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The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court

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THE VANISHING INDIAN RETURNS: TRIBES, POPULAR ORIGINALISM, AND THE SUPREME COURT

KATHRYN E. FORT*

ABSTRACT

As the nation faces cultural divides over the meaning of the “Founding,” the Constitution, and who owns these meanings, the Court’s embrace of originalism is one strand that feeds the divide. The Court’s valuing of the original interpretation of the Constitution has reinforced the Founder fetishism also found in popular culture, specifically within the politics of those identified as the Tea Party. As addressed elsewhere, their strict worship of the Founders has historical implications for both women and African Americans, groups both marginalized and viewed as property in the Constitution. No one, however, has written about how the Court’s cobbled historical narrative and their veneration for the Founders have affected American Indian tribes. Tribes barely exist in the Constitution, and the Founders’ “original” understanding of tribes was that they would inevitably disappear.

The “vanishing Indian” stereotype, promulgated in the early Republic, and reaching an apex in the 1820’s, continues to influence fundamentally how the Court views tribes. Compressing history from the Founding through the Jacksonian era undermines tribal authority and sovereignty within the Court. In its federal Indian law cases, the Court relies on racial stereotypes and popular conceptions of American history. As a result of these shortcuts, the Court folds all tribes into one large group, empties the American landscape of tribal peoples, and forces tribes into a past where they only exist to disappear.

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INTRODUCTION

Writing history is perilous. It is a tricky thing to weigh narratives, present facts, and make stories. This is particularly true when the history will directly affect the legal rights of a community in the present. Writing history with the authority of an institution behind the narrative is even more difficult. When the Supreme Court of the United States writes history, it imbibes the narrative with both cultural and legal authority, and the story the Court creates needs to be both persuasive and perceived as factual. The Supreme Court's narrative histories determine whether parties will succeed or fail in their various legal claims. The histories, perceptually neutral, are imbibed with assumptions and assertions. There is no way to write a history narrative that will please all involved—after all, one party will always lose in the court system. Acknowledging, however, that the Court is writing tilted narratives even in the face of the claim of originalist objectivity is important. Unpacking what the Court is doing in its American Indian law cases can demonstrate its assumptions about the role of tribes in the United States. And that assumption is that they should no longer exist.

As our nation faces strong cultural divides over the meaning of the “founding,” the meaning of the Constitution, original or not, and who owns these meanings, the Court's embrace of history and originalism is one strand that feeds these culture wars. Looking back to a “simpler” time, the Court's value on the original interpretation of the Constitution has reinforced the Founder fetishism also found in popular culture, specifically within the Tea Party.¹ The Tea Party's popular constitutionalism, or “popular originalism,”² “ignores slavery and compresses a quarter century of political contest into ‘the founding,’ as if . . . Thomas Paine's ‘Common Sense,’ severing the bonds of empire, were no different from those in the Constitution, establishing a strong central government.”³ Picking and choosing from the history of the Founding

1. Determining what the “Tea Party” believes can be particularly difficult, given its need to define itself as “leaderless” and to not have any one person speak for the group. *A Tea Party Primary: Transcript*, ON THE MEDIA (Sept. 17, 2010), <http://www.onthemedial.org/transcripts/2010/09/17/01>. In general, however, poll numbers indicate that people who identify themselves as Tea Party followers tend to be white, religiously conservative Republicans. *American Values Survey: Religion and the Tea Party in the 2010 Elections*, PUB. RELIGION RES. INST. (last visited Aug. 18, 2012), <http://www.publicreligion.org/research/?id=386>; see also JILL LEPORE, *THE WHITES OF THEIR EYES* (2010) [hereinafter *THE WHITES OF THEIR EYES*].

2. Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 73 (“I have argued elsewhere that the originalism movement is a populist one.”); Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 483 (2012).

3. Jill Lepore, *Tea and Sympathy*, THE NEW YORKER, May 3, 2010, at 31; see also Greene, *supra* note 2, at 64 (discussing the reverence of the Founders in the United States as one possible reason originalism as an interpretive method is not embraced outside the United States).

has led to inconsistencies addressed by others, such as the natural consequence of a strict worship of the Founders for both women (not belonging in politics or leadership positions)⁴ and African Americans (forever frozen in slavery).⁵ However, no one has written about what this combination means for Indian tribes. Tribes barely exist in the Constitution, and the Founders' understanding of tribes was their prophesized and inevitable disappearance. This moment for tribes in the Supreme Court is particularly difficult, as their very existence is regularly called into question.

What has been identified as the "vanishing Indian"⁶ stereotype, promulgated in the early Republic and reaching an apex in the 1820s, continues to fundamentally influence how the Court views tribes. By compressing together the same history the Tea Party does, legal authority from the Founders through President Jackson continues to undermine tribes' authority and sovereignty within the Court.⁷

The Court's historical narrative in its opinions is a form of public history, and the use of the vanishing Indian stereotype in that narrative makes the history itself problematic, leading to flawed decisions. Identifying the cultural work the Court is doing is vital for not just understanding why the Court is coming to its decisions, but how it achieves those ends. In addition, this cultural work reinforces the unsophisticated history used by those intent on a specific understanding of the Constitution via the popular representation of the "Founding."⁸

This Article seeks to illustrate the problems with the Court as public historian, and how those problems are currently affecting Indian tribes in federal court. The Court's embrace of the vanishing Indian framework demonstrates how the Court is not seeking to include or exclude tribes from the dominant culture, but rather eliminate them entirely.

Part I of this Article discusses the Court's role as historian, and the scholarship surrounding that role. Part II recaps the origins and history of the vanishing Indian concept in both popular culture and the federal government. Part III examines the modern Court's jurisprudence in light of a modern vanishing Indian framework. Finally, Part IV ties this jurisprudence both to current conservative cultural understanding of the country's founding and to its place within the scholarship on the Court's current "post-racial" jurisprudence.

4. THE WHITES OF THEIR EYES, *supra* note 1, at 123–24.

5. *Id.* at 159.

6. *See infra* Part II.

7. *See infra* Part III (writings from 1795 to 1831).

8. Zietlow, *supra* note 2, at 491.

I. THE SUPREME COURT AS PUBLIC HISTORIAN

This Article looks at the connection of “non-legal ideas and the law,”⁹ specifically how the non-legal idea of the vanishing Indian is inherently connected to the law. This narrative of history provides a backdrop and informs many federal Indian law decisions. The study of legal history generally focuses on the history of legal development or how laws give context to the study of history.¹⁰ The study of how history is used by writers, or the study of the narrative of history, has had less focus. However, legal history is receiving increasing attention,¹¹ but how the Court uses history in federal Indian law is rarely written about outside of the world of federal Indian law professors.¹²

Historiography within the Court is especially important in federal Indian law. As has been observed, “virtually all historical writing on Indian topics has the potential to affect contemporary Indian life.”¹³ The work of historians in the federal recognition process is an obvious example of public historian work affecting the legal rights of tribes.¹⁴ However, the Court’s use of history is also damaging to tribes, and even more so lately.

9. David W. Raack, *The Varieties of Legal History: Republicanism and the Marshall Court*, 15 OHIO N.U. L. REV. 175, 182 (1988).

10. Barbara Y. Welke, *Willard Hurst & the Archipelago of American Legal Historiography*, 18 LAW & HIST. REV. 197, 203 (2000) (“But while the scholarship of the last thirty years demands a rethinking of the boundaries of legal history, it also unquestionably reaffirms what was at the heart of Hurst’s work, that is, that law and legal process suffuse American life, that any understanding of American history must account for law.”).

11. Zietlow, *supra* note 2, at 510.

12. CHARLES ALLEN MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 24 (1969) (discussing federal Indian law in only one paragraph of a 234 page book); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (mentioning no federal Indian law cases); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809, 859 (1997) (discussing *Seminole Tribe v. Florida*, 517 U.S. 44 (1995), but as an 11th amendment case, not an Indian law case). More recent work on the Court’s use of history has focused on the *Heller* case. See Saul Cornell, *Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss”*, 56 UCLA L. REV. 1095, 1098 (2009); Jamal Greene, *supra* note 2, at 12–15; Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. REV. 1171, 1187 (2009); Sanford Levinson, *United States: Assessing Heller*, 7 INT’L J. CONST. L. 316, 325–26 (2009); William G. Merkel, *Heller as Hubris, and How McDonald v. City of Chicago May Well Change the Constitutional World As We Know It*, 50 SANTA CLARA L. REV. 1221, 1229 (2010); Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1402–03 (2009).

13. Albert L. Hurtado, *Public History and the Native American: Issues in the American West*, MONT.: THE MAG. OF W. HIST., Spring 1990, at 58, 59.

14. See Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 489–90 (2006); Gerald Torres & Kathryn Milun, *Translating Yonnonndio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 647–48 (1990).

The Court is considered a public historian, especially when the Court writes historical essays in its opinions. Since “what [the Court] declare[s] history to be [is] frequently more important than what the history might actually have been,”¹⁵ this is a particularly important point. The Court, therefore, is involved in creating public history, or public narrative, in its opinions; thus asking the Court to use its pulpit in an ethical manner is a fair request. The Court’s role in making history is even broader than a standard definition of public history in that it also

acts as constitutional symbol, as conscience, educator, legitimizer, and guardian of the nation’s political values. In these roles history becomes a value or a means of transmitting values. It is not a mere instrument of decision, as the lawyers would have it, nor is it a research project, as the historians sometimes view it.¹⁶

The Court’s “use and misuse [of history] affects the political values of the nation”¹⁷ because by “writing history into its opinions the Court contributes to the public’s view of the American past as much as, and sometimes even more than, professional historians.”¹⁸ Indeed, the Court engages in a back and forth with political culture and exchanges understanding of narrative and Constitutional history.¹⁹ As Jill Lepore noted in her article on the Tea Party and the Founding, professional historians may dismiss the popular history surrounding originalism, but the Court certainly has not.²⁰

The recent decision of *District of Columbia v. Heller*,²¹ a case with warring historical narratives in the opinions, has highlighted the Court’s role as historian again.²² After all, Justice Scalia’s new textual originalism, or “original public meaning,”²³ requires a certain amount of history, whether his choices are ultimately ahistorical, or “anti-historical,” or neither.²⁴ The

15. Kelly, *supra* note 12, at 123.

16. MILLER, *supra* note 12, at 193.

17. *Id.* at 196.

18. *Id.* at 25.

19. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 236–45 (2008); Greene, *supra* note 12, at 10–11.

20. Lepore, *supra* note 3, at 31; *see also* David Firestone, *So You Still Want to Choose Your Senator?*, N.Y. TIMES, June 1, 2010, at A26; Adam Liptak, *Tea-ing Up the Constitution*, N.Y. TIMES, Mar. 14, 2010, at WK5.

21. 554 U.S. 570 (2008).

22. Cornell, *supra* note 12, at 1098 (“*Heller* . . . [is] really just the latest incarnation of the old law office history—a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion.”); Greene, *supra* note 2, at 12–13; Henigan, *supra* note 12, at 1187; Levinson, *supra* note 12, at 325–26; Merkel, *supra* note 12, at 1229; Siegel, *supra* note 12, at 1402–03.

23. Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

24. Cornell, *supra* note 12, at 1111; Greene, *supra* note 12, at 9–10.

expected *McDonald v. City of Chicago*²⁵ decision opened up this discussion again just as the *Heller* scholarship was hitting the law reviews.

The first historian to coin the phrase “‘law-office’ history” argued that the Court was a truly awful historian, and that lawyers were not much better.²⁶ In Alfred Kelly’s famous article, he explains Chief Justice Marshall’s use of history in cases as “judicial fiat.”²⁷ Deciding a case by judicial fiat happens when the Court attaches a historical meaning to a Constitutional clause without resorting to research or inquiry.²⁸ Kelly goes on to claim that examples of history by judicial fiat are more difficult to discover in the twentieth century.²⁹

More relevant to this discussion is Kelly’s second category of the Court’s historical writing, the “historical essay,” when lawyers “used evidence wrenched from its contemporary historical context; and each carefully selected those materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions.”³⁰ That writing goes on to inform the Court’s writing. The complaint is not significantly different than Saul Cornell’s complaint about the *Heller* decision, which critiques the “Court’s highly selective use of academic scholarship on the Second Amendment.”³¹ The problem, the Court cherry-picking from both primary and secondary sources, is a constant concern for historians. This has been a concern with much of the Court’s reliance on history. For example, in his study of the Court’s use of the Federalist papers, Professor Wilson also demonstrated how rarely the Court looked to the writings of historians who have researched the Federalist papers.³²

25. 130 S. Ct. 3020 (2010).

26. Kelly, *supra* note 12, at 122; Robert J. Spitzer, *Why History Matters: Saul Cornell’s Second Amendment and the Consequences of Law Reviews*, 1 ALB. GOV’T L. REV. 312, 333–34 (2008).

27. Kelly, *supra* note 12, at 123 (Ignoring, however, one of Marshall’s most famous opinions via judicial fiat, *Johnson v. M’Intosh*, 21 U.S. 543 (1823)); see Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 681 (“Reading the Trilogy as history is a mistake. Reading the Trilogy as an exercise in lawyering is instructive. The Trilogy is lawyer’s history, oversimplified to make the holdings appear inevitable.”).

