opinion overruled that case, attacking the rationale of Justice Brennan's plurality opinion on numerous grounds. At that point, given that the Court denied Congress authority under the Interstate Commerce Clause to abrogate Eleventh Amendment immunity (because that clause was one conceivable source of congressional authority to deal with Indian gaming), the logical next question would be whether the Indian Commerce Clause supplied Congress that authority.

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

If the Supreme Court had been serious, it should have engaged in a rigorous analysis of the scope of congressional power under the Indian Commerce Clause. A quick review of the issues covered at the Constitutional Convention provides evidence that the Indian Commerce Clause could be interpreted in a manner different from the way both the Interstate and Foreign Commerce Clauses could be interpreted: the framers drafted the Indian Commerce Clause for different reasons from those used for the other two Commerce Clauses and, perhaps as a result, added the clause to the Constitution much later in the convention. According to Professor Albert Abel,

> The provision for regulation of commerce with foreign nations and among the several states had been published by the committee of detail two weeks, and definitely approved by the convention two days, before the subject of the Indian trade was introduced on the floor of the convention. It was not until several days later that the latter reported out of committee, still encumbered with some of the qualifications attached to it in the articles; and less than two weeks before the close of the convention that it was finally incorporated with the rest of the commerce clause and approved in the form with which we are familiar. By this time, the larger part of the discussion in the federal convention relative to commercial regulations was over, and in that which did take place later there is no language relating even remotely to Indian trade.[12]

After listing the evidence, Professor Abel concludes, "Whatever regulation of commerce might mean in connection with transactions with the Indians, it was so distinct and specialized a subject as to afford no basis for argument as to the meaning of the rest of the clause."[13] Moreover, the framers intended Congress' authority over Indian commerce to extend beyond mere "commerce." As Professor Robert Stern has argued, the framers intended the Constitution to serve as a "fix" on the problem of the Articles of Confederation, which had allowed the states to muddy the waters of federal policy related to Indian affairs policy. Stern asserts that "the whole spirit of the proceedings indicates that ... the draughtsmen meant commerce to have a broad meaning with relation to the Indians. ..." In fact, Stern acknowledges that "[t]he exigencies of the time may have called for a more complete system of regulating affairs with the Indians than of controlling

commerce among the states. ..."[14]

In short, the outcome of the *Seminole Tribe* case—and the fate of an important provision in the Indian Gaming Regulatory Act—rested with the Court's treatment of a case interpreting the Interstate Commerce Clause, instead of the Indian Commerce Clause.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, tribal interests attempted to prevent the U.S. Forest Service from constructing a road through an area in northern California that is sacred to the Yurok, Karuk, and Tolowa Indians. Conceding that the construction of the road would be "devastating" to the religion (but doubting that it would "doom" the religion), Justice O'Connor's majority opinion focused on two points: (1) The federal government owned the land at issue, and the Court was opposed to outsiders' attempts to control federal land projects. (2) The majority in the case was concerned that the Court would be forced to choose one religion over another, second-guess the salience of religious belief, or interpret the religious tenets of unfamiliar religions. The Court noted that validating the tribe's claim would result in a situation in which "government[s] ... were required to satisfy every citizen's religious needs and desires."

But foundational principles of federal Indian law would have required the Court to address the possibility that, in the case of the California Indians, the United States may have agreed via treaty that these specific Indian religious practices or these Indian lands must be protected from federal interference. That possibility might have required the Court to address the sticky question of the Treaty of Guadalupe Hildalgo and the subsequent unratified treaties with California's Indians that had been drawn up in the 1850s.[15] The Court, of course, did not do so in its decision in the *Lyng* case.

The difficult hypothetical pragmatic questions that caused Justice O'Connor's concern would not have arisen in this context, nor would this case have constituted a precedent for any other kind of case involving religious freedom. Rather than deal with the rights of communities and people who have a special relationship with the United States under foundational federal Indian law, the Court grouped tribal interests into the same category as the Catholic Church or the legalization of marijuana, neither of which were affiliated with political entities that had a treaty relationship with the United States.

