The United States Supreme Court and American Indian Tribal Sovereignty (review of American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice by David E. Wilkins)

Richard J. Ansson Jr.
BOOK REVIEW

THE UNITED STATES SUPREME COURT AND AMERICAN INDIAN TRIBAL SOVEREIGNTY

Richard J. Ansson, Jr.*


I. Introduction

In 1823, the Supreme Court addressed its first federal Indian question in Johnson v. McIntosh,1 and since McIntosh, the Court has decided numerous federal Indian questions. Indeed, in the past thirty years, the Supreme Court on average has addressed five federal Indian cases each term.2 Overall, in the 175 years since McIntosh, the Supreme Court's holdings in federal Indian cases have ranged from favorable to devastating, and throughout this period, scholars have sought to coherently analyze many of these conflicting decisions.

David Wilkins, in his book American Indian Sovereignty and the U.S. Supreme Court, is the latest scholar who has attempted to analyze the perplexing field of federal Indian law. Wilkins employs critical legal and historical analysis in evaluating fifteen of the Supreme Court's federal Indian decisions.3 In so doing, Wilkins claims that such analysis "should go far toward explaining why and how the Court arrived at these important Indian law decisions" and should lead to a discussion addressing the "larger issue of why the core democratic concepts of fairness, justice, and consent of the governed have not yet been fully realized for tribal nations and their citizens despite clearly pronounced treaty rights, federal policies of Indian self-determination and tribal self-governance, positive judicial precedents, and a triple citizenship" (p. 5).

Unfortunately, by analyzing only fifteen cases — many of which are not very well known — through the lenses of critical legal analysis, the author fails to adequately discern the issues he has sought to highlight. The author's

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1. 21 U.S. (8 Wheat.) 543 (1823).
3. See infra note 6.
4. See infra note 7.
analysis is misguided for two reasons. First, the author fails to demonstrate that his theory holds true in favorable as well as unfavorable Indian law decisions. Second, the author fails to examine in any great length the historical context in which the cases were penned. This article, after evaluating Wilkins' analysis, proposes that Indian law decisions should be examined in light of the historical and political context in which they arose.

Part II details Wilkins' misguided critical legal and historic analysis of the fifteen Supreme Court decisions. Part III denotes Wilkins' missteps by exploring the Supreme Court's treatment of federalism and Indian law. Part IV concludes by stressing that federal Indian opinions decided by the Supreme Court should be examined and evaluated in light of the historical and political context in which they arose.

II. Wilkins, Critical Legal Analysis, and the Supreme Court

A. Legal Consciousness and Critical Legal Analysis

Wilkins first outlines several broad areas of legal consciousness that the Supreme Court has employed when deciding federal Indian questions. First, in Wilkins' opinion, the Supreme Court has analyzed federal Indian questions in light of constitutional or treaty considerations (pp. 10-11). The author states with regard to this premise that:

The basic assumption of this legal consciousness is that constitutional or treaty considerations (i.e., ratified treaties or agreements) are the only relevant instruments for the adjudication of a legal dispute between tribes and the federal/ state governments. This consciousness is evident in Supreme Court opinions dealing with tribal sovereignty which generally acknowledge the inherent sovereignty of tribal nations and their pre- and extraconstitutional aboriginal rights of self-government. (p. 10).

Second, in Wilkins' opinion, the Supreme Court has analyzed federal Indian questions in light of the United States' duty to "civilize" American Indians (pp. 11-14). According to Wilkins, the Supreme Court has sanctioned paternalistic federal policies and, by so doing, has elevated the law to become an "effective instrument for civilizing indigenous peoples who are considered culturally inferior" (p. 11). Wilkins states that this consciousness is evident when the Supreme Court sanctioned Congress' assimilationist policies at the end of the nineteenth century and the beginning of the twentieth century (pp. 13-14).

5. See infra note 8.
Finally, Wilkins asserts that in deciding federal Indian questions the Supreme Court has used the law to further the development of the United States as a nation-state (pp. 14-16). In Wilkins' estimation, the Court has exercised its use of this consciousness in two ways. First, the author asserts that the Supreme Court affirmed assimilationist policies that aided merging "politically subordinate cultural group[s] into the politically dominant cultural group" (pp. 14-15). Second, Wilkins advocates that the Supreme Court used the law to aid in the establishment of federalism (pp. 15-16).

