The United States Supreme Court and Indigenous Peoples: Still a Long Way to Go Toward a Therapeutic Role

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The United States Supreme Court has long played a major role in defining the relationship between the country's majority institutions and its indigenous peoples. The history of Supreme Court jurisprudence regarding Native Americans has included, on the one hand, early and continuing recognition of "original" rights of sovereignty and property on the part of Indian tribes, and, on the other, the development of doctrine by which such rights are held to have been abrogated or diminished in favor of majority institutions.[1] The Court has also held valid the government's conferral of special benefits to Native Americans where the benefits have been found to be "tied rationally to the fulfillment of Congress' unique obligation [of trusteeship] toward the Indians."[2] Although the Court has in many instances ruled in favor of Native Americans, its approach in the multiple cases it has decided involving them could rarely be called *therapeutic* in the sense that term is used in the Introduction to this issue. The Court's jurisprudence in this area provides perhaps the starkest American example of the appellate judiciary functioning in an antitherapeutic role in the context of majority-minority conflicts. In this brief Article, I will identify particular aspects of the Court's jurisprudence to make this point. Further, I will suggest what is needed in order for the Court to function in a more conciliatory role.

The frame of analysis employed by the Supreme Court in cases involving indigenous peoples usually focuses on an assessment of the relevant exercise of federal power. The federal government, and Congress in particular, is deemed to have "plenary power" over Native Americans, and that power is considered to be subject only to limited

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1. *See generally* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW (4th ed. 1998).

2. Morton v. Mancari, 417 U.S. 535, 555 (1974).

constitutional constraints.[3] Native Americans have whatever "residual" sovereignty and land rights the federal government—or one of the European colonial powers that preceded it—has not taken away, as well as those rights and benefits that the government has acted affirmatively to provide. Such residual rights of dominion over territory and people extend only insofar as the rights are not inconsistent with the tribes' status as "domestic dependent" communities.[4]

Typically absent from the Supreme Court's decisions regarding Native Americans is adequate attention to historic misdeeds and their relation to relevant contemporary inequities experienced by Native Americans. Among these undertreated factors are the taking of indigenous peoples' land through fraudulent means, duress, or force; the outright slaughter of many indigenous women, children, and men who stood in the way of nonindigenous settlement; and the active suppression of indigenous religious and cultural patterns and indigenous self-governance institutions. Such events have been acknowledged or recounted in Supreme Court narrative mainly to reinforce the dominant mythology of conquest by which Native Americans are rendered vanquished subjects. "Every American schoolboy knows," wrote Justice Reed for the Court in *Tee-Hit-Ton Indians v. United States*, "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."[5]

For a jurisprudence concerning indigenous peoples to be in any sense therapeutic from the standpoint of all concerned, it should include a recognition of the wrongful nature of historic events and the suffering those events have caused, rather than a reinforcement of the conquest myth. Conflicts between the majority and any aggrieved minority are likely to persist and animosities are likely to fester or flare unless the historic wrongs that remain alive in the collective memory of the aggrieved are acknowledged by the agents of the larger society. Such acknowledgment is a matter of simple dignity for aggrieved groups, and it provides a basis for treating their claims in a manner that is considered fair and just by all concerned. When a court addresses a particular controversy involving an indigenous group, the history of wrongs that are relevant to the controversy should come to the fore.

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3. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

4. The term "domestic dependent nations," a term that remains of dubious meaning, was coined by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). *See generally* GETCHES ET AL., *supra* note 1.

5. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

Also mostly absent from the relevant Supreme Court jurisprudence is an embrace of process values of the kind that Professor Nathalie Des Rosiers finds in the decision of the Supreme Court of Canada in the 1998 Québec Secession Reference case.[6] Professor Des Rosiers identifies that decision as appropriately placing a high value on process, particularly a process in which both majority and minority voices and viewpoints are heard and treated with respect, and in which the outcome is ideally determined through negotiation and mutual accommodation rather than through a determination of a winner and a loser.[7] This regard for process, in Professor Des Rosiers' estimation, is evident both in the Court's treatment of the competing narratives of Québec secessionists and Canadian federalists as well as in its finding of a "duty to negotiate" in the event of a vote in favor of secession by a substantial majority of the Québec population.[8]

United States Supreme Court opinions, by contrast, have provided little support for process-driven solutions to conflicts between majority institutions and indigenous peoples. The Court's decision in *Alaska v. Native Village of Venetie*[9] exemplifies its method of propagating the conquest myth against indigenous peoples, rendering them the losers in a winner-take-all contest. The specific issue in that case concerned the power of the Alaska Native village of Venetie to exact taxes for business conducted on land owned by the village.[10] The power of Native communities to tax activity on community or tribal land is one of the attributes of indigenous sovereignty that the Supreme Court has recognized.[11] In *Venetie*, the State of Alaska contested the village's taxing authority, clearly seeing the assertion of such authority as a threat to its own sovereignty.[12]

