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Rebooting Indian Law in the Supreme Court

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2010 Dillon Lecture

REBOOTING INDIAN LAW IN THE SUPREME COURT

Matthew L.M. Fletcher*

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It is an honor to deliver the 2010 lecture in honor of South Dakota Supreme Court Associate Justice Charles Hall Dillon. Justice Dillon, I was pleased to discover, delivered an important dissent in an American Indian law case in 1924, *Dakota Life Insurance Co. v. Morgan*.¹ The majority had reversed a trial court decision affirming a life insurance award favoring the estate of an Indian who had represented to the insurance company that he was one-quarter Indian blood. Back then, it appears, insurance companies would refuse to insure the lives of Indian people unless they were one-quarter Indian blood or less.² It turned out the Indian, Jesse Kezena, was a full-blood Indian, and the insurance company wanted its money back. In dissent, objecting to the majority's agreement with the insurer, Justice Dillon wrote:

The highest function of the court should be to administer justice and not to engage in hairsplitting contests for the purposes of ascertaining the degree of Indian blood that may be possessed by the insured, especially when investigation, adjustment, and payment of the loss had been made.³

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¹ 199 N.W. 43, 45-46 (S.D. 1924) (Dillon, J., dissenting).

² *See id.* at 44 (“In its complaint plaintiff alleged that it was contrary to its rules to insure or accept as risks Indians of the full blood or the half blood....”).

³ *Id.* at 46 (Dillon, J., dissenting). He added:

The court should not, as a matter of law, permit life insurance companies to engage in the business of insuring the lives of our Indian people, and, after receiving the premium, wait until the death of the insured and then, after proof of loss, adjust the loss and pay the policy in full and, after doing so, bring an action for a return of the money so paid.

Id. at 45 (Dillon, J., dissenting).

Given the time – 1924 – this may have been a courageous dissent. And so I am honored to help us remember this jurist this year.

In 1990, twenty years before *Citizens United v. FEC*,⁴ the United States Supreme Court decided *Employment Division v. Smith*,⁵ one of the more controversial pronouncements issued by the Court in recent decades (and it appears one of the key cases that the students in this year’s moot court competition will reference in their quest for glory). *Smith* completely changed the federal law of government interference with religious practices, holding that the Court would no longer apply strict scrutiny to government decisions that burdened religion. The decision sparked a massive lobbying effort and succeeded in persuading Congress to overrule the decision legislatively.⁶ In hindsight, *Smith* was a perfect vehicle for a Supreme Court majority led by Justice Scalia to undermine Warren Court-era precedents on religious freedom. The case involved two Native American Church practitioners who ingested peyote in ceremonies. But the problem is that both men were drug rehab counselors who had been fired and were seeking unemployment compensation. From the point of view of most people, the case involved two drug rehab counselors who were inexplicably drug abusers themselves – in other words, a perfect vehicle for a significant change in the law undermining protections for such allegedly criminal outliers.

As practitioners and scholars, we rarely look at federal Indian law in the big picture, with a strategy geared toward moving the law in a specific direction. Unlike the civil rights movement of the 1940s and 1950s spearheaded by Thurgood Marshall, Jack Greenberg, and the NAACP Legal Defense Fund,⁷ culminating in *Brown v. Board of Education*,⁸ and unlike the late 1960s and 1970s women’s rights movement spearheaded by Ruth Bader Ginsburg and the ACLU,⁹ there has never been anything that could be characterized as a “movement” in federal Indian law.

⁴ 130 S. Ct. ___ (2010).

⁵ 494 U.S. 872 (1990).

⁶ See Religious Freedom Restoration Act, 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq.

⁷ See generally JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); JACK GREENBERG, LITIGATION FOR SOCIAL CHANGE: METHODS, LIMITS AND ROLE IN DEMOCRACY 16-23 (1974).

⁸ 347 U.S. 483 (1954).

⁹ See generally Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN & L. 157 (2002). For commentary about her run-in with Indian law in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), see ALVIN J. ZIONTZ, A LAWYER IN INDIAN COUNTRY: A MEMOIR 177-78 (2009).

Instead, Indian nations and advocates – and the federal judiciary – view Indian law through a reactionary lens, deciding major issues as the cases arise. There are a few mini-movements, long-term strategies on a particular issue, such as the *Cobell* litigation,¹⁰ the fishing rights cases of the 1960s and 1970s,¹¹ and perhaps a few others. But even those series of cases could hardly be called a strategic “movement.” As a result of a lack of a viable long-term strategy, I posit that tribal interests are and will continue to be punching bags in Supreme Court litigation.

My talk will proceed in three parts. First, I will discuss several cases from the past few decades, cases that tribal advocates find to be terrible and inexplicable losses given the foundational principles of federal Indian law articulated in the Marshall Trilogy and in the first Cohen Handbook. I will demonstrate that many of these cases were easy cases for the Court to decide against tribal interests, or what Justice Scalia would call a “laugher,”¹² as he did in depicting *Carciere v. Salazar*.¹³ Second, I will discuss the current strategies that tribal interests employ in litigating important cases in the federal judiciary and in the Supreme Court. I label this strategy – if it could be called that – reactionary, in that nearly all significant Indian law cases involve tribal reaction or defenses to situations initiated by others. To be fair, my research shows that the Supreme Court frequently accepts cert petitions from adversaries to tribal interests, putting tribal interests on the defensive anyway.¹⁴ Finally, I will offer suggestions on how to reboot federal Indian law in the federal judiciary and the Supreme Court. I will discuss cases or lines of cases that demonstrate how Indian nations can persevere in the Supreme Court, and suggest potential long-term strategies for tribal interests to pursue.