In Wilkins' opinion, the Supreme Court's use of these three aforementioned legal consciousnesses have allowed the Court to mask its decisions (p. 10). Wilkins argues that if one removes the mask one will find that the Supreme Court's real legal consciousness has stressed the "tribes' allegedly inferior cultural, political, technological, social, and spiritual status in relation to the prevailing lifestyle of Euro-America" (p. 10). Wilkins, therefore, hopes that by identifying and unmasking the previous judicial consciousness he can "establish a sense of the moral basis of the law [which is] the critical element that has seemingly been abandoned in American jurisprudence but is still recognized by tribal nations in their understanding of treaties and federal statutes" (p. 16).

B. Critical Legal Analysis and Selectively Chosen Supreme Court Decisions

Wilkins selectively applies his analysis to fifteen federal Indian law cases — some of which are relatively obscure and only one of which is

6. In chapter 2, Wilkins discusses Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), United States v. Rogers, 45 U.S. (4 How.) 567 (1846), and The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). These cases discuss wide-ranging issues such as aboriginal land title, the political status of tribes, and treaty abrogation (p. 17).

In chapter 3, Wilkins analyzes United States v. Kagama, 118 U.S. 375 (1886), Ward v. Race Horse, 163 U.S. 504 (1896), and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). These cases document Congress' plenary power over Indian tribes. (p. 17).


favorable to Indian rights. After discussing the facts and holdings of each case, Wilkins attempts to prove that the Supreme Court used different legal theories as masks in an overall effort to deprive individual Indians and Indian tribes of justice.

For instance, Wilkins claims that the Supreme Court masked its injustices in *Johnson v. McIntosh*, *United States v. Rogers*, *United States v. Kagama*, and *Tee-Hit-Ton Indians v. United States* when it employed the doctrines of discovery and conquest to deny individual Indians and Indian tribes of the justice they so deserved (p. 299). Additionally, Wilkins notes that in other cases such as *Rogers*, *Kagama*, *Lone Wolf v. Hitchcock*, and *United States v. Sioux Nation*, the Supreme Court relied on the plenary power doctrine to deny Indians and Indian tribes justice (p. 299). In all, Wilkins denotes an additional seven doctrines that the Supreme Court has employed to deny Indians justice.

Wilkins also notes that although the Supreme Court, over the years, has served "predominantly as a legitimator of congressional and executive actions," the Court has employed certain legal concepts that have gone beyond justifying congressional action (p. 302). In some cases, the author argues that the Supreme Court has relied on an implied congressional intent to deny Indians and tribes justice (p. 302). At other times, Wilkins maintains that the Court has contrived "a scenario in which it pits one law or treaty provision against another and then 'chooses' the one most likely to effect whatever political ends it is striving to accomplish" (pp. 302-03).

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8. Wilkins asserts that *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), is "the one case among my selections that has been interpreted as a 'victory' for the tribal party by some commentators." (p. 17).
11. 118 U.S. 375 (1886).
16. To support this proposition, Wilkins cites to *Kagama*, *Lone Wolf*, *Nice*, *Lyng*, and *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).
17. Wilkins notes that this approach "was used in *Rogers* (federal law v. treaty), *The
Wilkins states that by employing critical legal analysis he "intended to demythologize 'the law,' as expressed through the language of fifteen Supreme Court opinions that have affected Indian law" (pp. 2-3). However, instead of demythologizing the law, Wilkins' critical legal analysis actually mythologizes it. Indeed, by asserting that the Supreme Court employed unique legal principles to Indians and Indian tribes solely to mask the injustices its holdings were perpetuating (pp. 298-303), Wilkins creates a myth by overstating his critique of legal doctrine.

Critical legal analysis is famous for seeking "to convince a reader that a supposedly objective legal rule really contains imbedded subjective value choices and that even though the rule appears neutral, it falls more heavily upon society's disempowered." However, Wilkins' analysis seemingly goes further than just trying to convince the reader that an apparently neutral rule falls more heavily upon society's disempowered. Instead, Wilkins tries to convince the reader that the Supreme Court's pattern of masking injustices in legal doctrines has been routinely orchestrated (pp. 298-303) -- so much so that one can link all of these injustices together to "demythologize the law" (pp. 2-3).

