THE PAST AND FUTURE OF INDIAN LAW SCHOLARSHIP

THE PAST . . .

"A PEOPLE WITHOUT LAW"

JAMES BRADLEY THAYER

Boston Indian Citizenship Committee.

Reprinted by permission from the Atlantic Monthly for October and November, 1891.

A PEOPLE WITHOUT LAW.

I.

In saying "A People without Law" I mean our Indians. He who tries to fix and express their legal status finds very soon that he is dealing chiefly with their political condition, so little of any legal status at all have Indians. But we must at once discriminate and remind ourselves that there are different sorts of Indians. What makes any of them peculiar, in a legal point of view, is the fact that they belong to a separate political body, and that our government mainly deals with them, not as individuals, as it does with you and me, but in a lump, as a people or tribe.

York, who, although in tribes, have never held any direct relations with the United States, but have been governed as subjects by these States. The problem of this class of people has been slowly and quietly working out under the control of the separate States, without any interference from the general government, until, in some cases, politically and legally speaking, they are not Indians. In Massachusetts, in 1869, every Indian in the State was made a citizen of the State, and it is supposed, I rather think correctly, that they have thus become citizens o g. It would not have bee l government had ente s

68 ATLANTIC MONTHLY 540 (1891)

THE TROPE OF THE VANISHING INDIAN

YALE LAW JOURNAL

Vol. XXXIX JANUARY, 1930 No. 3

THE INDIAN PROBLEM AND THE LAW

RAY A. BROWN

When the first settlers from Europe arrived upon the North American continent they were immediately presented with an "Indian problem." This problem has been with them and their descendants ever since, and to-day it is far from being solved. It is true that at present it is not very pressing from the standpoint of the dominant white race. Most of the Indians' possessions of value have passed into our hands, and dangers from hostile uprisings have long since passed into history. Looking at the situation through the eyes of the Indian, however, it is doubtful whether his condition at any time has been as critical as it is to-day. His ancient heritage is in the hands of others, his customary mode of life is largely impossible, and even the means of subsistence, which he and his ancestors p vanished. Not having yet achieved the education

39 YALE LAW JOURNAL 307 (1926)

IOWA LAW BULLETIN

7 IOWA LAW BULLETIN 232 (1930)

EGAL STATUS OF AMERICAN INDIAN AND H PROPERTY

twithstanding the fact that from earliest childhood the American citizen has been keenly interested in the Ame n, yet he knows but little of the modern descendant o le. He thinks of the present day Indian as a member ly dying race, speaking a strange Indian tongue of f ts, with but little property and of but little national co

THE TROPE OF THE INDIAN AS THE EXOTIC OTHER IN NEED OF SALVATION

LO, THE POOR INDIAN!

William C. Sengbusch
of the Buffalo, New York Bar

ERE was nothing unusual about the letter from Detroit bank, dated July 11, 1938, requesting the ssion of a 1936 Dodge because of default in a mortgage. Nothing unusual, that is, except the of the debtor. At first glance, it, too, was not since it was merely Gowanda, New York. After into the matter up to our elbows, we found that parently innocent address designated an Indian

A review of the lega with the recommendatio ceed. The authorizaito accordingly, the replevi sheriff while we sat bac

53 COMMERCIAL LAW JOURNAL 66 (1948)

22 COLUMBIA LAW REVIEW 97 (1922)

COLUMBIA
LAW REVIEW

VOL. XXII FEBRUARY, 1922 NO.

NATIONALS WITHOUT A NATION: THE NEW YOR STATE TRIBAL INDIANS

California Law Review

Volume XIV MARCH, 1926 Number 3

The Legal Status of the California Indian

(Concluded)

14 CALIFORNIA LAW REVIEW 157 (1926)

ATUS: THE SUPREME COURT AND THE EXECUTIVE

IN ORDER to ascertain the legal status of the normal citizen it is

THE TROPE OF NORMALIZING INDIAN LAW — BUT STILL TRYING TO SAVE INDIANS FROM THEMSELVES

L 1959 No. 3

THE LEGAL STATUS OF AMERICAN INDIAN TRIBES

ROBERT W. OLIVER*

A perennial American problem, and periodically a political issue of first magnitude, is the national policy toward minority groups. The American Indians are a small group, but the oldest, and one which has long been the object of a national policy markedly different from that directed toward other minorities. During much of our history when there has been an almost unanimous insistence on national unity and even uniformity, Federal Indian policy has been designed to encourage the tribes to retain their separate identities and distinct characteristics.