I. The Losses

Tribal interests, which I define in my scholarship as Indian nations and individual Indians involved in litigation that tend to represent the interest of Indian nations, fare horribly in the federal courts and most especially in the Supreme Court. Dean David Getches and Professor

¹⁰ *E.g.*, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

¹¹ *See* *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979).

¹² Nazune Menka, “*The Case is a Laugher*”, INDIAN COUNTRY TODAY, May 29, 2009, available at <http://www.indiancountrytoday.com/opinion/letters/46461082.html>.

¹³ 129 S. Ct. 1058 (2009).

¹⁴ *See* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009).

Alex Skibine have most famously demonstrated how tribal interests have been on the down side of more than 75 percent of the Indian law cases decided by the Supreme Court since about 1987.¹⁵ Compare that outcome to the period of time between 1959 – the beginning of what Professor Charles Wilkinson called the “modern era” of federal Indian law – until 1987 or so, where tribal interests prevailed in just under 60 percent of the cases.¹⁶ It was 1987 when the newly-elevated Chief Justice Rehnquist and the newly-appointed Justice Scalia decided their first Indian law cases in their respective positions, and around that time Justice Scalia admitted that all he knew about Indian law was that Indians always won and Thurgood Marshall usually wrote the opinion.

And so we go to the cases. I apologize in advance for the characterization of these cases. They are not the way anyone who understands the context of these cases would describe them, but my proffered characterizations may help demonstrate how federal judges and Justices view these cases. If there is any doubt about the way that the Supreme Court and their clerks caricature tribal interests, I urge you to read a few cert pool memos.

We have already considered *Employment Division v. Smith*, the case about the Indian (only one of the two petitioners was an Indian) drug rehab counselor who took drugs. It doesn't help that the case came about during the War on Drugs announced by the Reagan Administration only a few years earlier.

What about *Alaska v. Native Village of Venetie*?¹⁷ There, the state of Alaska began constructing a public school on Native property, largely for the benefit of the indigenous people of the area. The village sought to impose a tax on the construction, essentially a tax on the state. Once the Ninth Circuit affirmed the tribal tax, there must have been no doubt the Court would reverse, using whatever legal justification it could find. And so, according the Supreme Court, there is no Indian Country (except for one reservation) in Alaska.

How about *Duro v. Reina*,¹⁸ where an Indian tribe sought to impose criminal penalties on a person who was not a citizen of the tribe, could not vote in tribal elections, could not serve on a jury, could *never* (on account of his ethnicity) become a citizen or vote with the tribe, and wasn't

¹⁵ See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001); Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 781 (2006).

¹⁶ See Fletcher, *Factbound and Splitless*, *supra* note 14, at 935.

¹⁷ 520 U.S. 522 (1998).

¹⁸ 495 U.S. 676 (1990).

even entitled to paid counsel in case of indigent status? Dare I say more? Was the outcome there surprising?

To extend the citizenship notion further along this continuum, there are the civil jurisdiction cases; namely *Montana v. United States*¹⁹ and *Brendale v. Colville Confederated Tribes*.²⁰ In both cases, non-Indians (remember, they cannot ever be citizens and have few, if any, political rights in tribal government) living within reservation borders but on fee simple land no longer subject to federal supervision successfully opposed tribal government regulation of their hunting and fishing and use of their own land.

And then there's *Blatchford v. Native Village of Noatak*.²¹ The Ninth Circuit there held that the State of Alaska was immune from suit by citizens of other states and even citizens of Alaska, but somehow not suits brought Indian tribes. And don't forget that the underlying suit involved a state natural resources revenue sharing plan benefitting only Native Alaskan villages and excluding all other villages, a plan asserted to be racially discriminatory by the State's attorney general. Occasionally, tribal interests are chewed up in the buzzsaw of states' rights and federalism, as in *Seminole Tribe v. Florida* and *Idaho v. Coeur d'Alene Tribe*.²² For key federalism thinkers like Justice Scalia, Justice Thomas, and numerous lower court judges, nothing in the Constitution protects tribal sovereignty (if it exists at all). In fact, since the Constitution expressly delineates state and federal sovereignty, it makes no sense to find in favor of tribal sovereignty over those sovereigns. Ever.

Several cases involve individual Indians who are guilty of some crime, sometimes heinous, who win below on jurisdictional grounds. Either the federal government or the state government doesn't have jurisdiction because the place where the crime occurred either is or is not Indian Country. The Indian crook appears to the law-and-order-minded Court like he or she is getting away with something. And so you have reservation diminishment cases like *Hagen v. Utah*.²³ Conversely, you have *United States v. Lara*,²⁴ where the defendant attacked a law officer deputized by both the tribal government *and* the federal government, and where the defendant never appealed the tribal court conviction.

¹⁹ 450 U.S. 544 (1981).

²⁰ 492 U.S. 408 (1989).

²¹ 501 U.S. 775 (1991).

²² 516 U.S. 44 (1996).

²³ 510 U.S. 399 (1994).

²⁴ 541 U.S. 193 (2004).

But what about cases like *Nevada v. Hicks*²⁵ and *Inyo County v. Bishop Paiute*,²⁶ where Indians and Indian tribes sought to utilize tribal sovereignty to prevent state law enforcement authority from properly investigating crime? You have Justice Scalia in *Hicks* forcibly reminding Indian tribes that they cannot be havens for lawbreakers to escape prosecution.

Somewhat similar are the Indian taxation cases like *Wagnon v. Prairie Band Potawatomi Nation*²⁷ and *Chickasaw Nation v. United States*,²⁸ where Indian tribes argued for exemption from federal and state taxes for economic development purposes. As Justice Souter wondered aloud in oral argument in *Wagnon*, weren't the tribes trying to double their revenue as businesses? Or to put it another way, weren't they trying to get away with something?

