The Native American Experience in the Wilderness of American Law. Who Exactly Are the Savages Here?

by Thomas C. Glover

Prepared for the Athenaeum Society
and presented on November 3, 2022, in Hopkinsville, Kentucky

Perspective is critical to the evaluation of any situation. Take, for instance, the map of the world. It is oriented so that Europe, North America, and Japan are at the top, dominating the rest of the world. In reality, an alien space traveler would not perceive the earth in this way, as there is no top or bottom in space. Maps express a perceived cultural reality as much as they represent facts on the ground. Historians, likewise, recognize that history is written by the victors. They realize that built into any nation's history are foundational myths that provide the underpinnings for a national self-perception. These myths form a core of beliefs within a culture and are perceived as sacred. They are challenged rarely and often at great peril to the challenger. For example, the myths surrounding the American Civil War such as the Lost Cause, states' rights versus slavery, and the origins of Confederate monuments will often trigger heated arguments if they are challenged.

No less volatile are the myths that surround the Native American and white culture. Take, for instance, the controversy that arose at the 45th Academy Awards in 1973, when Sacheen Littlefeather represented Marlon Brando. She declined his best actor award for *The Godfather* because of Hollywood's depiction of Native Americans and the siege of Wounded Knee, which was ongoing at the time. Legend has it that John Wayne had to be restrained backstage by six security guards to prevent him from forcibly removing her form the stage. Littlefeather was perceived to be attacking the Hollywood myth, carefully constructed over 60 years, of Native Americans who were savages that could only be saved through equal doses of Christianity and white culture.

This paper will explore the treatments of the Native Americans of North America under English and American law for the 400-year period from 1607 until the last U.S. Supreme Court term ending on June 30, 2022. The law seems to be a fruitful and more objective area of analysis, since rather than dealing with myths and interpretation of events, the positive law is written down in constitutions, statues, regulations, and case law. The naked truth of intent is much more apparent in a carefully drawn statue than in seeking truth from a series of conflicting events. The law is much more likely to reveal in stark terms in whose heart lies the savage beast.

I. English Law, 1607-1788

With the founding of the English settlement at Jamestown, Virginia in 1607, the Native Americans first encountered English law. The English, like other European nations operating in the Americas, relied upon the Doctrine of Discovery issued by the Vatican in the late 15th century. The doctrine treated these lands as open for occupation by European powers without regard to the Indian inhabitants. The English adopted this doctrine from the Spanish and Portuguese, when they began to colonize North America. The land was then taken by the English through two methods. First, the English would attempt to purchase the land through an exchange and, if this failed, conquest was the last resort.

English law imposed a written legal title system upon Indian land. The common law viewed Indian land claims as invalid, since the Indians did not make "proper use" of the land, which meant they did not farm the land by English standards. The extinguishment of Indian claims was usually accomplished by a treaty between the English and a tribe. One particular legal ruse was for a tribe to transfer the land of a competing tribe to the English by treaty. Also, the English often considered that a tribe, by signing a treaty of friendship, had implicitly surrendered the right to their land to the English. Warfare was often the final action taken to solidify English title to the land, as in the early 17th century. Wars against the Powhatan Confederacy in Virginia and the Pequots in New England. This use of the treaty process to secure title to Indian land would be adopted by the United States after independence.

With the end of the French and Indian War in 1763, the Indians began to realize that the American settlers were a greater threat than the British government. In 1763, the British imposed the Proclamation Line on the colonists, forbidding colonial settlements west of the Appalachian Mountains. The colonists ignored it and began settling in the west. Conflict between the colonists and Indians was inevitable. By the American Revolution, most tribes sided with the British. This is reflected in the Declaration of Independence, which makes reference to the attempts by the British to use Native American tribes to attack western colonial settlements. George III is accused of endeavoring "to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions." With the defeat of the British in the American Revolution, the new American government inherited the British legal traditions that were applied to the Native Americans.

II. American Land Seizures, 1789-1871

With the end of the Revolutionary War in 1783, and the adoption of the U.S. Constitution in 1789, the United States government took charge of relations with the Native Americans in the United States. The power to regulate the various tribes was located in Article I, Section 8, known as the Commerce Clause. It includes regulation of commerce "with the Indian Tribes." This is the source of Congressional power to pass laws regarding Native Americans. In 1790, pursuant to this Indian commerce clause, the first major federal statute regarding Native Americans was passed. The Trade and Intercourse Act of 1790 regulated and licensed trade with tribes, and allowed prosecution of non-Indians in federal court for crimes against Native Americans.

