MAMENGWAAG & ININIWIZH: A FUTURE FOR FEDERAL INDIAN LAW

FLETCHER

Coming Together of Peoples' conference

moving to

Lubar Commons

upstairs ~~7th~~ floor

elevator is available!

NINIWIZH -- MAMENGWAA

ANISHINAABE PEOPLE OFTEN KNOW THE **AADIZOOKAAN** (SACRED STORY) OF MILKWEED AND THE MONARCH BUTTERFLY — THE SYMBIOTIC RELATIONSHIP BETWEEN THE TWO IS AN EXPRESSION OF CHANGE AND PLANNING FOR THE FUTURE

MAI`INGAN

ANISHINAABE PEOPLE ALSO OFTEN KNOW THE **AADIZOOKAAN** OF THE WOLF AND THE NANABOOZHOO — THEIR SYMBIOTIC RELATIONSHIP GROUNDED IN **DIBAADENDIZIWIN** (HUMILITY) AS A MANIFESTATION OF ETHICAL LEADERSHIP

THE SUPREME COURT AND FEDERAL INDIAN LAW

1959-1987:
TRIBAL INTERESTS WON
56 PERCENT (46-36)

1987-2013:
TRIBAL INTERESTS WON
19 PERCENT (10-44)

2014-PRESENT:
TRIBAL INTERESTS WON
70 PERCENT (14-6)

[Speaking native language]

THE METAVERSE OF SUPREME COURT LITIGATION

CASE SELECTION:
KNOWING WHEN TO HOLD 'EM AND WHEN TO FOLD 'EM

TRIBAL SUPREME COURT PROJECT:
THE INCREASING **EFFECTIVENESS** OF THE PROJECT

COUNSEL OF RECORD/ORAL ADVOCATES:
INCREASING SPECIALIZATION — **SUPREME COURT BAR VERSUS SUBJECT MATTER EXPERTS**

CERT STAGE:
COMBATING **SCOTUS'** INSTITUTIONAL BIASES

AMICUS STRATEGY:
TARGETED, LIMITED BRIEFING (HISTORY, TRIBAL SPECIFICITY, POLICY); COMBATTING QUASI-UNETHICAL OPPOSITION BRIEFS); FINDING IMPORTANT FRIENDS

TEMPERING EXPECTATIONS:
HAVING A STRATEGY FOR WHEN YOU LOSE

WINNING AND LOSING ON THE MERITS

TEXT, TEXT, TEXT:
TREATIES, ACTS OF CONGRESS, CONTRACTS, ETC.

LAND:
TRIBAL LANDS ARE THE HEART OF TRIBAL SOVEREIGNTY

POLICY:
SCOTUS IS A POLICY COURT, NO MATTER WHAT THEY SAY PUBLICLY

GOOD GOVERNANCE:
TRIBAL NATIONS *GOVERN* THEIR *OWN* **TERRITORIES** AND **CONSTITUENTS** BETTER THAN ANY *OTHER GOVERNMENT* . . . AND IF A TRIBE IS NOT *GOVERNING* BETTER, THEY *SHOULD* NOT BE IN FRONT *OF* **SCOTUS**

GUARANTEED LOSERS:
TAX PROTESTING, INHERENT TRIBAL SOVEREIGNTY, ENVIRONMENTAL PROTECTION, SUBSTANTIVE CANONS

OPTICS:
TRIBAL NATIONS MUST **EARN** SYMPATHY AND EMPATHY

POWER:
AMERICA IS **HIERARCHICAL** AND *SO TOO* IS **SCOTUS**

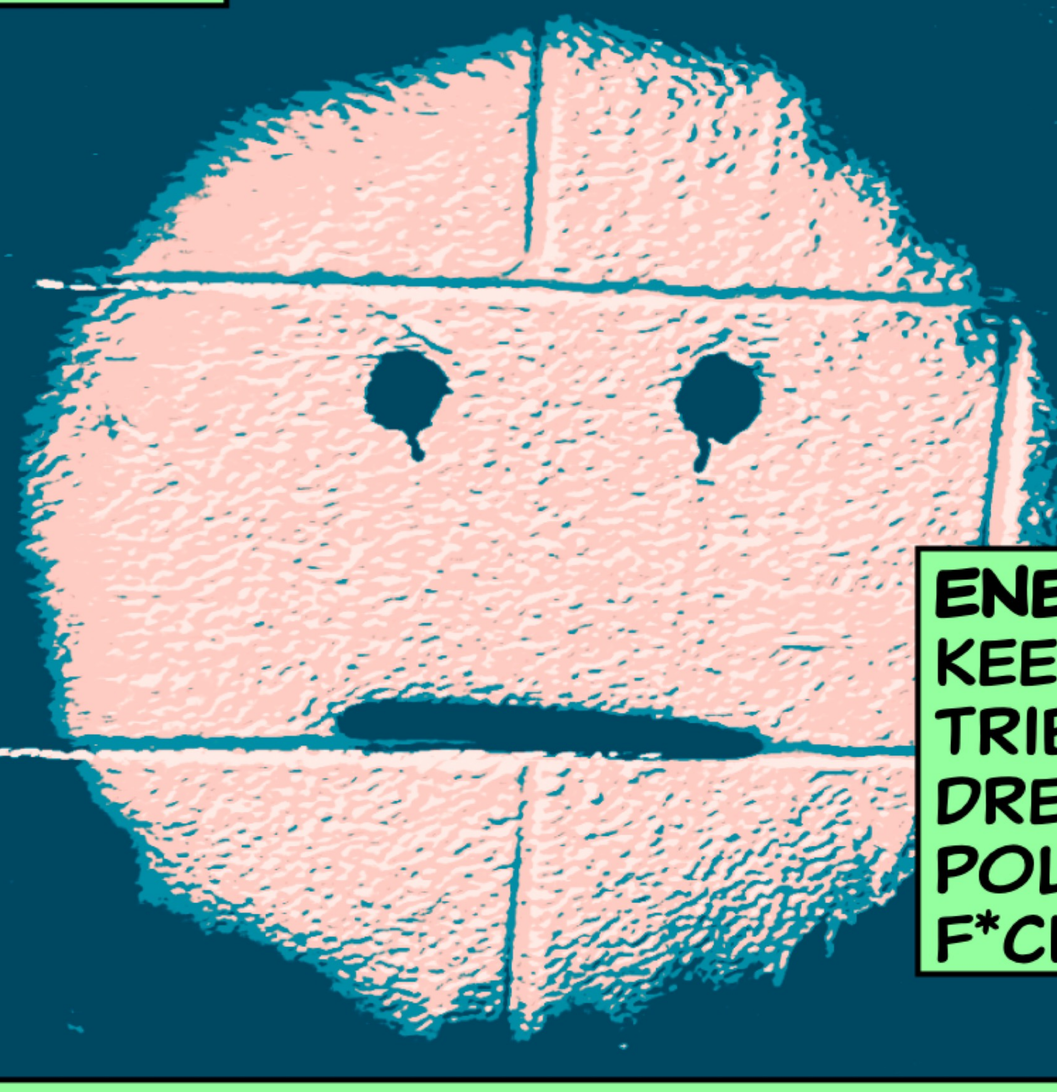
THE POST-BRACKEEN HANGOVER

INDIAN STATUS CRIMINAL CASES: PROVING INDIAN STATUS (WACTH FOR **U.S. V. HOPSON**)

SOVEREIGN IMMUNITY: **SCOTUS** STRONGLY DISFAVORS TRIBAL IMMUNITY (**LDF V. COUGHLIN**; WATCH FOR **FLYING T V. STILLAGUAMISH**)

OKLAHOMA!: TAX (**STROBLE V. OTC**); CRIMINAL JURISDICTION (**CREEK NATION** SUITS)

RELIGION CASES: OAK FLAT, ETC.