Many academicians find fault with critical legal studies analysis because they view critical legal studies analysis as an overstated critique of legal doctrine. Indeed, Wilkins' analysis is overstated in numerous ways, and one of the more obvious is his failure to discuss his critique of the law within a historical context. Wilkins acknowledges from the outset that he intends to demythologize the law "by focusing upon the broad institutional, societal, and, most important, historical effects of the Court's very political activities" (pp. 2-3). However, Wilkins' analysis does not explore the historical and political underpinnings of the Court's decisions. Ironically, Wilkins himself stated that

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18. Critical legal studies scholars have argued that the current legal system excludes outsiders by undue mystification of the law. Bailey Kuklin & Jeffrey W. Stemple, Foundations of the Law: An Interdisciplinary and Jurisprudential Primer 175 (1994). Other criticisms of the current legal system that have been advanced by critical legal studies scholars include "indeterminacy of legal doctrine; ...; doctrine and procedure structured to obscure the political aspects of law; protection of the interests of the dominant under the guise of neutrality." Id.

19. See infra note 22 and accompanying text for more on overstating legal doctrine and the critical legal studies movement.

20. Kuklin & Stemple, supra note 18, at 175. Critical legal studies analysis is also known "for exploring in detail purported contradictions that result from widely accepted but overstated concepts, such as the objective/subjective dichotomy, the separation of individual and community, the public/private distinction, the false choice between order and anarchy, and other dualities." Id.

21. See supra Part II.B.

22. Kuklin & Stemple, supra note 18, at 175.
"it is impossible to understand how the coordinate branches of government arrive at policy decisions regarding the constitutional and treaty rights of American Indian tribes, and individuals constituting these tribes, without total immersion in a historic context" (p. 1). Unfortunately, Wilkins does not heed his own advice, and his analysis proceeds to explore the historical context only if it tends to prove his analysis.

III. Federal Indian Law, Federalism, and the Supreme Court

Wilkins asserts that federalism has been one of the legal masks that the Supreme Court has employed to deny Indians and Indian tribes justice (pp. 8-17). Wilkins explains that federalism was used as a mask in the following ways:

The mask worn by the federalizing agents viewed the United States as the core unit such that nonfederal entities must either be absorbed or vanquished. The masks applied by the Court to the tribes divided them according to degree of "savagery," . . . into the assimilable and unassimilable, tribal nations that were deemed capable of being Americanized (from a Euro-American perspective) and joining the United States as separate, though integrated, political entities versus those mostly western tribes that were caricatured as "wild" and "uncivilized." In masking the legal process, Law was clearly an agent of national unity. During the late 1800s and well into the twentieth century, the Court rendered a number of decisions indicating a clear intent to dilute the extraconstitutional status of tribes by unilaterally declaring them "wards" of the government and disavowing their separate, independent status. The assertion of congressional power over tribal lands, resources, and rights is evidence of this nationalizing effort. (p. 16).

Wilkins' critique, however, seems to be overstated and misguided in many respects — a truism associated with critical legal analysis. According to Wilkins' account, the Supreme Court used federalism in the late 1800s and early 1900s to justify the congressional policy of assimilation because the Court wanted to deny Indians and Indian tribes justice. Unfortunately, by failing to discuss the concept of federalism outside the aforementioned period, Wilkins does not address whether the Court has used the doctrine of

23. Wilkins is absolutely correct in emphasizing the value of examining the historic relations between the tribes and the federal government. Indeed, Nathan R. Margold, a former solicitor of the Interior Department, stated that "[f]ederal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW xvii (Univ. of N.M. photo. reprint 1971) (1942).

24. See supra note 22 and accompanying text.
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federalism on an evenhanded basis. This inquiry is an important one because if the Court has used the doctrine of federalism on an evenhanded basis, then the Court may have afforded justice to Indians and Indian tribes under the doctrine of federalism. Therefore, the Court would not necessarily have been using federalism as a mask for justice during the late nineteenth and early twentieth centuries.