The issue of the Native Americans east of the Mississippi River came to a head during the administration of President Andrew Jackson. There was pressure by white southerners to settle the lands that now comprise Alabama, Mississippi, and parts of Tennessee for the expansion of cotton cultivation. Congress passed the Indian Removal Act of 1830, which provided for the resettlement of the five Civilized Tribes and other tribal remnants to Oklahoma. The Cherokee in Georgia, who had adopted white culture completely, turned to the federal courts to resist this removal.

In 1829, near Dahlonega, Georgia, gold was discovered on Cherokee land. This led to the first U.S. gold rush and further pressure to remove the Cherokee. In 1831, the Cherokee sued Georgia in the U.S. Supreme Court using original jurisdiction to prohibit Georgia from interfering with the Cherokee government. Chief Justice John Marshall dismissed the case on the grounds that the Court lacked original jurisdiction, but he indicated in the opinion that the Cherokee were legally correct. Marshall likely chose this approach in order to avoid a direct confrontation with President Jackson, who would almost certainly have ignored the Court.

To pull off this legal sleight of hand, Marshall found that tribes are not independent sovereign nations as the Cherokee claimed, but rather were domestic dependent nations. This allowed Marshall to extricate himself from the potential confrontation with Jackson, but it created a status for Indians that we are still struggling with today.

In 1832, the Cherokee sued Georgia in federal court to prohibit Georgia from regulating tribal lands. The case made it to the U.S. Supreme Court and in *Worcester v. Georgia* (1832), Chief Justice Marshall found that Georgia had no jurisdiction over tribal lands or its government. This became the law in the United States for 190 years, until June 29, 2022. The Court also found that Indian land was owned by the tribe, but administered by the federal government as a trust for the benefit of the tribe.

Unfortunately, President Jackson ignored these rulings and by 1840 the Indians east of the Mississippi had been relocated to the west. The U.S. government would then spend the next 50

years concentrating on the seizure of Indian land in the trans-Mississippi West. By 1871, the treaty system created by the British had accomplished its purpose and Congress by statute ended the treaty system with Native Americans going forward. From 1871 onward, the emphasis was on the creation of a federal reservation system, confinement of Native Americans on the reservations, and a forced assimilation into white culture.

III. Pacification and Assimilation, 1872-1932

With the end of the treaty system in 1871, U.S. Supreme Court opinions of the 1880s gave Congress plenary power over Indian policy. All of the tribes west of the Mississippi River were now assigned a reservation and the wars from 1872 until the Wounded Knee Massacre in 1890 were prosecuted to keep the various tribes on their respective reservation. With the vast majority of Indian lands now safely in white hands, Congress now turned its attention to elimination of Native American culture otherwise known as assimilation, reducing Indian sovereignty and attempting to further reduce the size of reservations.

In *Ex parte Crow Dog* (1883), the Supreme Court ruled that the U.S. district attorney in the Dakota Territory could not prosecute Indian-on-Indian violence in federal court. Congress then passed the Major Crimes Act of 1885, which gave federal courts jurisdiction to prosecute 7 major felonies between Native Americans. This was the first blow to Indian sovereignty over crimes on the reservation and eroded traditional Indian legal remedies.

Congress next passed the General Allotment Act of 1887 (Dawes Severalty Act), which gave legal title to 160 acres of reservation land to each head of household and individual adult on the reservation. This broke up the many reservations with the bulk of the prime land sold to speculators. The policy was designed to eliminate communal land ownership and force Indians to become farmers. This policy was upheld in *Lone Wolf v. Hitchcock* (1903), and the Supreme Court recognized total congressional power over reservations even if Congress violated pre-1872 treaties with any Indian nation.

In 1921, the U.S. Indian Service, a federal regulatory body, issued federal regulations that severely restricted tribal life. Indians were not allowed to leave their reservation, Indian dance was prohibited, and Indian children were placed - often by force - in Indian boarding schools. The children could not speak their language, practice Indian religions, or wear traditional clothing, and they had their hair cut short. To complete this assimilation in 1924, Congress passed the Indian Citizenship Act, which gave American citizenship to all Native Americans not already U.S. citizens through military service or by paying taxes.

IV. Indian New Deal, 1933-1940

With the election of Franklin Roosevelt in 1932 and the onset of the New Deal in response to the Great Depression, President Roosevelt began making changes to Indian law. The Indian Reorganization Act of 1934 reversed a number of previous policies. The allotment system created by the Dawes Act was abolished. Surplus Indian lands were restored to tribal control on the reservation. New tribal governments were created and forced assimilation of children through boarding schools was halted. But by 1941, with the U.S. entering World War II, the Indian New Deal ended.