Perhaps the only minority which is still "fair game" for ridicule, jest, and even contempt is the American Indian. The ignorant Negro of past generations no longer appears on motion-picture screens, but the bloodthirsty savage is now portrayed in Cinemascope. No editor in his right mind would publish a cartoon exploiting a supposed characteristic of a racial or religious minority, with one exception : scarcely a week passes that some national magazine does not use an Indian as the subject of a cartoon or advertisement.[1]

38 OREGON LAW REVIEW 193 (1959)

s license is attributable to Indians themselves, who for
ns have often voluntarily made tourist attractions of them-
selves and their culture. But in part also it stems from a longstanding

NDIAN LAW AND NEEDED REFORMS

ndians from Status of Dependent Political Wardship to that of Full Citize
2, 1924—Many Laws and Customs Designed to Meet Former Situatio
er Suitable—Moral Obligation of the Government in the Premises—Revie
Executive Policy Regarding Tribal Indians

BY JENNINGS C. WISE
Of the District of Columbia Bar

12 ABA JOURNAL 37 (1926)

GOVERNMENTAL POWER AND NEW YORK INDIAN LAN
REASSESSMENT OF A PERSISTENT PROBLEM OF FEDERAL-STATE RELATIONS*

THE TROPE OF RADICALIZED INDIANS

By GERALD GUNTHER**

"INDIANS ON THE Warpath Here"[1]—so, in a headline more like
than to terrorize, a New York City tabloid recently characterize
court action by the Tuscarora Indians to invalidate, for lack of federal
New York Power Authority's appropriation of reservation lands for
of the Niagara River Power Project.[2] Through reports such as these, m
for the first time that Indian tribes indeed still reside in New York—
the once mighty Iroquois Confederacy, some 7,000 strong, on seven res
over 85,000 acres.[3] More significantly, the recent flurry of claims
New York Indians indicates that the problem of delineating federa
authority over reservation lands, long a source of
not lost its capacity to generate controversy.

8 BUFFALO LAW REVEW 1

JURISDICTION OVER INDIAN COUNTRY IN NORTH DAKOTA

INDIANS

There is no definition of an Indian applicable to all situations, consequently, each jurisdiction has its own definition for its own purposes. The decisions on this question have been so diverse that on occasion a white man has been considered an Indian[1] and an Indian not an Indian[2] for legal purposes.

The federal government has defined who is an Indian by legislation[3] for various purposes and there have been judicial definitions by the United States Supreme Court.[4] The definitions by the federal government, which has been dealing with Indians longer than most states, have not been consistent and perhaps necessarily so because of treaty obligations[5] and policy reasons.[6]

Supreme Court in *State v. Kuntz held* that
lf-blood, a member of an Indian tribe, lives
tion, and is treated by the Bureau of Indian
States government as an Indian is an Indian.
court meant this to be a definition to be fol-