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

In *Wagnon v. Prairie Band Potawatomi Nation*, the Supreme Court ignored the entire terrain of argumentation offered by both parties and decided the matter by concluding that principles of federal Indian law did not apply at all. In the *Wagnon* case, the state of Kansas had imposed a tax on non-Indian distributors of gasoline sold on the Prairie Band Potawatomi Nation's reservation at a gas station owned by the nation. In accordance with prior Supreme Court precedent, the Prairie Band Potawatomi Nation sold its gas at the fair market rate (by imposing a tribal tax on the gas) in order to avoid what the Court had previously condemned in *Washington v. Colville Confederated Tribes*, 447 U.S. 134, 155–157 (1980), as "marketing the exemption." The state's tax had the effect of destroying the market rate, because it brought about double taxation on the tribe's gas sales. The Prairie Band Potawatomi Nation won a decision in the Tenth Circuit that federal law pre-empted imposition of the state's tax. Both the state and the Indian nation agreed that the pre-emption test would apply to the dispute. The state's argument rested on two major points: either the lower court had misapplied the pre-emption test or, alternatively, the Supreme Court should overrule the pre-emption test.

Given that the Prairie Band Potawatomi Nation had specifically patterned its taxing and gas sales scheme after clear Supreme Court precedent, it was no surprise that the Tenth Circuit had ruled in favor of the nation. But the Supreme Court avoided the problem of the pre-emption test by refusing to apply it at all.[16] Considering that the Court had been applying the pre-emption test for a long time—the same test that the lower court and all the parties agreed was applicable—to state taxes in cases such as *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), for the Supreme Court to simply state that the test did not apply at all is disingenuous as best.

Eliminating the Principles of Indian Law

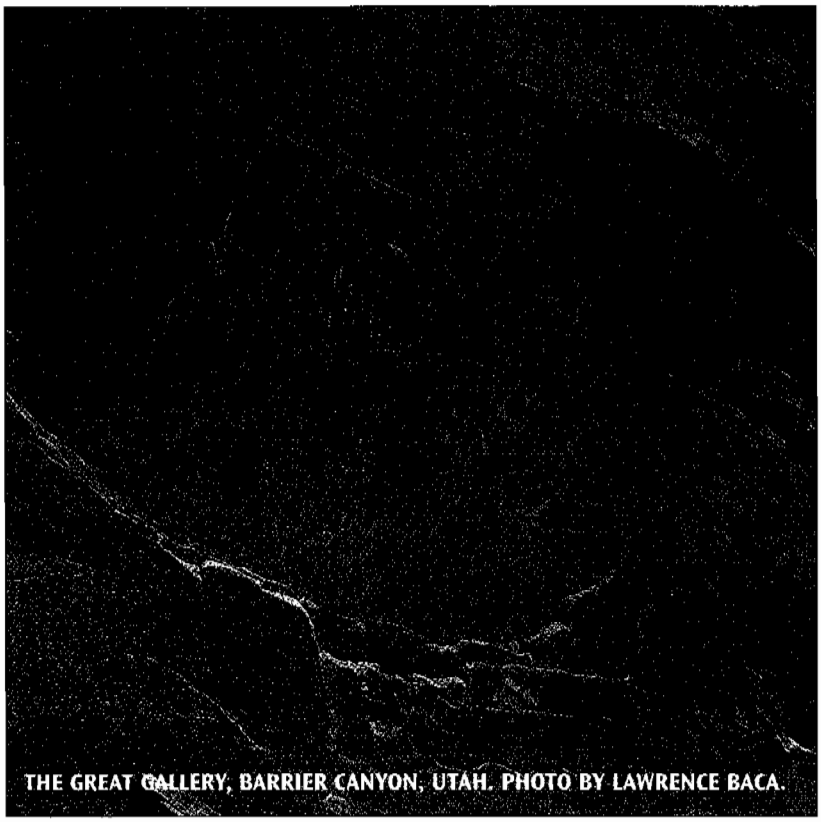
Some principles of federal Indian law have not survived the Supreme Court's handling of cases involving Indian law. In these cases, the principles appeared to have been settled law for long periods of time until the Court announced new principles that contradicted the settled law. It was easier for the Court to subvert the rule of law in these cases, because no explicit precedent appeared to be on point. Several examples are discussed below.

