UNIVERSITY OF OKLAHOMA

GRADUATE COLLEGE

WHAT EVERY AMERICAN SCHOOLBOY KNOWS AND OTHER DIRTY WORDS: INDIAN CHARACTER AND INDIAN COMPETENCY AS SETTLER COLONIALISM TOOLS OF THE SUPREME COURT

A THESIS

SUBMITTED TO THE GRADUATE FACULTY

in partial fulfillment of the requirements for the

Degree of

MASTER OF ARTS

By

JORDAN RENLEY DENNIS
Norman, Oklahoma
2017

WHAT EVERY AMERICAN SCHOOLBOY KNOWS AND OTHER DIRTY WORDS: INDIAN CHARACTER AND INDIAN COMPETENCY AS SETTLER COLONIALISM TOOLS OF THE SUPREME COURT

A THESIS APPROVED FOR THE
DEPARTMENT OF NATIVE AMERICAN STUDIES

BY

_____
Dr. Amanda Cobb-Greetham, Chair

_____
Professor Taiawagi Helton

_____
Professor Lindsay Robertson

To my family.

Table of Contents

Abstract

The Supreme Court has an ability to adopt the settler colonial ideologies for the purposes of creating doctrines in federal Indian law. Because of this, federal Indian law is moving further towards illegitimacy as an area of law. The law is rife with the settler colonial ideologies that create stereotypes and encourage the deletion of tribal sovereignty. This has led to Indian Character and Competency becoming official analysis of whether tribal sovereignty and jurisdiction is applicable. These analyses are tantamount racisms and confuse the reality of tribal circumstances with stereotypes and prejudices.

The only way to move toward legitimacy would be to remove the masks that the Supreme Court Justices wear in order to comply with settler colonialism and demand a new approach to analyzing federal Indian law issues. Otherwise, the compounding nature of unfortunate federal India law doctrines will lead to even more damaging effects on tribal sovereignty and, ultimately, tribal existence.

Introduction and Statement of the Problem

Federal Indian law does not derive its name from the interests that it seeks to protect. In fact, the law has little to do with protecting the interests of tribal governments or individual Native American people at all. Rather, its goal is to resolve tension between federal and state powers by subordinating state governments to the federal government with respect to affairs with Indians. If the primary and secondary goals are federal and state interests at stake in federal Indian law are federal and state and those interests are in the imperial and colonial benefit, then what is to be said about tribal interests? Federal and state actors experience fundamental distress when Native voices enter the conversation of federal Indian law.

This thesis examines the ways in which settler colonialism and its associated prejudices influence the outcomes of significant Supreme Court cases, particularly in recent decades, as the legislative and executive branches have become more tolerant of tribal self-governance, and the Supreme Court has "turned Indian law on its head" with the apparent aims of seizing Congressional authority and whittling away tribal sovereignty. Such an examination demonstrates how the underlying ideologies and discourse of settler colonialism continue to influence the judicial process. These underlying colonial prejudices often work as a framework for justices deciding cases and historically, have worked against the interests of American Indian tribal nations. Such a stereotypical understanding of American Indians is found in numerous federal Indian law decisions, resulting in a common law permeated by colonial ideologies of savagism. As Native scholar Ned Blackhawk writes in *Violence over the Lan*d:

> The narrative of Indian savagery is a lie told so many times that it became "truth" in the American mind. It was one of the necessary truths used to justify

> European and later American violence against Indigenous peoples to fulfill the demands of imperialism—unlimited expansion at all costs.[1]

As Blackhawk contends, it is this history of violence that has been largely ignored in American historiography in order to preserve an image of all that is good about the United States.

One example of judicial extension of the settler colonizer's mindset lies in the phrase "Indian character." This phrase has been used to refer to Native Americans negatively, to land as undeveloped, and to area of lower populations of non-Native Americans. The second word in federal Indian law with incendiary and often patriarchal applications is "competency." Competency is also used to describe tribal governments and courts in their roles as law and regulatory administers, which is where this paper's focus lies. The two terms are often used to negatively portray Native Americans, Native American property, and Native American governments.

Supreme Court justices partake in a form of masking that acts as a form of doublespeak. David Wilkens, in his book *American Indian Sovereignty and the U.S. Supreme Court: Masking of Justice,* writes that the Supreme Court has an ability to wear masks in order to conceal the realities of their decisions.[2] Using this as a framework for how justices are justified, it eases the explanation of how settler colonialism is advanced in modern times. There are two forms of masking using settler colonialism. First, the justices are able to mask themselves in their role as a Supreme Court Justice. In doing this, they can divert any criticism of their decisions away from

[1]Blackhawk, Ned. 2006. *Violence over the Land: Indians and Empires in the Early American West*, Cambridge, Mass: Harvard University Press.
[2] Wilkins, David E. 1997. *American Indian sovereignty and the U.S. Supreme Court: the masking of justice.* Austin: University of Texas Press.

them and place the blame of the problem on their inability to work outside of Common Law precedent. Second, the justices are able to view American Indians through stereotypes constructed by society which continues to accept and register these stereotypes as official and suitable. Because much of federal Indian law has adopted colonial ideologies of savagism, settler colonial decision-making is masked from being described as racist and erroneous.

Because of the Court's utilization of masking, American Indians, tribes, and individuals, are often forced to walk on eggshells and walk along fine lines as they navigate this world in political, governmental and individual senses. Otherwise, they will suffer from settler colonial examinations as they are reputed to be racists for proclaiming the Supreme Court racists. There is a clear imbalance in the treatment of American Indians in the legal system, which is created and affirmed at the hands of the Supreme Court justices.

Significantly, as Native legal scholar Walter R. Echo-Hawk writes in *The Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided*, colonial decision making is an ill-fitting method for contemporary terms.[3] He contends that our society has evolved beyond such inaccurate and problematic decision making that affects American Indians so detrimentally. He writes that

> [l]ike racism in our society, the vestiges of colonialism in the law must go. They have become inconsistent with the modern mainstream values and no longer enjoy a legitimate place in a land devoted to higher values. Now that we no longer consider Native Americans to be barbarians, infidels, or savages, or ourselves as colonial masters of an inferior and backward people, the legal

[3] Echo-Hawk, Walter R. 2010. *In the courts of the conqueror: the ten worst Indian law cases ever decided*. Golden, Colo: Fulcrum Pub.

> doctrines built upon those classifications become legal fictions that are no longer tenable, logical, nor entitled to any effect.[4]

The "fruit of the poisonous tree" doctrine is a useful lens through which to examine the colonial ideology and discourse used by Supreme Court justices in federal Indian law. The "fruit of the poisonous tree" doctrine is used to describe the scope of the Exclusionary Rule in criminal cases when illegal police conduct is used to obtain evidence against a defendant. To deter such conduct, the Court has instituted the Exclusionary Rules to suppress "fruit of the poisonous tree"—to prevent illegally obtained evidence from being served to jurors, and therefore, from affecting the outcome of the case. The Exclusionary Rule does not to punish society by letting a guilty defendant go free; rather it deters investigating officers from reprehensible conduct by denying them the benefit(fruit) of their wrongs. Examples of such conduct include police physically depriving or abusing a suspect during interrogation or conducting unreasonable, unwarranted searches and seizures. The poisonous tree would be the abusive interrogation or illegal search, and the tainted fruit would be the coerced confession or discovered evidence.

Settler Colonialism—racism, religious chauvism, and cultural supremacy to justify the subjugation and dispossession—contaminates the tree of federal Indian law. Rooted in settler colonialism, all the fruit of federal Indian law is tainted in its origins. Two poisonous fruits recently, but repeatedly served by the U.S. Supreme Court are "Indian character" and "Indian competency," which are closely connected but distinct concepts. While many fruits in the field of federal Indian law are tainted, these two are worthy of examination, given the Supreme Court's reliance on them. The Supreme

[4] Echo-Hawk, *Courts of the Conquerors*, 21.

Court and federal Indian law can move toward or away from legitimacy with each case. Removing these doctrines will move both the Supreme Court and federal Indian law toward greater legitimacy. This thesis examines the formation, development, and future of these poisonous fruits, in the hope that such labelling will result in their exclusion from the Supreme Court's toxic cornucopia of federal Indian law doctrine.