THE FIRST LAW REVIEW ARTICLE WRITTEN BY A NATIVE PERSON . . . PROBABLY . . . AND IT WAS CO-WRITTEN

36 NORTH DAKOTA LAW REVIEW 51 (1960)

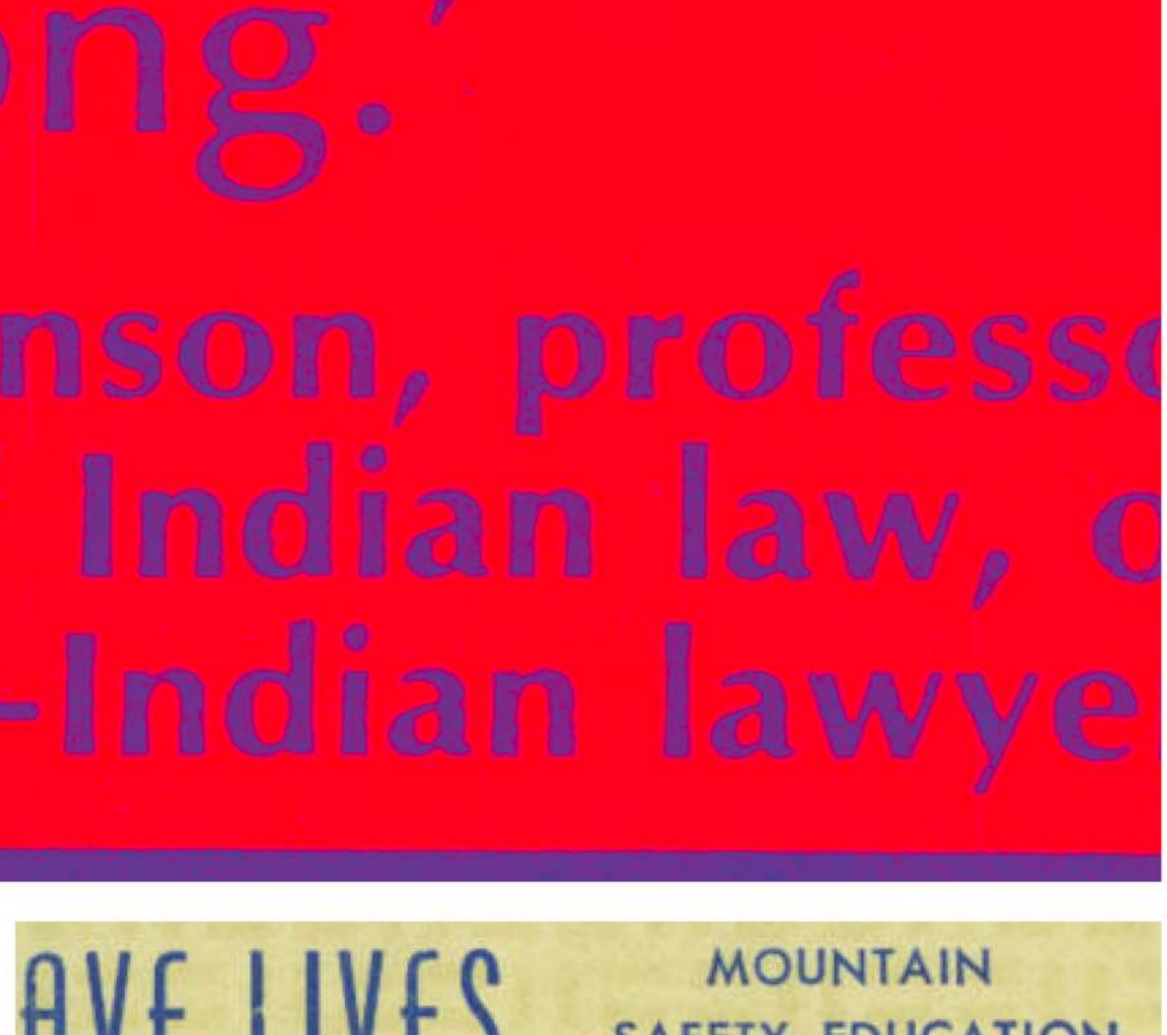
HANS WALKER, JR. — MHA NATION CITIZEN

THE BEGINNING OF THE PRESENT . . .

'They act as if there are only two court systems in the country . . . but they're dead wrong.'

— Ralph Johnson, professo of Indian law, o non-Indian lawye

RALPH W. JOHNSON — UNIVERSITY OF WASHINGTON LAW SCHOOL



Final Copy
11/20/95

HISTORY OF INDIAN LAW TEACHING 11/20/95

Ralph W. Johnson

LET ME TELL A STORY. ONE THAT ILLUSTRATES A CENTRAL CONFLICT BETWEEN INDIANs AND NONINDIANS. ABOUT 1966 OR SO, A NASA TEAM WORKING ON THE APOLLO MOON MISSION TOOK THE ASTRONAUTS NEAR TUBA CITY WHERE THE TERRAIN OF THE NAVAJO RESERVATION LOOKS VERY MUCH LIKE THE LUNAR SURFACE.

NEARBY, A NAVAJO SHEEPHERDER AND HIS SON WERE WATCHING THE ASTRONAUTS IN FULL SPACE OUTFITS. THEY WERE STRANGE LOOKING CREATURES OCCASIONALLY BEING HELPED BY OTHER PERSONNEL. THE TWO NAVAJO PEOPLE WERE NOTICED AND APPROACHED BY THE NASA PERSONNEL. SINCE THE MAN DID NOT KNOW ENGLISH, HIS SON ASKED FOR HIM WHAT THE STRANGE CREATURES WERE AND THE NASA PEOPLE TOLD THEM THAT THEY ARE JUST MEN THAT ARE GETTING READY TO GO TO THE MOON. THE NAVAJO MAN BECAME VERY EXCITED AND ASKED IF HE COULD SEND A MESSAGE TO THE MOON WITH THE ASTRONAUTS.