ENERGY CASES: KEEP-IT-IN-THE GROUND TRIBES VERSUS OIL-DRENCHED FEDS AND POLLUTERS — AND F*CKING CANADA

TRIBAL JURISDICTION OVER NONMEMBERS: OPTICS AND LAND OWNERSHIP FACTORS

EQUAL PROTECTION CASES: ANYTHING A STATE DOES THAT SUGGESTS A **TRIBAL MONOPOLY** OR ANY PERCEIVED DISCRIMINATION AGAINST **NON-INDIANS**

THE POTENTIALLY WEIRD FUTURE

THE EVISCERATION OF PLENARY POWER?

A NEW TREATY ERA?

DOGS AND CATS LIVING TOGETHER?

The Indians gave it to us, for shit's sake.

INDIGENOUS FUTURISMS

INDIGENOUS PARADIGM SHIFT IN AMERICAN POLITCS AND CULTURE

TRIBAL CONSENT/ F.P.I.C.

TWO INDIAN COUNTRIES – RED AND BLUE STATES

DOWN

ENFORCEMENT OF THE TRUST RESPONSIBILITY (DUTY OF PROTECTION)

MODIFICATION OF MANCARI: INTERMEDIATE SCRUTINY

PAY-TO-PLAY WITH THE UNITED STATES

OBEY

TRIBAL SELF-SUFFICIENCY . . . AND ISOLATION

TRIBAL EXIT STRATEGIES

Indians urged to merge for survival

Nations must combine efforts, UW confab told

By MARIA MEYER
Special to The Capital Times

"I have a story to tell you," she began. "I heard it many years ago from a Winnebago and it has helped me put things into perspective.

"We have been here on this sacred turtle island since the beginning of time. We learned to live with our many friends — our four-legged friends and our rooted friends. Then other people came to our land. They are our guests on this land and we must learn to be good hosts to them."

From the moment she stepped up to the microphone, the audience was captivated. Her chin-length, straight, salt-and-pepper hair, her slow and deliberate manner of speaking and her quiet voice all commanded attention. If there were any doubts in the audience that Patricia Locke would not be able to hold the attention of those who had come intending to hear Wilma Mankiller speak, those doubts were disspelled immediately.

Locke was speaking at the third annual "Coming Together of the Peoples Conference" Saturday at the University of Wisconsin Memorial Union. The three-day conference, sponsored by the Indigenous Law Student Association, is designed to raise awareness of current issues in Indian law.

Locke told the audience that the conference is a time for Indian people to come together to share their knowledge and to learn from each other. She said that it is important for Indian people to remember their responsibilities to the land and to the future generations.

Addressing the law students in the audience, Locke told them that they must never lose sight of their obligation to work diligently every day to help future generations survive. "It's not going to be easy," she said.

Robin Goree, president of the Indigenous Law Student Association, said that Locke inspires her. "This is more than just educating," she said. "It is a struggle to survive as a people and as sovereign nations."

Goree said that one of the goals of the conference is to promote the study of law among American Indian students. "We Native Americans depend on the law for our ex-

The Associated Press

Scott Sufficool, a Quinault Indian, and Irna Wilson-White, a Winnebago Indian, listen during the conference on American Indian issues held over the weekend on the UW campus.

Injured birds show signs of poisoning

APPLETON (AP) — Biologists have found hawks and owls suffering from neurological problems

A SHORT HISTORY OF INDIAN LAW IN THE SUPREME COURT

By Matthew L.M. Fletcher

The history of federal Indian law in the Supreme Court is dynamic, controversial, and inspiring. The history starts with the earliest decades of the Supreme Court and tracks the growth of the American Republic.

Guiding Principles in Indian Law

The long history of Supreme Court decisions in Indian law has cemented several guiding principles. First, Congress has plenary power in the exercise of its Indian affairs duties. Second, the United States owes a duty of protection to Indian nations and tribal members akin to a common law trust. Third, Indian nations retain inherent sovereign powers, subject to divestiture only by agreement or by Congress. Fourth, state law does not apply in Indian country absent authorization by Congress. Finally, Congress must clearly state its intention to divest tribal sovereignty.

Modern federal Indian law has given space for Indian nations to exercise self-governance and to preserve tribal lands, economies, and cultures. But for too long before the modern era, the Supreme Court ratified the mass dispossession of Indian lands, exploitation of Indian resources by outsiders, and attacks on tribal cultures, governments, and economies.

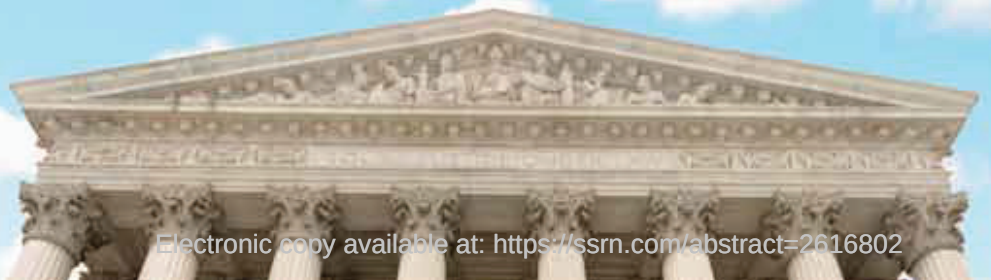
Until the Warren and Burger Court eras, the Supreme Court deferred absolutely to Congress and the executive branch prerogatives in setting federal Indian policy, which usually was designed to undermine tribal self-determination. However, during the Warren and Burger Court eras, the Court increasingly pushed back on bad federal policy and became a leader in modernizing federal Indian law. Strangely, despite congressional and executive branch support for tribal self-governance since the 1970s, the Supreme Court often has continued to resist federal Indian policy, undermining tribal governance.

Beginnings

The history of Indian law in the Supreme Court opens with the Marshall Trilogy—*Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). The Trilogy, primarily authored by Chief Justice John Marshall, established federal primacy in Indian affairs, excluded state law from Indian country, and recognized tribal governance authority. Moreover, these cases established the place of Indian nations in the American dual sovereign structure that still governs today.

Johnson is best known for the adoption of the so-called Doctrine of Discovery as the origin of American property title, but the case more properly should be known as the decision that established federal supremacy in Indian affairs over the states and individuals. The case involved a dispute over the ownership of parcels of land in the Ohio River Valley. Both parties claimed they had acquired title from Indian nations in the area, the Piankeshaw and Illinois Indians. The Supreme Court held that Indians could not sell their property interests—known to the Court as Indian title, original Indian title, or aboriginal title—to anyone except the national sovereign. Indian sales to individuals (as in this case) or to states or any other nation were void. The Court confirmed national authority over Indian affairs, which had barred all land and commercial transactions with Indians absent sovereign consent since at least the 1763 British Proclamation, a policy adopted by the First Congress in the 1790 Trade and Intercourse Act.