Prior to that case was *Lyng v. Northwest Indian Cemetery*,²⁹ where the Court refused to allow Indian religious practices to trump the federal government's decisions on lands the federal government owned. For the Court, it looks like the Indians are trying to get their land back through the backdoor of religious freedom.

Not all cases have fact patterns aligned so heavily against tribal interests, nor do tribal interests lose all such cases. Consider *Kiowa Tribe v. Manufacturing Technologies*,³⁰ where the tribe defaulted on an agreement to purchase shares from a business partner once it realized the shares were "worthless." There, the Court upheld tribal sovereign immunity after the deadbeat company sued the tribe for refusing to throw money down a well. Compare that case to *C&L Enterprises v. Citizen Potawatomi Nation*,³¹ a unanimous defeat for tribal interests where counsel for the Nation at oral argument conceded that the tribe may have been relying upon the ignorance of their business partner in sovereign immunity issues ... to get away with having to pay out on an adverse arbitration award.

However, tribal interests have done fairly well in litigating treaty rights. Most recently, the Court decided *Minnesota v. Mille Lacs Band of Chippewa Indians*,³² part of a long line of tribal treaty hunting and fishing cases involving the patently discriminatory application of state laws by state agencies and state courts against Indian people. In *Mille Lacs*, counties in

²⁵ 533 U.S. 353 (2001).

²⁶ 538 U.S. 701 (2003).

²⁷ 546 U.S. 95 (2005).

²⁸ 534 U.S. 84 (2001).

²⁹ 485 U.S. 439 (1988).

³⁰ 523 U.S. 751 (1998).

³¹ 532 U.S. 411 (2001).

³² 526 U.S. 172 (1999).

Minnesota continued to prosecute reservation Indians for treaty fishing and hunting decades after the tribe had established important conservation and law enforcement structures designed to preserve the habitat in accordance with treaty rights cases in the 1970s and 1980s that established those rights.

Some important cases, on first glance, seemed like they were good vehicles for advancing tribal sovereignty – but in the end they were not. The first is an older case, *Oliphant v. Suquamish Indian Tribe*,³³ where two non-Indian men on drunken benders during Chief Seattle Days actually *rammed* a tribal law enforcement vehicle. If any case would be sufficient to establish tribal criminal jurisdiction over non-Indians, one would think *Oliphant* would fit the bill, but the Port Madison Reservation of the 1970s supposedly housed only 50 Suquamish tribal members, a tiny percentage of the population on the reservation. As a former on-reservation lawyer for the Suquamish with just enough knowledge of the tribe’s history to get me in trouble, I seriously doubt it was only 50. And Port Madison was a reservation where Indian people from all around had been dumped due to federal and state government interference, so the actual Indian population was likely much higher than that. Plus, during Chief Seattle Days hundreds and perhaps thousands of Indians come onto the reservation for the powwow and ceremonies. But the 50 tribal members attempting to assert jurisdiction over the majority population likely undermined the strength of that case.

Another is *Strate v. A-1 Contractors*,³⁴ one of the Supreme Court’s ugliest precedents in the last 50 years. Again, the facts looked like an exceptional vehicle for the preservation of tribal sovereignty, so much so that the Supreme Court actually granted a *tribal* petition for certiorari, one of the very, very few times it has done so in the absence of a clear split in lower court authority (maybe the only time in 50 years). There, a non-Indian contractor driving a truck hit and severely injured a woman driving on a highway in the heart of the Fort Berthold Reservation, the home of Mandan Hidatsa and Arikara Nation. The non-Indian contractor was on the reservation because he was doing work for the tribal government. The woman, also a non-Indian, lived on the reservation, was married to a tribal member, and had tribal member children. These facts are compelling, but the Supreme Court ruled 9-0 against tribal sovereignty. Why?

³³ 435 U.S. 191 (1978).

³⁴ 520 U.S. 438 (1997).

Well, my suspicion is that the case was hijacked by a very, very unusual, but devastating, case in the Crow Tribal Court, *Red Wolf v. Burlington Northern Railroad*.³⁵ There, in a suit for damages against the railroad company after a train killed two tribal members at a railroad crossing, *allegedly* a tribal judge addressed the all-Indian jury in the language of the Absalooke people and suggested the case was a chance for them to punish the railroad for historic transgressions. The railroad filed an amicus brief in *Strate* complaining about its treatment, and so Justice O'Connor may have been aware of this case when she questioned the federal government's counsel during oral argument about a hypothetical case where a tribal court jury consists of "all the friends and relatives of the victim." A close case, one that could have been a *hugely* significant win for tribal interests, went 9-0 against them.³⁶

These are the kinds of *facts*, I suggest, that mean something to the Supreme Court.

II. Reacting to the Losses

Indian Country was slow to react to what now is a very apparent hostility in the Supreme Court and federal judiciary to tribal interests (a hostility that likely has been present for far longer than the last few decades, and at best manifests itself as indifference). It wasn't until after the Court's 2000 Term, where the Court decided *Nevada v. Hicks*,³⁷ *Atkinson Trading v. Shirley*,³⁸ *C&L Enterprises v. Citizen Potawatomi Nation*,³⁹ and *Klamath Water Users v. Department of Interior*⁴⁰ that Indian nations and leaders made the first real effort to join together to strategize. State governments opposing tribal interests had been doing the same for at least a

³⁵ See *Estates of Red Wolf and Bull Tail v. Burlington N. R. Co.*, No. 94-31 (Crow Court of Appeals, Feb. 21, 1996); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000). See also Brief for the American Trucking Assns., Inc. et al. as Amici Curiae in Support of Respondents 3, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872) (describing the *Red Wolf* case).