RALPH JOHNSON'S "HISTORY OF INDIAN LAW TEACHING"

THE PRE-LAW SUMMER INSTITUTE

Clover Barker, left, P.S. Deloria and Edward Green

Contract to Continue Indian Scholarships Signed

BIA, UNM Sign Agreement To Fund Indian Law Center

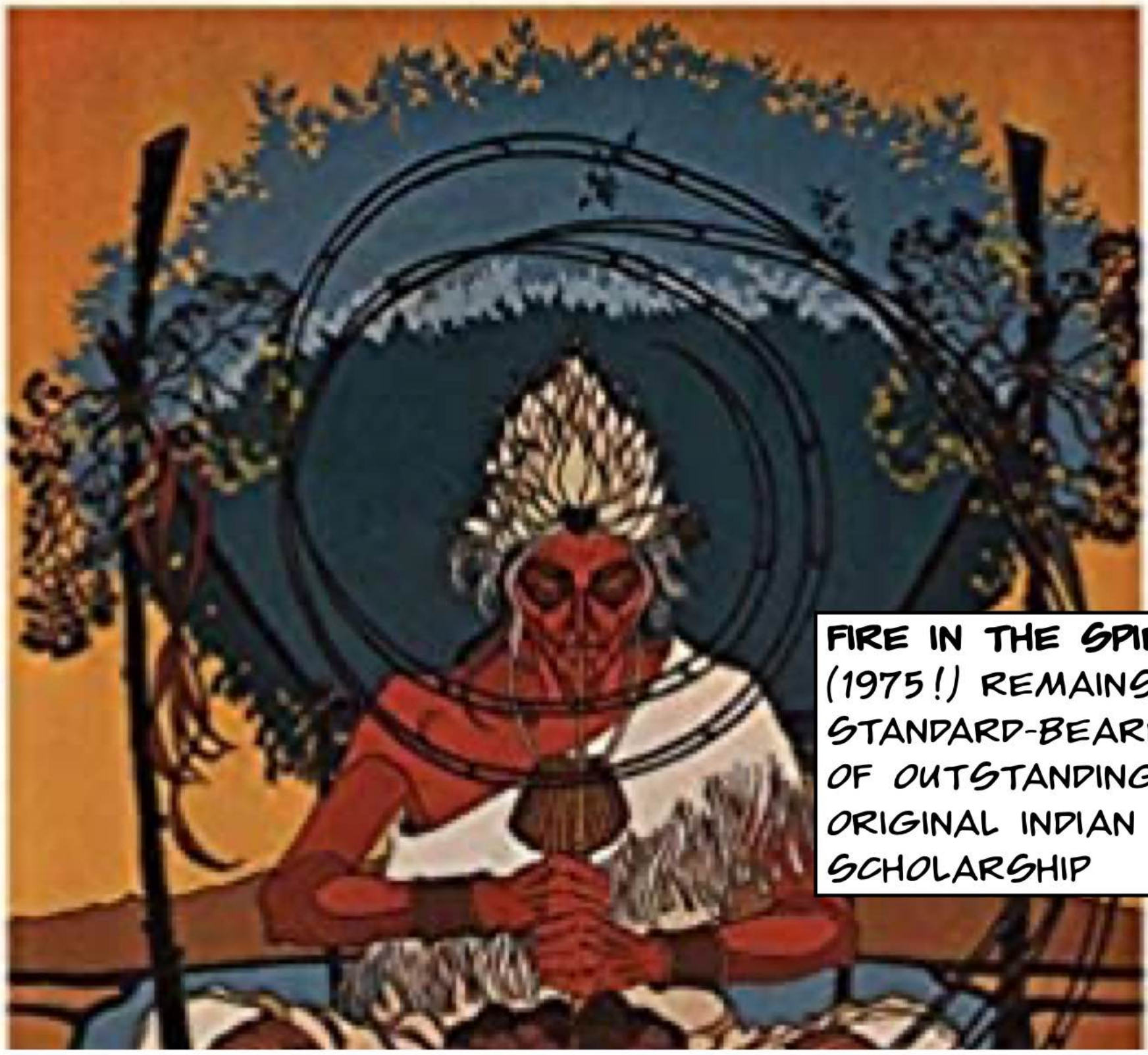
PLSI CLASS OF 1968

THE FIRST NATIVE LAW PROFESSOR

Fire and the Spirits

Cherokee Law from Clan to Court

by Rennard Strickland



FIRE IN THE SPIRITS (1975!) REMAINS THE STANDARD-BEARER OF OUTSTANDING, ORIGINAL INDIAN LAW SCHOLARSHIP

RENNARD STRICKLAND

THE FIRST GENERATION OF INDIAN LAW SCHOLARS

CHARLES WILKINSON & DAVID GETCHES

BOB CLINTON

CAROLE GOLDBERG

NELL NEWTON (& ANONYMOUS ADMIRER)

LOVELY, BRILLIANT PEOPLE — BUT WHAT'S MISSING HERE?