Congress reaffirmed federal supremacy over Indian affairs in the two Cherokee cases, *Cherokee Nation* and *Worcester*. There, the State of Georgia tried to assert the authority to legislate the Cherokee Nation's government out of existence, and then to confiscate Indian lands and resources. In the first case, a deeply split Court held that the Cherokee Nation was a domestic nation, but neither a state nor a foreign nation. In the second case, the Court held that the state laws had "no force" in Indian country, barred under the Supremacy Clause by federal statutes and the Cherokee Nation's treaties with the United States. *Id*. at



561. Of course, the Court's decision favoring the tribe did nothing to prevent the political and military process that eventually forced the Cherokee people to undergo the Trail of Tears.

The Interregnum

The Supreme Court's foundational cases allowed the federal political process—and all its attendant prejudices, inconsistencies, and complexities—to dominate Indian affairs after the Marshall Trilogy for a century and a half. A second trilogy of cases, informally known as the plenary power trilogy, memorialized the darkest decades for Indian people in American history. These cases—*Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Kagama*, 118 U.S. 375 (1886); and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)—explored the outer boundaries of congressional and executive power over Indian affairs, Indian lands, and even Indian lives—almost always without the consent of Indian people or Indian nations.

Federal Indian policy of the nineteenth century featured the wholesale removal of entire Indian nations from the East to what is now the central United States; large-scale and destructive warfare with Indian nations in the Southeast, the Great Plains, and the far West; and confiscation and exploitation of remaining and reserved Indian lands and resources by the United States and its citizens. Indian nations often became isolated on reservations or checkered parcels of detached lands in out-of-the-way regions.

The legal import of this isolation came to the forefront in *Crow Dog* and *Kagama*. In *Crow Dog*, leaders from the Sicangu band of Lakota Indians were conflicted over whether to concede additional lands and resources to the United States. Crow Dog, the leader of the group opposed to the concession, allegedly murdered Spotted Tail, the proponent of the concession. Federal officials wanted to prosecute Crow Dog under federal law, but the Supreme Court held that no federal statute or Indian treaty expressly authorized federal criminal jurisdiction over an Indian-on-Indian crime on Indian lands.

Congress quickly passed the Major Crimes Act, expressly authorizing federal criminal jurisdiction in such cases. *Kagama* was the first prosecution under the Act to reach the Supreme Court. For the first time, the Court addressed the source of Congress' constitutional authority over Indian affairs and Indian country. The Court rejected the government's contention that the Indian Commerce Clause authorized the extension of federal criminal jurisdiction over Indian country, the provision that Congress long had relied upon for much of its Indian affairs program. The Court held instead that more generalized federal interests in maintaining law and order on Indian lands, and protecting Indian people from states and their citizens, authorized the Major Crimes Act. 18 U.S.C. § 1153.

Meanwhile, Congress established allotment as national policy. Allotment involved the breakup of Indian reservations by "allotting" parcels to individual Indians and then selling "surplus" lands on the open market. Allotment was an unqualified disaster for Indian people, tribal governments, and reservation governance. Non-Indians quickly and efficiently acquired the most valuable allotted and surplus lands through legal and illegal means, and by 1928 two-thirds of the tribal land base disappeared.

Lone Wolf involved the objection to an allotment plan for the Kiowa-Comanche-Apache reservation. *See generally* Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, *in* Indian Law Stories 189 (Carole Goldberg et al. eds., 2011). Under the terms of the treaty, two-thirds of the adult males of the tribes would have to consent before the treaty could be amended. Lone Wolf the Younger argued that the Americans fraudulently acquired the consent of the tribe and the allotment plan approved by Congress should be enjoined. The Court held that Congress had the authority to proceed with the allotment plan under its plenary power over Indian affairs, that federal altering of Indian property rights over tribal objections could proceed because the tribe would receive compensation, and that the Court would presume that Congress was acting in good faith in setting the terms of compensation. The Court seemingly held that Indian claims challenging congressional and executive branch decisions on Indian affairs were not subject to judicial review by the courts.

The Supreme Court's extreme deference to the federal government's Indian affairs policies extended to the mid-nineteenth century. The capstone plenary power decision has to be *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). *See generally* Walter R. Echo-Hawk, In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided 359 (2010). There, the Interior Department authorized the harvesting of valuable timber in the Tongass National Forest claimed by Alaska Natives. The Court held that Congress never vested Alaska Native property rights and that the taking of property protected by Indian title was not subject to the Fifth Amendment Takings and Just Compensation Clause.

The Modern Era

The Supreme Court reaffirmed inherent tribal authority in *Williams v. Lee*, 358 U.S. 217 (1959), a decision heralded by Charles Wilkinson as the first case of the modern era of federal Indian law. Charles F. Wilkinson, American Indians, Time, and the Law 1 (1987). A non-Indian shop owner sued two members of the Navajo Nation in state small claims court to force the payment of debts incurred at the store, which was located in the Navajo reservation. The Supreme Court modernized tribal sovereignty by holding that state courts do not possess jurisdiction to hear claims brought arising on Indian lands against Indian defendants without congressional authorization.

Following *Williams*' lead in relation to state authority, the Court

reaffirmed several principles initially announced in *Worcester v. Georgia* and its progeny—that states may not tax on-reservation transactions involving tribal members (for example, *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965)), may not tax on-reservation income of tribal members (for example, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973)), may not tax on-reservation tribal economic development projects (for example, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)), and may not regulate on-reservation activity inconsistent with tribal government prerogatives (for example, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983)). The high point for tribal interests was the Supreme Court's dramatic rejection of the State of California's effort to regulate tribal bingo operations in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Further following *Williams*' lead in relation to tribal governance authority, the Supreme Court affirmed numerous aspects of tribal governance authority—including the power to tax members and nonmembers (for example, *Washington v. Colville Confederated Tribes*, 447 U.S. 134 (1980)), the power to prosecute Indian lawbreakers (*United States v. Wheeler*, 435 U.S. 313 (1978)), tribal sovereign immunity (for example, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)), the power to adjudicate civil claims (for example, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985)), and the power to exclude persons from Indian lands (*Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130 (1982)). The Court further held that Indian treaty rights remain extant unless Congress expressly abrogates them (for example, *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658 (1979)), and even then only if the government pays just compensation. *Cf. Menominee Tribe v. United States*, 391 U.S. 404 (1968). However, despite a lack of clear congressional guidance, the Supreme Court also held that Indian nations cannot prosecute non-Indian lawbreakers, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and that tribal civil jurisdiction over non-Indians is limited, *Montana v. United States*, 450 U.S. 544 (1981).

Despite significant limitations on tribal governance authority, the Supreme Court in the early decades of the modern era of federal Indian law marked the path of national Indian affairs, joining Congress in recognizing and encouraging tribal self-determination as the guiding principle in federal-state-tribal affairs.

Retrenchment

In recent decades, the Supreme Court has markedly shifted toward skepticism of tribal interests and tribal claims, and away from federal policies announced by Congress and the executive branch. *See generally* Wenona T. Singel, *The First Federalists*, 62 Drake L. Rev. 775 (2014). The Court routinely, though not always, has reversed presumptions favoring tribal interests and federal interests favoring Indian tribes. From the beginning of the Rehnquist Court to the current term of the Roberts Court, tribal interests have prevailed on less than one-quarter of the cases.

