REPLY

DOUBLE BIND: INDIAN NATIONS v. THE SUPREME COURT

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Replying to Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

> [The Indians'] right of occupancy is considered as sacred as the fee simple of the whites.
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> — Justice Henry Baldwin, *Mitchel v. United States* (1835)[1]

> Ignoring [two bedrock] principles [of federal Indian law], the Court has done what only Congress may do — it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity. Under our precedents, whether it is wise policy to honor the Tribe's tax immunity is a question for Congress, not this Court, to decide.
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> — Justice John Paul Stevens, *City of Sherrill v. Oneida Indian Nation* (2005)[2]

American Indian nations find themselves in a double bind. If they fail to exercise their retained sovereign powers, the Supreme Court leaves them alone, but in so doing they rob themselves of the ability to govern themselves, promote the well-being of their people, nurture economic development, preserve their cultures, and connect with the sacred.[3] If they exercise their sovereign powers and begin to achieve these long-sought goals, the Supreme Court reins them in, worried

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[1] 34 U.S. (9 Pet.) 711, 746 (1835).

[2] 125 S. Ct. 1478, 1496 (2005) (Stevens, J., dissenting).

[3] *See* Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* 1–2 (Native Nations Inst. for Leadership, Mgmt., & Policy and The Harvard Project on Am. Indian Econ. Dev., Paper No. 3, 2004), *available at* http://www.jopna.net/pubs/JOPNA06_MythsandRealities.pdf (explaining that the de facto exercise of tribal sovereignty has been the only successful economic development program for Indian nations).

about the effects of tribal sovereignty on the non-Indians with whom Indian nations cannot help but come into contact and sometimes conflict. They're damned if they do and damned if they don't.

The Supreme Court finds itself in a similar, but different, double bind. The Court cannot seem to live with Indian nations; those nations do not fit easily into the constitutional structure and their place in the federal system appears obscure and anomalous. Yet the Supreme Court cannot live without them either; much as the Court would like to limit tribal sovereignty, it is neither equipped nor inclined to erase tribal sovereignty entirely. Indian nations are not only mentioned in the Constitution, but are also the subject of an entire Title of the United States Code. Writing Indians out of the Constitution and deleting Title 25 of the U.S. Code would appear to be beyond the legitimate powers of the Court.

As Professor Philip Frickey explains in his excellent article, *(Native) American Exceptionalism in Federal Public Law*,[4] an increasing number of Justices on the Supreme Court are getting more and more distraught about the anomalous nature of tribal sovereignty. With increasing fervor, some Justices have suggested wholesale reconsideration of the place of Indian nations in the constitutional structure.[5] Rather than deferring to Congress to negotiate and legislate on what are obviously political questions of the highest order, or applying longstanding canons of interpretation in federal Indian law,[6] these Justices seek to harmonize inconsistent precedents and conflicting policies toward Indian nations in a manner that would both subordinate those nations to state governments and limit their ancient rights and inherent sovereign powers. The Court has moved in this direction by using federal common law — a polite way of saying that the Justices of the Supreme Court have taken it on themselves to write (or rewrite) the law so as to increase state power in Indian country and to decrease the powers and immunities of Indian nations. Why are they doing this?

In his usual insightful and perspicuous fashion, Professor Frickey provides an answer to this question.[7] In so doing, he illuminates the obscure, explains the incoherent, and opens a path to break through old conundrums. He urges the Justices to learn to live with ambiguity. They ought to do so, he argues, because the nature of federal Indian law requires negotiating between the incompatible premises of consti-

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[4] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

[5] *See, e.g.*, United States v. Lara, 124 S. Ct. 1628, 1641, 1648 (2004) (Thomas, J., concurring in the judgment).

[6] *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (Nell Newton et al. eds., forthcoming 2005).