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

In *City of Sherrill v. Oneida Indian Nation*, the Supreme Court held that the "settled expectations" of non-Indian property owners and state and local governments justified the application of equitable defenses such as laches, impossibility, and acquiescence to Indian claims of sovereignty. The Second Circuit then applied the broadest reading of the reasoning of the *Sherrill* Court to dismiss Indian land claims on appeal in which the Cayuga Indian Nation had *won* at the trial court level more than $200 million in damages and interest against the state of New York and several of its political subdivisions. In other words, *any* older claim to land, treaty rights, or sovereignty—no matter what its merit might be—could be subject to equitable defenses favoring non-Indian property or governmental interests.[17]

The Supreme Court's opinion first relied on the case of *Felix v. Patrick*, 145 U.S. 317 (1892), in which the Court

had held that an *individual* land claim was invalid because of laches, ignoring that the case being heard involved the land claim of a *sovereign*. Moreover, the Court ignored a more recent case that was directly on point (*Ewert v. Bluejacket*, 259 U.S. 129 (1922)), holding that equitable defenses do not apply to tribal claims. The Court had faced this exact question in a previous case (*County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985)), which involved the same parties over similar claims and had relied on precedent to reject the equitable defenses. Justice Stevens, who had dissented in the older case, ironically dissented again in *City of Sherrill*, criticizing the Court for ignoring foundational principles of Indian law. The Court also ignored the Indian Claims Limitation Act of 1982, Pub. L. 97-394, codified at 28 U.S.C. § 2415(b), expressing a policy of extending the statute of limitations for Indian land claims.


THE GREAT GALLERY, BARRIER CANYON, UTAH. PHOTO BY LAWRENCE BACA.

But the key violation of the rule of law occurred when the Supreme Court rewrote the law of laches related to tribal interests—as opposed to every other category of plaintiff—to apply even when the tribal plaintiff had taken every conceivable action to prosecute the claims. Moreover, the state and local government petitioners never raised the defenses of laches in their opening briefs, waiting until the reply brief to raise the question, thus denying the Oneida Indian Nation the opportunity to respond to it in writing. And, other than a brief question with no follow-up from Justice Scalia, there was no mention of laches during oral argument.[18]

In addition, *City of Sherrill* raises the issue of the breadth of the Supreme Court's reasoning. Given the existence and potential of massive claims for reparations winding their way through federal courts, Justice Ginsburg's reasoning in *City of Sherrill* could apply with equal force to non-Indian reparations claims in which any "settled" property interests are at risk. The *City of Sherrill* opinion serves, in some ways, as the legal implementation of philosophical objections to ancient claims. City of Sherrill may be the first shot off the bow in a larger reparations debate, and the ruling could be a signal that massive reparations are not forthcoming from this Supreme Court.[19]

United States v. Wheeler, 435 U.S. 313 (1978): Implicit Divestiture

Much has been written about the subject of the Supreme Court's application of a little-known doctrine of federal Indian law known as "implicit divestiture," and little more discussion is required here. The Court's application of implicit divestiture reflects a complete collapse in the rule of law in Indian law cases. Foundational principles of federal Indian law provide that there are two ways an Indian tribe can "lose" portions of its inherent authority to govern, such as the power to prosecute non-Indians. First, the tribe can bargain away portions of its sovereignty, usually via a treaty; one example of this is the right to declare war or engage in international relations. Second, Congress can unilaterally divest the tribe of portions of its sovereignty, as it did in when it extended state criminal jurisdiction into parts of Indian country.[20]

But the Supreme Court has arrogated to itself a third means of divesting tribal sovereignty—the application of implicit divestiture—when the Court stated in *United States v. Wheeler*, 435 U.S. 313 (1978), that it has the power to locate "that part of sovereignty which the Indian implicitly lost by virtue of their *dependent status*." (Emphasis added.) What the Court meant by "dependent status" is wholly unclear, although, in the first modern case applying implicit divestiture, then Justice Rehnquist's opinion relied on the legislative history of congressional bills that were never enacted and opinions of the Interior Department's solicitor that had been withdrawn. At first, the Court retreated from this broad, standardless statement of when tribal sovereignty may be implicitly divested, ruling in *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980), that it would apply the implicit divestiture doctrine only when "the exercise of tribal sovereignty would be inconsistent with *the overriding interests of the National Government*." (Emphasis added.) Nevertheless, the number of times the Court has applied the doctrine has exploded in the past three decades. Prior to 1978, the Supreme Court had exercised this "power" exactly once: in *Johnson v. M'Intosh*, 21 U.S. 543 (1832), the

Court held that Indian tribes do not have the power to alienate land absent the consent of Congress. Since 1978, the Court has applied this "power" more than a half-dozen times.[21]

San Manuel Bingo & Casino v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007).