Definition of Terms

Settler Colonialism

Colonialism, the oft cited root of the problem, comes in many forms. Colonialism, from the viewpoint of American Indians, can be seen as the European construction of another Europe. It has been defined as the dominance of a local people by an alien people.[5] Colonialism comes from a desire to expand an empire and control the relations between the locals and the alien power. There are different types of colonialism, including exploitative colonialism and settler colonialism. Exploitative colonialism involves fewer people from the alien power and require that resources by exported to the foreign land from which the power extends or to a foreign land of its choosing. An example of this would be the slave trading by European countries and later the Americas. Slaves were taken from their homeland and transferred to the Americas for development of the colonies.

Settler colonialism differs from exploitative colonialism in that the aim of settler colonialism is long-term occupation and domination, not just resource and labor extraction. "Settler societies are founded by migrant groups who assume a superordinate position vis-à-vis native inhabitants and build self-sustaining states that are de jure and

[5] Veracini, Lorenzo. 2011. "Introducing Settler Colonial Studies." *Settler Colonial Studies* 1(1): 1-12.

de facto independent from the mother country and organized around the settlers' political domination over the indigenous population."[6] In the American colonies, plantations were established and resources were sent back to Europe. That type of settlement appeared to align with the exploitation-style colonization. But when a whole new country was established and the colonies rebelled from the foreign sovereign, the script flipped. Settler colonialism was the new style of establishment. "[T]he object of settler colonialism is to separate indigenous peoples from their land"[7] and repopulate it with Imperial colonialist. In this scenario, mass immigration combined with mass displacement became the tactic. Displacement of the local population and creation of uneven power arrangements were the strategy for the making of America. This is the lens that this thesis will use to examine federal Indian law.

Settler colonialism and colonialism are similar but different.[8] Colonialism has been described as a domination by an external establishment.[9] The similarities are that outsiders move into occupied country and establish their own power structure that subverted existing authoritative structures.[10] The differences are that in the colonialism context, the newly established power structure is an outpost that remains loyal and subordinate to a central authority in the homeland of the colonizer. But, in the settler colonialism context, the distinction between the homeland and the newly established power structure ultimately disappears.[11]

---

[6] Weitzer, Ronald. 1990. *Transforming Settler States: Communal Conflict and Internal Security in Northern Ireland and Zimbabwe*. Berkeley: University of California Press.
[7] Krakoff, Sarah. 2013. "Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet", 24 Colo. Nat. Resources, Energy & Envtl L. Rev. 261, 265 (2013).
[8] Veracini, Lorenzo, "Introducing Settler Colonial Studies."
[9] *Ibid*.
[10] *Ibid*.
[11] *Ibid*.

The idea is not for the colonial power to exploit the resources and leave after the incentives are gone. In settler colonialism, the most valued resource is the land. The land is the purpose. Consequently, in settler colonialism, the settlers eventually outnumber the indigenous peoples, claiming the country as a new homeland, and then defining themselves as indigenous to the place and entirely, displacing the original inhabitants.

Moreover, the settler colonial power seeks not only to become the dominate authority over the land, its resources and, in some cases, its people, but also to establish the dominate historical narrative. Settlers have written out the rights of the indigenous by "decades of unilateral federal decision-making, ignorance of tribal cultures and tribal distinctiveness, and the overriding logic of concentrating as many Indians as possible on as little land as possible in order to maximize resources for others."[12] By establishing itself as the writer of the histories, the settler colonial power situates itself as the holder of the knowledge of the indigenous peoples. With that as a system of history, settlers can dehumanize the indigenous into the invented savage and become the first true occupants of the territory.[13] Settler colonialism, in the fruits-of-the-poisonous-tree analogy, develops the roots and trunk of the current predicament in federal Indian law.

Plenary Power

Although Congress regulated affairs with Indians as early as the Trade and Intercourse Act of 1790, it did not seek to regulate the internal affairs of tribes until the Major Crimes Act of 1885. Reviewing that statute in 1886, the Supreme Court found

[12] Krakoff, "Settler Colonialism and Reclamation," 286.
[13] O'Brien, Jean M. (2010) *Firsting and Lasting: Writing Indians Out of Existence in New England.* University of Minnesota Press: London.

not text in the Constitution justifying such congressional authority. Nevertheless, the Court in *Kagama v. United States* held that Congress had the authority, arising out of the Indians'' state of dependency, "so largely due to the course of dealing of the federal government with them. Thus, the Kagama Court translated Marshall's guardian-ward statement from mere analogy to plenary federal power over Indians themselves (not just over affairs with them), apparently unlimited by the text of the Constitution of the notion of a national government of limited, enumerated powers. Here, the Court concluded that "Indians were helpless wards subject to plenary congressional control."[14] Like all things federal Indian law, plenary power was never questioned but accepted as a constitutional given.[15] Two decades later, in *Lone Wolf v. Hitchcock* (1093), the Court held that plenary power to be unlimited consent of the governed, treaty text, the Trust doctrine or judicial review.

Nearly a century later, the Court reaffirmed the plenary power doctrine. In 1974, the Supreme Court, in settler colonialism fashion, decided that federal plenary power derived from a "special relationship." "The source of federal authority to conduct this "relationship," the Court stated, is "[t]he plenary power of Congress to deal with the special problems of Indians . . .." Endeavoring to anchor Congressional plenary power in in the Constitution, the *Morton v. Mancari* Court cited only two sources in the Constitution for this power: The Indian Commerce Clause and the treaty power." [16] But

[14] Frickey, Philip P. 1997. "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law," 110 Harv. L. Rev. 1754, 1761.
[15] *Ibid*. at 1760.
[16] *Ibid*.

that decision did not go uncritiqued. "In truth, however, neither these clauses nor any other constitutional text justifies the conclusion that the plenary power is legitimate."[17]

Although the Court overruled the portion of *Lone Wolf* foreclosing judicial review based on the Political Question Doctrine in 1977,[18] "[t]he field is so rife with judicial deference to congressional plenary power that the Supreme Court has struck down as unconstitutional federal statutes regulating Indians only six times"[19] as of 1997. Not only has this judicial deference to plenary power been so prevalent, but it has led to another doctrine that has further restricted American Indian Nations' right to self-government. The Court's congressional plenary power doctrine allows for expansion of tribal powers as well as divestments of those powers.[20] For a century and a half, the Court consistently maintained that, while tribal sovereignty exists at the sufferance of congress, only congress had the power to limit tribal authority, and it had to exercise explicitly that power.

Nevertheless, in *Oliphant v. Suquamish* (1978), the Court disregarded that precedent to hold that tribes lacked criminal jurisdiction over non-Indians, despite congress never having abrogated that power. Rather, by judicial fiat the Court held the power divested by virtue of their dependent status, a plain application of settler colonialist ideology and hierarchy that also violated the separation of powers constraints on the Supreme Court.

---

[17] *Ibid*. (Arguments abound over the morality of a body of law rooted in "conquest" or "discovery" and over the pernicious potential of plenary power to divest and alter the powers of Indian tribes. Getches, David H.1996. "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," 84 Cal. L. Rev. 1573, 1579).
[18] *United States v. Sioux Nations of Indians*, 48 U.S. 371 (1980).
[19] Frickey, "Adjudication and Its Discontents," 1766.
[20] Getches, David H. 1996. "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law," 84 Cal. L. Rev. 1573, 1579.