[7] Frickey, *supra* note 4.

tutionalism and colonialism. The best we can do is to minimize the unjust consequences of colonialism and this cannot happen unless the Court learns to tolerate anomalies, apply different legal standards in different contexts, and create an uneasy peace between laws promulgated in different eras that were designed to further opposing public policy agendas.

This is an attractive proposal and one I endorse. I write merely to emphasize a potential pitfall. This approach to Indian law may be helpful to Indian nations, but, applied in the wrong way and with the wrong values, it could erode tribal rights and powers even further.

Consider that there are two ways to treat someone the same as someone else. One can give the claimant the same rights as similarly situated others; however, one can also ensure that a claimant that is differently situated is guaranteed the rights associated with that different status. Increasingly, the Supreme Court is doing neither of these things. It is, in fact, giving Indian nations the worst of both worlds. As Professor Frickey notes, the Court is increasingly reluctant to recognize the special rights that go along with the special status of Indian nations. At the same time, the Court also often fails to accord Indian nations the same rights as others in cases where the tribes are indeed similarly situated to non-Indians.

I came to learn federal Indian law after learning property law and conflict of laws. When I first began to study the law governing the relations between Indian nations and the United States, I was struck by how often different rules applied than those that governed the property rights of non-Indians or the respective spheres of the state sovereigns in their relations with each other.[8] In more cases than I could count, and in situations too important to ignore, the Supreme Court denied protection for tribal property and sovereignty for reasons that would not be acceptable in non-Indian jurisprudence.

Most of my own scholarship therefore approaches the subject by comparing the legal protections granted to Indian nations to the legal protections granted to non-Indians. Some of the time, the comparison is satisfying: tribes are granted special rights because they are uniquely situated and it does not further equality to treat differently situated persons in the same manner.[9] However, at other times — and those times are more numerous than many tribal advocates would like — Indians are routinely denied rights and powers they would be granted if they were non-Indians. In many cases, what we find in federal In-

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[8] *See, e.g.*, Joseph William Singer, Lone Wolf*, or How To Take Property by Calling It a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37 (2002).

[9] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) (explaining how one can deny equal treatment both by recognizing difference and ignoring it).

dian law are not grants of "special rights" or the benefits of politically controversial forms of affirmative action; rather, we find old-fashioned dyed-in-the-wool discriminatory treatment, i.e., Indians that are similarly situated to non-Indians are denied rights granted to non-Indians. We see evidence that some property rights that would be recognized if held by non-Indians are denied recognition when claimed by Indian nations. We see that sovereign powers that would be routinely recognized when claimed by state governments are characterized as illegitimate when claimed by tribal governments. Arguments that would be rejected without a thought in cases involving non-Indian claims are accepted, embraced, and presented as compelling justifications for denying rights that would be found if the case involved analogous non-Indian claims.

Let's start with property. In *Tee-Hit-Ton Indians v. United States*,[10] the Supreme Court held that the federal government could seize timber on lands belonging to the Tee-Hit-Ton Indians, a clan of the Tlingit Tribe in Alaska, without compensating the tribe. It could do so because the tribal title had never been recognized by Congress in a treaty or statute and property held under "original Indian title" did not constitute "property" within the meaning of the Fifth Amendment. Note well: the lands were in fact owned by the tribe under the Court's interpretation of federal Indian law; after all, the Supreme Court did recognize the tribe as holding "aboriginal title." This title, however, did not constitute constitutionally protected "property." What reasons did the Court give for this startling conclusion?

First, Justice Reed's majority opinion argued that "[i]t is well settled" that original Indian title merely means "permission from the whites to occupy":[11]

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.[12]

This is simply false. No prior case says this. The main case that Justice Reed cited for the proposition that tribal possession is not "property" was *Johnson v. M'Intosh*,[13] a case which held no such thing. *Johnson* held that the title to Indian lands was split between the United States and the relevant Indian nation and that the United States possessed the power to convey the "fee" without the consent of the tribe, subject to the Indians' "title of occupancy," while giving the

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[10] 348 U.S. 272 (1955).
[11] *Id.* at 279.
[12] *Id.*
[13] 21 U.S. (8 Wheat.) 543 (1823).