³⁶ Another area of American Indian law that that I would have suspected to be an area of progression favoring tribal interests was sacred sites litigation, with the San Francisco Peaks case being a test case with great potential. In that case, a federal agency approved the use of sewage effluent to make artificial snow on the Peaks for the benefit of a ski resort known as the Arizona Snowbowl. The Peaks have a shortage of snow because the area is a desert, and it made no legitimate economic or environmental sense to support the Snowbowl. Oh, and the use of sewage effluent on the Peaks would virtually destroy critical aspects of the religions of numerous Indian nations located within a 100 or so miles from the Peaks, all of whom viewed the Peaks as highly sacred. With these economic, environmental, and religious interests aligning against the Arizona Snowbowl, it seemed likely the courts would recognize the tribal interests. But no, once again. See *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

³⁷ 533 U.S. 353 (2001).

³⁸ 532 U.S. 645 (2001).

³⁹ 532 U.S. 411 (2001).

⁴⁰ 532 U.S. 1 (2001).

decade, and had been publishing the Conference of Western Attorneys General *Deskbook on American Indian Law* as the guiding text for their strategy.

Thus, the National Congress of American Indians and the Native American Rights Fund, helped along by dozens of Indian nations, established the Tribal Supreme Court Project at the end of 2001.⁴¹ The Project has helped to coordinate the litigation strategy of dozens of cases, including several that have reached the Supreme Court. The Project has assisted in securing the representation of several litigators who are part of the so-called “Supreme Court Bar,” people with ties to the Court and with deep experience in litigating before the Court.⁴² In fact, one the original participants in the first meetings of the Project was John Roberts, now the Chief Justice of the Supreme Court. The Project has also assisted in developing an amicus strategy, which has limited the number of tribal amicus briefs filed before the Court, allowing them to be more focused – and therefore more likely to be read.

Many observers deemed the early years of the Project successful. From the 2002 Term until the 2004 Term, tribal interests prevailed before the Court three times, lost three times, and avoided a decision on tribal immunity that likely would have been adverse. But the last Indian law decision of the 2004 Term, *City of Sherrill v. Oneida Indian Nation*,⁴³ was utterly devastating. And since that decision, tribal interests have lost each of the five Indian law cases that have reached the Court. The Project’s strategies almost worked beautifully in one recent case, *Plains Commerce Bank v. Long Family Land and Cattle Company*,⁴⁴ involving tribal court jurisdiction over a bank well-known for “redlining” mortgages in Indian Country, but the outcome was still negative. Despite the work of a former Deputy Solicitor General on behalf of the Long Family, a subpar oral argument performance by the Bank’s counsel (not an experienced Supreme Court practitioner), and the support of the Office of Solicitor General, the decision was a familiar result, with the only major change being that the strategy generated four dissenting votes. I will return to this case, however.

Anecdotal evidence about the efficacy of the Project is mixed. Several Supreme Court Justices visit law schools, and occasionally answer questions from students about cases. Two of

⁴¹ See Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003).

⁴² See Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487 (2008).

⁴³ 544 U.S. 197 (2005).

⁴⁴ 128 S. Ct. 2709 (2008).

my former students were lucky enough to ask a question each, and the answers were not positive. One Justice noted that in her experience tribal advocacy before the Court was sub-standard before *and* after the establishment of the Project. (Another Justice cut off my former student's question and curtly rejected the basis for the question.)

The most significant problem with the Tribal Supreme Court Project, a problem that may be intractable, is the lack of a defining litigation strategy. Assuming one is possible, I discuss next how tribal interests might proceed in federal appellate and Supreme Court litigation with an active eye toward progressing, rather than reacting.

III. The Reboot

In the 1830s, the Cherokee Nation of Georgia hired one of the most influential, well-known, and successful appellate advocates in the nation, William Wirt, the former Attorney General of the United States, to represent them in a lawsuit against the State of Georgia. Georgia had all but declared war on the Cherokees, and had legislated to destroy them as a government. As is well known to tribal advocates, the Cherokee Nation's dispute with Georgia reached the Supreme Court and resulted in two important decisions – *Cherokee Nation v. Georgia*⁴⁵ and *Worcester v. Georgia*⁴⁶ – important both in Indian law and in mainstream American constitutional law, as Justice Breyer routinely points out in his law school talks.⁴⁷

The Cherokees had prepared as well as they could for the litigation. They had adopted a constitutional form of government, separation of powers in the branches of national government, a sophisticated judiciary, and an American-style law enforcement structure. The Cherokees farmed, traded, and did everything that American citizens and a state or local government can and should do. And to some, they did it better than the State of Georgia, which was one of the very poorest states with perhaps one of the most inept and corrupt state governments in the history of the Union.

After two false-starts involving a murder case⁴⁸ and an ill-conceived plan to sue Georgia in the Supreme Court's original jurisdiction docket,⁴⁹ the merits of the State of Georgia's anti-

⁴⁵ 30 U.S. 1 (1831).

⁴⁶ 31 U.S. 515 (1832).

⁴⁷ E.g., Danny Serna, *Breyer Discusses Court's History*, YALE DAILY NEWS, Feb. 16, 2010, available at <http://www.yaledailynews.com/news/university-news/2010/02/16/breyer-discusses-courts-history/>.

⁴⁸ See *Georgia v. Tassels*, 1 Dud. 229 (Ga. 1830).

⁴⁹ See *Cherokee Nation*, 30 U.S. 1.

Cherokee legislation reached the Marshall Court when Georgia prosecuted a federal employee for going into Indian Country without state consent. William Wirt was successful in convincing the Court, packed with staunch states' rights Justices, to strike down Georgia's laws.

The strategy worked in a way that would make present-day tribal advocates deeply envious, even if it did nothing to help the Cherokee people of the 1830s. How can it work now?