Implicit Divestiture

If settler colonialism is the root of the problem facing tribal interests in federal Indian law, then plenary power is the trunk of a poisonous tree that brings fruit bearing branches forth. It only follows that a dominant, contemporary branch be Implicit Divestiture. Implicit Divestiture was the answer to whether the Court would allow non-Indians to be subjected to tribal courts. Chief Justice Rehnquist authored *Oliphant v. Suquamish Indian Tribe* which introduced the Court's implicit divestiture doctrine.[21] Oliphant involved two non-Indians who were arrested by tribal authorities from disorderly conduct while on the reservation. Rehnquist, using his masking capabilities as Supreme Court Justice, applied the domestic, dependent nations doctrine to opine that the tribes had been dispossessed of any authority "inconsistent with their status."[22] A very consequential construction, it has be summarized as "a case-specific judicial determination of 'whether tribes have legitimate local interests implemented by appropriate lawmaking and law-applying procedures and institutions that transcend the interests of outsiders to be free from tribal authority.'"[23]

> Implicit Divestiture comes with an "implicit assumption."
>
> > The implicit assumption seems to be that the judicially constructed doctrine of congressional plenary power over Indian affairs not only accords Congress a police power in Indian country, but that it also represents a national policy that, in the absence of congressional action, there is a presumption that Indian reservation boundaries are irrelevant to rational, nondiscriminatory regulation of insiders and outsiders.[24]

---

[21] Ennis, Samuel E. 2011. "Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons," 35 Vt. L. Rev. 623, 626.
[22] *Ibid*.
[23] *Ibid.*
[24] Frickey, Philip P. 1999. "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers," 109 Yale L.J. 1, 71.

Implicit divestiture has turned into the Court's interpretation of what Congress "meant" to do.

Unfortunately, these two doctrines have given life to other divesting doctrines in federal Indian law. This thesis demonstrates how two other novel doctrines represent settler colonialism within the Supreme Court and federal Indian law. Especially since the 1980s, the Court has been using (1) Indian Character and (2) Indian Competency to expand judicial divestiture of tribal sovereignty, property, and jurisdiction. In so doing, the Court reifies the settler colonial hierarchy, enforcing dependency when tribes exercise independence, and invoking the coerce [power of the United States to put "uppity" tribes back in their "proper" subordinate place.

In Chief Justice John Marshall's contributions to federal Indian law, he lays the way for the development of plenary powers and Implicit Divestiture doctrines. In *Johnson v. M'Intosh*, the question before the Court was whether transfers of land titles between individuals and tribal nations that predated the existence of the United States were legally enforceable and therefore valid. It was during this case that Marshall relied heavily on the Doctrine of Discovery that would explain that "absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."

In *Worcester v. Georgia*, the final case of the Marshall trilogy that still impacts tribal interests today, the Court finished its previous planting of seeds and laid the way for today's issues. In *Worcester*, the Court determined that the relationships that existed between the tribes and the federal government were equivalent to that of a "ward to its guardian." In the case prior to *Worcester*, *Cherokee Nation v. Georgia*, the Court

referred to American Indian Nations as "domestic dependent nations." This serves as an early, brutal example of settler colonial discourse. The suggestion that Native Americans were in a state of pupilage[25] when compared to the "superior" existing federal government, was a powerful tool of settler colonialism, creating a subclass of humans out of those existing on the land desired for settling. It should be mentioned that *Worcester* was decided in favor of the federal government and against the intrusion of the state of Georgia, though the tribes were an indirect beneficiary.

The idea of creating a "domestic dependent nation" out of the Cherokee Nation, a culture that had a ninety percent literacy rate[26] and fully established government with checks and balances for the betterment of the settlers at the detriment of Native Americans was a watershed moment in U.S. tribal relations, but such judicial legerdemain did not stop in 1832. The Marshall Trilogy articulated the foundational principles of federal Indian law and established a legal history of American Indians through the perceptions and imaginations of settler colonizers. From the foundation of Domestic Dependent Nation came unchecked, extra-constitutional federal power of Indians in *Kagama v. United States* (1886) and *Lone Wolf v. Hitchcock* (1903), racial superiority of *Sandoval* (1913), and implicit divestiture in *Oliphant v. Suquamish* (1978) and *Montana v. United States* (1981), as well as perhaps the most settler colonial comments of all time in *Tee-Hit-Ton Indians v. United States* (1955). Justice Stanley Reed wrote that "

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded

[25] *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831).
[26] Walker, Willard. 1960. "Noes on Native Writing Systems and the Design of Native Literacy Programs," *Anthropological Linguistics* 148: 151.

> millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror's will that deprived them of their land.

This statement, over a hundred years after the Marshall Trilogy, cements the settler colonial stance of the Court against the interests of tribes across the board.

Review of Literature

This literature review consists of the following four sections. First, in order to determine how settler colonialism becomes the Supreme Court's decision-making lens, examination of the Court's use of subjectivity and experiences are necessary. Second, the development of federal Indian law will be explored. Third, the Supreme Court influence on sovereignty and jurisdiction of tribal nations as they perceive federal Indian law through the masks of settler colonialism. Forth and finally, settler colonialism in federal Indian law cases and the role that it plays in creating prejudicial outcomes.

Subjectivity of Supreme Court Decision-Making

While the idea of the Supreme court is that decisions made by it will be objective, research has shown that when humans are involved the human elements will remain. The particular element that will be focused on here is subjectivity. What is important to learn is, what makes up that subjectivity. The question that guide this research specifically is what role does settler colonialism play in the subjectivity of the decisions made by the Supreme Court in federal Indian law cases. While there is no research on this specific subject currently, employing research on the subjectivity of Supreme Court decision and on the psychology of settler colonialism to examine links within the Supreme Court will work to begin the process. Data from the Court decisions will guide as a marker for the Court's opinions and perceptions of Native Americans.

In *The Case Against the Supreme Court* (2014), Erwin Chemerinsky, eminent constitutional law scholar delves into the question of the Supreme Court's objectivity

and subjectivity in decision-making.[27] This work is involved in this research because it shows that the biases and stereotypes in federal Indian law are easily explained by showing a lack of objectivity and a breadth of prejudice. His goal was to determine whether the Supreme Court had made America better or worse. Chemerinsky argues that, instead of fulfilling its role as the Counter-majoritarian Branch by promoting justice and protecting the rights of the minorities against the tyranny of the majority, the Court is made of nine human biases that tend to promote those biases as best as possible. The court serves, according to Chemerinsky, as a tool to please the biases of the justices rather than prevent abuse to those who have no power. This book argues that the Court tends to stand with the rich and powerful rather than with those who desperately need the help of the judiciary.[28]

While this book offers useful insights and observations, Chemerinsky fails entirely to consider federal Indian law cases in his admiring assessment of the Warren Court. Throughout his book, he mentions the infamous cases such as *Dred Scott*, *Plessy v. Ferguson*, *Korematsu v. United States*, and *Buck v. Bell*. Chemerinsky describes the Warren Court as an inspirational template for the Supreme Court, arguing that, while it sometimes fell short, under Chief Justice Earl Warren the Court reached its apex. Chemerinsky fails to include Indian law injustices like *Tee-Hit-Ton v. United States*, making his glowing assessment of the Warren Court unduly Panglossian. Issued just two years after the warren Court's inception, Tee-Hit-Ton reinforced the Discovery Doctrine and the ward-guardian relationship by approving the uncompensated dispossession of aboriginal title from mere "savages." While offering a thoughtful

[27] Chemerinsky, Erwin. 2014. *The Case Against the Supreme Court*. New York: Penguin.
[28] *Ibid*.

critique of Supreme Court Practices, his argument omits federal Indian law: the biggest failure of the Supreme Court to date. This thesis aims to fill that gap.

Federal Indian Law

Federal Indian law is one of the least understood areas of law. Thus, a clear description of federal Indian law and its background is necessary. Bruce Duthu wrote about the Thurgood Marshall papers, which were released following the death of Justice Marshall in 1993, and their federal Indian law content. The papers discuss many issues and cases that Justice Marshall faced during his time on the Supreme Court. Specifically, Marshall discusses the lack of care given to federal Indian law. Duthu takes the message Marshall delivers in his papers and analyzes several papers from this period and sheds light on the lack of predictability within the Supreme Court decisions in federal Indian law.[29]

Duthu is the author of the second law review article which discusses the system that the Supreme Court has developed within federal Indian law. Specifically, Duthu looks at the doctrine of implicit divestiture that essentially gives the Court free reign to determine the extent of sovereignty that tribes have. Examining this, Duthu argues that the Court has made detrimental decisions at the costs of Native American interests.[30] These articles together lay out the pattern that federal Indian law has taken thus far, a markedly dangerous pattern.