28. Kelly, *supra* note 12, at 122–23.

29. *Id.* at 125. Unfortunately, this is simply not the case in federal Indian law. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289–90 (1955) (“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 millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”).

30. Kelly, *supra* note 12, at 125–26.

31. Cornell, *supra* note 12, at 1110; see also Henigan, *supra* note 12, at 1187; Alison LaCroix, *The Thick Edge of the Wedge*, SCOTUSBLOG (June 29, 2010, 12:29 PM), <http://www.scotusblog.com/2010/06/the-thick-edge-of-the-wedge/>.

32. James G. Wilson, *The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers*, 1985 BYU L. REV. 65, 66–67 (1985).

However, when Kelly wrote his article in 1965, he was concerned with the liberals' use of history to disguise judicial activism.³³ Robert Gordon wrote, "History—meaning here, not history as historians understand it, but the narrow project of the search for intentions—was proposed as the corrective to judicial discretion run riot."³⁴ Today, the pendulum has swung. The rise of conservative originalists' use of history to justify an interpretation of the Constitution faithful to the "original" understanding now is of concern to scholars,³⁵ and occupies a place in the popular culture.³⁶ Specifically, the *Heller* decision interpreting the Second Amendment illustrates the way the Court uses all types of historical sources to render its opinions.³⁷ In a complaint widely recognized in Indian law, scholars continue to point out how the Court ignored Second Amendment historical scholarship that did not fit with its opinion,³⁸ or used primary sources out of context.³⁹ At least one Justice has pointed out how the Court has been getting history "wrong," though he is often in dissent these days.⁴⁰ The Court, however, is in a strange place, where it appears both obsessed with history and yet ahistorical. The Court has been using history stripped of context, unmooring it from the culture that created it.

Some scholars have countered that the job of the Court is not to write history but to write law.⁴¹ For this and other reasons, an examination of the

33. Kelly, *supra* note 12, at 132, 149–50. However, Kelly also noted that "[t]he return to historically discovered 'original meaning' is, superficially considered, an almost perfect excuse for breaking precedent. After all, if the Fathers proclaimed the truth and the Court merely 'rediscovers' it, who can gainsay the new revelation?" *Id.* at 131–32.

34. Robert W. Gordon, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, in *THE HISTORIC TURN IN THE HUMAN SCIENCES* 339, 355 (Terrence J. McDonald ed., 1996).

35. Jeffery S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1180–81 (2009).

36. See *THE WHITES OF THEIR EYES*, *supra* note 1, at 123–24; Zietlow, *supra* note 2, at 484; Liptak, *supra* note 20, at WK1 (discussing popular constitutionalism); David G. Savage, *'Original Intent' Matter of Opinions; As the Supreme Court Demonstrates, Even History is Debatable*, L.A. TIMES, July 13, 2008, at A14.

37. *District of Columbia v. Heller*, 554 U.S. 570, 641 n.6, 643 n.7 (2008) (utilizing a book, state constitutions, declarations of rights, and ancient English law collections).

38. Cornell, *supra* note 12, at 1110–11; Henigan, *supra* note 12, at 1187; Levinson, *supra* note 12, at 325–26.

39. Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1344, 1350 (2009) (Interestingly, Lund considered *Heller* a work of "judicial fiat."); Siegel, *supra* note 19, at 196–97.

40. Jeffery Toobin, *Without a Paddle*, THE NEW YORKER, Sept. 27, 2010, at 34, 35 (quoting Justice Breyer from the bench as saying, "Since *Heller* was decided, numerous historians and scholars have expressed the view that the Court got its history wrong . . .").

41. Morgan Cloud, *Searching Through History; Searching For History*, 63 U. CHI. L. REV. 1707, 1745–46 (1996) (arguing that lawyers' histories are relatively harmless unless judges use them to decide cases as "history's true and literal meaning"); John Phillip Reid, *Law and History*,

Court's use of narrative has been under-examined.⁴² However, the "search for intentions" is vitally important to the Court now. As Judge Sutton writes, "[F]or several of the Justices a victory on the historical argument generally spells victory on the constitutional argument."⁴³ The same year the Court decided *Plains Commerce Bank v. Long Family Land and Cattle Co.*,⁴⁴ a history-heavy Indian law case, the Court also decided *Heller and Boumediene v. Bush*,⁴⁵ which were also identified by Judge Sutton as history-heavy cases.⁴⁶ While a caseload this focused on history is a relatively recent shift, it is painfully familiar to Indian law practitioners.⁴⁷ However, few legal historians examine cases dealing with federal Indian tribes as examples of egregious use of historical narrative.⁴⁸

Supreme Court decisions can be highly polarizing, but so can the recitation of facts and the historical narrative.⁴⁹ And, when the Court writes history, it is producing a public history. As writers of history, the Court still has an ethical and moral obligation for its choice of narratives.⁵⁰ In his book, *Broken Landscapes*, Professor Frank Pommersheim makes compelling points on this issue. He writes that "[h]istory rescues events from oblivion but not necessarily from tyranny."⁵¹ There seems to be a consensus, or at least an understanding,

27 LOY. L.A. L. REV. 193, 195 (1993) ("The differences in the logics are the differences that Kelly missed. They are so basic that they make the ways that the two professions interpret the past almost incompatible."); cf. J.M. Sosin, *Historian's History or Lawyer's History?*, REVIEWS IN AM. HIST. 38, 39 (1982) (chiding Reid for his own lawyer's history of the American Revolution, and stating that "Reid's book is perhaps an example of the advocate's brief applied to the [C]onstitutional debate over the standing army and the origins of the American Revolution As a whole the book is not based on close, systematic research.").

42. FRANK POMMERSHEIM, *BROKEN LANDSCAPE* 115 (2009).

43. Sutton, *supra* note 35, at 1181.

44. 554 U.S. 316, 327–28 (2008).

45. 553 U.S. 723, 723 (2008).

46. Sutton, *supra* note 35, at 1174.

47. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 7 (2005 ed.) (Due to the nature of federal Indian law, federal courts must interpret treaties and statutes from the eighteenth, nineteenth, and early twentieth centuries).

48. POMMERSHEIM, *supra* note 42, at 115 ("Yet, there is seldom any discussion of the nature of the historical enterprise itself in the cases or scholarly literature.").

49. Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 6 (2007) ("How courts see facts and the social contexts in which they arise have substantive outcomes."); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 222 (2010).

50. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1618, 1621 (1986); Gregory J. O'Meara, *The Name is the Same, But the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making*, 42 VAL. U. L. REV. 687, 745 (2008) ("[O]ne must bear in mind that the choice of factual narratives is a moral one; courts act in ethically important ways when they describe events.").

51. POMMERSHEIM, *supra* note 42, at 120.

that the Court cannot be expected to write history with “empathy” as Professor Pommersheim requests.⁵² Instead, the Court rules with certainty by using racially charged decisions and statutes for precedent and a belief that there is one right answer to be found in history.

History is constructed through an analysis of contradictory sources, and read through modern eyes. There is rarely one right interpretive answer. While it may stray into relativism to say there is no way to know the historical answer to a question, it is also true that it is hubris to believe in one *correct* history. As has been pointed out by both critical legal scholars and critical race scholars, historians faced with the same sources can come to different answers, but many times the minority point is never considered.⁵³ Examples abound showing how historical interpretation shifts over time, or how the relevance of some evidence can become more or less important.⁵⁴

As Neil Richards, a clerk to Chief Justice Rehnquist wrote, it is possible to analyze the Court’s good history and bad history by “examining the degree to which they follow the professional norms of academic and legal historians, and by examining whether they have foundation in historical evidence.”⁵⁵ However, as scholars examine the Court’s use of historical narrative and historical evidence, almost none outside of the fields take into account cases involving federal Indian tribes. The discussions about the abuse of history by the Court in federal Indian law cases is almost entirely within the field, where those who know the historical record point out again and again the Court’s disregard of it.

There are many purposes for the popular myth that is understood as American history, but the reverberations of colonization travel throughout it. This narrative both struggles with and ignores the aftereffects of colonization, and in doing so, struggles with and ultimately ignores tribes. Majority culture has written about and studied majority culture’s understanding of tribes from the time of contact onward, and one of the most famous cultural tropes, the vanishing Indian, has been studied and written about intensively in modern

52. Certainly President Obama’s request for a judge with empathy met with derision and concern from some sides. Presumably either no one wants an empathetic judge, or there is a fear that the judge’s empathy may be empathy for the “wrong” group. See Norton, *supra* note 49, at 202–03 (empathy for one group means the other group will suffer a loss).

53. See ANNETTE GORDON-REED, THOMAS JEFFERSON & SALLY HEMINGS: AN AMERICAN CONTROVERSY 210–11 (1997) (Minority point of view is not just ignored, but oftentimes minority sources, or historical sources created by those considered less important or less authoritative simply because of their minority or powerless status, are ignored.).

54. See ANNETTE GORDON-REED, THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY 21–23 (2008).

55. Richards, *supra* note 12, at 818.

times.⁵⁶ The vanishing Indian, however, was more than just a popular trope, much as Tea Party “history” has the possibility of becoming more than popular understanding. Instead, the vanishing Indian was a governing stereotype all three branches of government worked under for years, long after it had been abandoned as a cultural touchstone.⁵⁷ While the executive and legislative branches have officially abandoned this operative framework, the Supreme Court continues to lag behind.

Public history, such as both the Court’s and public historians’ writing, has ramifications in Indian law unlike any other area.⁵⁸ Because of this, scholars in the field of federal Indian law have worked on these issues a great deal.⁵⁹ Rob Williams details the larger history of legal racism with close readings of flawed cases.⁶⁰ He particularly focuses on the stereotype of Indian as savage,⁶¹ and how that stereotype permeates the Court’s opinions.

Professor Pommersheim devotes a thoughtful section in the fourth chapter of his book titled “History and Indian Law.”⁶² He uses the case of the Black Hills⁶³ to demonstrate the way the Court’s historical narrative must fit, or at least not deviate wildly from, majority culture’s understanding of history. He details Justice Rehnquist’s dissent from a legal historian’s perspective. One of his conclusions is that the Court’s clinging “to the inequities of the past . . . allows the oppression of past history to continue to oppress, rather than be transformed in the present.”⁶⁴

Finally, still others are concerned with how historians’ work can be used by the Court in Indian law cases. Gloria Valencia-Weber also focused on Kelly’s article and the Black Hills decision. Her conclusions, however, focus on the ethical implications for historians, especially the roles of historians as

56. See, e.g., JEAN M. O’BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND* xv–xvi (2010); BRIAN W. DIPPIE, *THE VANISHING AMERICAN: WHITE ATTITUDES & U.S. INDIAN POLICY* xiii (1982); Kristina Bross, *Dying Saints, Vanishing Savages: “Dying Indian Speeches” in Colonial New England Literature*, 36 *EARLY AM. LITERATURE* 325 (2001); Lora Romero, *Vanishing Americans: Gender, Empire, and New Historicism*, 63 *AM. LITERATURE* 385 (1991).

57. See *infra* Part II.

58. MILLER, *supra* note 12, at 23 (“In no other fields of public law does history play so decisive a role . . .”).

59. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 13–14 (1987); Frank Pommersheim, *Making All the Difference: Native American Testimony and the Black Hills*, 69 *N.D. L. REV.* 337, 337 (1993); Gloria Valencia-Weber, *American Indian Law and History: Instructional Mirrors*, 44 *J. LEGAL EDUC.* 251, 251 (1994).

60. ROBERT A. WILLIAMS, Jr., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS AND THE LEGAL HISTORY OF RACISM IN AMERICA* xxiv–xxv (2005).

61. *Id.* at 34–35.

62. POMMERSHEIM, *supra* note 42, at 115.

63. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

64. POMMERSHEIM, *supra* note 42, at 118.

expert witnesses.⁶⁵ This scholarship ties in with a concern of public historians about writing public history used later by the Court and in federal recognition litigation.⁶⁶ However, both raise similar concerns about the ethical role of historians, not necessarily the Court itself.

Because of the nature of federal Indian law, which requires analysis of treaties and other historical documents,⁶⁷ the Court must use historical narrative when deciding Indian law cases. However, the question becomes what organizing framework the Court uses. While the modern Court does not respect the goal of self-determination, what the Court does want to do or how it is informing itself on Indian law issues is less clear. However, the vanishing Indian concept provides one framework. First used by colonists to both explain and justify the removal and destruction of tribes and the taking of their land in the late 1700s and early 1800s, the modern Court has not yet abandoned the premise. By erasing tribes through historical vanishing Indian language, ignoring tribes in opinions, and freezing tribes in one fixed, unobtainable point in history, the Court embraces an ideology designed to eliminate tribal governments.⁶⁸ Like the historical vanishing Indian framework of the nineteenth century, the more that modern tribes do not conform to some idealized past version and remain there, the more they are subject to critique and erasure.⁶⁹

Today the Court clings to the idea that tribes will eventually disappear and its citizens will fully assimilate. Unfortunately, rather than the Court challenging itself on its anachronistic approach, this understanding of tribes resonates within the Court's current post-racial, ahistorical jurisprudence. The stereotype was part of the operating framework of the Founders, and tracing it through the three branches of government provides a context for the framework that is absent from the Court's decisions today.