My colleague, co-author, and friend Professor Rob Williams already suggested in his most recent book⁵⁰ what I am about to suggest. He argued in favor of a long-term litigation strategy along the lines of the civil rights strategies leading to *Brown v. Board of Education*. Professor Williams identified⁵¹ (as has Professor Joe Singer⁵²) the Court's decision in *Tee-Hit-Ton Indians v. United States*⁵³ as a precedent ripe for reversal. Where else in American jurisprudence can the government *take* private property without *ever* having to worry about just compensation or due process? I don't necessarily advocate a full-out onslaught on *Tee-Hit-Ton* today, but if there is still a significant aboriginal Indian property right out there being threatened, a careful litigation strategy could bring *Tee-Hit-Ton* down.

The Cherokee Nation prevailed in *Worcester* due to a series of factors, some out of their control. Georgia had intentionally victimized the Cherokees as part of a strategy of nullifying federal control over state lands and the state economy, not to mention the ever-present anathema of slavery.⁵⁴ The Georgia legislature threatened any Georgia official with criminal penalty if they acted to comply with the Supreme Court's decisions. Moreover, along with Georgia, some other southern states were actively opposing federal tariffs, federal courts, and other federal government activities. In the end, even President Jackson, the great Indian fighter and states' rights proponent, quietly forced Georgia's governor to comply with *Worcester*, partly as means of avoiding civil war.⁵⁵

Today I'll identify several major issues pressing in Indian Country that have a reasonable chance of ending up in the hands of the Supreme Court, and how and why tribal advocates *absolutely must* put a near-perfect vehicle before the Court in order to prevail. This is a piecemeal strategy, to be sure, but I have hope it can be successful nonetheless. Unfortunately for

⁵⁰ See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* xxxi-xxxv (2005).

⁵¹ See WILLIAMS, *supra* note 50, at 89-95.

⁵² See JOSEPH WILLIAM SINGER, *PROPERTY* 769 (3rd ed. 2009).

⁵³ 348 U.S. 272 (1955).

⁵⁴ See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969).

⁵⁵ See Stephen G. Breyer, *Reflections of a Junior Justice*, 54 DRAKE L. REV. 7, 9 (2005).

tribal advocates, I don't see a single goal that could bind together tribal interests in the same way as the civil rights movement, which had a goal of integration and the elimination of the *Plessy v. Ferguson*⁵⁶ precedent. But there are a series of "mini-movements" that could go a long way for tribal interests.

Labor in Indian Casinos

Whether the National Labor Relations Act applied to Indian tribal businesses was settled until 2003 when the National Labor Relations Board asserted jurisdiction over the San Manuel Indian Bingo and Casino enterprise.⁵⁷ Since that time, Foxwoods Resort Casino,⁵⁸ Soaring Eagle Casino & Resort,⁵⁹ and other tribal enterprises have been subjected to charges of unfair labor practices. The key arguments against federal jurisdiction lie along two strata: (1) whether inherent tribal authority to exclude nonmembers from Indian lands (sometimes expressed in treaty terms) forecloses NLRA application; and (2) whether tribal labor ordinances foreclose NLRA application. Arguing the principles of federal Indian common law foreclose NLRA application is a third possibility, but likely has no chance whatsoever.

Indian nations interested in the outcome of this matter must cooperate with each other, and put forth the very best vehicle for consideration. Frankly, Soaring Eagle and Foxwoods are *not* good vehicles. Foxwoods in particular (but Soaring Eagle as well) employ very few tribal members, and so the labor being organized is almost entirely non-Indian. The Saginaw Chippewa Indian Tribe, owner of Soaring Eagle, is the leading proponent of the treaty right to exclude theory, and they do have a powerful treaty right. But the Saginaw Chippewa tribal council also appears to favor a complete tribal ban on labor unions, an extreme position to take given the consequences. It is my understanding (but I may be wrong) that both parties see their case as winnable in the Second and Sixth Circuits respectively. Of course, that is the problem, since the Supreme Court most certainly will grant the government's cert petition following any loss in the circuits.

⁵⁶ 163 U.S. 537 (1896).

⁵⁷ See San Manuel Indian Bingo and Casino, 341 NLRB no. 138 (2004), *aff'd*, 475 F.3d 1306 (D.C. Cir. 2007). See generally Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435; Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

⁵⁸ See Foxwoods Resort Casino, No. 34-RC-2230 (National Labor Relations Board, Region 34, Oct. 27, 2007).

⁵⁹ See Soaring Eagle Casino and Resort, No. GR-7-RC-23147 (National Labor Relations Board, Region 7, Oct. 30, 2007).

A third tribe, the Little River Band of Ottawa Indians, is in the middle of litigating the issue in federal district court.⁶⁰ The Band has adopted a tribal labor rights ordinance and employed non-Indian labor specialists to adjudicate, under tribal law, labor charges against the tribal enterprise employer.⁶¹ The Band may have some of the same problems that will trouble Foxwoods and Soaring Eagle, such as the percentage of nonmembers that the enterprise employs. But a smaller, less profitable tribal casino with more tribal member employees will fare far better in court than an already-wealthy tribe that will look like just another Indian tribe looking to get away with something, or to double profits.

These three cases emphasize some of the vehicles that might make it to the Supreme Court for review. Indian nations interested in the outcome should be aware of the risks and benefits of each. And if there is to be a realistic chance of prevailing, Indian Country must organize. Foxwoods and Soaring Eagle, if they have not already,⁶² must back down. Their cases are perfect vehicles for Supreme Court review, from the perspective the National Labor Relations Board. Little River may not be ideal, either, but I am sure that they have somewhat better employee demographics and financial characteristics, and constitute a better vehicle.⁶³

American Indian Religious Freedom

The National Eagle Repository, and the accompanying permit system, is one of the worst cases of bureaucratic lunacy perpetuated by the Department of Interior.⁶⁴ Sadly enough, the repository is supposed to allow Indian people to access eagles and eagle parts for the benefit of Indian religions in spite of a national ban on such activity. I know from personal experience that such access often is a sad joke. My great-aunt applied for eagle feathers in the 1980s, finally receiving them a few years later. It was a smelly, bloody, rotting eagle wing. Horrible.