The turning point is not obvious, and some point to the *Oliphant* and *Montana* cases as the starting point, but the most vivid change occurred in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). There, the Supreme Court held that a state may tax a non-Indian company extracting natural resources from Indian trust lands on the Jicarilla Apache Reservation. The Court held that a tribe's interest in its own reservation resources was not sufficient to preempt the state tax, even though the state tax created a double taxation scheme that effectively undermined the tribal tax.

The Supreme Court also held in a series of cases that tribal courts may not exercise criminal jurisdiction over all nonmembers, including nonmember Indians, in *Duro v. Reina*, 495 U.S. 676 (1990). Though Congress quickly corrected that holding in the so-called *Duro* fix, *United States v. Lara*, 541 U.S. 193 (2004), Justice Anthony Kennedy's theory about why tribal governments may not exercise jurisdiction over nonmembers—because nonmembers have not expressly consented to tribal jurisdiction—continues to inform the Court's views on tribal regulatory and tribal court jurisdiction. *See, e.g*., *Plains Commerce Bank v. Long Family Land and Cattle Co*., 554 U.S. 316 (2008); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438 (1997). When informed that the Court's decisions created jurisdictional loopholes or statutory contradictions, the Court directs tribal interests to Congress to deal with the problems. *See, e.g*., *Duro*, 495 U.S. at 696.

The Supreme Court has also been undeterred by the unique history of the relationship between Indian nations and the United States in its decisions. Recent decisions have relied upon 19th century congressional policy declarations thoroughly repudiated in the modern era to reach decisions that a tribe's reservation boundaries have been diminished (for example, *Hagen v. Utah*, 510 U.S. 399 (1994)), to undermine 70 years of administrative interpretations of a statute designed to benefit Indian nations (*see Carcieri v. Salazar*, 555 U.S. 379 (2009)), to allow states to tax on-reservation land owned by the tribe (*Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998)), and to hold that state governments can invoke equitable defenses against tribal claims brought under federal statutes (*City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)). Perhaps most painfully for Indian people, the Court will not protect Indian sacred sites. *See, e.g*., *Lyng v. Northwest Indian Cemetery Protective Assn*., 485 U.S. 439 (1988). *See generally* Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The*

Story of Lyng v. Northwest Indian Cemetery Protective Association, *in* Indian Law Stories, *supra*, at 489.

The Court's reasoning in several cases turns the notion of tribal self-determination against tribal interests by denigrating the federal-tribal trust relationship. In *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Court excused unethical ex parte contact with the interior secretary by a mining company in royalty negotiations with the tribe to wipe out a $600 million judgment against the federal government. In *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), the Court held that the federal government did not have to disclose documents to the tribe about the scope of the government's trust duties to the tribe. Even when affirming a tribe's immunity from suit, the Court implored Congress to abrogate tribal immunity by statute. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc*., 523 U.S. 751 (1998).

In cases involving the mere interpretation of a statute or treaty, tribal interests have fared much better. Tribal interests have prevailed in critical decisions involving the Indian Self-Determination and Education Assistance Act (*Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012); *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005)), the Indian Gaming Regulatory Act (*Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014)), and treaty interpretation (*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)). But the Court has ruled against tribal interests (and the federal government) in decisions involving the Indian Reorganization Act (*Carcieri v. Salazar*, 555 U.S. 379 (2009)), the Freedom of Information Act (*Department of Interior v. Klamath Water Users Protective Assn*., 532 U.S. 1 (2001)), the Indian Gaming Regulatory Act (*Chickasaw Nation v. United States*, 534 U.S. 84 (2001); *see also Seminole Tribe of Florida v. Florida*, 516 U.S. 44 (1996) (striking down a critical provision in the Indian Gaming Regulatory Act)), the Quiet Title Act (*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012)), and the Indian Child Welfare Act (*Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013)).

The win-loss rate, some argue, is skewed by Indian nations that overstep, making claims beyond what the Court has articulated as settled precedent or what Congress desires. But there is strong evidence that an institutional bias against tribal interests drives the current Supreme Court. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 Ariz. L. Rev. 933 (2009). Even when the federal government sides with tribal interests, the Court is unimpressed. This institutional bias runs against the now-settled national policy favoring tribal self-determination.

Conclusion

Tribal interests have always faced an uphill climb in what Chief Justice Marshall once referred to as the "courts of the conqueror." *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823). But, despite tough lessons learned in the Supreme Court in recent decades, Indian people and their governments have become players in the American constitutional structure in a way likely thought inconceivable at the Founding of the Republic, and perhaps even as late as three or four decades ago. The future is bright.

Matthew L.M. Fletcher is a professor of law at Michigan State University College of Law.

Introduction, from page 2

only 1.5 percent of the BIA programs for Indians and only 2.4 percent of IHS programs were administered by Indian tribes and organizations. Today, over $2.5 billion of the IHS's appropriation is transferred to tribes and tribal organizations through Title I contracts and Title V compacts. Tribal participation in the BIA's self-governance program has progressed from seven tribes and total obligations of $27.1 million in 1991 to an expected 118 agreements including 266 federally recognized tribes in FY 2016 and obligations in excess of $435 million.

In addition, since 1975 the general framework of the Self-Determination Act has served as a model for Congress when legislation addressing other issues affecting Indian tribes has been necessary. For example, the Native American Housing Assistance and Self Determination Act, the Homeless Emergency Assistance and Rapid Transition to Housing Act, the Indian Mineral Development Act, and the Indian Tribal Energy Development and Self-Determination Act all explicitly invoke the principles of tribal self-determination.

Conclusion

The federal policy of self-determination in general, and the Self-Determination Act in particular—combined with the determination and vision of tribal leadership—have played a critical role in strengthening tribal governments and communities over the past 40 years. It is a solid foundation on which to build the future of Indian tribes.

Geoff Strommer is the managing partner of the Portland, Oregon, office of Hobbs, Straus, Dean & Walker, a national law firm that has specialized for over thirty years in representing tribes and tribal organizations throughout the United States.

Kirke Kickingbird is of counsel at Hobbs, Straus's Oklahoma City, Oklahoma, office.

Indian Law Reality Television, or How to Stop Worrying When Losing in the Supreme Court

MATTHEW L.M. FLETCHER

In 1997, the *American Indian Law Review* published three speeches, all given at the FBA's annual Indian Law Conference. They included "The Trend of Supreme Court Decisions in Indian Cases," by Deputy Solicitor General Louis F. Claiborne (1980); "Indian Law in the United States Supreme Court—Experiences in the 1980s and Predictions for the 1990s," by Reid Chambers (1991); and "A Review of the 1990s and a Look at What's Ahead," by Doug Endreson (1997).[1] None of these commentators came to this project with rose-colored glasses. Each of them advised listeners frankly that the Supreme Court is not a safe or predictable forum for tribal interests. More than two decades later, their advice remains sound, although frequently unheeded.

The organizers of the 50th anniversary of the Pre-Law Summer Institute asked me in 2017 to revisit those speeches. I happily did so, and I offer here a condensed and updated version of my talk. My conclusion then and now is that Claiborne, Chambers, and Endreson describe a legal environment for tribes that has since passed. The legal environment of the 1960s through the 1990s is a radical outlier in which tribes could actually expect to prevail on occasion. Throughout American history, Indian tribes and individual Indians almost *never* prevailed in the Supreme Court.