II. THE HISTORICAL VANISHING INDIAN STEREOTYPE

The modern Court uses old cases based in the vanishing Indian stereotype, and has adopted a form of it for its current federal Indian law caseload. There are "*connections between the significant ideas and the law.*"⁷⁰ Understanding

65. Valencia-Weber, *supra* note 59, at 263.

66. Hurtado, *supra* note 13, at 64–65.

67. MILLER, *supra* note 12, at 23.

68. See discussion *infra* Part III.

69. John Borrows, *Physical Philosophy: Mobility and the Future of Indigenous Rights*, in *INDIGENOUS PEOPLES AND THE LAW* 403, 413 (Benjamin J. Richardson, Shin Imai & Kent McNeil eds., 2009); Jean M. O'Brien, "Vanishing" Indians in Nineteenth-Century New England: Local Historians' Erasure of Still-Present Indian Peoples, in *NEW PERSPECTIVES ON NATIVE NORTH AMERICA: CULTURES, HISTORIES, AND REPRESENTATIONS* 414, 415 (Sergei A. Kan & Pauline Turner Strong eds., 2006).

70. Raack, *supra* note 9, at 182 (emphasis in original).

these connections “enhance[s] our understanding of the law’s past.”⁷¹ In addition, these significant ideas (in this case, the vanishing Indian stereotype) continue to enhance our understanding of the law’s present and future. The reliance on this stereotype historically has had repercussions in the Court’s creation of present law.

Because the current Court and conservative popular culture seem to be obsessed with the founding era and surrounding times, this overview of the vanishing Indian concept ranges from 1787 through the early 1800s. This is a large period of time encompassing many different stages of federal government development.⁷² The overarching theme of the vanishing Indian, however, is apparent throughout the time period.

The vanishing Indian concept refers to a literary, historical, and cultural understanding of the clash between “civilized” colonizers and “savage” Indians. The concept is rooted in the belief that in the face of “advancing civilization,” tribes and tribal citizens would necessarily and inevitably disappear.⁷³ This idea shifted over time from one of extirpation of all individual Indians to the disappearance of tribes as sovereign governments as an organizing force, and the assimilation of tribal members into the dominant society. Tied up with the vanishing Indian idea is the concept of the noble savage, a pristine Indian or tribe from before contact, which represented all that was good about indigenous peoples.⁷⁴ This noble savage is a person (usually man) at one with nature, who lives “free” and unburdened with worry.⁷⁵ This imaginary person, a European invention, necessarily disappeared

71. *Id.*

72. This same compression by the Court in certain decisions and by popular conservative culture is often cited by historians as a major problem with their understanding of the founding. In this case, the vanishing Indian stereotype can be tracked through this time period with relative ease.

73. DIPPIE, *supra* note 56, at 10 (marking this understanding as gaining the most force after the War of 1812); RENATO ROSALDO, *CULTURE AND TRUTH*, 69–71 (1989); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79 (1993).

74. ROSALDO, *supra* note 73, at 71; Alden T. Vaughan, *From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian*, 87 THE AM. HIST. REV. 917, 950 (1982); Louis S. Warren, *Vanishing Point: Images of Indians and Ideas of American History*, 46 ETHNOHISTORY 361, 362, 365 (1999) (“[I]f Indians were timeless and natural[,] there could be little doubt they would disappear before people of progress and industry.” Indians Curtis encountered had “a degree of cultural mixing that Edward Curtis could only see as evidence of a corrupted Indian America, one not worth photographing.”).

75. BERNARD W. SHEEHAN, *SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN* 89–90 (1973).

at the very first encounter with the colonists.⁷⁶ As multiple scholars have noted, Indians must always be the past, not the present or future.⁷⁷

Brian Dippie's book, *The Vanishing American*, explores much of this pathology and the reasons for it. He also explores the influence of the belief in American Indian policy. As he writes:

Sensitivity about the United States' moral stature among the nations of the world made it difficult for Americans to admit to a deep complicity in the Indians' destruction. It was easier to indict Indians for their own ruin, thereby washing the white man's hands of responsibility. An even more satisfactory explanation held that the fate of the aborigines was predestined.⁷⁸

Throughout the early 1800s the vanishing Indian became "a habit of thought."⁷⁹ As Dippie points out, forty novels from 1824 to 1834 had vanishing Indian "episodes."⁸⁰ Made popular in society through bestselling novels like James Fenimore Cooper's *The Pioneers*,⁸¹ the understanding that Indians would necessarily disappear in the face of advancing civilization was assumed and encouraged.

This trope was not limited to popular fiction, but as a "habit of thought," and it informed most encounters with tribes, either in reality or in historical interpretation. For example, in one case, a town celebrated its founding with a reading by the "last" of the local tribe, who read about his own tribe's disappearance.⁸² There seemed to be no cognitive dissonance about the citizen of the existing tribe reading about the tribe's disappearance. This understanding of the Indian as vanished was important because it accomplished the cultural work, making the extinction of tribes not just "natural but *as having already happened*."⁸³ This is contrary to evidence

76. DIPPIE, *supra* note 56, at 25; Warren, *supra* note 74, at 362.

77. O'BRIEN, *supra* note 56, at xxi-xxiii, 107; Borrows, *supra* note 69, at 415.

78. DIPPIE, *supra* note 56, at 12. Or the Indian tribes' fault entirely. See S. REP. NO. 53-377, at 7 (1894). As the 1894 report to the Senate regarding the "Five Civilized Tribes" related:

And, if now, the isolation and exclusiveness sought to be given to them by our own solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the Government of the United States, but comes from their own acts in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits.

Id.

79. DIPPIE, *supra* note 56, at 15.

80. DIPPIE, *supra* note 56, at 21; Romero, *supra* note 56, at 385.

81. See generally JAMES FENIMORE COOPER, *THE PIONEERS* (Donald Ringe ed., Penguin 1988) (1823).

82. O'Brien, *supra* note 69, at 424.

83. Romero, *supra* note 56, at 385; see Jen Camden & Kathryn Fort, "Channeling Thought": *The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 105-6 (2008) ("Although *The Pioneers* predates the Indian Removal Acts of the 1830s, it performed a kind of

showing that even at the time, while tribes suffered greatly in their encounters with the colonists, they were neither extinct, nor doomed for extinction.⁸⁴

The role of the vanishing Indian idea in society also shifted with time. Different ideas of what should “be done” about the “Indian question” used the vanishing Indian in different ways. For example, early beliefs about “civilizing” the Indian meant that Indian tribes would eventually disappear as organizing, governing bodies, though not Indian peoples.⁸⁵ Later attempts to remove tribes west both vanished Indian peoples and tribes from the land coveted by settlers.⁸⁶ Still others believed that Indian peoples themselves would disappear, through famine and war, as a natural part of their encounter with “civilization.”⁸⁷ In other cases, the ideas combined, meaning that unless the tribal members became “civilized”⁸⁸ or were removed,⁸⁹ they would surely all die. There are distinctions in these ideas, but the twin ideas of the Indian belonging to the past and the erasure of tribes as organizing entities thread through them all, emblematic of the vanishing Indian organizing framework.

cultural work by enabling readers to believe that the Indian removal had already happened.”). Also see Curtis photographs doing the cultural work of removal. Pat Durkin, *Introduction*, in *HEART OF THE CIRCLE: PHOTOGRAPHS BY EDWARD S. CURTIS OF NATIVE AMERICAN WOMEN*, 4, 5 (Sara Day ed., Pomegranate Artbooks 1997).

84. DIPPIE, *supra* note 56, at 126–27; O'BRIEN, *supra* note 56, at 145–67; Brewton Berry, *The Myth of the Vanishing Indian*, 21 *PHYLON* 51, 54 (1960).

85. See Secretary of War Crawford on Trade and Intercourse, March 13, 1816, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 26, 28 (Francis Paul Prucha ed., 3d ed. 2000) (“The utter extinction of the Indian race must be abhorrent to the feelings of an enlightened and benevolent nation.”); Secretary of War Calhoun on Indian Trade, December 5, 1818, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 31, 32 (Francis Paul Prucha ed., 3d ed. 2000).

86. The Indian Removal Act, 148 Stat. 411 (1830); Message of President Monroe on Indian Removal, January 27, 1825, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 39, 39 (Francis Paul Prucha ed., 3d ed. 2000); President Jackson on Indian Removal, December 8, 1829, *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 47, 47–48 (Francis Paul Prucha ed., 3d ed. 2000); President Jackson on Indian Removal, December 7, 1835 *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 70, 71 (Francis Paul Prucha ed., 3d ed. 2000).

87. Report of Henry Knox on the Northwestern Indians, June 15, 1789, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 12, 13 (Francis Paul Prucha ed., 3d ed. 2000); Indian Commissioner Medill on Indian Colonies, November 30, 1848, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 76, 77 (Francis Paul Prucha ed., 3d ed. 2000) (“Hence, it is to natural and unavoidable causes, easily understood and appreciated, rather than to willful neglect, or to deliberate oppression and wrong, that we must in great measure attribute the rapid decline and disappearance of our Indian population.”).

88. Secretary of War Calhoun on Indian Trade, *supra* note 85, at 32–33 (tribes ought not be considered independent nations, and tribal members must be civilized as it is the only way to “arrest the current of events, which, if permitted to flow in their present channel, must end in the annihilation of those who were once the proprietors of this prosperous country . . .”).

89. Message of President Monroe on Indian Removal, *supra* note 86, at 39 (without removal Indians will be exterminated).

Scholars have noted the role of historians in creating and perpetuating the language of the extinct Indian tribe.⁹⁰ As one author has pointed out, historians drafted narratives of place by writing out the Indian, claiming the people were extinct.⁹¹ Jean O'Brien's work discusses the role of historians in writing Indians into extinction, demonstrating both the role of New England historians in developing the vanishing Indian concept and the sheer number of texts doing so.⁹²

All of this societal and cultural understanding of the vanishing Indian informed political leaders from the local to national level.⁹³ It informed their decision-making processes and their policy initiatives.⁹⁴ For policy makers, writing this history of Indian tribes was useful to majority culture. By maintaining that all tribes and tribal people have the same history, specific tribal differences flattened out. This method of making all tribes into one tribe, and all Indians into disappearing Indians, eliminated the specific problems and rights each tribe faced in their separate situations.⁹⁵ As Dippie writes about abolitionists and Indian people, "[d]ifferent tribes meant different problems to different people," thus making the "Indian problem . . . incredibly complex"⁹⁶ compared to the relatively simple overarching goal of the abolition of slavery.

Congressional solutions at the time faced the problem of legislating for a disappearing people who would just not disappear. The vanishing Indian assumption was partly based on imperfect information. Field officers' cultural understanding influenced their annual Indian reports to Congress. Those field reports provided policy makers in the East with faulty information and reinforced current beliefs.⁹⁷ These assumptions played out in strange ways. For example, in a land grant from the United States to the Cherokee Nation, the land was granted until the Cherokee Nation "[became] extinct, or abandon[ed]

90. O'Brien, *supra* note 69, at 414–15; Francis P. Jennings, A Vanishing Indian: Francis Parkman Versus His Sources, 87 PENN. MAG. OF HIST. & BIOGRAPHY 306, 306 (1963).

91. O'Brien, *supra* note 69, at 428.

92. O'BRIEN, *supra* note 56, at xi–xxvi.

93. See *id.* at xx, xxii; SHEEHAN, *supra* note 75, at 4.

94. SHEEHAN, *supra* note 75, at 6 ("If in little else, on the question of the Indian there was a wide consensus of opinion" between men with views as diverse as Timothy Pickering, Thomas Jefferson, Henry Knox, and Samuel Worcester); Berry, *supra* note 84, at 52–53.

95. See COHEN'S HANDBOOK, *supra* note 47, at 26–32 (detailing the numerous different types of treaty provisions negotiated between each tribe and the federal government); see generally VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS 1775-1979 (1999) (describing and collecting treaties based on negotiation time frame).

96. DIPPPIE, *supra* note 56, at 82; see also BUREAU OF INDIAN AFFAIRS, 25TH CONG., ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS 426 (1838) ("There are inherent difficulties in the dissimilar conditions of the tribes.").

97. BUREAU OF INDIAN AFFAIRS, 26TH CONG., ANN. REP. OF THE COMM'R OF INDIAN AFFAIRS 327, 331–32 (1839).

the same.”⁹⁸ The Civilization Fund Act in 1819 was passed “for the purpose of providing against the further decline and final extinction of the Indian tribes . . .”⁹⁹ The federal Indian policy eventually shifted from one of treaty-making to assimilation and allotment, demonstrating both the belief and the hope that tribes would disappear.¹⁰⁰ As late as 1891, the American Bar Association (ABA) debated over a resolution to provide “for courts and a system of law in and for the Indian reservations.”¹⁰¹ Senator Dawes’s response was “[w]hy are you providing for a vanishing state of things?”¹⁰² The ABA speaker countered that it would probably take at least thirty to sixty years under the Dawes allotment plan for tribes to disappear.¹⁰³

This assumption was not limited to Congress. A look at the presidential speeches of the founding fathers also illustrates the evolution of the vanishing Indian assumption. Henry Knox, as Secretary of War to George Washington, wrote that “[i]t is painful to consider that all the Indian tribes existing in those states now the best cultivated and most populous, have become extinct.”¹⁰⁴ However, it took some time for presidents in their public papers to arrive at the official conclusion that tribal extinction was the natural end to tribal peoples, either through the disappearance of tribes or the “civilization” of tribal peoples. Only through the “incorporation” of tribal members into dominant culture could they avoid death and extermination.¹⁰⁵ This incorporation, however, required the “death” of the tribal structure and the vanishing of tribes.