The recent cases in this area follow two lines. First, the government prosecutes Indian people for harvesting eagles without applying for the proper permit, the Indians arguing unsuccessfully that few have received a permit to harvest a whole eagle and to apply for a permit

⁶⁰ See *Little River Band of Ottawa and Chippewa Indians v. National Labor Relations Board*, No. 1:09-cv-141 (W.D. Mich.).

⁶¹ Cf. Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487.

⁶² Foxwoods recently announced that their card dealers have entered into a union bargaining agreement. See Associated Press, *Union Says It Has Contract Agreement with Foxwoods*, BOS. GLOBE, Jan. 26, 2010, available at http://www.boston.com/news/local/connecticut/articles/2010/01/26/union_claims_contract_agreement_with_foxwoods/.

⁶³ See generally Kaighn Smith, Jr., *Tribal Work Laws before It's Too Late*, INDIAN COUNTRY TODAY, Jan. 26, 2010.

⁶⁴ See 16 U.S.C. § 668a; 50 C.F.R. § 22.22.

would be futile.⁶⁵ Second, the government prosecutes non-Indians, categorically barred by the Eagle Act and federal regulations from harvesting eagles, and the federal courts toss those indictments on grounds that the regulations violate the Religious Freedom Restoration Act.⁶⁶ For Indian people, this is a sickening result.

What is needed, of course, is a proper vehicle for testing the regulations and the repository. A few facts favor Indian petitioners – eagles have returned in great numbers in some parts of the nation, and the reality of the Repository is to deny American Indian religious freedom in any meaningful sense. Winslow Friday, victim of the Tenth Circuit’s opinion rejecting his religious freedom claims, never even knew that the government had a permit system for harvesting whole birds.⁶⁷ Indian Country must locate a sympathetic petitioner, someone who would pass muster before a Senate confirmation hearing, and bring a test case. The best thing the federal government could do is to continue what they’re doing with the repository and the eagles.

I fear, however, that federal appellate courts will reject the contentions of the non-Indians, setting up a Supreme Court challenge. If they win, they win as non-Indians and that does nothing for Indian people. If they lose, they lose for everyone. And there are currently federal appeals cases involving non-Indians on the burner. They have a head start.

Tribal Criminal Jurisdiction over Non-Indians

Sooner or later, one of two perfect vehicles for Supreme Court review of tribal criminal jurisdiction over *anyone* will reach the Court. Either there will be a nonmember defendant prosecuted in tribal court who indigent and uncounseled, subjected to a jury of tribal members and excluding all nonmembers, with a lay judge, with the defendant eventually directly appealing the conviction through the habeas provision of the Indian Civil Rights Act.⁶⁸ A case like that *could* persuade the Supreme Court that Indian nations can *never* possess authority to prosecute lawbreakers.

However, a better case would involve a tribal court that guarantees indigent counsel, provides at least the opportunity for nonmembers to sit on the jury, and provides open and

⁶⁵ *E.g.*, United States v. Friday, 525 F.3d 938 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

⁶⁶ *E.g.* United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009), *on appeal*; *cf.* United States v. Hardman, 297 F.3d 1116, 1121 (10th Cir. 2002) (en banc).

⁶⁷ John Carlson, Address, University of Colorado Law School (Jan. 29, 2010).

⁶⁸ 25 U.S.C. § 1303. *See* United States v. Lara, 541 U.S. 193, 211-14 (2004) (Kennedy, J., concurring in the judgment). *Cf.* Means v. Navajo Nation, 432 F.3d 924 (9th Cir. 2005) (en banc) (applying *Lara* in affirming tribal court conviction of nonmember Indian represented by counsel), *cert. denied*, 549 U.S. 952 (2006); Morris v. Tanner, No. 03-35922, 160 Fed. Appx. 600 (9th Cir., Dec. 22, 2005) (same), *cert. denied*, 549 U.S. 970 (2006).

transparent access to tribal laws and tribal court precedents. Moreover, tribal judges who are licensed attorneys are an absolute requirement. As Dean Washburn noted, the proposed Tribal Law and Order Act that extends tribal court sentencing authority to three years⁶⁹ will expose more tribal court convictions to federal habeas review.⁷⁰ A series of federal cases affirming tribal criminal convictions can't hurt.

What follows the Tribal Law and Order Act, of course, may be a limited form of the so-called *Oliphant* fix, say, involving tribal criminal jurisdiction over non-Indian misdemeanors. Justice Kennedy likely is the swing vote on that question (if it ever arises), and he is of the view that Congress cannot contract away the rights of American citizens, as he stated in *Boumediene v. Bush*.⁷¹ Winning him over may be impossible without a long track record of successful tribal prosecutions affirmed in federal habeas proceedings.

State Authority in Indian Country

These are hard cases for tribal advocates to win the state government can point to nondiscriminatory reasons and application of the state law, usually taxation of non-Indians in Indian Country, and states always have the foundation and the text of the Constitution upon which to draw for balancing purposes. The remnants of the foundational *Worcester* rule – that state law has no force in Indian Country – is threatened by dicta from the Court suggesting that Indian Country is part of a state, for example.⁷²

Here is where Indian Country can take great strides in the federal judiciary, and perhaps in the Supreme Court. Consider the following fact patterns:

- State government recognizes automobile registration and license plate of all states and Indian nations except those located within the State itself;⁷³
- Local government enacts ordinance requiring all land sales within its jurisdiction be subject to a restrictive covenant prohibiting sales of land to Indian tribes absent the local government's consent;⁷⁴

⁶⁹ See Tribal Law and Order Act, S. 797 (2009); S. Rep. 111-93 (2009).