SOME OF THE MOST CITED FEDERAL INDIAN LAW REVIEW ARTICLES OF THE LATE 20TH CENTURY

IE 107 DECEMBER 1993 NUMB

ARVARD LAW REVIEW

ARTICLE

MARSHALLING PAST AND PRESENT: COLONIALISM, CONSTITUTIONALISM, AND INTERPRETATION IN FEDERAL INDIAN LAW

*Philip P. Frickey**

ederal Indian law is often dismissed as esoteric and incoherent. In th e, Professor Frickey argues that this need not — and should not — se. Rather, he claims, federal Indian law represents the intersecti onialism and constitutionalism in the American historical experien ch, it is central to our understanding of American public law. Mo Professor Frickey contends that a coherent, normatively sensitive a h to contemporary federal Indian law is possible.

rofessor Frickey identifies, in the three foundational federal Indian l ns written by Chief Justice John Marshall, an ingenious, evolvi to mediate the tensions between colonialism and constitutionalis ding to Professor Frickey, Chief Justice Marshall achieved this sub mmodation by conceiving of Indian treaties and other documents th the exclusive sovereign-to-sovereign relationship between the feder ument and tribes as constitutive texts. As such, Chief Justice Marshal retive approach to them mirrored his . Unfortunately, the Supreme Court a lost sight of Chief Justice Marshall's ap the implications of a return to a consti a method is both more coherent and m of federal Indian law.

107 HARVARD LAW REVIEW 381 (1993)

University of Pennsylvania Law Review

FOUNDED 1852

Formerly American Law Register

L. 132 JANUARY 1984

EDERAL POWER OVER INDIANS: ITS SOURCES, SC AND LIMITATIONS

NELL JESSUP NEWTON†

INTRODUCTION

Judicial deference to federal legislation affecting Indians me that has persisted throughout the two-hundred-year hist erican Indian law. The Supreme Court has sustained nearly ce of federal legislation it has considered directly regulating I nd federal power or withi This judicial deference ofte ry power to regulate Indi e's requirement of defere 1977 did the Court exp

132 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 195 (1984)

udicial Review of Indian Treaty brogation: "As Long as Water lows, or Grass Grows Upon the h" — How Long a Time Is That

arles F. Wilkinson* and John M. Volkman**

CONTENTS

63 CALIFORNIA LAW REVIEW 601 (1975)

Conquering the Cultural Fro The New Subjectivism of the S Court in Indian Law

David H. Getches†

For a century and a half, the Supreme Court was fa foundation principles respecting Indian tribal sovereign United States can abrogate tribal powers and rights, i by legislation. Accordingly, the Court has protected res claves for Indian self-government, preventing states from laws and taxes, and holding that even federal laws coul to Indians without congressional permission. Recentl Court has assumed the job it formerly conceded to Con ing and weighing cases to reach results comporting w subjective notions of what the Indian jurisdictional sit be. This new subjectivist approach, the author argues, s ereignty from its historical moorings, leaving lower cou cipled, comprehensible guidance. Tribes hold distinc treaties and other laws. They strive to perpetuate the land base through governance. But now they are left to of pend on the perceptions of Ju . The author also assesses tu ciples. Although most of th accepts subjectivism, he concludes that a return is po

84 CALIFORNIA LAW REVIEW 1573 (1996)

S.Ct. 2076, 95 L.Ed.2d 668 (1987) (noting the difficulties that attend the "extreme fractionation of Indian lands").

