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The Vanishing Indian Returns

Kathryn E. Fort

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 has 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, 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.

I. Introduction

Writing history is perilous. It is a tricky thing to weigh narratives, present facts, 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

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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 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 This understanding of the founding and the Constitution “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.” 2 Picking and choosing from the history of the Founding has led to inconsistencies addressed by others, such as the natural consequence of a strict worship of the

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Founders for women (not belonging in politics or leadership positions)\(^3\) and African Americans (forever frozen in slavery).\(^4\) 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”\(^5\) stereotype, promulgated in the early Republic, reaching an apex in the 1820’s, continues to fundamentally influence how the Court views tribes. By compressing together the same history the Tea Party does, writings from the Founders through President Jackson continue to undermines tribes authority and sovereignty within the Court.\(^6\)

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.”

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.

\(^4\) Id. at 159.
\(^5\) See infra Section II.
\(^6\) See infra Section III (writings from 1795-1831).
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 post racial jurisprudence.

I. The Supreme Court as Public Historian

This article looks at the connection of “non-legal ideas and the law.” 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. The study of how history is used by writers, or the study of the narrative of history, has had less focus. Specifically, the study of how the Supreme Court uses history in its decisions, in their role as public historians, is even less popular. Finally, how the Court uses history in Indian law is rarely written about outside of the world of federal Indian law professors.

Historiography and 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

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8 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.”).
contemporary Indian life.” Historians in the federal recognition process is an obvious example of public historian work affecting the legal rights of tribes. However, the Court’s use of history is also damaging to tribes, and even more so lately.

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,” this is a particularly important point. The Court, therefore, is involved in creating public history, or public narrative, in its opinions. 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, or is it a research project, as the historian’s sometimes view it.” The Court’s “use and misuse [of history] affects the political values of the nation” because by “writing history into its opinions the Court contributes to the public view of the American past as much as, and sometimes even more than, professional historians . . .” Indeed, the Court engages in a back and forth with political culture and exchanges understanding of narrative and Constitutional history. As Jill Lepore noted in her

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11 Kelly, supra note 9, at 123.
12 MILLER, supra note 9, at 193.
13 Id. at 196.
14 Id. at 25.
article on the Tea Party and the Founding, professional historians may dismiss the popular history surrounding originalism, but the Court certainly has not.\textsuperscript{16}

The recent decision of \textit{District of Columbia v. Heller},\textsuperscript{17} a case with warring historical narratives in the opinions, has highlighted the Court’s role as historian again.\textsuperscript{18} After all, Justice Scalia’s new textual originalism, or “original public meaning originalism”\textsuperscript{19} requires a certain amount of history, whether his choices are ultimately ahistorical, or “anti-historical,” or neither.\textsuperscript{20} The expected \textit{McDonald v. City of Chicago}\textsuperscript{21} decision opened up this discussion again just as the \textit{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.\textsuperscript{22} In Alfred Kelly’s famous article he explains Chief Justice Marshall’s use of history in cases as “judicial fiat.”\textsuperscript{23} Deciding a case by judicial fiat happens with the Court attaches a historical meaning to a Constitutional clause without resorting to research or inquiry.\textsuperscript{24} Kelly goes on to claim that examples of history by judicial fiat are more difficult to discover in the twentieth century.\textsuperscript{25}


\textsuperscript{17} 554 U.S. 570 (2008).


\textsuperscript{20} Cornell, \textit{supra} note 18, at 1111.

\textsuperscript{21} 130 S.Ct. 3020 (2010).

\textsuperscript{22} Kelly, \textit{supra} note 9, at 122; Robert J. Spitzer, \textit{Why History Matters: Saul Cornell’s Second Amendment and the Consequences of Law Reviews}, 1 ALB. GOV’T L. REV. 312, 333 (2008).

\textsuperscript{23} Kelly, \textit{supra} note 9, at 123 (Ignoring, however, one of Marshall’s most famous opinions via judicial fiat, \textit{Johnson v. M’Intosh}, 21 U.S. 543 (1823)).