⁷⁰ See Kevin K. Washburn, Address, University of Colorado Law School (Jan. 29, 2010). See generally Kevin K. Washburn, Testimony, United States Sentencing Commission, Phoenix Regional Hearing (Jan. 21, 2010).

⁷¹ 128 S. Ct. 2229, 2259 (2008) (“Our basic charter cannot be contracted away like this.”).

⁷² See *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (“‘Ordinarily,’ it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”) (quoting UNITED STATES DEPT. INTERIOR, FEDERAL INDIAN LAW 510 & n. 1 (1958)).

⁷³ E.g., *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818 (10th Cir. 2007).

⁷⁴ E.g., *Baylake Bank v. TCGC, LLC*, 2008 WL 4525009 (E.D. Wis., Oct. 1, 2008).

- Local government refuses to enter into a law enforcement cooperative agreement with a local tribe, and refuses to investigate crime on Indian lands, and even objects to a public safety agreement entered into between a tribe and another local government;⁷⁵
- State government in a Public Law 280 state is ineffective in enforcing criminal laws in Indian Country;⁷⁶
- State government confiscates tribal business assets, assaults Indian business operators, and engages in this activity on Indian lands.⁷⁷

None of these fact patterns are slam-dunks. Faced with the last fact pattern, one tribe lost badly in the federal courts, but facts that tend to shock the conscience are all but a necessary predicate to getting the attention of the federal judiciary.

And there are bad fact patterns to watch for. Where tribal governments are perceived to be interfering with state government processes, such as in state campaign finance regulation or state criminal investigation, very little good can come from that for tribal interests.

The proper vehicle must involve egregious, anti-Indian or anti-tribal state government action, but even that might not be enough. The federal government must weigh in supporting tribal interests in a meaningful way. It seems that the government's interest in maintaining tribal roads was insufficient in *Wagnon*.

Recent scholarship suggests that the foundational case of modern Indian law, *Williams v. Lee*,⁷⁸ came about not because of the Warren Court's dispensation toward tribal interests, but because of *federal* interests.⁷⁹ In fact, a clear reading of most favorable Indian law decisions in the Warren and Burger Courts demonstrate a federal interest that happened to side with tribal interests against the interests of states, local governments, and individual nonmembers. It could be said that the Supreme Court has rarely, *if ever*, ruled in favor of tribal interests on their own merits, but instead in favor of federal interests that happened to coincide with tribal interests.

⁷⁵ *E.g.*, Village of Hobart v. Oneida Indian Nation of Wisconsin, No. 08-CV-1313 (Brown County Circuit Court, Wisc. 2009).

⁷⁶ *Cf.* Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711 (2006).

⁷⁷ *E.g.*, Winnebago Tribe of Nebraska v. Stovall, 205 F. Supp. 2d 1217 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003); Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir.), *cert. denied*, 549 U.S. 1053 (2006).

⁷⁸ 358 U.S. 217 (1959).

⁷⁹ See Dewi I. Ball, *Williams v. Lee (1959) – 50 Years Later: A Re-assessment of One of the Most Important cases in the Modern-era of Federal Indian Law*, ExpressO, available at http://works.bepress.com/dewi_ball/1.

Rereading the strongest federal Indian law preemption case, *White Mountain Apache Tribe v. Bracker*,⁸⁰ we see the federal government providing loans and technical assistance to a nascent tribal enterprise (the well-named FATCO) under a federal bureaucratic regime – all of which was barely sufficient to keep the tribal business afloat. The United States and the Tribe demonstrated that state taxation of FATCO’s activities would effectively bankrupt FATCO, wasting the federal government’s efforts and money, and undermining the federal regulatory regime.

Tribal interests alone, to combat or balance against state interests, likely will never impress the Supreme Court. In my research and preparation for my work on the Supreme Court’s certiorari process, especially the so-called cert pool, and how it affects the development of Indian law, I spoke with several former Supreme Court clerks. Former clerks who were part of the cert pool generally rejected my claims about the certiorari process, while former clerks who were not part of the cert pool tended to approve of my conclusions. One former clerk who was part of the cert pool suggested that Indian law petitions, like habeas petitioners, only attract the attention of the Court (and the clerks) when the tribal interest has won below. This is because *Indians are not supposed to win*, an assertion seconded by Ninth Circuit Judge William Fletcher, speaking recently about the Ninth Circuit’s en banc opinion in the San Francisco Peaks sacred sites case.⁸¹

Tribal advocates are very good at persuading the Office of Solicitor General to side with them before the Supreme Court.⁸² But a survey of the Supreme Court cases in which the federal government sided with tribal interests in the past few decades demonstrates that even the recommendations of the United States fails to persuade the Supreme Court to rule in favor of tribal interests.⁸³ The persuasive and scholarly amicus briefs filed by the OSG seem destined to the same trash heap in which the Court tosses law professor amicus briefs.

Tribal Civil Jurisdiction over Non-Indians

⁸⁰ 448 U.S. 136 (1980).

⁸¹ See Judge William Fletcher, Address, University of Colorado Law School (Jan. 29, 2010) (discussing *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc)).

⁸² E.g., Brief for the United States as Amicus Curiae Supporting Respondents, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008) (No. 07-411).

⁸³ See Matthew L.M. Fletcher, *The Tenth Justice Lost in Indian Country*, MSU Legal Studies Research Paper No. 07-12 (Aug. 19, 2009), available at <http://ssrn.com/abstract=1457997>.