98. Act of May 28, 1830, ch. 148, 4 Stat. 412.

99. Act of Mar. 3, 1819, ch. 85, 3 Stat. 516.

100. DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 140-65 (5th ed. 2005). The end of treaty-making was in 1871. Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566. The Dawes General Allotment Act was passed in 1887. Dawes General Allotment Act, ch. 119, 24 Stat. 388 (1887).

101. ABA Rep. of the 14th Ann. Meeting 18 (1891).

102. *Id.* (Senator Dawes echoes the language from Justice Marshall’s opinions on tribes, specifically his “actual state of things” from *Johnson v. M’Intosh*, 21 U.S. 543, 591 (1823)).

103. *Id.*

104. Berry, *supra* note 84, at 52–53.

105. See President Jefferson to William Henry Harrison, February 27, 1803, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 22, 23 (Francis Paul Prucha ed., 3d ed. 2000) (“[A]nd they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi.”). The language of incorporation is part of the assimilationist, vanishing thought of the time. See *Johnson*, 21 U.S. at 589 (“The new and old members of the society mingle with each other; the distinction between them is gradually lost and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired . . .”); BUREAU OF INDIAN AFFAIRS, 32D CONG., ANN. REP. OF THE COMM’R OF INDIAN AFFAIRS 13 (1851) (“[A]ny plan for the civilization of our Indians will, in my judgment, be fatally defective, if it do not provide, in the most efficient manner . . . for their ultimate incorporation into the great body of our citizen population.”); see also *infra* Part III.

The goal of the federal government to civilize the Indian evolved over time, because for most of Washington's presidency his concern was to keep wars with the tribes from destroying the new country.¹⁰⁶ Only in Washington's Seventh Annual Message did the President mention "civilization" with regards to Indians.¹⁰⁷ Finally, in Washington's final message, he started by discussing the measures meant to "ensure a continuance of the friendship of the Indians," and argued the goal is to "draw them nearer to the civilized state, and inspire them with correct conceptions of the power, as well as justice, of the government."¹⁰⁸

While John Adams had virtually nothing to say in his presidential speeches about the relationship between the United States and tribes during his short and troubled presidency, the role of Thomas Jefferson and tribes has been well documented by historians.¹⁰⁹ By 1801, the role of the government in civilizing Indian tribes appeared in the second paragraph of his First Annual Message:

Among our Indian neighbors also a spirit of peace and friendship generally prevails, and I am happy to inform you that the continued efforts to introduce among them the implements and the practice of husbandry and the household arts have not been without success; that they are becoming more and more sensible of the superiority of this dependence for clothing and subsistence over the precarious resources of hunting and fishing, and already we are able to announce that instead of that constant diminution of their numbers produced by their wars and their wants, some of them begin to experience an increase of population.¹¹⁰

Jefferson did appear to believe that the "intermix[ing]" of Indian people and the colonists was the "natural progress of things,"¹¹¹ and wrote in a letter it would lead to becoming "one people."¹¹² More darkly, though, in the same

106. COLIN G. CALLOWAY, *FIRST PEOPLES: A DOCUMENTARY SURVEY OF AMERICAN INDIAN HISTORY* 219–24 (3d ed. 2008).

107. President George Washington's Seventh Annual Address (Dec. 8, 1792), in *THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES: FROM WASHINGTON TO HARRISON* 46 (1841). Indeed, the President was concerned with demonstrating to the Indians that there was reciprocal justice for murders of tribal citizens: "To enforce upon the Indians the observance of justice it is indispensable that there shall be competent means of rendering justice to them." *Id.*

108. President George Washington's Eighth Annual Address (Dec. 7, 1796), in *THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES: FROM WASHINGTON TO HARRISON* 47 (1841).

109. See SHEEHAN, *supra* note 75, at 5–6.

110. John T. Woolley & Gerhard Peters, *Thomas Jefferson's First Annual Message*, THE AMERICAN PRESIDENCY PROJECT (Dec. 8, 1801), <http://www.presidency.ucsb.edu/ws/index.php?pid=29443>.

111. Letter from Thomas Jefferson to Benjamin Hawkins (Feb. 18, 1803), in 8 *THE WRITINGS OF THOMAS JEFFERSON, 1801–1806*, 214 (Paul Leicester Ford ed., 1897).

112. *Id.*

letter he writes to the recipient that “your [Benjamin Hawkins] reflections must have led you to view the various ways in which their history may terminate, and to see that this [incorporation] is the one most for their happiness.”¹¹³

The “improvement” of Indian tribes to a civilized state continued through the Madison presidency, though the terminology was sharper in his first Inaugural address, where the country was to “carry on the benevolent plans . . . to the conversion of our aboriginal neighbors from the degradation and wretchedness of savage life to a participation of the improvements of which the mind and manners are susceptible in a civilized state.”¹¹⁴ By the time of Monroe’s First Annual Address to Congress in 1817, the tenuous balance between respecting tribes in order to obtain their land and hoping for their civilization started to tilt in favor of forced civilization. The language of the natural order of things and the framework of vanishing Indian terminology is clear in his speech. Writing about the treaties which led to large land purchases which included all of the Indian-owned land left in Ohio, parts of Michigan, and Indiana, the President wrote that “[i]n this progress, which the rights of nature demand and nothing can prevent, marking a growth rapid and gigantic, it is our duty to make new efforts for the preservation, improvement, and civilization of the native inhabitants. The hunter state can exist only in the vast uncultivated desert.”¹¹⁵ With these two sentences—the expansion of civilization as natural and unpreventable, and the land as a vast unoccupied desert—the Executive Branch established the vanishing Indian framework.

By 1818, the language had grown even stronger, and the extinction of “independent savage communities” in the face of civilized population was “clearly demonstrated.”¹¹⁶ Monroe spoke about the progress of a civilized population “invariably terminated in the extinction” of tribes, and that “[t]o civilize them, and even to prevent their extinction, it seems to be indispensable that their independence as communities should cease”¹¹⁷ In Monroe’s 1820 Annual Address, he wrote that “[l]eft to themselves their extirpation is inevitable.”¹¹⁸

113. *Id.* at 214–15.

114. James Madison, Inaugural Address (Mar. 4, 1809), in 8 THE WRITINGS OF JAMES MADISON, 1808–1819, 49 (Gaillard Hunt ed., 1908).

115. John T. Woolley & Gerhard Peters, *James Monroe’s First Annual Message*, THE AMERICAN PRESIDENCY PROJECT (Dec. 12, 1817), <http://www.presidency.ucsb.edu/ws/index.php?pid=29459>.

116. John T. Woolley & Gerhard Peters, *James Monroe’s Second Annual Message*, THE AMERICAN PRESIDENCY PROJECT (Nov. 16, 1818), <http://www.presidency.ucsb.edu/ws/index.php?pid=29460>.

117. *Id.*

118. John T. Woolley & Gerhard Peters, *James Monroe’s Fourth Annual Message*, THE AMERICAN PRESIDENCY PROJECT (Nov. 14, 1820), <http://www.presidency.ucsb.edu/ws/index.php?pid=29462>; see also DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 89, at 39.

Of course, this mentality reached its apex in the Executive Branch under the presidency of Andrew Jackson.¹¹⁹ Jackson, though not considered a founding father, is still lionized as an early president of “the people.” His writings are not considered founding sources by historians, but his need to move Indians off their land and clear them from the view of the majority was a major theme of his presidency and a driving force in the country.¹²⁰ By 1871, Congress passed the constitutionally questionable statute ending treaty-making with the Indian tribes.¹²¹

This stereotype, of course, did not reflect reality. The purpose of the vanishing Indian idea was to move Indians off the land, both mentally and physically. When the concept took hold, tribes in the east had suffered from both disease and warfare, and their presence was more easily dismissed than those tribes farther west.¹²² In effect, the vanishing Indian stereotype grabbed hold in the east, particularly in the hands of James Fenimore Cooper and his thinly veiled fictional accounts of New York.¹²³ This narrative framework, or colonial history of tribal peoples, was then applied regardless of the situation of specific tribes. Majority culture created one narrative history that eliminated all Indian tribes, regardless of the specific internal and external history of each individual tribal nation. This might be the first, but would certainly not be the last time that tribes would be grouped into one unified “history,” usually to their detriment.

119. Berry, *supra* note 84, at 53 (quoting Andrew Jackson, infamous for his role in the removal of tribes from the Southeast: “Humanity has often wept over the fate of the aborigines of this country, and philanthropy has been long busily engaged in devising means to avert it; but its progress has never for a moment been arrested, and one by one have many powerful tribes disappeared from the earth.”); *see also* Romero, *supra* note 56, at 392 (“Cooper’s natives . . . expunge imperialist conflict from the Jacksonian cultural memory.”).

120. *See* President Jackson on Indian Removal (Dec. 7, 1835), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 71, 71–72 (Francis Paul Prucha ed., 3d ed. 2000).

121. Act of Mar. 8, 1871, ch. 120, 16 Stat. 566 (1871). Various Indian Commissioners pushed for this prior to 1871, including in 1869. BUREAU OF INDIAN AFFAIRS, 41ST CONG., ANN. REP. OF THE COMM’R OF INDIAN AFFAIRS 485, 492 (1869); Cong. Globe, 40th Cong., 2d Sess. 3263–65 (1868) (House Debate on Treaty-Making Power, June 18, 1868). As early as 1818, Secretary of War Calhoun requested the tribes no longer be treated as “independent nations,” though he did not mention ending treaty-making. Secretary of War Calhoun on Indian Trade, *supra* note 85, at 32.

122. PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE: FEDERAL INDIAN LAW IN A LIBERAL CONSTITUTIONAL SYSTEM 66 n.104 (1991) (“As a result of 150 years of land deals, by the beginning of the nineteenth century many of the Indian nations had moved inland and were not ‘visible’ to the new Americans.”).

123. O’BRIEN, *supra* note 56, at xii (“[T]hat region [southern New England] took the lead in this genre and writers there produced an enormous body of literature in the nineteenth century. New Englanders dominated this culture of print, obsessed over its self-fashioned providential history, and defined itself as the cradle of the nation and seat of cultural power.”).

The Supreme Court, the third arm of government, understood and accepted the issue of the time to be the inevitable disappearance of the Indian.¹²⁴ The Court was, and is, necessarily informed by the issues and culture of the day.¹²⁵ Justices, based in the east, and at the heart of vanishing Indian culture, would have no reason to believe anything to the contrary.¹²⁶ In a relatively famous exchange between Justice Story and Justice Marshall, the Justices focused on the “plight” of the Indians in the face of civilization.¹²⁷ In an address commemorating the first settlement of Salem, Massachusetts, Justice Story wrote the following:

What can be more melancholy than their history? By a law of their nature, they seem destined to a slow, but sure extinction. Everywhere, at the approach of the white man, they fade away. We hear the rustling of their footsteps, like that of the withered leaves of autumn, and they are gone forever. They pass mournfully by us, and they return no more . . . But where are they? Where are the villages, and warriors, and youth; the sachems and the tribes; the hunters and their families . . . The wasting pestilence has not alone done the mighty work. No,—nor famine, nor war. There has been a mightier power, a moral canker, which hath eaten into their heart-cores—a plague, which the touch of the white man communicated—a poison which betrayed them into a lingering ruin.¹²⁸

This classic example of the vanishing Indian motif includes the law of nature leading to the extinction of Indian peoples, and equates Indians with the season of fall, of fading away. In addition, the extinction of the tribal peoples was not

124. SHATTUCK & NORGREN, *supra* note 122, at 55 (“Without abandoning a framework of law, the United States sought a social, political, and economic order that would minimize the presence and power of Native Americans. In the legal opinions of the Supreme Court in the mid and late nineteenth century, there was confusion as jurists clung to the ideal of a nation of laws, while trying to accommodate expansionist nationalist interests.”); JUSTICE JOSEPH STORY, A DISCOURSE PRONOUNCED AT THE REQUEST OF THE ESSEX HISTORICAL SOCIETY, ON THE 18TH OF SEPTEMBER, 1828, IN COMMEMORATION OF THE FIRST SETTLEMENT OF SALEM, IN THE STATE OF MASSACHUSETTS 73–75 (1828) (“History and Influence of the Puritans” speech); Letter from John Marshall to Joseph Story (Oct. 29 1828), in *THE PAPERS OF JOHN MARSHALL* 178, 179 n. 2 (Charles F. Hobson ed., 2002).

125. Corinna Barrett Lain, *The Countermajoritarian Classics (and an Upside-Down Theory of Judicial Review)* 68–72 (Aug. 31, 2010) (unpublished manuscript) (<http://ssrn.com/abstract=1669560>) (“The point is that in the aggregate, the Justices’ views will tend to more or less reflect dominant public opinion because they, too, are part of the public.”).