But that's not so bad. As David Getches once told me, don't obsess over the Supreme Court. Indians and tribes didn't stop because the Supreme Court ruled against them. Luckily for tribal interests, some Indian law decisions that inspire hundreds of pages of law review and journal critical commentaries don't actually have any impact whatsoever, except perhaps on the parties themselves.[2]

In this way, the Supreme Court is like reality television.

I write today to explain that tribal interests should never expect to prevail often or predictably in the Supreme Court. There are too many structural, institutional, and cognitive biases and limitations prevalent in constitutional adjudication for tribal interests to ever feel confident in that venue. I conclude that tribal interests should take steps to anticipate losses in the Supreme Court, and I suggest that tribal counsel affirmatively seek a second legal opinion from an uninterested attorney that will detail why tribal interests should never expect to win reliably before the Court.

Tribal Interests in the Supreme Court

I draw from Claiborne's speech, in particular, the conclusion that the constitutional structure itself incentivizes structural discrimination against tribal interests before the Supreme Court. The Constitution spells out and defends state and federal sovereignty but not tribal sovereignty. So long as tribal interests understand that reality, they can prepare in advance for disappointment in the Court.

I make no claim whatsoever that any individual judge harbors a personal animus against Indians or tribes. The Supreme Court *as an institution* discriminates against Indians and tribes, and always will, no matter what the composition of the Court may be. The Court is a constitutional court, and the U.S. Constitution is at play in *every* Supreme Court matter. The Constitution protects and defines federal and state sovereignty, while tribal sovereigns are expressly excluded from the American constitutional polity. As an institution governed by the Constitution, the Court will always be skeptical of American

legal, political, and economic institutions not governed by the Constitution (e.g., Indian tribes).

Structural Biases

The Constitution simply does not govern or regulate tribal powers. The Constitution primarily deals with states and the federal government. Indian tribes and foreign nations are tangential to the main business of the Constitution. When a state or federal interest conflicts with a tribal or foreign interest, the judiciary almost always favors the interests announced and governed in the Constitution (state and federal interests) rather than those of other governments (tribes and foreign nations). This bias directly affects tribal conflicts with states and the federal government. For example, tribal interests generally do not prevail in preemption disputes with state governments unless the United States weighs in with a strong federal interest.[3]

The Constitution also vests the power over Indian affairs with Congress, creating an additional structural bias, this time favoring the federal government over both tribal *and* state governments. The Constitution specifically granted Congress powers to regulate commerce with Indian tribes. Congress used that power in 1790 to preempt the field of Indian affairs with the Trade and Intercourse Act. The Constitution also established the Treaty Power in the federal government. Because federal power in Indian affairs is plenary, the judiciary is extremely unlikely to strike down federal statutes for lack of federal power, whether state or tribal interests favor the laws or not. The judiciary has affirmed the authority of the federal government to impose incredibly disruptive programs on Indian and tribal interests, such as federalizing Indian country criminal jurisdiction and privatizing Indian reservations through allotment.[4] The judiciary also has confirmed the power of the federal government to regulate state powers in Indian country.[5]

The Constitution acknowledges a special relationship between the federal government and Indian tribes. The Commerce Clause lists states, foreign nations, and Indian tribes in a grouping of sovereign entities. The Constitution provides for how state sovereign powers are to be regulated but says little on foreign nations and Indian tribes. The close grouping of foreign nations and Indian tribes, the federal primacy in Indian affairs, and the extensive use of the Treaty Power and War Powers in dealing with Indian tribes all helped to establish a special relationship between the federal government and Indian tribes analogous to the relationship of the federal government to foreign nations. The Supreme Court historically assumed that the special relationship was therefore akin to foreign affairs matters left exclusively to the other branches of the federal government under the political question doctrine.[6] The judiciary's deference to the federal government in the exercise of its trust relationship further supports federal legislative programs in Indian affairs, both for the benefit and detriment of Indian and tribal interests.[7]

The structural biases present in the Constitution that favor federal power in Indian affairs and disfavor race discrimination also create conflicts. The acknowledgement of Indian tribes and individual Indians in the text of the Constitution (as well as the euphemism referencing the slavery of African-Americans and others) initially created a bias in favor of race-based classifications in law. The Reconstruction Amendments reversed that bias generally but left Indian tribes and individual Indians in the Constitution's text. The antidiscrimination policies of the post-Reconstruction Amendments Constitution (or colorblindness, as you will) should be inapplicable to Indian affairs statutes creating what otherwise would be considered racial classifications, so long as they fulfill the purposes of the federal-tribal trust relationship, but the judiciary seems conflicted about this area.

Because Indian law is so federalized, Indian affairs legislation is beholden to congressional political processes. The federal legislative process is a lumbering behemoth—slow to act, slow to respond, and inclusive of political interests on all sides, even those completely irrelevant to Indian affairs. There could be many more statutes to deal with gaps in federal Indian law, but instead of statutes, the judiciary is left to fill those gaps.

Finally, because Indian law is federalized, involves regular constitutional interpretation, and is riddled with disputes and conflicts, the Supreme Court accepts a disproportionally high share of Indian affairs cases for review. Because there are many gaps in the law and confusion in the lower courts, the Supreme Court is frequently tempted to behave as a common law court.[8] And when the Court makes policy, the difficulty of the federal legislature to respond seemingly reinforces the Court's actions. It is all too easy for the Supreme Court to make a policy choice and then mention that Congress can alter the landscape of the law if it so chooses. The failure of Congress to act allows the Court to later assume that the judiciary got it right.

Institutional Competencies (and Biases)

The Supreme Court's roles (self-defined by the Court itself, given that the Court's docket is discretionary) include resolving important federal matters of law and resolving conflicts in law in the lower courts. These roles are articulated in the Court's Rule 10, which provides the standards for certiorari decisions. Indian law usually is not an important area of federal law, unlike (say) affirmative action, abortion, freedom of religion, gerrymandering, and the like, so that aspect of the Court's role is limited. However, another area of law that likely belongs in this category is federal statutes that have been struck down by lower courts. In Indian law, this is truly a rare circumstance, but like any federal statute struck down, a decision striking down an Indian affairs law will be reviewed by the Court. Additionally, perhaps because of the structural biases described above (and likely because of the cognitive biases described below), tribal assertions of power over nonmembers attract the Court's attention. Finally, because Indians and tribes are always suing the United States over breaches of the government's trust duties to Indian and tribal interests (and occasionally winning), the Court tends to think of successful money damages awards against the government as implicating an important federal interest sufficient to justify review.

Splits in lower court authority are relatively rare. The vast majority of federal court decisions in Indian affairs are made by the Ninth, Tenth, and Eighth Circuits (in decreasing order of numbers). Splits in authority involving federal or state criminal jurisdiction do happen among federal and state courts, though not often, but these splits in authority tend to force the Court's hand by implicating both splits in authority and (relatively) important federal interests. As a result, reservation boundaries matters that are reservation-specific (or "factbound," in the Court's parlance) tend to attract the attention of the Court even without a split in authority.

The Court plays a role in policing the separation of powers between the federal branches (alongside the other branches) and in moderating federalism disputes between the federal and state governments. Disputes between states and Indian tribes in which the state loses below tend to be reviewed at a higher rate by the Court, likely influenced by the structural biases described in the previous

subpart. State disputes with the federal government over Indian affairs decisions are the same.