The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given "[t]he special nature of [Indian] tribunals," *Duro v. Reina*, 495 U.S. 676, 693, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990), which differ from traditional American courts in a number of significant respects. To start with the most obvious one, it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes. See *Talton v. Mayes*, 163 U.S. 376, 382–385, 16 S.Ct. 986, 41 L.Ed. 196 (1896); F. Cohen, Handbook of Federal Indian Law 664–665 (1982 ed.) (hereinafter Cohen) ("Indian tribes are not states of the union within the meaning of the Constitution, and the constitutional limitations [illegible] states do not apply to tribes"). Althou[illegible] the Indian Civil Rights Act of 1968 (ICR[illegible] makes a handful of analogous safeguar[illegible] enforceable in tribal courts, 25 U.S[illegible] § 1302, "the guarantees are not identical," *Oliphant*, 435 U.S., at 194, 98 S.Ct. 1011,[5] and there is a "definite trend by tribal courts" toward the view that they "ha[ve] leeway in interpreting" the ICRA's due process and equal protection clauses and "need not follow the U.S. Supreme Court precedents 'jot-for-jot,'" Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L.Rev. 285, 344, n. 238 (1998). In any event, a presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty," 435 U.S., at 210, 98 S.Ct. 1011.

Tribal courts also [illegible] American courts (and o[illegible]

cant geographic component to tribal sover-

other) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130–131 (1995). The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law," National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out.

Hence the practical importance of being

[illegible]

[illegible] state [illegible] § 144[illegible] broug[illegible] distri[illegible] origi[illegible] Court review of "judgments or decrees rendered [illegible] where fed[illegible] of course[illegible] formity i[illegible] federal law, a risk underscored by the fact that "[t]ribal courts are often 'subordinate [illegible]al branches of tribal government[illegible]ro, *supra*, at 693, 110 S.Ct. [illegible] Cohen 334–335).

governments are not included in the

IN 2001, THE SUPREME COURT SEEMED TO APPLY TO DOMINANT TROPES OF INDIAN LAW SCHOLARSHIP AGAINST TRIBAL INTERESTS.

* INDIAN LAW IS EXOTIC, CONFUSING, AND UNKNOWABLE — AND THEREFORE SUSPICIOUS.

* INDIAN TRIBES IN THE SELF-DETERMINATION ERA ASSERT POWERS NO "DEPENDENT," PASSIVE, VANISHING INDIANS SHOULD BE "ALLOWED" TO POSSESS.

* ACTIVE — RATHER THAN DEPENDENT AND VANISHING TRIBES — ARE THREATS TO NON-INDIANS.

NEVADA V. HICKS, 533 U.S. 353, 383-85 (2001) (SOUTER, J., CONCURRING)

THE RESPONSE . . .

RANSCRIPT: THE NEW REALISM: THE NEXT GENERATION OF SCHOLARSHIP IN FEDERAL INDIAN LAW*

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PROFESSOR PHIL FRICKEY DECLARED THE PREVIOUS DECADES OF INDIAN LAW SCHOLARSHIP A FAILURE IN PERSUADING THE SUPREME COURT.

HE CALLED FOR JUNIOR SCHOLARS TO CONDUCT MORE GROUNDED, PRACTICAL RESEARCH — NO MORE ARTICLES ABOUT OLIPHANT WAS WRONGLY DECIDED.

32 AMEERICAN INDIAN LAW REVIEW 1 (2007)

* Transcript of a meeting of the National Congress of American Indians, at Berkeley, Cal. (Nov. 17, 2006).

ibal) Sovereignty and Illibe

A NEW BEGINNING*

Angela R. Riley†

ralism struggles with an ancient paradox. That
imes treacherous course between individua
accommodation. In this Article, I argue that
manifested in very concrete intrusions on Ameri
. On the one hand, tribal sovereignty guard
ght to live and govern beyond the reach of the dor
separatism" embodies liberalism's com
ntion of pluralism. On the other hand, critics ch
onto Indian nations is necessary to prevent infra
ribal governments. For these scholars, individu
referenced above Indian nations' sovereignty.
rs concerned with illiberal practices perp
ts are increasingly calling for an expansion of
ribal communities. But these urgings are rarely
nd thoughtful analysis of American Indian tribal s
rs writing in this area f *at*
ibal communities would p *ril*
ndian differentness altog *ba*