126. See Siegel, *supra* note 19, at 239–41 (discussing the role of popular culture in understanding the Second Amendment and how *Heller*, consciously or not, echoes the language of popular culture); see also BUREAU OF INDIAN AFFAIRS, 25TH CONG., ANN. REP. OF THE COMM’R OF INDIAN AFFAIRS 414 (1838).

127. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* 713–14 (1988).

128. Joseph Story, *History and Influence of the Puritans*, in *MISCELLANEOUS WRITINGS OF JOSEPH STORY* 408, 462–63 (William W. Story ed. 1852).

due to war or famine, but rather the touch of the white man. In the face of modernity, represented by white men and “civilization,” the Indian could no longer survive, through no fault of anyone.

Justice Marshall’s response to Justice Story’s address was slightly more balanced, and called attention to the role of the white man and the “disreputable conduct . . . in the affair of the Cherokees in Georgia.”¹²⁹ His empathy with the “plight” of the Indians did not, however, change the language Justice Marshall used in *Johnson v. M’Intosh*,¹³⁰ or the actual state of things confronting him in the Cherokee Nation¹³¹ case. Yet, unlike most of the non-frontier populace, the Court was faced with constant and repeated evidence of the existence of tribes. Though often futile, tribes attempted to bring cases to the Court. Although the Court held that most dealings between Congress and tribes constituted non-justiciable political questions,¹³² the Court still found itself faced with cases involving tribal land or tribal rights.¹³³ Even in the face of these cases, the Court continued to write cases for a vanishing people.

The Court’s most famous use of vanishing Indian language was in *Johnson v. M’Intosh*.¹³⁴ The case has been cited nearly 2000 times for various propositions, including the doctrine of discovery. The text in the case regarding the advance of civilization and the necessary retreat of the indigenous is one paragraph, the relevant parts reading “[a]s the white population advanced, that of the Indians necessarily receded The soil . . . being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power.”¹³⁵ This influential and powerful precedent inscribed

129. WHITE, *supra* note 127, at 714.

130. *Johnson v. M’Intosh*, 21 U.S. 543, 556 (1823).

131. *Cherokee Nation v. Georgia*, 30 U.S. 1, 40 (1831).

132. *United States v. Rogers*, 45 U.S. 567, 572 (1846); see DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE 45 (1997) (describing the holding as one of the most “effective doctrines not only to deny tribal nations justice but, perhaps more accurately, to prevent their even having a forum for the airing of tribal or individual Indian grievances against federal, state, corporate, or private interest in judicial corridors”).

133. COHEN’S HANDBOOK, *supra* note 47, at 443 (“Between 1836 and 1946, Congress enacted 142” acts waiving sovereign immunity for Indian claims). These claims would just involve Indian tribes and the federal government. They do not include cases that involve private parties interpreting chain of title issues, nor state claims of jurisdiction over Indian tribes, nor application of federal laws over Indian tribes. See, e.g., *Buttz v. N. Pac. R.R. Co.*, 119 U.S. 55 (1886); *Ex Parte Crow Dog*, 109 U.S. 556 (1883); *Beecher v. Wetherby*, 95 U.S. 517, 522 (1877); *United States v. Joseph*, 94 U.S. 614, 615 (1876); *Leavenworth, Lawrence & Galveston R.R. Co. v. United States*, 92 U.S. 733, 789 (1875); *United States v. Cook*, 86 U.S. 591 (1873); *United States v. Brooks*, 51 U.S. 442, 445 (1850); *Clark v. Smith*, 38 U.S. 195, 200–01 (1839).

134. *Johnson*, 21 U.S. at 590–91.

135. *Id.*

vanishing Indian language into federal Indian law, regardless of the reality.¹³⁶ The case demonstrates clearly the creation of the one pan-tribal history used in the Court in the face of specific tribal facts to the contrary.¹³⁷

Other cases also used vanishing Indian terminology.¹³⁸ One case which particularly illustrates the dissonance in vanishing Indian cases, and the reaching of a different result when the Court grapples with specific tribal history, is the *Kansas Indians*¹³⁹ case, decided nearly forty years after *M'Intosh*. Kansas wanted to tax lands held by individual Indians by claiming the tribes they belonged to were no longer identifiable as tribes.¹⁴⁰ The land had been divided among individual Indians pursuant to a treaty with the United States. The lower court wrote that "[t]he nationalities of some of the tribes most ferocious in history have become extinct, the members thereof constituting a worthy portion of the great body politic, undistinguishable from the great mass."¹⁴¹

However, the Court was faced with a dilemma. The Indian tribes in this case were not extinct, contrary to policy and cultural understanding. Testimony from tribal leaders made this abundantly clear.¹⁴² The tribes in question had just signed treaties with the federal government. The Court used language such as "the small number of Shawnees—the tribe does not now contain over twelve hundred souls"¹⁴³ but was forced to come to the conclusion that the lands cannot be taxed. The Court did so grudgingly, writing: "It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas."¹⁴⁴ The Court also acknowledged that the purpose of the treaty with the Wea tribe

doubtless, was, that the separation of estates and interests, would so weaken the tribal organization as to effect its voluntary abandonment, and, as a *natural result*, the incorporation of the Indians with the great body of people. *But this result, desirable as it may be, has not yet been accomplished with the Wea tribe*¹⁴⁵

136. LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LAND 3–29 (2005).

137. *Id.*

138. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers")

139. *In re Kansas Indians*, 72 U.S. 737 (1866).

140. The tribes were the Shawnee, Wea and Miami. *Id.* at 737.

141. *Id.* at 747. This distinction illustrates the extinction of tribes and the incorporation of tribal members into the general population.

142. *Id.* at 744 (attorney's argument).

143. *Id.* at 753.

144. *In re Kansas Indians*, 72 U.S. at 756.

145. *Id.* at 758 (emphasis added).

Ten years later, in the case *Beecher v. Weatherby*,¹⁴⁶ the Court continued to use similar language. This case dealt with a land patent regarding the recovery of lumber in a certain section of Wisconsin.¹⁴⁷ The question was whether the federal or state patent granted title.¹⁴⁸ There was also a question as to whether the section had been reserved to the Menomonee tribe. The Court found the following:

Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States 'its ancient and honored policy' of devoting the central section in every township for the education of the people.¹⁴⁹

As the Court moved away from specific language and to general narrative ("Indian tribes," "State, as in other States"), the Menomonee tribe lost. The racist language of the time is embedded in the quote, but so is the assumption that the tribe would disappear in the face of white settlement. This is a subtle, but important, difference. The Court was not concerned with keeping specific tribes in or out of dominant culture, but rather, eliminating their presence entirely. The question became how that disappearance would occur.

The movement from vanishing Indian to assimilated Indian, Brian Dippie argues, was a place of compromise for those who believed the Indian would disappear and those attempting to "save" the Indians.¹⁵⁰ He argues that assimilation shifted thought from literal disappearance of Indian people to the disappearance of "only the Indian race and culture and not the individuals."¹⁵¹ This could also be described as a distinction between the disappearance of Indian peoples and the disappearance of Indian tribes. This shift in thought, if it is indeed a shift, is the framework that persists today. No one would seriously argue for a literal extermination of tribal people, but the disappearance of tribes certainly is a different matter. Even Dippie concedes the work some did to counter the belief in the extinction of Indian tribes "never entirely supplanted the belief that one morning the world would awaken to find not an Indian alive."¹⁵² Indeed, Jean O'Brien writes, "'Civilization' for Indians meant literal or figurative death—there is no other conceivable outcome."¹⁵³

146. 95 U.S. 517 (1877).

147. *Id.* at 522.

148. *Id.*

149. *Id.* at 526 (emphasis added).

150. DIPPIE, *supra* note 56, at 137.

151. *Id.* at 137.

152. *Id.*

153. O'BRIEN, *supra* note 56, at 119.

III. THE VANISHING INDIAN RETURNS: THE MODERN SUPREME COURT

Indian tribes did not disappear in the thirty to sixty years following the passage of the Dawes Act. Predictions of tribal disappearance were over-exaggerated. The vanishing Indian stereotype

has long served as a sort of elegiac counterpoint to the triumphal fanfare of the common 'white' man that has been the anthem of Euro-American discourse of progress. Yet, as events in fact turned out, the nineteenth century campaign to exterminate the Native population was not entirely successful, and from today's perspective the cult of the vanishing Indian appears as a curious, premature aestheticization of a genocide *manqué*. The 1990 United States census reports a Native population of more than 1.6 million.¹⁵⁴

However, Indian tribes disappeared from majority cultural understanding in other ways. As Louis Warren writes, "Even the New Social History and New Left History, preoccupied as they were with the fortunes of 'everyday people' on the frontier, could not imagine a narrative of American history with Indians at the center."¹⁵⁵ Though in resurgence, tribal peoples and governments still suffer from the majority culture's belief that they exist only in the past. Treaty rights victories in the modern era,¹⁵⁶ the influx of government operating funds for some tribes from gaming and other economic development,¹⁵⁷ and the continued pressure from tribal citizens for their inherent rights of self-governance and respect continued to slowly raise awareness in majority culture.

154. Richard Warren Perry, *The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity*, 28 IND. L. REV. 547, 555–56 (1995). *But see* Oklahoma Governor Mary Fallin, State of the State Address (Feb. 8, 2011) ("One hundred and twenty-two years ago, many thousands of pioneers came in covered wagons to the unsettled lands of Oklahoma. They built tent cities in the unsettled wilderness."); Oklahoma Governor Mary Fallin, Inaugural Address (Jan. 10, 2011) ("Pioneers who ventured to our state were in pursuit of a new life . . . a better life . . . for themselves and their families . . . And through their wisdom, foresight and courage, prairies became productive farmland and towns were built on a once barren wilderness.").

155. Warren, *supra* note 74, at 370. *But cf.* Jennings, *supra* note 90, at 306.

156. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 208 (1999); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979); Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968); Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Att'y for the W. Dist. of Michigan, 369 F.3d 960, 971–72 (6th Cir. 2004); United States v. Michigan, 471 F. Supp. 192, 278–81 (W.D. Mich. 1979).

157. *See, e.g.*, MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 739–96 (2011); SOUTHEAST MICHIGAN COUNCIL OF GOVERNMENTS, LOW IMPACT DEVELOPMENT MANUAL FOR MICHIGAN: A DESIGN GUIDE FOR IMPLEMENTORS AND REVIEWERS 387–89 (2008); John Frank, *Bill Signing Approves Live Gaming at Cherokee Casino*, CHARLOTTE OBSERVER, June 29, 2012, at 1B, 5B; Ethan Stewart, *The Sustainable Chumash: Inside The Santa Ynez Band Of Mission Indians' Quest To Go Green*, SANTA BARBARA INDEP., May 24 2012, at 27.

The work to diminish Indian nations by the Supreme Court happens even as the legislative and executive branches continue to endorse a path of tribal self-governance.¹⁵⁸ This erasure and diminishment is happening at a time when tribes are consistently increasing in population and exercising their rights of self-governance.¹⁵⁹ The Court is not only not endorsing self-determination, but it is actively moving to eliminate it. One way it can do this is through precedent and history.

Starting with the ascension of Justice Rehnquist to Chief Justice, Indian tribes started losing in the Supreme Court at an alarming rate.¹⁶⁰ Many scholars have discussed why this is happening, but it is also useful to consider *how* this is happening.¹⁶¹ Beyond the complaints about the Court's anti-tribal jurisprudence, how is the Court using history and narrative to repeatedly defeat tribal nations? The Court's narrative histories embracing the idea of vanishing tribes does the heavy lifting in opinion after opinion, attempting to prove tribal extinction in the face of tribal resurgence. Justice Rehnquist considered himself something of a historian,¹⁶² but his histories in federal Indian law cases are some of the worst examples of narrative history writing. His work, along with others on the Court, attempted to erase tribes from the American history, and to negate their role today.¹⁶³ The vanishing Indian understanding of the federal tribal relations aligns with historical interpretations of documents that use so-called concurrent understanding to enforce laws today.¹⁶⁴ The Supreme Court has returned to the operating assumption of the vanishing Indian touchstone.¹⁶⁵ While the Court's language may not be as evidently blatant as it has been in

158. *But see* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST* 8 (1990).

159. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72, 72 (1997).

160. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 943–45 (2009).

161. *See generally* WILLIAMS, *supra* note 60 (discussing the Rehnquist Court's use of racist language toward Indian tribes); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579 (2008) (discussing the Rehnquist Court's racism towards Indian tribes).

162. *See generally* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* (1998) (discussing civil liberties during wartime); WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876* (2004) (discussing the presidential election of 1876); WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* (1992) (discussing past impeachments).

163. *See* WILLIAM H. REHNQUIST, *THE SUPREME COURT* 36 (2001) Quoting the Commerce Clause, the Chief Justice leaves out the "and with the Indian tribes" portion of the clause. *Id.* He also makes no mention of Indians or tribes anywhere in the book.

164. *Antoine v. Washington*, 420 U.S. 194, 218 (1975) (Rehnquist, J., dissenting) ("The following excerpts from the Court of Claims opinion [a 1908 case], which would appear to have the added authenticity that is given by contemporaneity . . .").