The Supreme Court also polices the lower federal courts by enforcing the limited jurisdiction of the federal judiciary. Sovereign immunity cases—federal, state, and tribal—are seemingly ever-present on the Court's docket, as are Article III standing cases (though perhaps because of the structural biases described above, plaintiffs opposing tribal interests almost always have standing, but tribal interests do not).

The institutional tools of the Supreme Court are many, but also limited (in theory). Many Indian affairs cases decided by the Supreme Court involve constitutional and statutory interpretation cases, or texts. This is in the heartland of the Court's work. Many Indian affairs cases require the Court to delve into the archives for historical resources and make judgments about them. (I have previously expressed concern for the Court's role here, but this likely cannot be avoided.) This is also part of the Court's competency.

As an institution with limited powers, whose influence depends entirely on persuasion and the legitimacy of the institution, the Supreme Court cannot be a policy court. Yet it is, and it always has been. Advocates know this, which is why the Court is peppered with numerous amicus briefs, sometimes dozens, sometimes hundreds, in every single case it reviews. Many of these amicus briefs are straight-up legal arguments (often repetitive of the merits briefs of the parties), but the better briefs bring to the Court's attention other types of information relevant to the Court's decision. These often are straight-up policy briefs, not much different than the reports and testimony that advocates submit to Congress or the executive branch. The Court has not acknowledged or dealt with this issue in a meaningful or transparent way, but the Court has no institutional capacity to interrogate the claims made in these policy briefs. Lower courts can hold trials where evidence and witnesses are interrogated and examined, but the Supreme Court cannot. It is here where the Court is at its weakest institutionally, but it allows observers to assume that this is where the Court is at its strongest. These policy briefs can have outsized influence on the Court by treading a careful line between offering aggressive assertions of fact and policy and making illegitimate and outlandish representations. The Court's proxy for determining the validity of an amici's claims is the author of the brief or the institution filing the brief. This method is fraught with potential error and riddled with the opportunity for abuse by zealous and passionate advocates.

This is especially so in Indian affairs cases. Indian affairs matters are not of general knowledge; they are often reservation-specific and prone to confabulation by advocates. The Court's institutional capacity to govern and moderate the amici is perilously and dangerously (for tribal interests, mostly) inadequate. Repeatedly, the Court has been told (by both tribal and Indian interests and their opponents) that a decision in an Indian affairs case will lead to monumental policy consequences, only for those consequences to be illusory. Perhaps the worst example of this phenomenon (but far from the only one) is *City of Sherrill v. Oneida Indian Nation*,[9] where the Court adopted a legal theory (it had previously and expressly rejected in earlier cases) proposed by a fringe amicus that no party briefed at any stage of litigation—a theory that demanded extensive fact-finding by a trier of fact—and applied that theory to the case at hand without any briefing or opportunity for the tribe to litigate the merits of that theory or to establish facts relevant to that theory.

Cognitive Biases

Claiborne suggested that the relative invisibility of Indian tribes in national affairs benefitted Indian tribes before 1980. To the extent that Indian people appeared in national politics in the 1960s and 1970s, it was as an exotic offshoot of the civil rights movement. For a long while now, as Reid Chambers and Doug Endreson each noted, that invisibility is long gone. Indian tribes and individual Indians are well known to the public as casino operators, as they are characterized repeatedly on shows like *The Simpsons* and *The Killing.* The successes and failures of Indian gaming have turned many Americans against Indians, who now subvert the mainstream public's long-running perception of Indians as poor and sympathetic, mystical outsiders. Strangely enough, even the recent publicity about the protests at Standing Rock fits into that narrative. But add in media about payday lending schemes, marijuana cultivation, and patent protections, and Indians are becoming more visible than ever, and it is not necessarily in a good light.

Indian people now are at incredible risk of being targeted by the mainstream media on a variety of levels, most acutely in the context of the Indian Child Welfare Act. The non-Indian adoptive parents in recent ICWA cases have used the media to great effect, grossly caricaturing the tribal interests in their own children. In Indian child welfare contests, the strategy of using the media to destroy tribal legal and political positions is now routine. It turns out mainstream America is just looking for an excuse to grieve against Indians.

How this plays out in the Supreme Court is unclear. It doesn't help tribal interests that the governing foundational precedents the Court relies on are riddled with disturbing commentaries about Indians and tribes. The Court in *Tee-Hit-Ton Indians v. United States*[10] referred to what "every American schoolboy knows"—that Indian treaties were shams perpetrated by Americans on uncivilized and ignorant Indian people, but that case explained how tribal property interests can be protected by the Takings and Just Compensation Clause. The Court in *Ex parte Crow Dog*,[11] which introduced the clear rule supporting tribal interests, excused Crow Dog from federal criminal prosecution, in part because, as an ignorant savage, he would be unfairly treated in federal court by civilized laws and lawyers. Throughout the Indian law canon, Indian people are referred to as "incompetents," "wards," unlettered, people without laws, uncivilized heathens, and so on. Regardless of the language used, the Court's Indian affairs jurisprudence depends on the presumed inferiority of Indian people.

Perhaps the Court has improved on that front generally, but now the Court can be expected to assert biased, factually unsupportable claims about Indian tribes. The Court (in majority and other opinions) has asserted that Indian tribes are "extra-constitutional" and possess "quasi-sovereign powers." The Court claims that tribal court procedures are "unfamiliar" to nonmember litigants. The Court asserts that since nonmembers cannot vote, serve on juries, or run for tribal office, they are therefore political outsiders who cannot expect due process or fairness under tribal law from tribal governments. And the Court still rests heavily on the old guardian-ward metaphor that Congress and the executive branch discarded long ago.

For the judiciary, modern tribes are more complicated than ever before. Historically, tribes were under the thumb of the federal government. Modern tribes have resources, self-governance powers, and the federal government often backing them up. Consider *City of Sherrill v. Oneida Indian Nation*,[12] where the Supreme Court armed nontribal governments and non-Indians with equitable defenses

designed to protect nontribal interests, despite the fact that the state and local government interests had not made that argument at all. There, a tribe repurchased reservation land illegally alienated from the tribe centuries earlier and asserted an immunity from local taxes on that land. The Court said too much time had passed, and that the tribe's immunities were too disruptive to the non-Indian governments and citizens to be allowable. There was no evidence on the record whatsoever about those potential disruptions, so the Court relied on representations made by nonparty municipalities about potential disruptions. The potential scope of that Court's reasoning is vast, and it is truly an existential threat to Indian tribes. However, as Justice Breyer casually admitted in the *Dollar General v. Mississippi Band of Choctaw Indians* argument, the Court's view of Indian country is "impressionistic," and the Court struggles with reaching conclusions about the facts on the ground.[13]

Most fundamentally, the judiciary views Indians and tribes as outsiders—even foreigners—to the American legal and political world. The federal government's jealous preservation of its dominance in Indian affairs was initially tied to the outsider status of Indians and tribes. Even now that Indians are citizens and Indian tribes are ingrained in federal, state, and local government affairs, the judiciary continues to place the outsider status label on Indians and tribes.

I once workshopped a paper critical of the Supreme Court's certiorari process, particularly the cert pool, which elevates its law clerks to a hugely important gate-keeping status in identifying cert petitions for review.[14] That paper's greater contribution was to show that tribal cert petitions are almost always denied, while opponents to tribal interests had significantly better results at the cert stage (which arguably had little to do with the cert pool).