I want to conclude with tribal civil jurisdiction over non-Indians.⁸⁴ This is a difficult nut to crack, but there is hope. I have a two-part suggestion. The first is to take down the federal judiciary's assertion of authority over tribal courts. And the second is to win a *Montana* case. I believe these strategies should be done in tandem.

There is a way to defeat federal court review over tribal court jurisdiction, established in *National Farmers Union*.⁸⁵ I recognize that there are proposals (though no bills) recommending federal court review over tribal court decisions as a means of incorporating tribal courts into the federal system,⁸⁶ but I'm talking about the federal common law cause of action that often results in a federal court order enjoining a tribal court from enforcing a tribal court judgment or even proceeding with a civil suit against a nonmember. The issuance of a federal court order staying a state court proceeding is not unusual, and the Constitution's Supremacy Clause (among other authorities) regulates that structure. But there literally is no Constitutional or statutory authority authorizing federal courts to enjoin the activities of tribal courts. *National Farmers Union*, not the Constitution and not Congress, established that authority.

Since the Court's decision creating this "pure federal common law" rule,⁸⁷ the Rehnquist and Roberts Courts have decided several cases directly undermining the reasoning behind *National Farmers Union*. The more recent decisions limit pure federal common law causes of action to instances where state prerogatives interfere with federal interests, so much so that they undermine the federal regime. These cases, to be sure, are rare. Noting these infirmities is the first step, perhaps enough to give the conservative Justices doubts about the *National Farmers Union* precedent.

National Farmers Union established a common law cause of action with the unexpressed purpose of protecting nonmembers from due process problems in tribal courts. As with criminal jurisdiction cases, a proper vehicle for winning a tribal court jurisdiction case before the Supreme Court would require a tribal court judgment where the nonmember defendants had significant due process protections. Couple with doubts about federal court jurisdiction to issue broad orders enjoining tribal courts, there may be hope for a winner in a *Montana* case.

⁸⁴ See Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, __ U. COLO. L. REV. __ (forthcoming 2010).

⁸⁵ 471 U.S. 845 (1985).

⁸⁶ Cf., e.g., Kevin Gover & Robert Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497 (1985); Alvin J. Ziontz, *After Martinez: Civil Rights Under Tribal Government*, 12 U.C. DAVIS L. REV. 1 (1979).

⁸⁷ Lumen N. Mulligan, *A Unified Theory of 28 U.S.C. § 1331 Jurisdiction*, 61 VAND. L. REV. 1667, 1716 (2008).

One potential vehicle for Supreme Court review that may attract the attention of the Court involves efforts by tribal law enforcement to enforce civil offenses and civil forfeiture on trust lands, and especially at a tribal business enterprise. Some tribes, such as the Pokagon Band of Potawatomi Indians⁸⁸ and the Muscogee (Creek) Nation,⁸⁹ have begun to enforce civil offense ordinances against non-Indians coming onto the reservation for business purposes. In essence, the non-Indians charged have committed crimes, and the tribal government proceeds with asserting civil jurisdiction. A federal court would then, presumably, apply the federal common law rules limiting tribal civil jurisdiction over nonmembers. The Supreme Court, in ruling against a tribe in favor of a non-Indian criminal perpetrator, would have to conclude that quasi-criminal perpetrators coming on to the reservation do not substantially affect the political integrity or health and welfare of reservation people. At Muscogee, the non-Indian brought guns and a ton of drugs to the casino. As Pokagon, a non-Indian brought a gun inside the casino and accidentally discharged it. State law enforcement has no jurisdiction, and federal law enforcement is not guaranteed, given the disproportionate levels of federal prosecution declinations.⁹⁰ The only remedy available in these cases (not just a select few the federal government can prosecute) is a tribal civil fine.

If the Court rejects that analysis, they will be elevating worse and worse non-Indian actors over Indian people. In *Montana* and *Brendale*, the Court saw innocent non-Indian property owners challenging tribal regulatory authority. In *Bourland*, the Court saw innocent non-Indian hunters. In *Strate*, the Court saw a negligent non-Indian tortfeasor. In *Atkinson Trading*, the Court saw a non-Indian business accepting a windfall in Navajo public services without paying taxes. In *Plains Commerce Bank*, the Court saw a non-Indian bank that refused to fulfill a promise to supply capital to an Indian rancher during a brutal winter, culminating in the death of the rancher's entire herd. If the next case is a violent, intoxicated, drug-running or gun-smuggling non-Indian who has avoided federal and state prosecution, how can the Court still refuse to recognize tribal jurisdiction?

⁸⁸ See POKAGON BAND OF POTAWATOMI INDIANS CODE OF OFFENSES § 1(B) (2008).

⁸⁹ See *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007 (10th Cir. 2007).

⁹⁰ See Hearing to Examine Federal Declinations to Prosecute Crimes in Indian Country before the Senate Indian Affairs Committee, 110th Cong., 2d Sess. at 42 (Sept. 18, 2008) (Prepared Testimony of M. Brent Leonhard, Deputy Attorney General for the Confederated Tribes of the Umatilla Indian Reservation).

In conclusion, I would argue that there are certain cases tribal interests can win in the Supreme Court, or at least the federal appellate courts. I may be wrong about some of the fact patterns I think will be successful, and I may have neglected to include a few that could be successful, but the point of this lecture is not to establish a comprehensive blueprint for a long-term litigation strategy. Instead, my purpose is to encourage – and demand – that Indian Country and their litigation specialists establish a litigation strategy *in the first instance*.

Thurgood Marshall, an architect of the most successful social justice litigation strategy in American history, once wrote, “[M]ere access to the courthouse doors does not by itself assure a proper functioning of the adversary process....”⁹¹ The federal courts have been open to Indian nations since 1966.⁹² After 44 years, Indian nations need a plan.

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⁹¹ Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

⁹² 28 U.S.C. § 1362.