---

[29] Duthu, N. Bruce. 1996."The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict." *Vermont Law Review 21.1* 47-110.
[30] Duthu, N. Bruce. 1994. "Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country." *American Indian Law Review 19.2* 353-402.

Supreme Court Decisions and Tribal Sovereignty

Sarah Krakoff's argues that the Supreme Court should tend the law with an even hand. The Court was designed to take a minimalist approach on decision-making. Krakoff's argument nicely overlaps with another coding scheme of my research besides the Court and tribal sovereignty. Her paper also discusses the decision-making process that synthesizes nicely with effects on tribal sovereignty. She discusses the Court's policy to limit its effects on the areas of law so that the legislative and executive branches as well as the state and local governments will not be circumvented by Court decisions. However, when it comes to federal Indian law, the policy stops. The Court, quite honestly, acts as though it has supreme power to rule and push tribal interests. Krakoff's argument will be synthesized with an argument that the Court's lack of minimalism is a settler colonialism approach to federal Indian law.[31]

Examining sovereignty is extremely important for an argument like mine. A large portion of sovereign authority arises from jurisdictional authority. Frank Pommersheim writes about how tribal sovereignty is effected by federal and state sovereigns. His analysis goes through how tribal jurisdiction has been diminishing under the imperial rule of the Court. Pommersheim makes an argument for how tribal governments should operate themselves to avoid further diminishment by the Court. Pointing out a pattern, he suggests that tribal interests are under attack and continuously lose sovereignty at the Supreme Court.[32]

---

[31] Krakoff, Sarah. 2001. "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty." *American University Law Review 50.5* 1177-1272.
[32] Pommersheim, Frank. 1989. "The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction." *Arizona Law Review 31.2* 329-364.

Supreme Court Decisions and Settler Colonialism

This section is an attempt to synthesize everything discussed thus far with theories of settler colonialism. Scholarship argues that the Court is a tool for the expansion and maintenance of imperial rule. David Getches argues that the Court takes an approach to federal Indian law the lacks objectivity. He argues that decisions by the Court appear to be blatantly subjective to promote their own ideologies.[33] Getches, in another article, uses the Rehnquist Court as an example to show abandonment of precedent in federal Indian law.[34] These two articles combined reveal how the court takes a view on federal Indian law that it does not in any other area of law. The big picture here is the motive behind the inconsistency is settler colonialism.

One such example of this type of subjectivity is the case *Oliphant v. Suquamish Indian Tribe*. This Supreme Court decision is the epitome of settler colonialism in federal Indian law. Here, the Court abandoned all logic in deciding the case against the tribal interest. Precedent was set aside and statutory construction was ignored. The Supreme Court has consistently overruled cases that have been written and decided with such lack for logic and precedent.[35] Barsh and Henderson write a compelling analysis and criticism of *Oliphant*.

Another example of the Court limiting tribal sovereignty is the lack of jurisdiction over nonmembers. Philip Frickey argues that when the interests of nonmembers clash with tribal interests, the result is the limiting and diminishing of

[33] Getches, "Conquering the Cultural Frontier," 1573-655.
[34] Getches, David H. 2001. "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values." *Minnesota Law Review 86.2* 267-362.
[35] Barsh, Russel Lawrence; Henderson, James Youngblood. 1979. "The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark." *Minnesota Law Review 63.4* 609-640.

tribal sovereignty and jurisdiction. The sum of these sort of legal clashes is that imperialism is reinforced with the tools of colonization and racism.[36] Frickey draws lines between the furtherance of imperialism and colonialism and the cultural racism and discrimination. The conflicts resolve in the betterment of the majority and the detriment of the tribes.

Of course, no research in this particular area of federal Indian law is complete without the work of Robert Williams. Williams' argument enters into the conversation here to articulate how myths based on racism have also been contributing factors in federal Indian law decisions. This argument does not go without an explicit suggestion. Williams argues that a new approach to federal Indian law is necessary. This article is 30 years old, but still holds valid applications to date. The myth that developed federal Indian law still develops it to this day.[37]

Williams later wrote about the Rehnquist Court's continuation of cultural racism in contradiction of tribal interests. On colonization, Williams contends that a legal system is a requirement for the continuation of a colonization. This sort of legal system allows for the denial of self-determination, the displacement of property rights and the restriction on sovereign authority. Williams points out that the colonizer and racist will compare the differences between himself or herself and those who are the targets of the racial discrimination and colonization. This will serve as a guide for me as I research the cases and read the opinions of the justices.[38]

---

[36] Frickey, Philip P. 1999. "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers." *The Yale Law Journal 109.1* (1999): 1-85.
[37] Williams, Robert A. Jr. 1986. "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence." *Wisconsin Law Review 1986.2* 219-300.
[38] Williams, Robert A. 1992. "Columbus's legacy: The Rehnquist Court's perpetuation of European cultural racism against American Indian tribes". *Federal Bar News & Journal.* 39.6 358-369.

The final literature reviewed for my research was *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided*. The author, Walter Echo-Hawk, writes about the 10 worst cases in federal Indian law and the effects they have in a legal sense. Echo-Hawk dives into the history of the cases and discusses the injustices that the cases resulted in. He also claims that a new approach is necessary and that the dark side of federal Indian law should be reformed. Echo-Hawk further recognizes that today is the best time for reform since tribes have new found wealth from casino revenue and have capital resources available to contend equally in the legal system, finally.[39]

Conclusion

The scholarship has provided in-depth analysis and study of the Supreme Court, the dark side of federal Indian law, tribal sovereignty, settler colonialism. However, there is a gap. The research has not come together and synthesized an in-depth explanation for the current, downward trajectory of tribal interest in federal Indian law. If I were to combine *The Case Against the Supreme Court*, *The Courts of the Conqueror*, and *Columbus's Legacy* then seventy-five percent or more of my research would be complete. These three scholarships together bring about the essence of my goal here and do the better part of filling the gap I intend to seal.

The criticism I deliver to the scholarship is that they stop short of delivering on the issue of subjectivism in federal Indian law. Further, it must be understood that if the Court and its supporters are to succeed in their complete colonization of the American Indians and the end of tribal cultures are realized, the rest of the country will suffer.

[39] Echo-Hawk, Walter R. 2012. *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided.* Golden, Colorado: Fulcrum Publishing.

Indigenous populations are vital to the survival of the rest of the world. Urgency must be realized and decolonization should be taught. The scholarship does not go this far and I believe that is necessary. A word on this to truly relay the necessity of change could do a lot to make change.

Indian Character

Phillip P. Frickey cited Oliver Wendell Holmes, Jr. to describe the inaccuracies in American Indian law.[40] "Surely Oliver Wendell Holmes, Jr. gave federal Indian law no thought when he wrote that 'experience'—including '[t]he felt necessities of the time' and 'even the prejudices which judges share with their fellow-men'—contributes more 'than the syllogism' to the development of judge-made law."[41] He said, quoting Holmes, that experience is the root of judge-made law. Is that a bad thing? Should justices use their experience as a guide for making common-law? That seems like the wisest way to make the law. But what do they do if they do not have any experience? Unfortunately, in the absence of experience, stereotypes too often govern. Developing a stereotype using a settler colonial lens has developed Indian Character to discuss people and places.

In Supreme Court case, *Solem v. Bartlett*, the Court analyzed whether the surplus land act diminished a reservation. Justice Marshall wrote in the 1984 opinion that "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred."[42] Here, the Court decided that diminishment of the reservation did not occur.

Indian character usually refers to the land like in the case of *Solem v. Bartlett* (1984). However, the uses Indian character have not always been used in the context of land and jurisdiction over that land.

---

[40] Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 3 (1999).
[41] *Ibid*.
[42] *Solem v. Bartlett*, 465 U.S. 463, 471 (1984).