95 CALIFORNIA LAW REVIEW 799 (2007)

THE YALE LAW JOURNAL

KRISTEN A. CARPENTER, SONIA K. KATYAL, AND ANGEL

In Defense of Property

ABSTRACT. This Article responds to an emerging view, in scholarship a
that it is normatively undesirable to employ property law as a means of prot
cultural heritage. Recent critiques suggest that propertizing culture impede
ideas, speech, and perhaps culture itself. In our view, these critiques arise la
commentators associate "property" with a narrow model of individual owne
neither the substance of indigenous cultural property claims nor major theo
in the broader field of property law. Thus, departing from the individual rig
Article situates indigenous cultural property claims, particularly those of An
the interests of "peoples" rather than "persons," arguing that such cultural p
to indigenous group identity or peoplehood, and deserve particular legal pro
observe that whereas individual rights are overwhelmingly advanced by pro
ownership model, which consolidates control in the title-holder, indigenous
to fulfill an ongoing duty of care toward cultural resources in the absence of
dis model of property to explain and justify
cul nonowners' fiduciary obligations towar
W al property law in terms of peoplehood a
ful nature of indigenous claims and the po
law itself to embrace a broader and more flexible set of interests.

118 YALE LAW JOURNAL 1022 (2009)

Fit for the r
ome Data at Last

38 CONNECTICUT LAW REVIEW 697 (2006)

CAROLE GOLDBERG & DUA

I. INTRODUCTION

ublic Law 280 in 1953, Cong
al jurisdiction into Indian co
ictures law enforcement and cr
ed tribal population and 52% o
d potentially affects all 239 A

NDIANS, CRIME, AN

104 MICHIGAN LAW REVIEW 709 (2006)

*Kevin K. Washburn**

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* BUT CF. 4 CALIFORNIA LAW REVIEW CIRCUIT 1 (2013)

GROUNDED SCHOLARSHIP WITH PROPOSALS GROUNDED IN TRIBAL PHILOSOPHIES, PRIMARILY FROM NATIVE SCHOLARS WHO BRING THEIR OWN EXPERTISE AND EXPERIENCE TO THE WORK, PRESUMABLY IS NOW MORE VALUED.

Toward an Indigenous Jurisprudence of Rape

Sarah Deer*

"But to speak, at whatever the cost, is to become empowered rather than victimized by destruction. In our tribal cultures the power of language to heal, to regenerate, and to create is understood."

14 KANSAS JOURNAL OF LAW AND PUBLIC POLICY 121 (2004)

Indian Tribes and Human Rights Accountability

WENONA T. SINGEL*

49 SAN DIEGO LAW REVIEW 567 (2012)

BANISHMENT AS CULTURAL JUSTICE IN CONTEMPORARY TRIBAL LEGAL SYSTEMS

PATRICE H. KUNESH*

One of our chiefs killed a man.

The people talked against him. "We will take him out of his place," they said.

That is what they wanted to do. But the Indian law stopped it. Even so, the chief and his wife and children were banished from the camp….But he was still chief, though all by himself.

One day his wife came poking her way into the ma e soldier chiefs. "We're in pretty bad shape out there," s o game, no food. My poor children are starved to skinny bones. Pray have pity on

37 NEW MEXICO LAW REVIEW 85 (2007)

SUPREME COURT CITATIONS TO INDIAN LAW ARTICLES

American Indian Legal Scholarship in Indian Law Cases

Time period	*Number of Indian law cases in the Supreme Court*	*Citations to Indian legal scholarship (total citations)*[72]	*Percentage*
1959–1965	9	0	0.0
1966–1970	6	1	16.7
1971–1975	18	5	27.8
1976–1980	26	7	26.9
1981–1985	20	10	50.0
1986–1990	19	8	42.1
1991–1995	10	0	0.0
1996–2000	15	4	26.7
2001–2005	14	4	28.6
2006–2012	8	1	12.5

4 CALIFORNIA LAW REVIEW CIRCUIT AT 13.

2013-2021

24 CASES
23 CITATIONS
4 CASES WITH CITATIONS
6 TOTAL OPINIONS WITH CITES

SOTOMAYOR — 11 CITATIONS IN 1 OPINION
THOMAS — 9 CITATIONS OUT OF 3 OPINIONS
RBG — 2 CITATIONS IN 1 OPINION
BREYER — 1 CIATION IN 1 OPINION