165. Perhaps the Court never moved beyond it.

the past, its holdings continue to treat tribes as less significant within the history of America and to eliminate them as a governing entity. The Court does this in different ways, both obviously and more subtly. The obvious ways include holdings that explicitly attempt to diminish tribal sovereignty, particularly in their authority over non-Indians on or within the borders of tribal lands.¹⁶⁶ More subtle adoption of this understanding expresses itself through choices in citations and quotes,¹⁶⁷ and the erasure of tribes and their history from decisions that directly affect them.¹⁶⁸ When the Court's holdings try to limit the sovereignty of tribes or the role of tribal governments, it reinforces vanishing Indian stereotypes. When the Court cites, unnecessarily, to old cases that include vanishing Indian narratives, it reinforces those narratives as valid. In some ways the Court is hamstrung by precedence, but in others, specifically the obsession with original intent and historical evidence, they are putting themselves in the position of rewriting the same bad history.

One justification the Court gives is that in interpreting old statutes, the Court must now use the understanding of those drafting the law at the time. For example, in general allotment cases, the Court uses the idea that Congress believed tribes would cease to exist to explain current landowner justified expectations. The fact that this expectation did not come to pass, or that Congress no longer has a policy of tribal allotment, does not change the current interpretation policy at the Court.¹⁶⁹

The Court in *Plains Commerce Bank*, a decision about tribal court jurisdiction over a bank involved in commercial activities with tribal members, includes a particularly chilling and unnecessary reference to allotment and assimilation. Chief Justice Roberts wrote, "[T]he Cheyenne River Sioux Tribe lost the authority to restrain the sale of fee simple parcels inside their borders when the land was sold as part of the 1908 Allotment Act. Nothing in *Montana* gives it back."¹⁷⁰

166. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *United States v. Lara*, 541 U.S. 193 (2004); *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

167. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 176–77 (1980) (Rehnquist J., dissenting); *Oliphant*, 435 U.S. at 191; *Antoine*, 420 U.S. at 194.

168. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

169. See *Montana*, 450 U.S. at 574 n.9; *County of Yakima*, 502 U.S. at 255; Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. (forthcoming Fall, 2012) (manuscript at 11–13), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2005413.

170. *Plains Commerce Bank*, 544 U.S. at 340.

Following the dual strands of the vanishing Indian trope from the nineteenth century, the inevitable extinction of tribes (through disappearance or “civilization”), and the romanticism of perfect pre-contact tribes,¹⁷¹ the recent Supreme Court jurisprudence embraces what has been considered a flawed framework for years. In addition, while this framework is most readily apparent in Indian law cases, history-writing via stereotype is not limited to Indian law cases. The point of the original vanishing Indian trope was not to narrate what was actually happening, but rather to provide the cultural work¹⁷² necessary to move along a process started by federal Indian policies. The Court’s work now treats tribal powers of self-governance as already gone, and the Court’s work is taking an active role in creating (diminished recognition of tribal sovereignty) what it claims has already happened (diminished tribal sovereignty). By rewriting history, the Court dismisses the very real, and very important, histories that underlie all of its legal dealings with Indian tribes. The history the Court writes seeks to minimize the unique status of tribes within the federal legal system.¹⁷³

In addition, the Court continues to use one stereotypical narrative history for all tribes. Even when an opinion is based on a specific tribal history and treaty, such as the Crow Nation and the 1868 Treaty of Fort Laramie, the end result applies to all tribes.¹⁷⁴ This happens regardless of the fact that each tribe has a unique treaty history.¹⁷⁵ In addition, if all tribes are the same, the thing that makes them unique—their inherent sovereignty and government-to-government political relationship with the United States based on treaties—

171. Borrows, *supra* note 69, at 417.

172. Camden & Fort, *supra* note 83, at 105–6.

173. See 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, 80–81 (1999) (“If the judges borrow concepts from the general law, not simply from constitutional values and general congressional purposes associated with particular statutes, the uniqueness of federal Indian law may evaporate But even if the doctrinal drift alone is unlikely to revive the nineteenth-century non-Indian notion of the ‘vanishing Indian,’ it is the harbinger of vanishing Indian law.”).

174. *Montana v. United States*, 450 U.S. 544 (1981); see also *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (finding the Suquamish tribe had no tribal civil jurisdiction over non-Indians with narrow exceptions.)

175. A similar example is *Oliphant*, 435 U.S. at 191, where one small tribe in an area with many non-Indians attempted to exercise criminal jurisdiction over a non-Indian. The resulting decision applied to all tribes’ criminal jurisdiction. See J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823-1835*, 32 N.C. CENT. L. REV. 27, 63 (“*Oliphant* then treats all Indian Tribes, no matter how different, no matter how tangled their histories are with the government of the United States, in the same rigid way.”); see also *Osage Nation v. Irby*, 597 F.3d 1123 (10th Cir. 2010) (where the circuit court ignored the uniqueness of the Osage Nation Allotment Act (separating subterranean minerals and allotting the land only to Osages with no “surplus” allotments) and the uniqueness of the Osage Nation’s relationship with the United States, instead applying standards from *Solem v. Bartlett*, 465 U.S. 463 (1984) and *DeCoteau v. District County Court*, 420 U.S. 425 (1975)).

fades into the background.¹⁷⁶ By using one damaging narrative framework for all tribes, the Court continues its work of eliminating tribes from the jurisdictional framework of federal Indian law.

The *Montana*¹⁷⁷ case is also an example of the requirement that Indians remain static and of the past. Other scholars have noted this idea as part of the nineteenth century vanishing Indian writing,¹⁷⁸ and John Borrows writes about it informing today's understanding of Indian peoples.¹⁷⁹ The Supreme Court continues to use this understanding when interpreting treaty rights. For if the Court writes that the Crow people did not eat fish long ago, in their perfect pre-contact state, then they must never eat fish now, nor have contemplated holding a treaty right to fish.¹⁸⁰ Regardless of whether the assertion was true, the assumption was that any change in the way Crow people lived made them somehow less Indian and their treaty rights less legal.

Once the Court established a generic narrative for tribes requiring them to exist only in a non-existent past, other narrative methods the Court used to erase tribes reinforce the idea. Justice Rehnquist used a form of erasure by focusing on every legal issue in a case except the tribal interest, even when the tribe was a party. This is true even in cases where the tribe wins. When the tribe is a named party, the Court managed to come to a decision without involving any tribal context. Most famous among these cases is *Seminole Tribe v. Florida*.¹⁸¹ Taught in most constitutional law classes as an example of Eleventh Amendment jurisprudence, the case provides no context for the statute at issue¹⁸² and is an example of federal Indian law without the Indians. The Court narrowed the decision so closely to the power of Congress to abrogate States' immunity from suit that there is no discussion of the Indian Gaming Regulatory Act, and only a brief discussion of the Indian Commerce Clause.

176. Cf. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (one demonstration of how a tribe wins when the Court uses specific history to provide context to tribal and federal documents).

177. *Montana*, 450 U.S. at 544.

178. O'BRIEN, *supra* note 56, at 118–19 (“Hewing to the temporalities of race, this passage holds out change as the exclusive purview of non-Indians. Indians are categorically depicted as static and incapable of change. Even when concerted measures had been taken to ‘civilize’ Indians, they cannot survive in this state.”).

179. Borrows, *supra* note 69, at 404 (“We are too often seen as intellectually stagnant, with unchanging, static views of life. Some consider our ideas to be the product of another age, having little relevance to the contemporary world. They see our philosophies as quaint anachronisms of another time. Others might regard our ideas as intellectually compelling, even correct, but too feeble to prevail in their encounter with the modern age. Thus, Indigenous people and their ideas are often seen as vanishing from the earth.”).

180. *Montana*, 450 U.S. at 556.

181. 517 U.S. 44 (1996).

182. *Id.* at 48.

In addition, the Court lacks the ability to write a narrative history of a tribe with balanced or well-researched sources. In *Duro v. Reina*,¹⁸³ the Court first stated that the case did not require a “review of history.”¹⁸⁴ Then, however, the opinion reviewed one of the worst cases of law office history in federal Indian law, *Oliphant v. Suquamish Indian Tribe*.¹⁸⁵ In addition, when the Court did attempt to find a historical record regarding treaty histories, it cited to a student comment¹⁸⁶ and a student note¹⁸⁷ for the proposition that “scholars” were “divided in their conclusions” regarding nonmember jurisdiction in historical sources.¹⁸⁸

While the Court has trouble with Indian law history, there are also problems with its increasing atemporality.¹⁸⁹ When the Court decides to avoid presenting any contextual history for a case,¹⁹⁰ plain meaning statutory construction eliminates the need for “complicated” legal and factual backgrounds, which could include the history between tribes, individual Indians, and the federal government.¹⁹¹ Recently the Court decided a case where the “ordinary meaning” of the language precluded any complex understanding of the varied relationships between tribes and the United States.¹⁹² This understanding of history is not limited to Indian law cases, but the Court’s atemporality and separation from context is especially apparent in Indian law cases.¹⁹³

Vanishing Indian primary sources are a particularly pernicious area of Supreme Court writing. In a system bound by stare decisis, the Court looks

183. 495 U.S. 676 (1990) Ironically, while in most cases the Court seeks to lump all tribes together, in *Duro*, the Court agrees that while federal law has the power to treat all Indians the same, tribal law does not have that same power.

184. *Id.* at 688.

185. 435 U.S. 191 (1978).

186. Karl Jeffery Erhart, Comment, *Jurisdiction over Nonmember Indians on Reservations*, 1980 ARIZ. ST. L.J. 727 (1980).

187. Patricia Owen, Note, *Who is an Indian?: Duro v. Reina’s Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians*, 1988 BYU. L. REV. 161 (1988).

188. *Duro*, 495 U.S. at 690.

189. See *infra* Part IV for additional discussion of the Court’s ahistoricism.

190. See *United States v. Clarke*, 445 U.S. 253, 259 (1980) (Blackmun, J., dissenting) (“Since the Court’s opinion sets forth none of the facts of the case, it may be well to mention at least a few.”).

191. See *id.* at 254 (majority opinion) (“Both the factual and legal background of the case are complicated, but these complications lose their significance under our interpretation of § 357.”).

192. *Carcieri v. Salazar*, 555 U.S. 379, 388–89 (2009); see Matthew L.M. Fletcher, *Decision’s in. ‘Now’ begins work to fix Carcieri*, INDIAN COUNTRY TODAY, Feb. 25, 2009 (“The court’s cramped reading of ‘now’ is the worst kind of judicial formalism . . .”).

193. Merkel, *supra* note 12, at 1229 (“[T]he most disturbing feature of the *Heller* opinion is that it is militantly a-contextual. Deliberate avoidance of context, in turn, depends on tuning out the preamble which, when crafted, highlighted the context and helped crystallize the meaning to late-eighteenth-century eyes and ears.”).

back to problematic decisions and legislation. Federal Indian law is necessarily bound up in history and historical documents. Tribes successfully used treaties to defend treaty and land rights. The Court cannot cease to cite to historic sources. Unfortunately, the Court's lack of context, particularly when it is citing to federal sources from a time period when the mentality of policy makers was to eliminate tribes, means that these sources neither get the examination they deserve nor reveal the motivation of the drafter.¹⁹⁴

The problems inherent with history used in the *Oliphant* case have been detailed elsewhere,¹⁹⁵ but a few points remain regarding the Court's drafting of historical narrative and its use of vanishing Indian sources. To demonstrate tribes did not historically have jurisdiction over non-Indians, the opinion first quoted an 1834 memo from the Commissioner of Indian Affairs stating that "Indian tribes are without laws."¹⁹⁶ Then the Court cited an 1830 treaty with the Choctaw tribe, or the treaty of Dancing Rabbit Creek.¹⁹⁷ The Dancing Rabbit Creek treaty was a removal treaty, where the tribe agreed to land in the west in exchange for their land in the east. The Choctaw Indians were being "vanished" from east of the Mississippi. This removal treaty, one treaty out of 366,¹⁹⁸ was the one Justice Rehnquist chose to highlight, arguing that it stands for all treaties and tribes, and that it means no Indian tribe ever had a form of criminal jurisdiction over non-Indians.

Still another example of erasure by quoting primary sources that use vanishing Indian terminology includes *Nevada v. United States*,¹⁹⁹ which rested on the creation of the Paiute Tribe's reservation and the water rights between the tribe and later settlers. The opinion used a primary source to describe the first settler's description of Pyramid Lake,²⁰⁰ and then quoted at length from a 1926 Bureau of Indian Affairs letter that uses vanishing Indian language:

[I]f their ultimate welfare depends in part on their being able to hold their own in a civilized world . . . they should look forward to a different means of livelihood, in part at least, from their ancestral one, of fishing and hunting.

194. Tweedy, *supra* note 169, at 16–21.

195. See generally Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616–17 (1979).

196. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (which reminds the author of the ABA's similar concern in 1891, *supra* note 101).

197. *Oliphant*, 435 U.S. at 197 (citing A Treaty of Perpetual Friendship, Cession, & Limits, 7 Stat. 333 (Sept. 27, 1830)).

198. Barsh & Henderson, *supra* note 195, at 617.

199. 463 U.S. 110, 113 (1983).

200. *Id.* at 114–15.