Scholars at the workshops who clerked on the Court for judges who did not participate in the cert pool egged me on in support. Scholars who clerked on the Court for judges who were part of the cert pool were not supportive of my conclusions. Weirdly, after one such workshop, one of those former clerks took me aside after critiquing my conclusions. The clerk admitted that prisoners and tribes were not supposed to win below and that when they did, the clerks were to pay particular attention to petitions arising from those cases. It was as if a conspiracy theorist had met the inside informant who confirmed the conspiracy. Regardless, the structural infirmity that tribal interests face at the Supreme Court virtually guarantees that tribes will remain disfavored interests there.

Strengths of Modern Tribal Government

Louis Claiborne foresaw a positive sea change in Indian tribal governance capacity, perhaps because he was aware of the potential for Indian tribes to develop once they embraced 638 compacting.[15] By the mid-2010s, more than 50 percent of all federal Indian affairs programs were administered by the tribes themselves.[16]

Self-determination compacts were an enormous advancement but, for many tribes, were nothing compared to the massive influx of gaming revenues that would follow. Claiborne by 1980 no doubt was aware that some tribes had commenced some form of gaming operations, if for no other reason than because the Department of Justice was keenly interested in eradicating Indian gaming completely. Reid Chambers was writing during the first few years of the Indian gaming era and barely mentioned gaming. Doug Endreson was writing in the devastating aftermath of the *Seminole Tribe v. Florida* decision that eviscerated tribal bargaining power in the casino-style gaming context.[17]

Indian gaming is now, and has been for a decade or so, a $30 billion a year business. It is true that less than half of Indian tribes have any kind of gaming operation at all (the 229 Alaska Native tribes are barred, which cuts down the total number of tribes), but a wide majority of Indian tribes in the contiguous 48 states have some form of gaming. And for a most of those tribes, gaming revenues plus federal contracting funds have elevated Indians from abject poverty to lower middle class.

Federal contracting requires Indian tribes to actually act as federal contractors, meaning they have to run a tight administrative ship in order to comply with federal contracting laws. Indian gaming regulations require Indian tribes to responsibly manage complex, cash-based businesses. In both arenas, Indian tribes have been enormously successful. As a result, tribal governance capacity grows every year, far beyond what Claiborne probably envisioned in 1980 or what Chambers envisioned in 1991, and perhaps even what Endreson envisioned in 1997.

It is not entirely clear that this advancing and dynamic competence matters much to the Supreme Court. The Court as an institution does not go on fact-finding missions or hold legislative hearings to determine how effective government officials are at their jobs. The Court depends on the parties and, often, on amicus briefs or secondary resources like law review articles and social sciences journals.

Along with enhanced tribal government capacity, the cooperation between states, local governments, the federal government, and Indian tribes has developed exponentially. Congress long has encouraged cooperation in specific areas, such as Indian child welfare, off-reservation hunting and fishing, Indian gaming, and violence against women. The executive branch in recent years has dramatically furthered cooperation in the context of law enforcement and judicial processes generally. In another context—Indian taxation—the Supreme Court itself suggested tax compacts as a solution to tribal-state disputes.[18]

The reality about Indian country criminal justice is far more complicated. As the Indian Law and Order Commission demonstrated in the context of serious felonies,[19] there are incredible and often fatal inefficiencies, given the sheer number of jurisdictions at play in Indian country. But, enforcement of misdemeanors and civil offenses is much simpler because of the growing sense of obligation that federal, tribal, and state and local jurisdictions have toward cooperating with each other on these matters. Intergovernmental cooperation is now the norm, with tribes and state and local governments negotiating their disputes more than ever.

In short, a lot of positive growth is occurring in Indian country today.

Toward a "Clinic of No"

Louis Claiborne concluded with a recommendation that tribal interests do their best to prevail in the lower courts and do everything they can to preclude Supreme Court review. The recommendation remains the primary strategy of high-stakes appellate litigation for tribal interests, though tribal interests still petition for Supreme Court review at the same rate as their adversaries.[20] Regardless, tribal interests are going to find themselves in the Supreme Court whether they like it or not. I will argue below that every tribe or individual Indian that faces or seeks Supreme Court review should receive at least one opinion from an outside, uninterested attorney who will tell them the reasons why they will lose—not *are likely* to lose, but *will definitely* lose.

Under no circumstances should tribal interests rely exclusively on legal advice from lawyers who have a potential financial interest in their appellate matter.[21] Medical patients always ask for a second and third opinion in serious matters. Why should tribal interests facing Supreme Court review act more recklessly than medical patients? Yes, seeking additional legal advice could be very expensive, but if a tribe cannot afford it, it absolutely needs to walk away from the matter.

Far too many Indian tribes hire their litigation counsel for wrong, irrelevant, and even absurd reasons. Tribal leaders sometimes hire attorneys after a period of "client development," which too often means expensive wining and dining. Tribes sometimes hire attorneys by word of mouth alone, or because they gave a good speech at an Indian law conference, or because they wrote a blog post published on their company website that indicates they are aware of an interesting legal problem, or because they have long braids and look good in a suit, or because they throw a good party in a penthouse suite at tribal casinos, or because they charge the highest per-hour rate, or because they guarantee victory. Relatively rarely do tribes retain outside counsel that specializes in appellate litigation the way state governments do—through a carefully monitored procurement policy.

Tribal leaders should be required by tribal law to find a lawyer who will tell them objectively that they probably will lose and to explain why. This is what I mean by a second opinion. This kind of opinion is absolutely covered by attorney-client privilege. My idea of a "Clinic of No" would do it for free. Maybe that second opinion is just flat wrong, and a tribe might have a great chance to win, but that's not the point. The point is that tribal leaders absolutely go into appellate litigation knowing that they could lose. The Supreme Court can change anything they like, at any time—all it takes is five votes.

Just ask tribes like New York Oneida, Narragansett, Gun Lake Potawatomi, Prairie Band Potawatomi, Mohegan, Crow, Cherokee—all tribes that lost in the Supreme Court when the Court articulated a new test that disfavored them after they had won in the lower courts. In the cases of Narragansett and Cherokee Nation, the Court even refused to allow the tribal interests to engage the new test on remand.[22]

That said, tribes do not stop when they lose. The New York Oneida lost but negotiated away their disputes with the state and local governments over their land bases a few years later. The Gun Lake Potawatomi went to Congress and won a legislative override to the negative decision (and then had to defend it, again before the Supreme Court).[23]

I conclude with reference again to the metaphor of reality television. We watch and wait with bated breath when the Supreme Court grants a case, hears the argument, and finally issues an opinion. There is either much passionate rejoicing or (usually) much lamenting these outcomes. But then Indian lawyers and tribal leaders go to work. The Supreme Court as an institution, and the judges as people, are far removed from the daily lives of Indian people and their allies. We shouldn't forget that. ⊙

Matthew L.M. Fletcher is professor of law at Michigan State University College of Law and director of the Indigenous Law and Policy Center. Professor Fletcher graduated from the University of Michigan Law School in 1997 and the University of Michigan in 1994. He is a citizen of the Grand Traverse Band of Ottawa and Chippewa Indians.

Endnotes

[1]Louis F. Claiborne, *The Trend of Supreme Court Decisions in Indian Cases,* 22 Am. Indian L. Rev. 585 (1997); Reid Peyton Chambers, *Indian Law in the United States Supreme Court – Experiences in the 1980s and Predictions for the 1990s,* 22 Am. Indian L. Rev. 601 (1997); Douglas B.L. Endreson, *A Review of the 1990s and a Look at What's Ahead,* 22 Am. Indian L. Rev. 611 (1997).