> The white people think we have no brains in our heads. They are great and powerful., and that makes them make war with us. We are but a little handful to what you are. But remember…when you hunt for a rattlesnake, you usually cannot find it—and perhaps it will bite you before you see it.[43]

> The color of the skin makes no difference. What is good an just for one is good and just for the other, and the Great Spirit made all men brothers. I have red skin, but my grandfather was a white man. What does it matter? It is not the color of the skin that makes me good or bad.[44]

This case is particularly disturbing. *Montoya* has never been overruled. To the contrary, the case is positively reinforced to this day to define when a "tribe" exists.[45] The facts of the case involve the destruction of property by a group of Mescalero Apache. *Montoya* was suing under the Indian Depredation Act. This act allowed a person to sue the United States and a tribe whenever the claimant's property was damaged during a conflict arising between the tribe and the United States. However, applying the Indian Nonintercourse Act, the source of a tribe's sovereign immunity, the Court found that the Mescalero Apaches involved in the destruction did indeed constituted a "tribe." Therefore, sovereign immunity applied.

The opinion was authored by Justice Henry Billings Brown, who served as an Associate Justice on the Supreme Court from January 5, 1891 until May 28, 1906. His total years of service as a judge in the federal judiciary was thirty-one years. He authored many notable opinions besides *Montoya v. United States*, including *Plessy v. Ferguson*, the infamous "separate but equal" affirmation that was overruled in 1954 by *Brown v. Board of Education*. *Montoya* has yet to be overruled. Indeed, the same Court

---

[43] Shingis – Delaware Chief
[44] White Shield – Arikara Chief
[45] *See Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1126, 1230-1231 (10th Cir. 2014); *Marble Hill Oneida Indians v. Oneida Indian Nations of New York State*, 62 Fed.Appx. 389, 391 (2d Cir. 2003); *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992).

that issued *Brown*, also issued *Tee-Hit-Ton*. Justice Reed, the lone holdout in *Brown*, wrote *Tee-Hit-Ton*.

Justice Brown grew up on Massachusetts and attended Yale for a Bachelors in Arts and then Yale and Harvard for a law degree. After graduation, Justice Brown specialized in admiralty law on the great lakes from an office in Detroit, Michigan. Through the years, Justice Brown served as a deputy marshal, an assistant US attorney for the Eastern District of Michigan, and a Wayne County Judge in Detroit. Then he was appointed to the federal district court in the Eastern District of Michigan in 1875. In 1891, he became a Supreme Court Justice. Ten years after his Supreme Court appointment, he wrote the following:

> The North American Indians do not, and never have, constituted 'nations' as that word is used by writers upon international law, although in a great number of treaties they are designated as 'nations' as well as tribes. Indeed, in negotiating with the Indians the terms 'nation,' 'tribe' and 'band' are used almost interchangeably. The word 'nation' as ordinarily used presupposes or implies an independence of any other sovereign power absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter negotiations with other nations.[46]

Here, Justice Brown writes the history of the North American Indian as he sees fit, perched from the seat of a settler. Wearing his settler's power robe, he demonstrates the authority of the U.S. government over the North American Indians by disestablishing them as 'nations.' But he goes on to explain further.

> These characteristics the Indians have possessed only in a limited degree, and when used about the Indians, especially in their original state, we must apply to the word 'nation' a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert.[47]

[46] *Montoya v. United States*, 180 U.S. 261, 265, 21 S. Ct. 358, 358–59, 45 L. Ed. 521 (1901).
[47] *Ibid.*

Again, the Court at Justice Browns pen point minimizes tribal authority and significance as operating and governing nations. The inequality in defining responsibilities suggest a lack of experience with tribal governments as well as a prejudice toward settler colonial interests over the interest of the American Indian nations. But Justice Brown goes further and introduces the settler colonial perception of Indian Character.

> Owing to the natural infirmities of the *Indian character*, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he could dominate the tribe by the qualities which originally enabled him to secure their leadership. [48]

Justice Brown delivered perhaps one of the most racists rants in the history of the Supreme Court here. "Nomadic habits" in itself proves that Justice Brown was perched from a settler colonial perspective while judging the stereotype of the North American Indian. The best rebuttal evidence against this nonsensical paragraph is that of fact. For instance, the portion of the opinion that reads "they have no established laws, no recognized method of choosing their sovereigns by inheritance or election…." This is simply not true. One widely recognized account is the Gayanashagowa, which was an established constitution for the Haudenosaunee (or Iroquois) which was made up of six nations (Oneida, Mohawk, Cayuga, Onondaga, Seneca, and Tuscarora). But this was not unique.

[48] *Ibid.*

Justice Brown finishes his draconian paragraph with one final judgment: "In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."[49]

My question is simple. If Oliver Wendell Holmes, Jr. is right, and Common Law is directed from experience of the justice, then where did Justice Brown get his experience? Why is it that this is his rule for all Indians?

"Each Indigenous nation or city-state or town comprised an independent, self-governing people that held supreme authority over internal affairs and dealt with other peoples on equal footing."[50] Justice Brown's misrepresentation of the Indians can be explained by the fact that most non-Indians had issues with the pre-existing governance systems. "The system of decision making was based on consensus, not majority rule. This form off decision making later baffled colonial agents who could not find Indigenous officials to bribe or manipulate." This explains the issue. The way that issues and politics were handled by the preexisting nations would confuse the closed minds of colonizers such as Justice Brown.

"Owing to their natural infirmities…." Felix Cohen addressed this sort of imperialist, colonialist, racist view in the *Handbook*:

> Clear thinking on the subject has been sacrificed in the effort to find ambiguous terms which will permit us, by appropriate juggling, to maintain three basic propositions:
> 1) That Indians are human beings;
> 2) That all human beings are created equal, with certain inalienable rights; and
> 3) That Indians are an "inferior" class not entitled to these "inalienable rights.[51]

---

[49] *Ibid.* Emphasis added.
[50] Dunbar-Ortiz, Roxanne. *An indigenous peoples' history of the United States* (Boston: Beacon Press, 2014), 25.
[51] Kehoe, Alice Beck. *A Passion for the True and Just: Felix and Lucy Kramer Cohen and the Indian New Deal* (Tucson: University of Arizona Press, 2014), 173.

Justice Brown's decision was exactly that—an appropriate juggle to maintain the Indians as inferior in the minds of the Court and Americans. Thinking of the Victoria Band of Apache like this makes rendering unfavorable and unjust decisions easier. This is probably the same logic, Indians are inferior, that is, that made it easy for Abraham Lincoln to order the largest mass execution in the history of the United States when 38 Dakota men were executed for their participation in the Dakota Wars of 1862.

Though there is a difference in the acts, Lincoln ordered an execution of men who fought for their people who were starving and being taken advantage of and Justice Brown wrote a Supreme Court opinion that was racists, both are forms of violence in either the physical sense or political. The lasting effect of the Sand Creek Massacre, Wounded Knee and countless other genocidal massacres are burdensome and taxing to say the least. The lasting effects of the Marshall Trilogy, and language of the like truly have an enduring influence.

Montoya v. United States is an example of a durable legacy of settler colonialism because of two words in the opinion: Indian character. These words, grown out of settler colonialism, are to be used later on to have a detrimental effect that is reminiscent of previous time. Indian character in *Montoya* was applied to the Native American as a being. Later, it would be applied to land to find Indian Country or take away from Indian Country.

Even though *Montoya* was not the first time the Court used the term Indian Character, it was the first time it was used and described as such—inferior, weak, angry, etc. However, Indian Character from *Montoya* was itself reminiscent of *United States v. Joseph*.

In the *United States v. Joseph*, the language of the court was volatile towards the Indian but did not expand the racist stereotype to include the Taos Pueblos. There was a description of the Taos laid out by the lower court. In it, it described the character of the Taos as civilized, manufacturing, agrarian[52] and so forth. They called the Taos a people of integrity and education. The Court admired the structure of the Taos and their culture.

What made the Taos so remarkable to the Court was exactly what made the Indian so inferior. The Court noted that the only commonality was the tribal character of the Taos and the Indians. But the beings, Taos and Indians, shared no character in the eyes of the Court. The Indians are an inferior race that could not compete with the sophistication of the Taos or the colonials.