They should expect not only to farm their allotments but also to do other sorts of work and have other ways of making a living.²⁰¹

The letter, introduced in the Joint Appendix used in the case, continues: “This means, of course, that they should also look forward to the day when they will have individual property and to conditions under which it will be impossible for them to maintain their reservation intact and as an isolated domain on which to fish and hunt, graze cattle, and conduct only a few small farms.”²⁰² Using this type of evidence, the Court held that the settlers had better claim to the water rights than the tribe, perhaps an obvious conclusion of the primary source documents used to privilege settlers over Indians.

Justice Rehnquist’s dissent in *Antoine v. Washington*²⁰³ used a 1906 Court of Claims case to present the history of the Confederated Colville Tribe’s Reservation. His statement that the case had “added authenticity that is given by contemporaneity” is an apt illustration of how tribal interests are injured by contemporaneous sources from when the vanishing Indian frame of thought informed policy decisions.²⁰⁴ There is a distinction between sources from the time of treaty-making, particularly in the early years (when the philosophy was less about eliminating tribes and more about ensuring the survival of the country) and sources from the time when allotment, assimilation, and elimination structured policy decisions relating to Indian tribes.

Finally, close readings of opinions where the writing itself reflects back on and resonates with earlier narratives reveals the same vanishing Indian mode of thought. Justice Ginsberg’s opinion in *City of Sherrill v. Oneida Indian Nation*²⁰⁵ does this in a couple of ways. For example, the Court used the word “ancient” eight times in discussing the tax case.²⁰⁶ This reinforces the

201. *Id.* at 137 (alterations in original).

202. Joint Appendix at *210, *Nevada v. United States*, 1981 U.S. Briefs 2245 (Dec. 16, 1982).

203. 420 U.S. 194, 213 (1975) (Rehnquist, J., dissenting).

204. *Id.* at 218; *see also* Tweedy, *supra* note 169 at 11–12.

205. 544 U.S. 197 (2005).

206. *Id.* at 202 (“on the ground that OIN’s acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas’ ancient sovereignty piecemeal over each parcel”) (“Our 1985 decision recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit.”); *id.* at 202–03 (“we hold that the Tribe cannot unilaterally revive its ancient sovereignty”); *id.* at 213 (“because the Court in *Oneida II* recognized the Oneidas’ aboriginal title to their ancient reservation land”); *id.* at 215 (“Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill.”); *id.* at 217 n.11 (“does not overcome the Oneidas’ failure to reclaim ancient prerogatives earlier”) (“OIN’s claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality.”); *id.* at 221 (“In sum, the question of damages for the Tribe’s ancient dispossession is not at issue in this case”). Ancient is a word used particularly in

understanding of tribes as far removed from today's jurisprudence and recalls back to *Johnson v. M'Intosh*, when the Court referred to Indians in 1823 as "ancient inhabitants."²⁰⁷ In addition, at least one quote from *City of Sherrill v. Oneida Indian Nation* used vanishing Indian language, where the Court referred to the former "wilderness" of the land where the city of Sherrill now sits.²⁰⁸ Wilderness necessarily implies emptiness, and a lack of population.²⁰⁹

Finally, one of the most infamous quotes of the case, where the Court wrote that the Oneida Indian Nation cannot "rekindl[e] the embers of sovereignty that long ago grew cold," recalls imagery of conflagration and fire. In James Fenimore Cooper's famous novel and vanishing Indian archetype, *The Pioneers*,²¹⁰ the "last of the Mohicans," Chingachgook, dies a fiery death on traditional tribal land in upstate New York to make room for the white settlers.²¹¹ The Court's imagery of dying embers, also on land in upstate New York, reminds the reader that once removed, vanished, and burned away, there is no room for tribes to operate as sovereigns.²¹²

The Court also rarely fails to reference tribes' "incorporation into the American republic"²¹³ as an explanation for tribes' diminished sovereignty. In 2008, the Court used the phrasing twice in the same case, stating first that by

Oneida cases, though the issues at hand in these cases are no more ancient than the Declaration of Independence or the Constitution.

207. 21 U.S. 543, 591 (1823).

208. 544 U.S. at 215.

209. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1524 (1991) ("a wild, uncultivated, uninhabited region, as of forest or desert").

210. COOPER, *supra* note 75, at 246.

211. *Id.* at 248

212. *City of Sherrill* was expanded by the Second Circuit in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005) to apply to all cases where the Indian land claim would disrupt established societal expectations. As Alexander Tallchief Skibine points out, "established societal expectations" are the expectations that Indian tribes would disappear, or already have disappeared. Alexander Tallchief Skibine, Lecture at Michigan State University College of Law's 7th Annual Indigenous Law Conference: Persuasion and Ideology (October 8, 2010).

213. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) ("[W]e noted that 'through their original incorporation into the United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty.'"); *Montana v. United States*, 450 U.S. 544, 563 (1981) ("But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty."); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) ("Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.").

incorporation the tribes lost the right of governing non-Indians,²¹⁴ and that “[b]y virtue of their incorporation into the United States, the tribe’s sovereign interests are now confined to managing tribal land”²¹⁵ As others have pointed out, there is no constitutional basis for this incorporation.²¹⁶ However, not only is it representative of problematic precedent, the language itself of “incorporation into . . . the republic” is assimilationist language, anticipating the necessary disappearance that happens after incorporation.²¹⁷

Not only did the Court cite to vanishing Indian treaties and sources, it cited to cases using vanishing Indian terms, thus bringing forward vanishing Indian narrative histories. Of course, the Court cited to racist federal Indian law cases repeatedly,²¹⁸ but ones with specific vanishing Indian language accomplish a slightly different kind of narrative work. In his dissent in *Washington v. Colville Tribe*,²¹⁹ Justice Rehnquist cited to a case discussed supra, *The Kansas Indians* case.²²⁰ In *Kansas Indians*, the Court and attorneys’ understanding of the tribes was based on their eventual disappearance, not unusual at the time. However, using it as precedent in a case in 1980 brings forward ideas abandoned long ago.

Finally, the Supreme Court’s writing based on stereotypes goes beyond the Indian law cases. So while the Court writes tribes out of cases directly involving them, the Court writes them into cases for stereotypical examples. The myth of the American West makes its way into a surprising number of cases. This “general history” used by the Court is usually the most egregious, based on the Justice’s understanding of history rather than history with sources, or sourced history. If “[e]very . . . schoolboy knows” the history, there is no reason for sources.²²¹

This writing is not limited by ideological divide. The *Heller* dissent, written by Justice Breyer, reinforces the idea of the receding frontier and savage Indians as late as 2008:

214. *Plains Commerce Bank*, 554 U.S. at 328 (quoting *Oliphant*, 435 U.S. at 209).

215. *Id.* at 334.

216. POMMERSHEIM, supra note 42, at 141; see Matthew L.M. Fletcher, *Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 982 (2010) (“Indian nations did not (and perhaps cannot, absent an express mechanism) ratify the American Constitution as their own, but they have a very real place in the American constitutional polity as partially independent sovereigns subject to laws of their own making and enforcement.”).

217. President Jefferson to William Henry Harrison, February 27, 1803, reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 22, 23 (Francis Paul Prucha ed., 3d ed. 2000); see also Greene, supra note 2, at 77 (“It was the very commitment to equality as against appreciation of difference that Justice Scalia cited in *Employment Division v. Smith*, which rejected the claim of a Native American to constitutional protection of his peyote use.”).

218. See generally WILLIAMS, supra note 60, at 89–160.

219. 447 U.S. 134, 178 (1980) (Rehnquist, J., dissenting).

220. 72 U.S. 737 (1867).

221. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289 (1955).

Further, any self-defense interest at the time of the framing could not have focused exclusively upon urban-crime related dangers. Two hundred years ago, most Americans, many living on the frontier, *would likely have thought of self-defense primarily in terms of outbreaks of fighting with Indian tribes*, rebellions such as Shays' Rebellion, marauders, and crime-related dangers to travelers on the roads, on footpaths, or along waterways.²²²

An excellent example of this general, public history is Justice Rehnquist's opinion in *Leo Sheep Company*,²²³ a case relating to the Quiet Title Act, railroads, and land patents. Justice Rehnquist wrote a history of the "west" from the Louisiana Purchase through 1865 without a single mention of tribes, tribal peoples, or treaties.²²⁴ Land granted to the Union Pacific Railroad by the United States has been under suit in other cases involving Indian tribes²²⁵ but in this case, there is no indication of any tribes anywhere near the land in question.

While this case is not specifically about tribes, Justice Rehnquist chose to write a much broader history than necessary for the case, which he implicitly conceded when writing the following:

[T]his is one of those rare cases evoking episodes in this country's history that, if not forgotten, are remembered as dry facts and not as adventure. Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across land that was originally granted to the Union Pacific Railroad under the Union Pacific Act of 1862—a grant that was part of a governmental scheme to subsidize the construction of the transcontinental railroad. But that issue is posed against the backdrop of a fascinating chapter in our history In this spirit we relate the events underlying passage of the Union Pacific Act of 1862.²²⁶

He refers to the area of the "American West" as the "Great American Desert" to indicate a complete lack of people from the Mississippi River to the coast of California. He writes, "As late as 1860, for example, the entire population of the State of Nebraska was less than 30,000 persons, which represented one person for every five square miles of land area within the State."²²⁷ He doesn't need to use the words "vanishing Indian" or even

222. *District of Columbia v. Heller*, 554 U.S. 570, 715 (2008) (Breyer, J., dissenting) (emphasis added).

223. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

224. *Id.* at 670–77.

225. *United States v. Union Pac. Ry. Co.*, 168 U.S. 505 (1897); *Kindred v. Union Pac. R.R. Co.*, 225 U.S. 582 (1912); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941); *see also* WILKINS *supra* note 132, at 52 ("In the report issued by the Senate's Committee on the Pacific Railroad, Senator William Stewart (R., Nevada) wrote that tribes 'can only be permanently conquered by railroads. The locomotive is the sole solution of the Indian question'").

226. *Leo Sheep Co.*, 440 U.S. at 669.

227. *Id.* at 670.

“Indian” to reinforce the myth. Indigenous peoples’ complete absence from Justice Rehnquist’s history of the West is enough.

Recently *Leo Sheep* came up in a post on a popular blog about the Supreme Court, SCOTUSblog. In a 2009 post by Lyle Denniston about the addition of a bust of Chief Justice Rehnquist to the Supreme Court, Denniston points out this case in the first line of his post, using it to illustrate “Bill Rehnquist, the historian, at his very best.” The case is “not one of the Supreme Court’s great decisions . . . but in that brief space, then-Associate Justice William H. Rehnquist brought vividly to life the history of the Old West.”²²⁸ In this way, a history absent of Indians continues to enter the cultural dialogue of our country today, even from a minor case written in 1979 about a land grant from 1862. And in our system of stare decisis, cases like *Leo Sheep* continue to live on in other ways as well. As recently as 2008, the Montana Supreme Court discussed the holding of *Leo Sheep* at length.²²⁹ Supreme Court cases and the histories contained in them continue to educate long after their drafting.

IV. THE VANISHING INDIAN, “POST-RACIAL” JURISPRUDENCE, AND POPULAR HISTORY

The resurgence of the idea of the vanishing Indian in the Court ties into many different cultural touchstones. Specifically, the obsession with the Founders²³⁰ in Constitutional interpretation and the understanding of “post-racial” America come together in a disturbing mix for tribes and tribal sovereignty.

“Post-racial” jurisprudence is the argument that our judicial system reflects a post-racial society evidenced by the election of President Obama.²³¹ There is, necessarily, an attendant “post-racial” jurisprudence critique pointing out the inherent problems with this assumption.²³² Federal Indian law and “post-

228. Lyle Denniston, *WHR Enters Court’s Pantheon*, SCOTUSBLOG (Dec. 10, 2009, 4:32 PM), <http://www.scotusblog.com/2009/12/whr-enters-courts-pantheon/>.

229. *See* *Our Lady of the Rockies, Inc. v. Peterson*, 181 P.3d 631, 642 (Mont. 2008).

230. Jared A. Goldstein, *The Tea Party’s Constitution*, 88 DENV. U. L. REV. 559, 565 (2011) (explaining that, in a book identified as influential to the Tea Party understanding of the Constitution, the Founders are both those who led the revolution in 1776 and drafted the Constitution in 1789).

231. Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1605 (2009).

232. *See id.* at 1620–21; Helen Norton, *The Supreme Court’s Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 258 (2010); John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. 785, 805–06 (2009); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1359 (2011); Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 26 (Fall 2009); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 74, 85–86 (2010); Zietlow, *supra* note 2, at n.91.

racial” jurisprudence critique are not a neat fit, not the least of which because the organizing framework of federal Indian law is the sovereign-to-sovereign relationship between the tribes and the federal government. This means the benefits flowing to tribal members is a product of the government-to-government relationship between tribes and the federal government, not as part of laws developed to prevent discrimination based on race. There is, however, room to use “post-racial” critique scholarship to discuss how the Court treats groups it perceives as being treated “differently” than dominant culture, even if that treatment arises out of different histories. If “post-racial” jurisprudence ignores race or seeks to “stop discrimination on the basis of race [by] stop[ping] discrimina[tion] on the basis of race,”²³³ the Court’s vanishing of tribes is another way to look at a colorblind, or tribal-blind, jurisprudence.²³⁴

As discussed at length *supra*, the Founders, specifically Madison and Monroe, and later writings by Jefferson, contemplated the end of tribes as tribal people, first by inevitable death through wars and disease, and with the few remaining incorporating into society. Certainly the continued existence of tribes as government entities beyond the Jackson era was not anticipated. When using the views of the Founders as the basis for Constitutional interpretation regarding Indian tribes, it is hardly surprising that tribes and tribal sovereignty is constantly under attack in the Supreme Court.²³⁵ This puts the Court at least fifty years behind the other two branches of government. Since 1970, both Congress and the Executive Branch have endorsed a policy of self-determination and have passed laws to that effect.²³⁶ The current era of “judicial termination,” where the Court uses its role to reduce tribes as governing entities, runs opposite to current congressional and executive policy.²³⁷

This understanding of the Founders as the arbiters of history has extended beyond the Court²³⁸ and into popular culture. Popular conservative historians, embodied by the Tea Party understanding of the Constitution, adhere to one

233. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007).