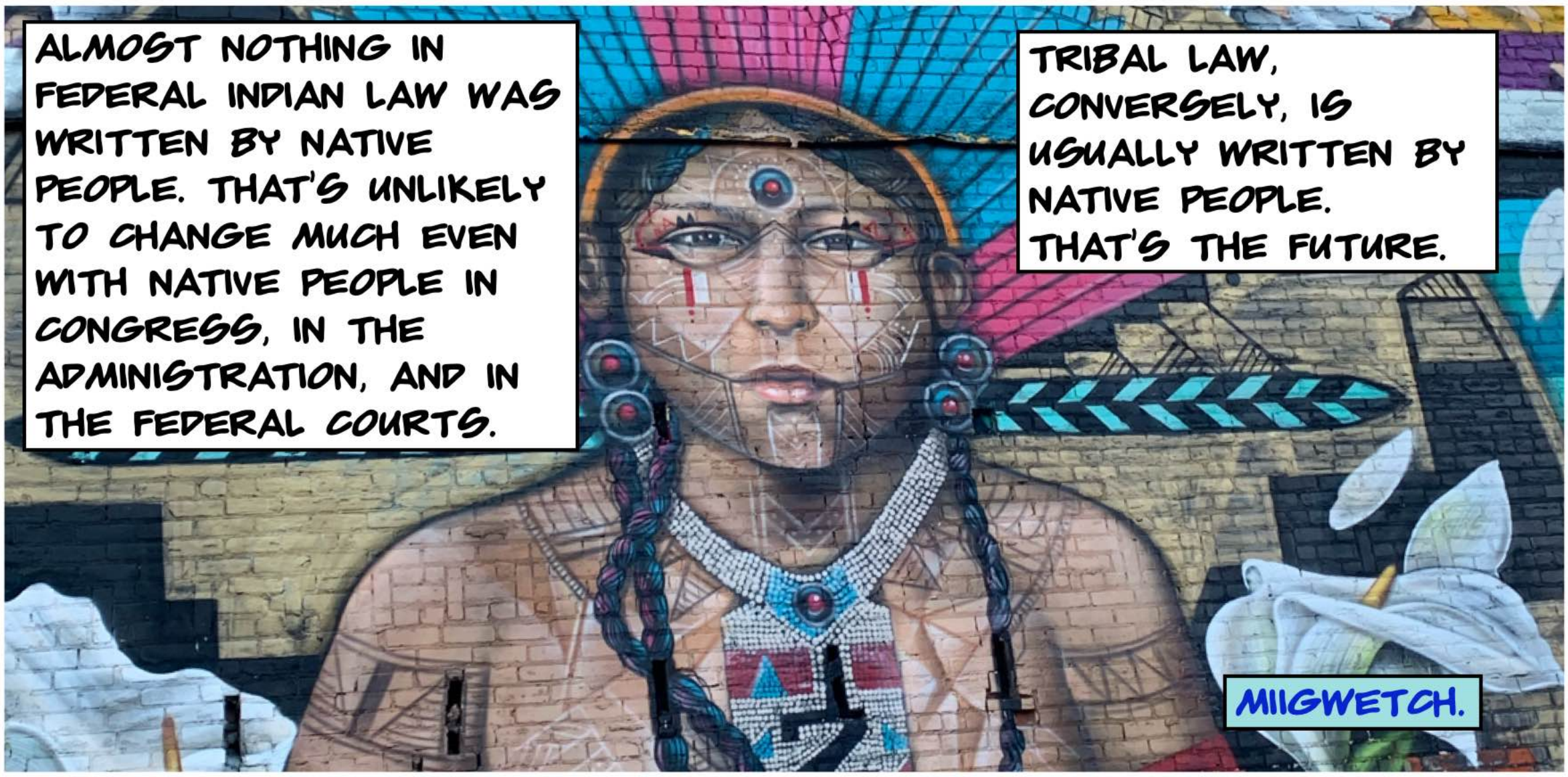
THE FUTURE . . .

ANISHINAABE INAAKONIGEWIN: PRINCIPLES FOR THE INTERGENERATIONAL PRESERVATION OF MINO-BIMAADIZIWIN

Kekek Jason Stark*

Anishinaabe-izhichigewinan miinawaa go Anishinaabe gaa-pi-izhichigewaad mewinzha, geyaabi imaa ayaamagad.
(Indian traditions and what the Indian came to do l[illegible] it's still there).
– Giniw-Aanakwad Joe Auginaush[1]

82 MONTANA LAW REVIEW 293 (2021)



VAMPIRES ANONYMOUS AND CRITICAL RACE PRACTICE

*Robert A Williams, Jr.**

I.

I can only explain what Vampires Anonymous has done for me by telling my story. I know, stories, particularly autobiographical stories, are currently being dissed by some law professors. Raised in an overly obsessive, objectively neutralized cultural style, they are plain and simple Storyhaters. Their middle to upper class par-