\textsuperscript{24} Kelly, \textit{supra} note 9, at 122.

\textsuperscript{25} \textit{Id.} at 125. Unfortunately, this is simply not the case in federal Indian law, \textit{see, eg.}, \textit{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
More relevant to this discussion was 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.”\textsuperscript{26} Those appellate briefs go on to inform the Court’s writing, and is not significantly different than Saul Cornell’s complaint about the \textit{Heller} decision, in the “Court’s highly selective use of academic scholarship on the Second Amendment.”\textsuperscript{27} 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.”\textsuperscript{28} This has been a concern with much of the Court’s reliance on history. In studying 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.\textsuperscript{29}

However, when Kelly wrote his article in 1965, he was concerned with the liberals’ use of history to disguise judicial activism.\textsuperscript{30} 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,\textsuperscript{31} and occupies a place in the popular

\begin{footnotesize}
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\item \textsuperscript{26} Kelly, \textit{supra} note 9, at 126.
\item \textsuperscript{27} Cornell, \textit{supra} note 18, at 1110; \textit{see also} Allison LaCroix, \textit{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/; Henigan, \textit{supra} note 18, at 1187.
\item \textsuperscript{29} James G. Wilson, \textit{The Most Sacred Text: The Supreme Court’s Use of The Federalist Papers}, 1985 BYU L. REV. 65 (1985).
\item \textsuperscript{30} Kelly, \textit{supra} note 9, at 132, 149, 150. However, Kelly also noted that “the 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 ‘rediscover’s it, who can gainsay the new revelation?” \textit{Id.} at 131-2.
\item \textsuperscript{31} \textit{See supra} note ___; Jeffery S. Sutton, \textit{The Role of History in Judging Disputes About the Meaning of the Constitution}, 41 TEX. TECH L. REV. 1173 (2009).
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interest. The Heller decision illustrates the way the Court uses all types of historical sources to render its opinions, and 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, or used primary sources out of context. Perhaps a turn so strongly in this direction will also starkly illustrate the issues with the Court’s use of history outside of the area of federal Indian law. At least one Justice has pointed out how the Court has been getting history “wrong,” though he is often in dissent these days. 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 which created it.

Some scholars have countered that the job of the Court is not to write history but to write law. For this and other reasons, an examination of the Court’s use of narrative has been underexamined. However, the “search for intentions” is vitally important to the Court now. As Judge Sutton writes, “for several of the Justices a victory on the historical argument generally spells victory on the constitutional argument.”

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32 See David G. Savage, Original Intent Matter of Opinion; As the Supreme Court Demonstrates, Even History is Debatable, L.A. TIMES, July 13, 2008, at 14A; Liptak, supra note 16 (discussing popular constitutionalism); LEPORE, supra note 2, at 119-25.
34 Cornell, supra note 18, at 1110-11; Henigan, supra note 18, at 1187; Levinson, supra note 18, at 325-26.
36 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.”).
37 Morgan Cloud, Searching Through History; Searching For History, 63 U. CHI. L. REV. 1707, 1745-6 (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, 27 LOY. L.A. L. REV. 193 (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?, REV. 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 Constitutional debate over the standing army and the origins of the American Revolution... As a whole, the book is not based on close, systematic research.”).
38 FRANK POMMERSHEIM, BROKEN LANDSCAPES 115 (2009).
39 Sutton, supra note 31, at 1181.
Commerce Bank v. Long Family Cattle, a history heavy Indian law case, the Court also decided Heller and Boumediene v. Bush, which were identified by Judge Sutton as heavy history cases. While a caseload this focused on history is a relatively recent shift, it is painfully familiar to Indian law practitioners. However, few legal historians examine cases dealing with federal Indian tribes as examples of egregious use of historical narrative.

Supreme Court decisions can be highly polarizing but usually the recitation of facts and therefore the historical narrative are not. 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 its choice of narratives. In his book, Broken Landscapes, Prof. Frank Pommersheim makes compelling points on this issue. He writes that “history rescues events from oblivion but not necessarily from tyranny.” There seems to be a consensus, or at least an understanding that the Court cannot be expected to write history with “empathy” as Prof. Pommersheim requests. Instead, the Court rules with certainty by using racially charged decisions for precedent and a belief that there is one right answer to be found in the history.