Justice Samuel Miller wrote the opinion in *United States v. Joseph*. He also wrote the opinion in *United States v. Kagama* in which he proclaimed that Indians were so weak and degenerate they required the paternal protection of the general government.

> The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[53]

Justice Samuel Miller's experience with Native American's is unclear. He was born and raised in Kentucky and studied to become a physician and later a lawyer.[54] His

[52] Agrarian lifestyles were, at one point, a large goal of colonization. Agrarian cultures seemed to use the land more functionally and did not waste resources according to colonizers. So this was a large separator for the Court. The fact that an Indigenous population was agrarian and did not follow a land-based religion that required large portions of land to be set aside for worship and wasted to resourcefulness was positive in the eyes of the Court here.
[53] *United States v. Kagama*, 118 U.S. 375, 384–385 (1886).
[54] https://www.oyez.org/justices/samuel_f_miller

views on slavery were that it should be gradually be done away with. However, his views on Native Americans were sad, tragic, damaging and volatile, to say the least. The echoes of *United States v. Joseph* into *Montoya v. United States* are just the beginning of the Court's attempt to nurture the imperial, colonial and racial reign of the past into a new era—covert instead of the previous overt.

These figments of imaginations of these celebrated intellects are used as legal nonfictions to create a systematic colonialism as well as imperialism and racism to effectuate a barrier between those in power and those not. How can you challenge a system when the system does not recognize its own flaws but instead uses precedents rooted in exactly the settler colonialism that created the barrier? The only experience these justices have are in their social circles and their precedents. This experience created Indian character: the device for destruction of culture, sovereignty, jurisdiction, self-protection, and political integrity.

Indian Character: The Land from Beneath Our Feet

The most prevalent and fullest area of Indian Law that currently contains Indian character as a test is the infamous diminishment cases. There are currently eight diminishment cases that date as far back as 1961 and as recent as 2016 with *Nebraska v. Parker*. The diminishment doctrine was established to determine when and opening of reservation by congress has, in effect, made the reservation smaller. The effect is that Tribal jurisdiction for tax regulations, policing powers and other purposes has been limited to the newly diminished portions of the reservation. In a way, it determines the reaches of Indian country jurisdiction.

Diminishment is distinguishable from disestablishment because the latter is an actual termination of the reservation, although there may be Indian country that still exists where the reservation once did. In diminishment cases, the reservation remains intact but is made smaller and the areas allotted to non-Indians are essentially taken out of the reservation and Indian country. For the purposes of this argument, we will primarily use the term diminution because we are focusing on the settler colonial tactic of shrinking Indian country and therefore tribal jurisdiction and sovereignty. We are focusing on the settler colonialism use of Indian Character against tribal interests in Indian country. Whether a tribe has a reservation or not is of minimal focus here.

The focus of the diminution cases is on the allotment era decisions of Congress and how the opening of the reservations have limited or terminated Indian country. Instead of starting with the first case of the diminution doctrine, we will start on the fifth of these cases because it is there where there is a cleaner structure of the doctrine and how it works. Further, the settler colonial efforts of the Court are also very noticeable in the fifth case.

In 1984, the Rehnquist Court heard *Solem v. Bartlett*.[55] Justice Thurgood Marshall authored the opinion for a unanimous Court. The focus of the case was Congress' Cheyenne River Act that targeted 1.6 million acres on the Cheyenne River Sioux Reservation. The issue at hand was whether the Cheyenne River Act had diminished the reservation by the 1.6 million acres and downsized the Indian country. Justice Marshall wrote that the test was stringent. "Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land acts requires that Congress clearly evince

[55] 465 U.S. 463.

an "intent to change boundaries" before diminishment will be found."[56] But the test does not seem to be as concrete as it is implied.

"Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred."[57] The Court first stated that Congress has to intently change the boundaries of the reservation but then allows a congressional expectation become a deciding factor. This congressional expectation weakens the test. "In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers."[58]

Solem v. Bartlett was decided in favor of the Cheyenne River Sioux Reservation, but against tribal interests. In a settler colonialist framework, finding and stacking clues in favor of diminishment and using Indian Character as a tool for destruction of Indian country and therefore tribal sovereignty, just makes sense. If the goal is to settle the land and colonize it for the betterment of the dominating sovereign, then Indian character makes sense. The Indian nations can prevail as evidenced in *Solem*, if the land retains its Indian Character. But this is not always the case and the dangers of Indian Character are grave, because the ultimate goal of settler colonialism is the dispossession

[56] *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)
[57] *Ibid*. at 471.
[58] *Ibid*. at 471–472.

of Indigenous people's rights and lands followed by the disappearance of the Indigenous peoples.[59]

In *Brendale v. Confederated Tribes and Bands of Yakima Indian*, the Court's ruling on the Yakima Nation's zoning authority was highly dependent on the "opened" or "closed" character of the area. The Court defined opened areas as: "Access to the open area, as its name suggests, is not likewise restricted to the general public. The open area is primarily rangeland, agricultural land, and land used for residential and commercial development."[60] The closed areas are defined as the area which is closed to the general public. Only Yakima citizens have access to these closed areas. Justice Stevens wrote that "the pristine character of this vast, uninhabited portion of its reservation"[61] has remained so due to tribal interest in keeping it that way. This is where the Indian Character doctrine is visible. Though the Court never says as much, this is an application of Indian Character. Authority of zoning regulation means, for states, counties, and cities, means the right to determine the use of the land whether for commercial, agricultural or residential development or any other type of land use. But after *Brendale*, it appears that once the "pristine" character of the land has become compromised, the land may be subjected to diminution.

Though the *Brendale* conclusion is confusing and uses several doctrines to reach several conclusions, Indian Character is used whether or not the Court recognizes that

[59] A famous example of dispossession is the Trail of Tears. Knowledge of this event is widely known and remembered. However, when a reservation or Indian country is diminished, there is another movement from the self-recognized area into a smaller one. The Trail of tears is famous because of the length of the march and the number of casualties. Today, the casualty is existence. Diminishment is essentially the process of dispossession and the march to disappearance.

[60] *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415–416 (1989).

[61] *Ibid*. at 440.

fact. *Brendale* creates an Indian Character restriction that thwarts many potentials for tribes to use the land resources. This restriction is further evidence of the Court's settler colonialism stance toward tribal interests in federal Indian law.

Furthermore, Brendale presents a legal application of the thesis behind Phillip Deloria's *Indians in Unexpected Places*. The stereotype of unaltered lands being of Indian Character and lands being developed with commercial buildings and residential neighborhoods being solely the characteristic of the non-Indian communities is preposterous. Judging American Indian communities based on the Native American communities of the past is saying that American Indian communities are not allowed to transform and adopt updated versions of their history. It is as if the justices themselves have never seen a tribal headquarters but instead too many mid-twentieth century westerns, or are just without experience of tribal understanding. The use of Indian Character would be equivalent of inviting a judicial board of nine non-Americans into the United States to determine who has jurisdiction over China Town in Lower Manhattan. The idea that the U.S. would not have jurisdiction and regulatory authority over those areas that have a foreign character is outlandish. And that is what happens with Indian Character.

In 1998, the Supreme Court used Indian Character as a tool again in *South Dakota v. Yankton Sioux Tribe*. The Court here seemed more focused on the Indian Character of the residence. They measured the percentage of residence that lived in the area of question to determine its Indian Character. This was the emphasis here. Again, Indian Character was used to tell tribes that if they use their land resources and sell it to non-Indians, they are likely to lose the jurisdictional and regulatory authority over that

area. This case gives the ultimate suggestion that that which carries Indian Character comes with Indian Competency.

Indian Character and Blood Quantum: A Scientific Approach

The Supreme Court has advanced the language within Federal Indian law to a point that it has evolved throughout the years. Today, Indian Character is not what it began as. Indian character is now about land and property and not people. But this section aims to talk about the future of Indian Character.

Today, the Nations determine their citizenship and membership requirements. Some nations require a member to be a lineal descendant of another member. Others require a test of degree of Indian blood. This test, often called the Blood-quantum, opens membership up to those who meet the degree of Indian blood required for membership. For Instance, the Mississippi Band of Choctaw require a quarter (1/4) degree of Mississippi Choctaw blood for membership. But the Choctaw Nation of Oklahoma require lineal descent.