A. Federalism & The Early Supreme Court

By the time Chief Justice John Marshall had the opportunity to wrestle with the question of Indian affairs and its relationship with principles of federalism, he had already established himself as a devote federalist and nationalist.25 Appointed by federalist-minded President John Adams, Chief Justice Marshall quickly established himself as the protector of federal principles, and, as such, Marshall penned his opinions to advance the federalist cause.26 Indeed, by the time Chief Justice Marshall was presented with a case concerning federal-state-Indian relations, he had already written numerous decisions establishing federal supremacy over the states.27

During the United States' early years, states tried to exert their powers over a number of different matters — many of which they knew they had voluntarily ceded to the federal government in the United States Constitution.28 In the realm of Indian affairs, the states had given the federal government control over managing Indian relations.29 Nevertheless, some states tried to exert and retain control over Indian affairs.30

The desire of certain states to retain control over Indian affairs rested in the fact that the states' colonial predecessors had almost dominated control over Indian affairs.31 During this period, the crown set the general policies, but the management of Indian policies generally was left to the separate colonies.32 As early as 1754, Benjamin Franklin had suggested that the colonies should form a union of colonies and centralize control over Indian affairs.33 The very next year the British Crown also sought to centralize

26. See id.
27. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that Congress' powers were to be broadly construed and that the states were not to burden, retard, or impede the exercise of such powers).
28. See, e.g., GOLDMAN, supra note 25, at 320-25.
29. See U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).
32. See id.
33. See id.
Indian affairs through the appointment of Indian agents directly responsible to London.\textsuperscript{34}

In 1781, the nation approved the Articles of Confederation in which article IX vested the Continental Congress with power to regulate trade and manage affairs with Indians, not members of any states.\textsuperscript{35} States had residual authority over Indian affairs within their own states.\textsuperscript{36} After the Revolution, the federal government tried to regulate Indian affairs; however, it encountered resistance from certain states — New York, North Carolina, and Georgia — when it sought to establish boundary lines with various tribes.\textsuperscript{37}

In 1789, the United States Constitution was adopted, and in the Constitution, the states delegated the power to regulate "Commerce . . . with the Indian tribes" to Congress.\textsuperscript{38} In 1790, Congress asserted its power when it enacted the Trade and Intercourse Act of 1790 which forbade the sale of land by any Indians within the United States to any person or state, unless done in a public treaty under U.S. authority.\textsuperscript{39} After 1790, Congress continued to enact legislation designed to regulate commerce with the Indian tribes.\textsuperscript{40}

The Supreme Court first addressed an Indian question in 1823 in \textit{Johnson v. McIntosh}.\textsuperscript{41} In \textit{McIntosh}, the Supreme Court did not recognize a private purchase of land between a non-Indian and an Indian tribe.\textsuperscript{42} In so doing, the Court gave federal sanction to the doctrine of discovery which declared that Indians held only a possessory use interest in the land and that the United States held legal title.\textsuperscript{43} Though \textit{McIntosh} primarily addressed the question of aboriginal land title, the decision, in terms of federalism, recognized the United States' right, not Indian tribes or states, to the land. Without this decision, the new federal government's power would have been severely limited because it would have encountered a legal quagmire in deciding the legitimacy of land titles in United States territory.

The Supreme Court next addressed an Indian question in \textit{Cherokee Nation v. Georgia}.\textsuperscript{44} In \textit{Cherokee Nation}, the Cherokees brought suit in an effort to prevent Georgia from imposing its state laws within Cherokee Territory.\textsuperscript{45} Although Chief Justice Marshall refused to accept the case because he had

\begin{itemize}
  \item 34. See \textit{id}.
  \item 35. See \textit{ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW} 141 (3d ed. 1991).
  \item 36. See \textit{id}.
  \item 37. See \textit{id}.
  \item 38. U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).
  \item 40. \textit{See O'BRIEN, supra} note 30, at 51-52.
  \item 41. 21 U.S. (8 Wheat.) 543 (1823).
  \item 42. See \textit{id} at 573-74.
  \item 43. See \textit{id}.
  \item 44. 30 U.S. (5 Pet.) 1 (1831).
  \item 45. See \textit{id} at 20.
\end{itemize}
determined that the Cherokee Nation was not a foreign state which could sue Georgia in the United States courts, he held that the Cherokee Nation was a domestic dependent nation because it was a distinct political society capable of managing its own affairs and governing itself. In so doing, Chief Justice Marshall rejected the argument of state-rights Justices Baldwin and Johnson who sought to allow the state to impose laws over the Cherokee Nation.