The *Venetie* case, however, was about more than just taxation. The State of Alaska, invoking the standard frame of analysis for judicial determinations of indigenous issues, argued that the particular exercise of federal power in Alaska had entirely deprived the village of Venetie, and virtually all other Native communities in the state, of governmental jurisdiction over community-held lands.[13] The litigation in *Venetie* thus represented a far-reaching contest over govern-

6. *See* Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of the Courts in Minority/Majority Conflicts*, CT. REV. Spring 2000, at 54 (discussing ref Re Secession of Québec, 2 S.C.R. 217 (1998)).

7. *Id.* at 61-62.

8. *Id.* at 62.

9. Alaska v. Native Village of Venetie Tribal Gov't., 522 U.S. 520 (1998).

10. *Id.* at 526.

11. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

12. 522 U.S. at 525.

13. *Id.* at 530.

mental authority between the Native peoples of Alaska and the state government, which represented the interests of the majority. The position taken by the state undoubtedly exacerbated the sense of alienation on the part of indigenous peoples and helped consolidate majority sentiment against indigenous claims of continuing sovereignty.

Rather than help bridge the majority-minority divide underlying the *Venetie* case, the Supreme Court helped to consolidate it. The Court, in an opinion authored by Justice Thomas, unanimously found that relevant federal enactments, particularly the Alaska Native Claims Settlement Act,[14] rendered Venetie's lands—and, by implication, most all of the lands now held by indigenous communities in Alaska—outside the rubric of "Indian country,"[15] and hence not lands to which indigenous sovereignty or governmental authority attached.[16] According to the Court, the condition of Native peoples in Alaska had been determined by Congress, and that determination on the issue of the distribution of governmental authority was in favor of the state and its majority constituency.[17] The Court provided no measure of validation to the indigenous voice or point of view, and it provided nothing to engender majority-minority reconciliation over a fractious issue of fundamental importance to both indigenous and nonindigenous people. In typical fashion, upon declaring the indigenous litigants losers, the Court sought to wash its hands of the matter while reaffirming federal supremacy, stating that any modification in the outcome "is a question entirely for Congress."[18]

Even in rendering decisions that are favorable to indigenous litigants, the Supreme Court has adhered to the conquest myth and exalted federal supremacy at the expense of process-oriented solutions of the kind identified by Professor Des Rosiers.[19] In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Court held that Indian tribes enjoy sovereign immunity from civil suit with regard to transactions occurring both on and off reservation lands, whether or not the transaction involves tribal governmental activities.[20] In his majority opinion, Justice Kennedy relied on the Court's earlier precedents, but characterized the doctrine of sovereign immunity as something that had "developed almost by accident" and that Congress had left

14. 43 U.S.C. §§ 1601 (1994).

15. The court applied the definition of "Indian country" found in 18 U.S.C. § 1151, which relates to the geographic scope of tribal and related federal jurisdiction. *Venetie*, 522 U.S. at 526.

16. *Venetie*, 522 U.S. at 530.

17. *Id.* at 528.

18. *Id.* at 534.

19. *See generally* Des Rosiers, *supra* note 6.

20. Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc., 523 U.S. 751 (1998).

intact.[21] Thus, the Court's holding in favor of tribal sovereign immunity was made reluctantly, out of purported deference to Congress.

Justice Kennedy declared that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine of [tribal sovereign immunity]."[22] In examining those reasons, he ignored the historical inequities and considerations of self-determination, which, from the perspective of the indigenous litigants, favor maintaining those attributes of indigenous sovereignty that indigenous peoples have not freely given up, including Native governmental institutions' immunity from suit. Rather, in Justice Kennedy's view, sovereign immunity is an "accident"—something Congress and the Courts unwittingly allowed to survive conquest. Kennedy concluded the Court's opinion by inviting Congress to get on with unfinished business and to limit or do away with tribal sovereign immunity: "Congress, subject to constitutional limitations, can alter its limits through explicit legislation."[23]

A more recent Kennedy opinion, *Rice v. Cayetano*, further demonstrates a judicial tendency in favor of consolidating the conquest of indigenous Americans at the expense of supporting process-driven solutions to indigenous peoples' claims.[24] The decision in *Rice* rendered invalid the voting procedure for electing the trustees that govern the Office of Hawaiian Affairs, or OHA, the Hawaii state agency that administers programs designed for the benefit of people whose ancestry can be traced to those inhabiting the Hawaiian Islands prior European arrival in 1778.[25] Voting for the OHA trustees was limited to the same class of people defined by Hawaiian indigenous ancestry.[26] Because of this voting limitation, people generally regarded as Native or indigenous Hawaiians have substantially controlled OHA, although, of course, not without differences of opinion. A majority of the Court, however, held that the voting limitation constituted an "explicit, race-based voting qualification," violating the Fifteenth Amendment to the United States Constitution.[27] As a result of the Court's holding, Native Hawaiians will no longer be privileged in the selection of OHA trustees, and Native Hawaiian control over OHA governance will now have to give way to the dominant political winds.