United States the power to extinguish the Indian title "by purchase or by conquest."[14] *Johnson* was perfectly silent on the question of whether the United States would be obligated to pay compensation when it extinguished tribal title. Justice Reed cited only two other cases to support the Court's position. The first, *Beecher v. Wetherby*,[15] similarly held that the United States could convey the fee without tribal consent (and that the taker would hold the property subject to the tribal title of occupancy). The other case, *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad Co.*,[16] held that Congress has the power to extinguish tribal title without tribal consent. Justice Reed quoted out of context a paragraph from *Santa Fe* to the effect that "[t]he power of Congress [in regard to extinguishment of Indian title based on aboriginal possession] is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues."[17] This does not mean that there are no constitutional limits on extinguishment; indeed, in *Santa Fe*, the Court ruled that extinguishment will not be "lightly implied" but must be accomplished by an express act of Congress.[18] *Santa Fe* merely held that tribal consent was not required to extinguish tribal title; the case did not address the question of whether compensation was required when tribal title was extinguished. In fact, the first case to hold that tribal title may be extinguished without compensation was *Tee-Hit-Ton*. In stark contrast, the *Mitchel v. United States* Court emphasized, in precedent ignored by Justice Reed, that Indian title is "as sacred as the fee simple of the whites."[19]

The Court then gave a variety of reasons to find that aboriginal title did not constitute "property." Justice Reed noted that the tribe had been "greatly reduced in numbers" and now had only sixty-five members.[20] This implied that it would be unusual for so few individuals to own so much land. Of course, there is no rule in American law that limits the amount of property one or two or even sixty-five people may own, and a few people own a great deal of property in the United States. Justice Reed further noted that "ownership was not individual but tribal,"[21] implying that because the tribe's claim was "wholly tribal," it "was more a claim of sovereignty than of ownership."[22] This

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[14] *Id.* at 587.

[15] 95 U.S. 517 (1877).

[16] 314 U.S. 339 (1941).

[17] *Tee-Hit-Ton*, 348 U.S. at 281 (quoting *Santa Fe*, 314 U.S. at 347) (internal quotation mark omitted).

[18] *See Santa Fe*, 314 U.S. at 354.

[19] 34 U.S. (9 Pet.) 711, 746 (1835).

[20] *Tee-Hit-Ton*, 348 U.S. at 285–86.

[21] *Id.* at 286.

[22] *Id.* at 287.

is, of course, a non sequitur. The Commonwealth of Massachusetts owns land despite the fact that it is a sovereign. Sovereign status and land ownership are not only not incompatible but are also the usual case for Indian nations. Justice Reed also noted that "the various tribes of the Tlingits allowed one another to use their lands."[23] This suggests hospitality rather than an absence of possession. Non-Indians do not lose possession by inviting others to come onto their land.

Finally, Justice Reed argued that "the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth."[24] Again, it is uncertain why use of an "identified territory" does not constitute possession merely because the use is seasonal. It is a commonplace of property law in the United States that seasonal use of property may give rise to rights under adverse possession doctrine, for example.[25] Nor are the listed activities insufficient to demonstrate a claim of exclusive possession. The Tee-Hit-Tons showed in court the location of villages, burial grounds, and hunting grounds — in short, the places they occupied and the land in which they lived. It appears that the Tee-Hit-Ton Indians had established in court the kind of occupation that would satisfy the requirements for adverse possession under the law of most states.[26] For this reason, I believe the Supreme Court would have protected the tribe's possessory rights if it had been a non-Indian corporation rather than a Native nation. What then could possibly have justified denying the Tee-Hit-Ton Indians constitutional status for their property?