V. Termination, 1941-1967

In 1946, Congress created the Indian Claims Commission to hear tribal claims for the illegal taking of tribal land by the government. Designed to last until 1956, the ICC continued until 1978 due to the overwhelming number of claims filed. It wasn't long before the ICC took an ominous turn for Native Americans. The U.S. House passed the House Concurrent Resolution 108 of 1953, which created a government policy of termination of Indian tribes. The ICC was to provide compensation for tribal land seizures, then abolish the tribe, end the reservation, and end all federal services for Indians. Congress next passed Public Law 280, which allowed selected states to take over jurisdiction of civil and criminal cases on reservations. This created a jurisdictional mess that has yet to be worked out. Finally, Congress created a relocation program, which required young Native Americans to relocate from their reservation to urban areas to receive housing and job training. Unfortunately these young Indians were placed in urban ghettos and their only job training was for manual labor. These three programs devastated many tribes and left native culture in a shambles.

VI. Self-Determination, 1968-2022

With the advent of the Civil Rights Movement of the 1960s, it became clear that the last 20 years of government policy had resulted in tremendous injustices to Native Americans. Congress responded with the Civil Rights Act of 1968, which included an Indian Civil Rights Act. This act applied most of the rights contained in the Bill of Rights to tribal lands, which had been exempt from them until then. However, in *Santa Clara Pueblo v. Martinez* (1978), the Supreme Court found that federal courts could not add rights by judicial opinion to the Indian Bill of Rights. Only Congress, with its plenary power, could interfere with tribal governments by adding rights for Native Americans on the reservation. In 1978, Congress passed the Indian Religious Freedom Act, which allowed the use of eagle feathers in religious ceremonies and gave Indians access to sacred religious sites on former tribal lands. But in *Employment Division, Oregon Department of Natural Resources v. Smith* (1990), the Court held that Oregon could both prosecute and deny unemployment benefits to an Indian member of the Native American Church for using peyote in a religious ceremony. This case seems to bear a striking resemblance to recent cases in which the Court has found religious exceptions for Christians involving vaccinations and providing wedding services to gay couples. But the Court has not found a religious exception for Native Americans using peyote.

In 1988, two small tribes near Palm Springs, California, opened a bingo parlor and a card club. California authorities sought to shut it down, leading to *Cabazon Band of Mission Indians v. California* (1988), in which the Court found that since California did not ban and criminalize all forms of gambling, then they could not interfere with the Cabazons' gambling operations. This led to the Indian Gaming Regulatory Act of 1988, which provided for federal regulation of Indian gaming operations through the National Indian Gaming Commission. In 2022, the Supreme Court in *Ysleta del Sur Pueblo v. Texas* (2022) reaffirmed *Cabazon* by preventing Texas from shutting down electronic bingo on a reservation, since Texas law allows charity bingo. As of 2021, tribal casino revenue had reached $39 billion.

In 2022, the Supreme Court issued a bombshell opinion, which has rocked Indian Country to its very core. The controversy began in 2020 with *McGirt v. Oklahoma* (2020). McGirt, a Seminole, had been convicted in Oklahoma state court for sexual abuse on the reservation of his step-granddaughter, also a Seminole. The Court found that Oklahoma lacked jurisdiction, reversed the conviction, and any prosecution must be held in federal court. Neil Gorsuch wrote the majority opinion in which he was joined by the four liberal justices. This case presented the specter that Oklahoma was holding 8000 felons who might have to be released.

Oklahoma responded with *Oklahoma v. Castro-Huerta* (2022). One thing had changed from 2020: Ruth Bader Ginsburg had died and been replaced by Amy Coney Barrett. In *Huerta*, the defendant, a non-Indian, was convicted of child neglect of an Indian child on the reservation. The Court, by a 5-4 vote, did not overturn *McGirt*, but rather found that for 233 years the states had concurrent jurisdiction with the federal government over crimes on Indian lands, but apparently no one realized it. This case appears to overrule Chief Justice John Marshall in the *Worcester* case and the *Lone Wolf* case from 1903, which gave Congress plenary power over Native Americans. No one in Indian Country or in state or federal government knows what this means. *Huerta* is only one legal data point. We will have to await other opinions to see if the Court has, in fact, turned 233 years of legal history on its head.

VII. Conclusion

Since 1607, Native Americans have been at the mercy of both English and American law. They have experienced every social, medical, and economic problem possible. The law has buffeted them by changing direction at least once a generation. Their land has been stolen from them and their culture crushed under the boot-heel of assimilation. The only remaining question is whether *Huerta* signals yet another radical shift in the way American law treats Native Americans.