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21. *Id.* at 756-58.
22. *Id.* at 758.
23. *Id.* at 759.
24. 528 U.S. 495 (2000).
25. *Id.*
26. *Id.*
27. *Id.*

The Court's decision in *Rice* deals a blow to efforts to generate adequate redress for widely acknowledged historic and continuing wrongs against Native Hawaiians, who as a group do not qualify for federal programs or statutory benefits aimed at Native Americans generally, and whose status under United States law remains ambiguous. In 1993, Congress adopted a joint resolution acknowledging and apologizing for historical acts that "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people" and expressing its "commitment to . . . provide a proper foundation for reconciliation between the Untied States and the Native Hawaiian peoples."[28] In the aftermath of this joint congressional resolution, the State of Hawaii stepped up efforts to facilitate a resolution of Native Hawaiian claims as Native Hawaiian groups pressed their demands with ever greater effectiveness at the state, national, and international levels. As debate has continued regarding how best to resolve Native Hawaiian claims for redress for historical wrongs, OHA has represented an existing program aimed at benefiting Native Hawaiians, a program justified by circumstances of historical origins that have not yet been adequately addressed. The State justified the voting limitation for the OHA trustees as a means to allow Native Hawaiians themselves to determine how the program would be administered.[29]

Justice Kennedy's plurality opinion in *Rice* gives no weight to the historic and continuing inequities suffered by Native Hawaiians in determining the constitutionality of the OHA voting limitation. Upon finding that the limitation is a race-based classification, the limitation for Kennedy becomes just as invidious as the voter qualifycations employed in the deep South to exclude or limit voting by Blacks.[30] It is apparently irrelevant that the voting limitation regarding OHA is far from the kind of racially motivated discrimination present in the other, now infamous schemes, or that, to the contrary, the OHA voting limitation can be justified as a part of an effort to redress historic wrongs suffered by a minority. Justice Kennedy's opinion does invoke history, but his historical narrative is one that ultimately reinforces the conquest myth with regard to Native Hawaiians. Although he acknowledges some suffering and historic wrongs against Native Hawaiians, the picture that emerges is one of a vanquished people whose fate has been decided by an inevitable pattern of history, the outcome of which must now simply be accepted.[31]

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28. S.J. Res. 19, 103d Cong., 1st Sess., 107 Stat. 1510 (1993).

29. Research regarding the status of Native Hawaiian claims in the State of Hawaii and the OHA programs is on file with the author.

30. *Rice*, 528 U.S. 495.

31. *Id.*

Rather than seek to situate the Court as a conduit for reconciliation, Justice Kennedy's opinion marks the boundaries of the possible responses to Native Hawaiian claims, and it does so in a manner that limits creative impulse and stifles conciliatory encounter. For Justice Kennedy and the concurring Justices, conquest is the presumed state of affairs, no matter how sad the history experienced by Native Hawaiians may be. Any effort to address Native Hawaiian grievances must conform to United States constitutional constraints, which are defined and imposed without regard to those grievances or the reasons for them. According to Justice Kennedy,

> When the culture and way of life of a people are all but engulfed by history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.[32]

There is no question that cases involving indigenous peoples raise difficult issues, and that appellate judges face a daunting challenge when they confront these issues. In meeting this challenge, however, the Supreme Court has not advanced what could be called a therapeutic jurisprudence. Rather, it has propagated a demeaning myth of conquest and diminished the impact of the indigenous point of view in the resolution of relevant conflicts. A different, more conciliatory approach is needed. One such approach—something like the one taken by the Supreme Court of Canada in the Québec Reference case—is suggested, ironically, by the last sentence of Justice Kennedy's quote above. That sentence might be read to suggest the following: that the Constitution can be a basis for a shared discourse, assisted by the judicial process, that leads to the identification of common values among indigenous and nonindigenous peoples; these values in turn, could guide the resolution of indigenous peoples' claims through appropriate procedures of negotiation involving all concerned. Unfortunately, that does not appear to be what Justice Kennedy had in mind. The Supreme Court still has a ways to go before what it does in relation to indigenous peoples can be called therapeutic.

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32. *Id.*