Justice Reed's final argument was a pragmatic one. He argued that "no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment."[27] This argument would be unacceptable if applied to a non-Indian owner. It is a routine aspect of regulatory takings law that the public need for private property does not justify taking it without compensation; that is the whole point of the Takings Clause.[28] *Tee-Hit-Ton* has never been

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[23] *Id.*

[24] *Id.*

[25] *See* Nome 2000 v. Fagerstrom, 799 P.2d 304 (Alaska 1990).

[26] *See* JOSEPH WILLIAM SINGER, AN INTRODUCTION TO PROPERTY § 4.2, at 137–40 (2d ed. 2005).

[27] *Tee-Hit-Ton*, 348 U.S. at 290.

[28] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 841–42 (1987) ("California is free to advance its 'comprehensive program' [providing a continuous strip of publicly accessible beach], if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.").

overruled or repudiated by the Supreme Court and continues to be cited to this day.[29]

Let us turn to sovereignty. In *Brendale v. Confederated Tribes and Bands of the Yakima Nation*,[30] the Supreme Court ruled that Indian nations could not, in general, apply their zoning laws to non-Indians who had purchased fee simple title to land within the reservation.[31] Those non-Indians had bought lands pursuant to the allotment acts when the policy of the United States was to break up tribal ownership and convey tribal lands to individual tribal members and to move slowly to abolish tribal sovereignty.[32] Although this policy was repudiated in 1934 with passage of the Indian Reorganization Act and no longer formed the basis of federal policy toward Indian nations in 1982, the Court found that the sale of the lands inexorably took them outside the scope of legitimate tribal sovereign power.[33] One possible reason was the fact that only tribal members could vote in tribal elections and thus formally influence tribal zoning law while both Indians and non-Indians could vote in state and local elections in Washington State.[34] In another case decided in 1982, Justice Stevens had argued, for example, that "[s]ince nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited."[35]

This is one of those arguments that sounds good if you say it fast. On further reflection, it becomes evident that it is not an argument anyone would make in any other (meaning non-Indian) context. I live in Cambridge, Massachusetts, and if I bought land in Belmont, Massachusetts, right next door, I would be subject to the Town of Belmont's zoning laws even though I do not vote, and am not legally entitled to vote, in Belmont town elections. There is simply no property right and no voting right to vote in the elections of the government that is empowered to regulate one's real property. It is not clear why a non-Indian who buys land on an Indian reservation suddenly has

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[29] *See* Karuk Tribe v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000); State v. Elliott, 616 A.2d 210, 213 (Vt. 1992); *see also* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (criticizing *State v. Elliott*).

[30] 492 U.S. 408 (1989).

[31] *Id.* at 432 (White, J., announcing the judgment of the Court).

[32] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

[33] *Brendale*, 492 U.S. at 422 (White, J., announcing the judgment of the Court) (arguing that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands" (quoting Montana v. United States, 450 U.S. 544, 561 (1981)) (internal quotation marks omitted)).

[34] *See id.* at 445 (Stevens, J., concurring in the judgment) ("Only enrolled members of the Tribe, however, are entitled to participate in tribal elections."); *see also* Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (criticizing the reasoning in *Brendale*).

[35] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 173 (1982) (Stevens, J., dissenting).

greater rights than a non-Indian who buys land in another town. It is true that a non-Indian who moves to an Indian reservation may strongly wish to vote in the government that regulates her land use. Yet it was the law of the case in *Brendale* that the reservation had not been disestablished or diminished and that only Congress had the power to take the land out of Indian country. Ignorance of the law is no excuse when one buys property outside Indian country and it is not clear why it immediately should become one when one buys land inside Indian country.