The very next year Chief Justice Marshall, in Worcester v. Georgia, used principles of federalism to protect the Cherokees from Georgia's attempt to impose its laws on the Cherokee Nation. In Worcester, a non-Indian was arrested for living within Cherokee Territory without permission from state authorities and was convicted for violating a Georgia law that required such permission. The Supreme Court overturned the conviction and declared the statute unconstitutional. In reaching this decision, the Court relied upon the constitutional doctrine that regulation of Indian affairs was granted to the federal government and not to the states.

**B. The Supreme Court and the Post-Civil War Years**

In 1883, in *Ex parte Crow Dog,* Crow Dog killed another Indian. Federal authorities subsequently tried Crow Dog for murder. Crow Dog argued that the federal government could not try him because the federal courts had no jurisdiction over Indian activities on the Lakota Reservation. The Supreme Court affirmed this argument because Congress had not enacted legislation giving it criminal jurisdiction over the tribes. Congress reacted to Crow Dog by passing the Major Crimes Act of 1885 which gave federal courts jurisdiction over murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

The very next year, in *United States v. Kagama,* the Supreme Court looked at Congress' claim to criminal jurisdiction in Indian affairs. In *Kagama,* two Indians killed another Indian on the Hoopa Valley Indian Reservation in California. The Supreme Court held that the government could enact such legislation, not under the Indian Commerce Clause, but by

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46. See id.
47. 31 U.S. (6 Pet.) 515 (1832).
48. See id. at 559-61.
49. See id.
50. See id.
51. 109 U.S. 556 (1883).
52. See id. at 557.
53. See id.
54. See id. at 572.
56. 118 U.S. 375 (1886).
57. See id. at 375-76.
58. See id.
virtue of its authority as guardian of the tribes. Since Kagama, numerous decisions have allowed Congress to broadly regulate Indian affairs.

However, where Congress has not acted, the Supreme Court has upheld a tribe's sovereign rights. For example, in 1896 in Talton v. Mayes, the Supreme Court, during the height of the assimilation era, held that Indian tribes could use grand juries whose number of members did not meet the requirements of the United States Constitution. This was because tribes were exercising their own independent sovereignty which did not arise from the federal government.

C. The Supreme Court and the Modern Era

During the modern era, states have sought to exercise power over tribes. However, the Supreme Court has by and large struck down state efforts to infringe upon tribal sovereignty. For example, in McClanahan v. Arizona Tax Commission, the Supreme Court held that Arizona lacked jurisdiction to impose its state income tax on an Indian resident of the Navajo reservation who derived her income from reservation sources. The McClanahan Court further noted that the state has no power over any matters where the subject matter is Indian and within the Indian reservation.

D. Federalism & The Supreme Court

The Supreme Court has applied principles of federalism in a fairly evenhanded manner to federal Indian cases. Under principles of federalism, the Supreme Court has denied the right of states to regulate Indian tribes unless Congress has authorized the states to regulate tribes. Additionally, the Supreme Court has given Congress much latitude in regulating Indian

59. See id. at 384-85.
60. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that Congress' power over tribes was absolute, and therefore, Congress had the right to pass a law that violated a treaty); United States v. Sandoval, 231 U.S. 28 (1913) (applying Congress' liquor prohibition to Pueblos even though United States v. Joseph, 94 U.S. 614 (1876), had held that Pueblos had an advanced culture).
61. 163 U.S. 376 (1896).
62. See id. at 385.
63. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (holding that "[w]hen on reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest"); Bryan v. Itasca County, 426 U.S. 373, 388 (1976) (holding that even under Public Law 280, states lacked power to tax property held by tribal members).
64. 411 U.S. 164 (1973)
65. See id. at 173.
Although decisions made under this doctrine have not always been favorable to Indians or Indian tribes, the Supreme Court has applied the principles of federalism in a relatively consistent manner, and, as a result, one can reasonably conclude that the Supreme Court has not used the doctrine solely to mask injustice.

IV. Conclusion

Wilkins' discussion of the Supreme Court's federal Indian holdings, though interesting and intriguing, is misguided. Wilkins' failure stems from his inability to "demythologize the law" in his evaluation of fifteen Supreme Court opinions — many of which were not well known and all of which, save one, were unfavorable rulings. Instead, of "demythologizing the law," Wilkins analysis actually mythologizes the law because he overstates his critique of legal doctrine and because he fails to discuss his critique within a historical and political context. Consequently, future analysis evaluating federal Indian opinions decided by the Supreme Court should be examined in light of the historical and political context in which they arose.