[2]Frank Pommersheim, Tribal Justice: Twenty-Five Years as a Tribal Appellate Justice 77–80 (2016) (describing the legacy of *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316 (2008)).

[3]*Compare California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), *with Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

[4]*See United States v. Kagama,* 118 U.S. 375 (1886) (criminal jurisdiction); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903) (allotment).

[5]*See Menominee Tribe v. United States,* 391 U.S. 404 (1968).

[6]*See Baker v. Carr,* 369 U.S. 186, 215 (1962).

[7]*Compare Morton v. Mancari*, 417 U.S. 535 (1974), *with United States v. Antelope,* 430 U.S. 641 (1977).

[8]For example, see Justice Scalia switching his vote against tribal sovereign immunity between *Kiowa Tribe v. Mfg. Techs.,* 523 U.S. 751 (1998), and *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782 (2013), despite Congress reaffirming its support of tribal immunity.

[9]544 U.S. 197 (2005).

[10]348 U.S. 272 (1955).

[11]109 U.S. 556 (1883).

[12]544 U.S. 197 (2005).

[13]Justice Breyer asked the tribe's counsel: "[If] I wanted to know if you wanted me to read one thing that you have cited in respect to what is only impressionistic, that the vast number of tribal courts are indistinguishable in terms of fairness, et cetera, from the courts of—other courts in the United States, what would I read?" Oral argument at 37:29, available at Oyez.org.

[14]Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes,* 51 Ariz. L. Rev. 933 (2009).

[15]25 U.S.C. § 5301.

[16]Geoffrey D. Strommer and Stephen D. Osborn, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act,* 39 Am. Indian L. Rev. 1, 1 (2014-2015).

[17]517 U.S. 44 (1996).

[18]*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 514 (1991).

[19]Indian Law and Order Commission, A Roadmap For Making Native America Safer (Nov. 2013).

[20]And occasionally prevail. *See Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649 (2018).

[21]Matthew L.M. Fletcher, *Bullshit and the Tribal Client,* 2015 Mich. St. L. Rev. 1435, 1448–53.

[22]*Carcieri v. Salazar,* 555 U.S. 379, 395–96 (2009); *Adoptive Couple v. Baby Girl,* 570 U.S. 940 (2013) (denying motion for stay to allow the lower court to conduct a best interest of the child hearing)

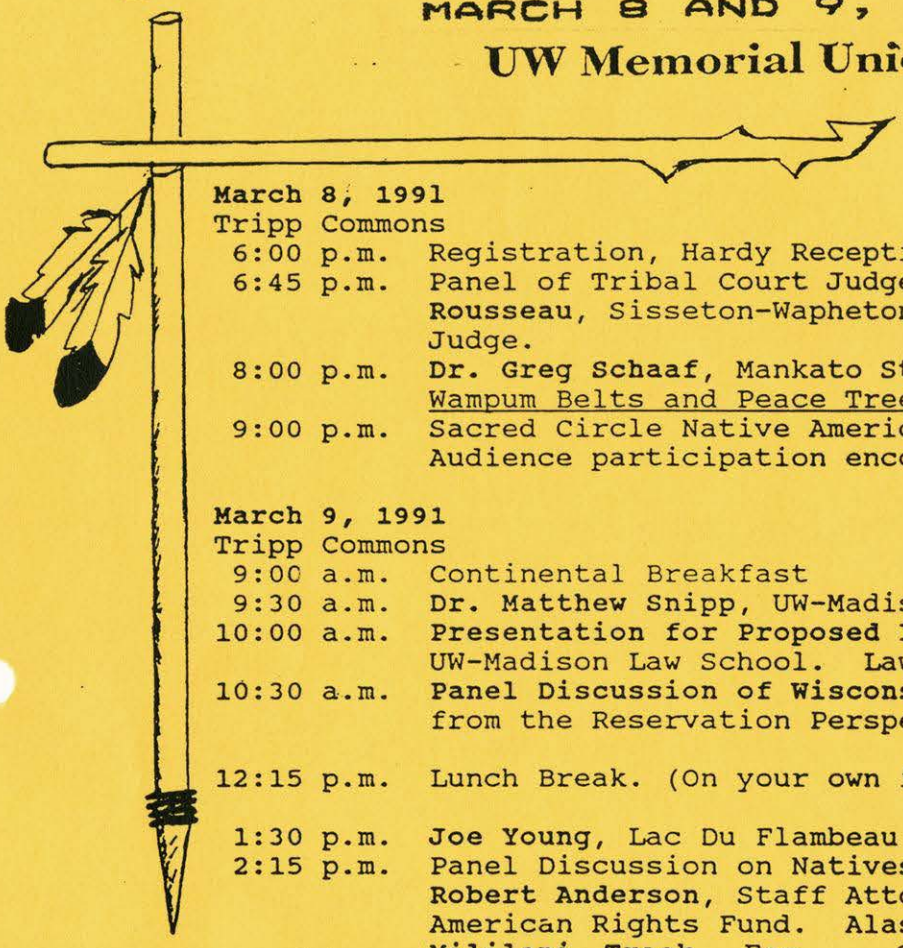
[23]*Patchak v. Zinke,* 138 S. Ct. 897 (2018).

Coming Together of the Peoples

Conference on Native American Issues

MARCH 8 AND 9, 1991

UW Memorial Union



March 8, 1991
Tripp Commons

6:00 p.m. Registration, Hardy Reception, and Opening Prayer.
6:45 p.m. Panel of Tribal Court Judges: Panel Head **Lorraine Rousseau**, Sisseton-Wapheton Band, Sioux Tribal Judge.
8:00 p.m. **Dr. Greg Schaaf**, Mankato State University. Author of Wampum Belts and Peace Trees
9:00 p.m. Sacred Circle Native American Dance Performance. Audience participation encouraged.

March 9, 1991
Tripp Commons

9:00 a.m. Continental Breakfast
9:30 a.m. **Dr. Matthew Snipp**, UW-Madison Rural Sociology Dept.
10:00 a.m. **Presentation for Proposed Indian Law Center** at the UW-Madison Law School. Law Faculty.
10:30 a.m. **Panel Discussion of Wisconsin Tribal Leaders:** Views from the Reservation Perspective.

12:15 p.m. Lunch Break. (On your own in the Student Union)

1:30 p.m. **Joe Young**, Lac Du Flambeau Tribal Attorney.
2:15 p.m. Panel Discussion on Natives of Varying Status.
Robert Anderson, Staff Attorney of the Native American Rights Fund. Alaskan Native Rights.
Mililani Trask, Esq., Gibson Foundation for the Preservation of Native Hawaiian Rights.
Allogan Slagle, Esq., Assn. on American Indian Affairs. Federal Acknowledgment of Tribes.

4:30 p.m. Break
6:30 p.m. **Banquet.** Memorial Union Cafeteria. Tickets Available in Advance ($ 14.00)
8:00 p.m. **Al Smith**, Native American Church Plaintiff in Smith v. Oregon (the peyote decision). Religious Freedom.

Free Event: Open to all University Staff, Faculty, and Students.

Sponsor: Indigenous Law Students Association

Co-Sponsors: Multi-Cultural Council ; Student Bar Association; American Indian Studies Program; Interim Multi-Cultural Center. Law School.

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