Finally, consider the 2005 decision in *City of Sherrill v. Oneida Indian Nation*.[36] In 1795, the State of New York took recognized title lands belonging to the Oneida Indian Nation of New York in clear violation of the 1793 version of the Nonintercourse Act, originally passed in 1790. In 1985, the Supreme Court held that the Nonintercourse Act meant what it said: no "claim" to Indian lands "shall be of any validity in law or equity" unless the U.S. agrees to the sale.[37] Nor did the Nonintercourse Act or any other federal statute contain a statute of limitations that would bar the claim.[38] Although the Court did not decide in 1985 whether laches would bar the claim, the Court did state that because the Nonintercourse Act "is still the law, . . . the application of *laches* would appear to be inconsistent with established federal policy."[39] When the Oneida Nation purchased its own land from a non-Indian possessor, it claimed that it had united title (which it had never lost) and possession (which it had now regained), that Congress had never acted to extinguish its title or diminish the Oneida reservation, and that the land was therefore exempt from local property taxation since it was tribally owned land within Indian country. The Supreme Court disagreed, mainly on the ground that the doctrine of laches barred the Oneida Nation from recovering sovereignty piecemeal by purchasing back its land. As the Court explained, "[the] doctrine [of laches] focuse[s] on one side's inaction and the other's legitimate reliance [to] bar long-dormant claims for equitable relief."[40]

As a number of scholars have noted, this is an unusual application of the laches doctrine. Laches ordinarily applies only when *unjustified* delay induces reliance on the part of others.[41] Yet there is no reason to

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[36] 125 S. Ct. 1478 (2005).

[37] *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 230, 232 (1985).

[38] *Id.* at 244.

[39] *Id.* at 245 n.16 (emphasis added).

[40] *Sherrill*, 125 S. Ct. at 1491.

[41] *See* Thiru Vignarajah, Case Comment, City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005)* 7–9 (2005) (unpublished manuscript, on file with the Harvard Law School Library); *see also* Sarah Krakoff, City of Sherrill v. Oneida Indian Nation*: A Regretful Postscript to the Taxation Chapter in Felix S. Cohen's Handbook of Federal Indian Law, 2005 Edition*, 41 TULSA

believe the delay in bringing the lawsuit was unjustified. Indeed, jurisdictional barriers would have barred the suit at any point up until 1966 — a fact of which the Supreme Court seemed to be unaware — and even today, any claim against the State of New York brought by the Oneida Indian Nation would very likely be barred by New York's sovereign immunity.[42] It is unclear why delay in bringing a lawsuit against the State of New York is unjustified when it would have been fruitless to bring it at any time. The only plaintiff with the power to sue the State of New York on behalf of the Oneida Nation, overriding New York's sovereign immunity, would have been the United States itself.[43] The Supreme Court effectively blamed the Oneida Nation because the United States failed to act on its behalf when the Oneida Nation had no legal power to force (or even induce) the United States to act in compliance with its trust obligations to Native nations.[44]

Where does this leave us? Professor Frickey is correct that the Supreme Court fails to understand why it is not possible to fully integrate Indian law into the norms otherwise governing public law. But it is also true that the Court fails to extend the same protections to Indians and Indian nations that its public law principles would impel it to extend to non-Indians in similar situations.

What we need is a form of double vision. We should respect the sovereignty and property of Indian nations partly because the colonial past demands special rules designed to minimize the injustices associated with conquest and partly because our deepest constitutional principles demand that Indian rights be understood to be "as sacred as" the rights of non-Indians and therefore subject to legal protection that is at least as good as that granted non-Indians.[45] None of this undermines Professor Frickey's argument. It is simply important to recognize that advocates of Indian rights need to tolerate ambiguity ourselves. And we better be careful of what we wish for, because we may get it.

L. REV. (forthcoming Winter 2005); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. (forthcoming Winter 2005).

[42] *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, & Sacred Obligations*, 38 CONN. L. REV. (forthcoming 2006) (manuscript at 16, on file with the Harvard Law School Library).

[43] *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991) (holding that the states have sovereign immunity from suit by Indian nations but not from suits by other states or by the United States itself).

[44] *See* Singer, *supra* note 42 (manuscript at 9).

[45] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).