Each membership has its pros and cons. However, the danger of blood-quantum in the future could be devastating. Blood-quantum is the scientific application of Indian Character. This means that if the Supreme Court of Congress ever decides to enter an era of termination again, all that is necessary is require a high degree of Indian blood for membership purposes for a tribe to have Indian Character. Because of furtherance of colonialism, Native American populations have taken a real hit. Therefore, higher blood quantum among members are becoming less and less common.

The Indian Character discussion here is hypothetical and cautionary. In *Adoptive Couple v. Baby Girl*, the first words written by Justice Samuel Alito were troublesome.

"This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."[62] Further, the media frenzy that surrounded the case also attacked Veronica's "lack of Indian Character." With the Supreme Court starting an opinion off like in such a manner and the media in full support of such actions, fear of Indian Character being adopted on a personal basis does not seem irrational. Further, the white house has recently seen a transition like none other. With the recently sworn in Trump who has on the record argued in favor of a "look test", fears are not just rational, but necessary.

Donald Trump - They Don't Look Like Indians To Me, Sir

In 1993, Donald Trump testified in front of a House subcommittee that a scandal involving the mafia was running and controlling the Native American gaming casinos. Trump argued that "everybody it seems to me, from even from just a common-sense standpoint, knows what's going on." Trump later goes on to explain that the common-sense is that these Native American gaming facility permits are given to non-Native Americans. The following is the key portion of Trump's argument:

> REP. GEORGE MILLER (D-CALIF): Is this you, discussing Indian blood: "We're going to judge people by whether they have Indian blood whether they're qualified to run a casino or not?"
> TRUMP: That probably is me, absolutely. Because I'll tell you what. If you look, if you look at some of the reservations that you've approved, that you, sir, in your great wisdom have approved, I will tell you right now -- they don't look like Indians to me. And they don't look like the Indians ... Now, maybe we say politically correct or not politically correct, they don't look like Indians to me, and they don't look like Indians to Indians.
> And a lot of people are laughing at it. And you're telling me how tough it is and how rough it is to get approved. Well, you go up to Connecticut and you look. Now, they don't look like Indians to me, sir.
> MILLER: Thank God that's not the test of whether or not people have rights in this country or not -- whether or not they pass your "look" test.

[62] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556 (2013).

> TRUMP: Depends whether or not. ... Yeah. Depends whether or not you're approving it, sir.
> MILLER: No, no, it's not a question of whether or not I'm approving it. It's not a question of what I'm approving it. Mr. Trump, do you know, do you know in the history of this country where we've heard this discussion before? "They don't look Jewish to me?"
> TRUMP: Oh, really.
> MILLER: "They don't look Indian to me." "They don't look Italian to me."
> TRUMP: Mm-hm.
> MILLER: And that was the test for whether people could go into business, or not go into business. Whether they could get a bank loan. You're too black, you're not black enough.
> TRUMP: I want to find out. ... Well, then why don't you -- you're approving for Indian. Why don't you approve it for everybody then, sir?
> MILLER: But that's not a ...
> TRUMP: If your case is non-discriminatory, why don't you approve for everybody? You're saying only Indians -- wait a minute, sir.
> MILLER: You wouldn't stand -- you wouldn't stand for it in five minutes.
> TRUMP: You're saying only Indians can have the reservations, only Indians can have the gaming. So why aren't you approving it for everybody? Why are you being discriminatory? Why is it that the Indians don't pay tax, but everybody else does? I do.

President Trump's "common-sense" perception was not as alarming until recently.[63] This was of thinking fits the settler colonialism agenda perfectly. The idea that who qualifies as American Indian depends on how outside settlers interpret the phenotype of the citizens of an American Indian Nation. This argument that "they don't look like Indians to me" is perhaps as alarming as it gets. And perhaps just as alarming, Trump never caught on to what was wrong with his "look test." The look test is "I am a member of the overriding sovereign and I think that you are not what you say you are because you do not look like that to me. You do not look Indian; therefore, you must not be Indian." Being Indian is not a look just as being American is not a look. This is

[63] Until he became president.

polar to the Self Determination Era's policy that the Nations are responsible for determining citizenship. No one else.

The creeping fear here is that the man speaking the words above is now able to influence policy. Much like Phillip Deloria's argument that American Indians are likely to show up in unexpected places, they are also not likely to conform to President Trump's perception of being Indian. Being American Indian is determined by the American Indian. Letting President Trump's prejudice further settler colonialism and create, yet again, a determination of citizenship by that other than the Nation, is dismemberment of a Nation by the settler state.

Competency

Indian Competency Background: Trust Land

Competency. An ugly word in federal Indian law that has reared its head all too many times. The Indian Competency Commissions were ironic. Courts ruled in favor of many treaties in which tribes signed away property and rights. On the contrary, when Indians were given trust lands or are trying nonmembers in tribal courts, the competence of the Indian comes barreling into question from almost nowhere. However, there is a hint of competency origins in Kagama.

In the *United States v. Kagama*, the Court opined about competency. However, it was the competency of Congress that the Court ruled on.

> "It seems to us that this is within the competency of congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States, -dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty

> of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen."[64]

This sentiment, that Indians were incompetent do to their "weakness and helplessness," would become a recurring theme. Toward the turn of the century, the General Allotment Act was legislated. This Act, commonly referred to as the Dawes Act, was the allotment of reservation lands to the tribal member and trusts. Surplus lands were to be put into a trust then sold to nonmembers for the benefit of the collective tribe. This process has been cited quite often as one of the largest acts of colonization to effect assimilation. The goal was to create agrarians out of Indians. The sentiment that is largely tied to these attempts is quoted here:

> A great general has said that the only good Indian is a dead one. . . . In a sense, I agree with this sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man.[65]

Soon after the General Allotment Act took shape and came into effect, rules were established to determine the level of competency of the Indian deed holder. First, there was an intertribal determination of the competency of the property owner. But soon, there would be a change. After a 25-year period of the land in trust, a competency commission would be deliver the judgment of the property owner's competency. A quick reminder here, these where people judging the competency of other people. Men finding men competent or not. The rhetoric of the time allowed this ridiculous adoption. A finding of incompetency was justifiable because a nonIndian was judging the Indian.

The Indian Reorganization Act of 1934 would bring changes to competency commissions. Any lands in trust in 1934 would remain there indefinitely. The

---

[64] *United States v. Kagama*, 118 U.S. 375, 383–84, 6 S. Ct. 1109, 1114, 30 L. Ed. 228 (1886).
[65] Richard Henry Pratt, Founder, Carlisle Indian Industrial School

competency commissions were never at the points of the pens of the Supreme Court for judgment of validity. However, the issue of competency comes before the Court in another form.

Tribal Court Competency: History

The history of tribal courts that developed into the modern existence goes back to the nineteenth century in the forms of the Courts of Indian Offenses.[66] These courts were the initial move from a system that powers emerged from one branch of authority into a system with three branches in tribal governance. Frank Pommersheim wrote about the beginning of tribal courts and the story is somewhat humorous when viewed in hindsight. Before the astonishing opinion in Oliphant that tribal courts were questionable, they started in Indian country because outsiders viewed that as a necessity to administer rule and law.

Before the 1883 order from the secretary of Interior to create Courts of Indian Offenses, Indian agents would assume the position of the judge in "courtroom proceedings." If the local agent was not up to the task they would appoint an assistant agent or delegate the task to a trusted tribal member. The Courts of Indian Offenses were established as a method of assimilation and civilization of the Indian to create law-abiding Americans.