234. *See Adarand Constr. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“In the eyes of government, we are just one race here. It is American.”); *South Dakota v. Bourland*, 508 U.S. 679, 693–94 (1993) (“When Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation of rights suggests that the Indians would otherwise be treated like the public at large.”). These statements tend to support Reva Siegel’s argument that the court has an anti-balkanization perspective, at least with regards to equal protection cases. For tribes, an anti-balkanization perspective would be especially damaging, and supports the notion of tribes being “incorporated” into the “American fabric.” Siegel, *supra* note 232, at 1282.

235. *See* Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517, 521–22 (2011).

236. *See* H.R. DOC. NO. 91-363, in GETCHES ET AL., *supra* note 100, at 226–28.

237. *Cf. Lain*, *supra* note 125, at 8–9.

238. Wilson, *supra* note 32, at 66 (noting that the use of The Federalist papers in Court opinions jumps dramatically in the 1960s and remains high through the mid-1980s).

particular history with no interest in moving forward.²³⁹ To romanticize the past so completely leaves out not only women and minority groups; it relegates Indian tribes even more to the past than they already are. If tribes at the time of the Founders were expected to vanish, their continued existence today is an anomaly. Under the current conservative popular understanding of constitutional history, Indian tribes cannot be modern. The romanticism of the Founders, and the way things were at the Founding, are the way things are supposed to be today.²⁴⁰ Of course, if society cannot be modern, then Indian tribes *certainly* are not modern. An adoption of values, mores, and law of the late 1700s and early 1800s is an adoption of the vanishing Indian stereotype. In inscribing current “post-racial” jurisprudence on the past, the Court values an imagined past while ignoring the role of color and race while there.²⁴¹

The popular narrative driving conservative political culture and the judges it produces is particularly unhelpful for Indian tribes. Now not only is the Court echoing its understanding of “post-racial” culture,²⁴² the Court is also echoing an understanding of history which celebrates and glorifies the Founders, and the time surrounding the writing of the Constitution. Indeed, the ahistorical methods of *Heller* and other decisions, and the conservative Tea Party movement’s embraces of rhetoric, are not limited to the time of the Founding but extend through the 1800s, which further reinforces the importance of a era highlighted by the vanishing Indian motif and the actual Indian removals. Not only does a certain segment of the populace today want

239. See Goldstein, *supra* note 230, at 573 (“Like religious fundamentalists, Skousen and the Tea Party movement reach back to a mythic past, the time of the founding of the nation and the adoption of the Constitution, as the source of the fundamentalist principles they preach”); Randall Stephens, *The Past is No Foreign Country*, HISTORY NEWS NETWORK, (June 28, 2010), <http://www.hnn.us/articles/128365.html> (“[Glenn] Beck, like many conservatives, Christian or not, is incapable of coming to terms with the notion of change over time. What was true for bewigged, knee-breeches-wearing, slave-owning nabobs in eighteenth century Virginia must be just as true for a minivan-driving NASCAR dad in 2010. (Still, few of those NASCAR dads would adopt some of Ben Franklin’s woolly polytheistic notions.) Did America’s public schools once allow Protestant-styled prayers in the classroom? Then they should do so still. Were women once the caretakers of hearth and home? Then maybe they should still be.”); THE WHITES OF THEIR EYES, *supra* note 1, at 124–25.

240. Goldstein, *supra* note 230, at 575 (“In Skousen’s and the Tea Party’s view, the Constitution itself establishes the fundamental values—the Founders’ principles—which are eternal and to which the nation must adhere if it is to survive. The Tea Party’s Constitution does not merely provide a framework for resolving differing political views; the Constitution itself resolves those differences.”).

241. See Greene, *supra* note 235, at 521 (“So understood, the divide between originalists and living constitutionalists is between those who believe we are at our best when we are who we have been and those who believe we are at our best when we are who we might become.”).

242. Cho, *supra* note 231, at 1600–04 (defining post-racial ideology with four features: Racial Progress, Race-Neutral Universalism, Moral Equivalence, and Distancing Move).

to remain in an ideological past, that ideological past puts Indian tribes into a past where they do not exist.

The vanishing Indian required the end of tribes through acceptance of “civilization” and “incorporation” into the American republic. This attitude is what persists at the Court today, and in this way, the vanishing Indian theme is in fact a significant part of “post-racial” jurisprudence. The adoption of majority culture standards and the incorporation of tribal entities into the mainstream echoes similar concerns of other “post-racial” skeptics.²⁴³ This incorporation into the mainstream, colorblind world is the same strand of “civilization” from the old vanishing Indian framework.

Ironically, “post-racial” jurisprudence also looks to the immediate future, where young people grow up supposedly unaware of race.²⁴⁴ According to this analysis, tribes become anachronisms as they appeared to majority society in the past. As sovereigns, but not entirely recognized as sovereign by the Court, tribes appear to some jurists as relics of a race-based past when citizens ought to be looking forward to a colorblind future. The requirement of post-racial, so-called “universal” programs, designed to help people not on the basis of race, can be read as counter to all of federal Indian law. If the Court views tribes as little more than social clubs, then programs targeted to tribes are perceived as racial and disfavored in the “post-racial” Court.

When it comes to Indian tribes, the Court is no longer expressly stating the extinction of tribes is preferred, but the undercurrent of assimilation and disappearance still holds. Justice Rehnquist’s *Leo Sheep* history does this cultural work for the Court. Tribes may hold the place of an ethnic or social organizing framework, but tribes as sovereign nations with a separate law framework vis a vis the federal government appears untenable for the Court. For example, Justice Thomas’s concurrence in *United States v. Lara*²⁴⁵ illustrates part of this problem. From his perspective, he can argue tribes lost all utility in 1871 with the end of treaty-making.²⁴⁶ Justice Thomas cannot find basis in the Constitution for Congress’s plenary power over Indian tribes.²⁴⁷ This plain finding would probably have support from many Indian law scholars. The problem arises from where Justice Thomas would take the idea. Instead of arguing for resumption of strong exercise of tribal sovereignty, it appears Justice Thomas would be happier for tribes to be subsumed into the United States, to assimilate and to be incorporated. As he writes, “[T]he States

243. powell, *supra* note 232, at 791 (“Other conservatives argue that we must convince racially marginalized groups to adopt the proper cultural values[.]”).

244. *Id.* at 789.

245. *United States v. Lara*, 541 U.S. 193 (2004).

246. *Id.* at 225 (Thomas, J., concurring).

247. *Id.* at 215 (“I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the ‘metes and bounds of tribal sovereignty.’”).

(unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments The tribes, by contrast, are not part of this constitutional order, and their sovereignty is not guaranteed by it.”²⁴⁸ Tribes, not considered long for this world by the drafters of the Constitution, also cannot exist today, at least to those with a certain originalist understanding. Justice Thomas’s concurrence in *Lara* provides a chilling look into his understanding of tribes as non-sovereign groups specially treated in the law for no particular reason. His focus on the 1871 statute ending treaty-making makes the link that the end of treaty-making meant the end of tribal sovereignty.

Though it does not always fit neatly into the same rubric, the Supreme Court’s jurisprudence in federal Indian law has some things in common with “post-racial” jurisprudence. The Court removes context from the history it presents. The Court treats the cases as fundamentally ahistorical, stubbornly keeping context at bay,²⁴⁹ ignoring the implications of using historical stereotypes to come to decisions without context. This is a paradox in both “post-racial” jurisprudence and in federal Indian law—history is both extremely important and at the same time atemporal and unanchored. Chief Justice Rehnquist’s concern with the plain meaning of the text without any context is an example of this strange ahistoricism. In his dissent from *Minnesota v. Mille Lacs*,²⁵⁰ he complained about “scattered historical evidence,” that President Taylor’s reservation establishment order was a removal order was not as important as the text of the order.²⁵¹ Considering the context of the removal policy would be “second-guess[ing] a century and a half later.”²⁵² When a tribe tries to make that argument outright—that subsequent Congressional policies and laws negate laws from an earlier policy period²⁵³—the Court still does not agree.²⁵⁴ As the Court wrote, “If the Yakima

248. *Id.* at 218–19.

249. *See, e.g.,* *Carcieri v. Salazar*, 555 U.S. 379, 380 (2009) (insisting “now” means only the year when the statute under consideration was passed—1934); Norton, *supra* note 49, at 218–19 (pointing out Justice Kennedy’s “brief and acontextual recitation of the disparate impact standard in the majority opinion . . .” and contrasting that with Justice Ginsberg’s more historical dissent in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009)).

250. 526 U.S. 172 (1999).

251. *Id.* at 212 (Rehnquist, C.J., dissenting) (the text did include the phrase “remove to their unceded lands”).

252. *Id.* at 214.

253. *See* GETCHES ET AL., *supra* note 100, at 74–242 (identifying the policy periods in federal Indian law); Matthew L.M. Fletcher & Kristen A. Carpenter, *In Memoriam: David Getches: A Tribute to a Leader and a Scholar*, 59 FED. LAW. 42, 43, 49 (2012).

254. *Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 259–60 (1992). The Yakima Nation and United States argued the General Allotment Act and the Burke Act were “a dead letter, at least within the confines of an Indian reservation.” *Id.*

Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.”²⁵⁵

Another angle of post-racial jurisprudence, identified as the whitening of discrimination,²⁵⁶ is also relevant in land claims cases—specifically the “reframing [of] antidiscrimination law’s presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim.”²⁵⁷ In fact, this is the one way to frame all of Indian law, where the burden of tribes on non-Indians is the preferred claim, and the burden of non-Indians on tribes is not.²⁵⁸ For example, a case discussed at length, the *Sherrill* case, looked at the “history” of the tribe’s sovereignty for the past two hundred years, ignored all context, and put all the burden of the on the tribe. Like the *Parents Involved* case, there was no explanation for the tribes “inaction” in bringing in a land claim case. Detailed elsewhere, the tribe’s inability to bring a land claims case was based on the actions of the federal and state government preventing the tribe from coming to court, and preventing the tribe from hiring objective counsel.²⁵⁹

This ahistoricism within federal Indian law cases is deadly, locking tribes into a forgotten past and preventing them from existing in current caselaw. Eliminating tribes from the federal legal landscape leaves tribal citizens as one minority group among many, and subject to a jurisprudence obsessed with a time when they only existed to become civilized.

CONCLUSION

To quote an award-winning historian, the point of this Article is

not just a banal moral point that stereotypes are bad. It is a judgment about the effect that the reliance on stereotypes has on the finished product of historians. Stereotypes are a problem for the writing of history because they allow for the use of shortcuts. Whenever shortcuts are taken, essential and important parts of the story can be missed, and historians may end up not considering all possible paths to whatever can be called the truth.²⁶⁰

This warning to historians applies in its way to the Court. Using stereotypical shortcuts to write history obscures possible other truths, and quite simply, limits the legal rights of tribes and tribal peoples.

255. *Id.* at 265.

256. Harris & West-Faulcon, *supra* note 232, at 102.

257. *Id.* at 81.

258. Fletcher, *supra* 160, at 943–46 (showing the increase since 1986 in claims and petitions from the states and counties prevailing, while claims and petitions from tribes have not).

259. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, & Sacred Obligations*, 38 CONN. L. REV. 605, 617 (2006).

260. GORDON-REED, *supra* note 53, at 10–11.

The cultural work the Court continues to do to tribes is to remove them from popular majority understanding and to make them a relic of the past. That this work dovetails so nicely with the current conservative understanding simply makes it easier for this work to achieve a form of legitimacy.

Tribes, needless to say, have not vanished. This is a time of tribal resurgence. Tribal communities, governments, and justice systems continue their work started long before the Supreme Court attempted to exercise jurisdiction over them, and it will continue long after the last Supreme Court Indian law decision. Relying on stereotypical histories to describe tribes and their people is lazy, and it obscures this truth.

The Supreme Court continues to try to enforce a history of assimilation even as they are creating it. By focusing on the continued limitation of tribal sovereignty, they ignore what is actually going on with the resurgence and renaissance of tribes and tribal justice systems. The Court is stuck in a past it cannot leave behind. The Court's decisions are becoming more and more anachronistic as the opinions fail to fit the reality on the ground. What will happen is not clear, but perhaps these attempts will lead tribes to increase their already strong resistance to the Court's attempts at jurisdiction.²⁶¹

261. See Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L., 45, 121 (2012); Matthew L.M. Fletcher, *supra* note 216, at 973.