The Supreme Court's abdication of the rule of law in Indian law cases has had an effect on the lower courts. In *San Manuel Bingo & Casino*, the National Labor Relations Board reversed almost 30 years of its own administrative precedent and held that the National Labor Relations Act (NLRA) applies to all tribal business activities. The D.C. Circuit upheld the board's decision. It should be noted that Congress had enacted this legislation in 1935, one year after passing the Indian Reorganization Act, making it plausible (if not likely) that Congress never intended for the NLRA to apply to Indian tribes or their businesses. Because of the meager number of tribal businesses in 1935, Congress would not have considered the NLRA to be a burden on them. And, despite the absolute lack of any amendments to the NLRA in relation to tribes, the judiciary has amended the statute to apply to tribes.[22]

Conclusion

In an increasing number of Indian law cases—with *Seminole Tribe* and *Lyng* as prime examples—the Supreme Court has ignored federal Indian law altogether in its reasoning. In more and more Indian law cases—with *City of Sherrill* and *Wagnon* being of importance—the Court has surprised the parties in the case by basing its reasoning on areas of law not even briefed by the parties and by completely ignoring relevant precedent. The Supreme Court's purported application of the rule of law is blunted by statistics as well, with tribal interests having a 3 percent chance of reversing a negative decision reached by a lower court and litigants who oppose tribal interests having a 16 percent chance of reversing a negative outcome. In the past two decades, tribal interests have lost 75 percent of their cases before the Supreme Court, reversing the prior trend of the Court's findings in favor of tribal interests in slightly more than half its cases. Where is the rule of law here?

Justice Breyer's statements on the fragility of our constitutional system come at an important time, given the current trends in the Court's decision-making. Perhaps of all the Supreme Court justices on the Court, only Justice Breyer is aware of the role that federal Indian law has played in the development of the legitimacy of the rule of law in our constitutional system. Even though federal Indian law may be a relatively ignored area of law—too different and too complex to attract the attention of mainstream Court watchers—federal Indian law offers a frightening glimpse of the future of the Supreme Court's view of the "rule of law." **TFL**

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Endnotes

[1]Justice Breyer's comment when he accepted the American Bar Association's 2007 "Rule of Law" Award, as quoted in Bob Egelko, *Breyer: Public Support Key to Judiciary Future: Supreme Court Justice Uses Historic Rulings as Examples*, S.F. CHRON. (Aug. 12, 2007).

[2]*Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Winters v. United States*, 207 U.S. 564 (1908); *Winans v. United States*, 198 U.S. 371 (1905); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979); Robert A. Williams, Jr., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (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).

[3]See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007); *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553 (2007); *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).

[4]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, 413–414 (2000).

[5]See *Georgia v. Tassel*, 1 Dud. 229 (Ga. 1830); Tim Alan Garrison, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 111–129 (2002); Vine Deloria, Jr., *Conquest Masquerading as Law*, in UNLEARNING THE LANGUAGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA 94, 98 (Wahinkpe Topa (Four Arrows), ed., 2006); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 503, 505 (1969); R. Kent Newmyer, *Chief Justice John Marshall's Last Campaign: Georgia, Jackson, and the Cherokee Cases*, 23 J. SUP. CT. HIST. 76, 78 (1999); Richard P. Longaker, *Andrew Jackson and the Judiciary*, 71 POL. SCI. Q. 341, 348 (1956).

[6]David Loth, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 368 (1949) (quoting a letter from Chief Justice Marshall to Justice Story); *see also* Lindsay G. Robertson, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 136 (2005); Francis S. Stites, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 159 (1981).

[7]*See*, for example, Lawrence Davis, *Criminal Jurisdiction in Indian Country*, 1 ARIZ. L. REV. 62 (1959).

[8]Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 781 (2006); *see also* Matthew L.M. Fletcher, *Supreme Court Outcomes: Federal Indian Law from 1959*, Turtle Talk Blog (Nov. 21, 2007), turtletalk.wordpress.com/2007/11/21/supreme-court-outcomes-federal-indian-law-from-1959/ (listing all Indian law cases from 1959 to the present).