Tribal Court Competency: Today

Transcending to a more modern time after many tribes have set up court systems, there are still concerns of the day which has led to ill-favored Supreme Court Decisions. "Tribal courts today face significant challenges. They must work to satisfy

[66] Richland, Justin B. & Deer, Sarah. *Introduction to Tribal Legal Studies*. 2d. (AltaMira Press: London, 2010), 93-95.

the sometimes-competing demands of those inside and outside the tribal communities."[67] Further, Tribes have taken measures to create a system that is respected by outsiders to save sovereignty for the inside. "While tribal courts seek to incorporate the best elements of their own customs into the courts' procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition. For example, more and more tribal judicial systems have established mechanisms to ensure the effective appeal ability of decisions to higher courts. In addition, some tribes have sought to provide tribal judiciaries with the authority to conduct review of regulations and ordinances promulgated by the tribal council. And one of the most important initiatives is the move to ensure judicial independence for tribal judges."[68]

The irony of the authority that the Supreme Court has "These statutes were widely perceived in Indian country as supporting and advancing the right of tribal self-government and self-determination. While scholarly criticism of plenary power continued, there was little direct criticism from the tribes and no significant legal challenges to its existence. On balance, or so it seemed, the plenary power doctrine was being used to assist rather than to harm tribes. And, of course, extensive power is like that; it can be used for good or ill."[69]

The Honorable Sandra Day O'Connor wrote about the lessons that could be learned from each of the three sovereigns' judiciaries. She wrote that the Tribal courts had much to learn from the state and federal courts. I would argue that they have more

---

[67] The Honorable Sandra Day O'Connor, "Lessons from the Third Sovereign: Indian Tribal Courts," 33 Tulsa L.J. 1, 2 (1997).
[68] *Ibid.*
[69] Frank Pommersheim, "Tribal Courts and the Federal Judiciary: Opportunities and Challenges for A Constitutional Democracy," 58 Mont. L. Rev. 313, 322–23 (1997).

to teach. For instance, in Oklahoma the Supreme Court once operated in a way that satisfied deep pockets more so that justice.[70] The Supreme Court of the United States reversed Alabama courts for failure to provide adequate council.[71] However, the Court overlooked evidence of prejudice in the policing and interrogating of the 9 suspects of the alleged crime. In *Brown v. Mississippi*, 4 years later the Court determined that a Mississippi trial convictions were received due to "brutality and violence" during the interrogation process.[72]

The Supreme Court itself has seen its days. The list is far from short of cases where prejudices ruled the day: *Dred Scott v. Sanford*, *Plessy v. Ferguson*, *Korematsu v. United States*, *Buck v. Bell*, *United States v. Thind*, *Lum v. Rice*, and several others. The language in the mention cases are disgusting to say the least. But today, these holdings do not have holdings that carry forward the same prejudices. But there are some cases that were decided on prejudice and still rule the day.

[70] Berry, William A. & Alexander, James Edwin. *Justice for Sale: The Shocking Scandal of the Oklahoma Supreme Court* (Oklahoma City: Macedon, 1996). Oklahoma Courts were giving favorable opinions for those who would pay the justices.
[71] *Powell v. Alabama*, 287 U.S. 45 (1932). Perhaps one of the most racially based cases. The Court
[72] *Brown v. Mississippi*, 297 U.S. 278 (1936). This case involved three defendants who were both black men. The defendants were arrested and charged for the murder of Raymond Stewart. The first defendant arrested, Ellington, was brutally beaten repeatedly until he agreed to testify and gave a confession that was to the liking of the arresting officers. The next two defendants were treated in like. The arresting officer who beat and interrogated the defendant also served as the courtroom officer during the trial and testified on the confessions. When on the stand, the officer was asked if he beat the defendants he admitted that was true. Then the state (Senator John Stennis was the prosecutor) asked how badly the officer beat the defendants (as if it matters) to which he replied, "Not too much for a negro; not as much as I would have done if it were left to me." Yes, these men were convicted at this trial. The Supreme Court reversed and remanded, but the defendants accepted plea bargained rather than face this sort of treatment again.

Conclusion

> The path to glory is rough, and many gloomy hours obscure it. May the Great Spirit shed light on your path, so that you may never experience the humility that the power of the American government has reduced me to. This is the wish of a man who, in his native forest, was once as proud and bold as yourself.[73]

Settler colonialism require a legal system that will support them and allow it to fester and grow. The Supreme Court acts as a tool for these values to exist and thrive. If we take the weapon out of the hands of the colonizers, then we begin to change the trajectory of the war on imperial rule, colonial oppression and racist violence. Though there is a long list of malefactors in this country that come to power, the greatest malefactors are often those who do not know or understand their transgressions. Through education and research, the Supreme Court may one day become the swivel for positive change in federal Indian law that is overdue many years.

However, because of settler colonialism and its masking capabilities, the Supreme Court easily moves further and further from legitimacy within federal Indian law. It is up to advocates to point out tainted fruit and make such arguments so that the masking no longer is acceptable and pointing out such illegitimacies does not result in shaming the claimant that points out such injustices.

[73] Black Hawk – Sauk

References

Barsh, Russel Lawrence, and James Youngblood Henderson. 1979. "The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark." *Minnesota Law Review 63.4.*

Berry, William A., and James Edwin Alexander. 1996. *Justice for Sale: The Shocking Scandal of the Oklahoma Supreme Court.* Oklahoma City: Macedon.

Blackhawk, Ned. 2006. *Violence over the Land: Indians and Empires in the Early American West.* Cambridge: Harvard University Press.

Chemerinsky, Erwin. 2014. *The Case Against the Supreme Court.* New York : Penguin.

Dunbar-Ortiz, Roxanne. 2014. *An Indigenous People's History of the United States.* Boston: Beacon Press.

Duthu, N. Bruce. 1994. "Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country." *American Indian LAw review 19.2.*

Duthu, N. Bruce. 1996. "The Thurgood Marshall Papers and the Quest for a Principled Theory of Tribal Sovereignty: Fueling the Fires of Tribal/State Conflict." *Vermont Law Review 21.1.*

Echo-Hawk, Walter R. 2010. *In the Courts of the Conqueror: The Ten Worst Indian Law Cases Ever Decided.* Golden, Colorado: Fulcrum Pub.

Ennis, Sammuel E. 2011. "Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons." *35 Vt. L. Rev. 623.*

Frickey, Philip P. 1999. "A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers." *109 Yale L.J. 1.*

Frickey, Philip P. 1997. "Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law." *110 Harv. L. rev. 1754.*

Getches, David H. 2001. "Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values." *Minnesota Law Review 86.2.*

Getches, David H. 1996. "Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law." *84 Cal. L. Rev. 1573.*

Jr., Robert A. Williams. 1992. "Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes." *Federal Bar & News Journal 39.6.*

Jr., Robert A. Williams. 1986. "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence." *Wisconsin Law Review 1986.2.*

Kehow, Alice Beck. 2014. *A Passion for the True and Just: Felix and Lucy Kramer Cohen and the Indian New Deal.* Tucson: University of Arizona Press.

Krakoff, Sarah. 2013. "Settler Colonialism and Reclamation: Where American Indian Law and Natural Resources Law Meet." *24 Colo. Nat. Resources, Energy & Envtl L. Rev. 261.*

Krakoff, Sarah. 2001. "Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty." *American University Law Review 50.2.*

O'Brien, Jean M. 2010. *Firsting and Lasting: Writing Indians Out of Existence in New England.* London: University of Minnesota Press.

O'Connor, Sandra Day. 1997. "Lessons from the Third Sovereign: Indian Tribal Courts." *Tulsa Law Journal 1.*

Pommersheim, Frank. 1989. "The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction." *Arizona Law Review 31.2.*

Pommersheim, Frank. 1997. "Tribal Courts and the Federal Judiciary: Oppurtunities and Challenges for a Constitutional Democracy." *58 Montana Law Review 313.*

Richland, Justin B., and Sarah Deer. 2010. *Introduction to Tribal Legal Studies.* London: AltaMira Press.

Veracini, Lorenzo. 2011. "Introducing Settler Colonial Studies." *Settler Colonial Studies* 1-12.

Walker, Willard. 1960. "Noes on Native Writing Systems and the Design of Native Literacy Programs." *Anthropological Linguistics.*

Weitzer, Ronald. 1990. *Transforming Settler States: Communal Conflict and Internal Security in Northern Ireland and Zimbabwe.* Berkley: University of California Press.

Wilkins, David E. 1997. *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice.* Austin: University of Texas Press.