[9]*See* Matthew L.M. Fletcher, *Quick Empirical Study of Cert Grants and Denials*, For the Seventh Generation Blog (Aug. 23, 2007), tribal-law.blogspot.com/2007/08/quick-empirical-study-of-cert-grants.html; and Matthew L.M. Fletcher, *Federal Indian Law Cert Petitions: A Comparison of State Petitions and Tribal Petitions (1997 to Present)*, Turtle Talk Blog (Nov. 24, 2007), turtletalk.wordpress.com/2007/11/24/federal-indian-law-cert-petitions-a-comparison-of-state-petitions-and-tribal-petitions-1997-to-present/.

[10]See Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2 (Nell Jessup Newton et al., eds., 2005); Oral Argument of Appellant, *Prescott v. Little Six Inc.*, 387 F.3d 753 (8th Cir. 2004) (quoting Judge Wollman at 14:51 of oral argument: "[T]he Supreme Court sort of makes it up as they go along."); and Matthew L.M. Fletcher, *Means Case a Supreme Affirmation of Tribal Sovereignty*, INDIAN COUNTRY TODAY, Oct. 20, 2006, at A3, www.indiancountry.com/content.cfm?id=1096413861.

[11]Lawrence Lessig, *How I Lost the Big One*, LEGAL AFF. 62 (March/April 2004).

[12]Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 467–468 (1941)

[13]*Id.* 468

[14]Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1342 n. 27 (1934); *see also* THE FEDERALIST No. 42, at 269 (James Madison) (Clinton Rossiter, ed., 1961) (referring to the Indian affairs proviso as "absolutely incomprehensible").

[15]*See* Steve Talbot, *California Indians, Genocide of, in* 1 ENCYCLOPEDIA OF AMERICAN INDIAN HISTORY 230–231 (Bruce E. Johansen and Barry M. Pritzker, eds., 2007) (discussing the 18 "lost treaties"); Robert F. Heizer, EIGHTEEN UNRATIFIED TREATIES OF 1851–1852 BETWEEN THE CALIFORNIA INDIANS AND THE UNITED STATES GOVERNMENT (1972); Frederico M. Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hildago*, 33 UCLA L. REV. 1364 (1986); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hildago*, 26 N.M. L. REV. 201 (1996); Guadalupe T. Luna, *Legal Realism and the Treaty of Guadalupe Hildago: A Fractionalized Legal Template*, 2005 WIS. L. REV. 519.

[16]*See* Brief for Petitioner 9-33, *Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676 (2005) (No. 04-631).

[17]*See* Kathryn E. Fort, *The (In)Equities of Federal Indian Law*, 54 FED. LAW 32 (March/April 2007); Wenona T. Singel and Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession and Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

[18]*See* Singer, *Nine-Tenths, supra* note 17, at 615–628, *cited in Oneida Indian Nation of N.Y. v. New York*, 2007 WL 1500489, at *7 n. 3 (N.D. N.Y. 2007); Brief for Petitioner, *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855); Reply Brief 2-5, *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855); Oral Argument 32, *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855).

[19]*See* Richard A. Eptstein, *Property Rights Claims of Indigenous Populations: The View from the Common Law*, 31 U. TOLEDO L. REV. 1 (1999); Samuel T. Morison, *Prescriptive Justice and the Weight of History*, 38 CREIGHTON L. REV. 1153 (2005); Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615 (2003); Jeremy Waldron, *Redressing Historical Injustice*, 52 U. TORONTO L. J. 135 (2002); Jeremy Waldron, *Superseding Historical Injustice*, 103 ETHICS 4 (1992).

[20]*See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); Treaty of Hopewell, Article III, discussed in *Cherokee Nation v. Georgia*, 30 U.S. 1, 38 (1831) (Baldwin, J., concurring); 18 U.S.C. § 1162 (P.L. 280); 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); 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, 270–280 (2000).

[21]For example, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Duro v. Reina*, 490 U.S. 676 (1990); *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant*, 435 U.S. 191; *Williams, supra* note 2, at 102–103 (referencing the 1834 Western Territory Bill, "which was never passed," as authority for the *Oliphant* decision); William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 408 (1992) (discussing *Criminal Jurisdiction of Indian Tribes over Non-Indians*, 77 INTERIOR DEC. 113 (1970), withdrawn in 1974, as an additional source of authority in *Oliphant*).

[22]*See* San Manuel Bingo and Casino, 341 NLRB No. 138, 2004 WL 1283584 (May 28, 2004), aff'd; *San Manuel Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007); Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 691, 712-725 (2004).