Strangely, finding absolutism in history is not where most historians fall. History is constructed through an analysis of contradictory sources, read through modern eyes. There is rarely one right interpretive answer. While it may stray into relativism to say there is no way to

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42 Sutton, supra note 31, at 1174.
43 POMMERSHEIM, supra note 38, at 115 (“Yet, there is seldom any discussion of the nature of the historical enterprise itself in the cases or scholarly literature.”).
44 Robert Cover, Violence and the Word, 95 YALE L.J. 1601 (1986); Gregory O’Meara, The Name is the Same, But the Facts Have Been Changed to Protect the Attorneys: Strickland, Judicial Discretion, and Appellate Decision-Making, VAL. U. L. REV. (forthcoming) (manuscript at 67) (2007), available at http://ssrn.com/abstract=1022031 (“[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.”).
45 POMMERSHEIM, supra note 38, at 120.
46 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.
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.47 Examples abound showing how historical interpretation shifts over time, or how the relevance of some evidence can become more or less important.48

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.”49 However, as scholars examine the Court’s use of historical narrative and historical evidence, almost none outside of the field take into account cases involving federal Indian tribes. The discussions about the abuse of history by the Court as it relates to federal Indian law decisions 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 times.50 The vanishing Indian,

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47 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. See ANNETTE GORDON-REED, THOMAS JEFFERSON & SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997).
49 Richards, supra note 9, at 818.
however, was more than just a popular trope, much as Tea Party “history” has the possibility of becoming more than popular understanding. Instead, it was a governing stereotype all three branches of government worked under for years, long after it had been abandoned as a cultural touchstone.\(^5^1\) While the Executive and Legislative branches have officially abandoned this operative framework, the Supreme Court continues to lag behind.

Public history, both the Court’s and public historians’ writing, have ramifications in Indian law unlike any other area.\(^5^2\) Because of this, scholars in the field of federal Indian law have worked on these issues a great deal.\(^5^3\) Rob Williams details the larger history of legal racism with close readings of flawed cases.\(^5^4\) He particularly focuses on the stereotype of Indian as savage,\(^5^5\) 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.”\(^5^6\) He uses the case of the Black Hills\(^5^7\) 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 for the Court to “cling to the inequities of the past [it] . . . allows the oppression of past history to continue to oppress, rather than be transformed in the present.”\(^5^8\)

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\(^5^1\) See infra Section II.
\(^5^2\) Miller, supra note 9, at 23 (“In no other fields of public does history play so decisive a role[.]”).
\(^5^5\) Id. at 35.
\(^5^6\) Pommersheim, supra note 38, at 113.
\(^5^8\) Pommersheim, supra note 38, at 118.
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 expert witnesses.\(^{59}\) This scholarship ties in with a concern of public historians about writing public history used later by the Court and in federal recognition litigation.\(^{60}\) 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,\(^{61}\) the Court must use historical narrative when deciding Indian law cases. However, the question then 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 a 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 1700’s and early 1800’s, 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.\(^{62}\) 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.\(^{63}\)

\(^{59}\) Valencia-Weber, supra note 53, at 263.
\(^{60}\) Hurtado, supra note 10, at 64-65.
\(^{61}\) MILLER, supra note 9, at 23; .
\(^{62}\) See infra Section III.
Today the Court clings to the idea that tribes will eventually disappear and its citizens 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 provide a context for the framework, a context 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 significant ideas and the law.” Understanding these connections “enhance our understanding of the law’s past.” 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 seems to be obsessed with the founding era and surrounding times, this overview of the vanishing Indian concept ranges from 1787 through the early 1800’s. This is a large period of time encompassing many different stages of federal government development. 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

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64 Raack, *supra* note 7, at 182.  
65 *Id.*.  
66 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.
inevitably disappear.\textsuperscript{67} 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.\textsuperscript{68} A person (usually man) at one with nature, living “free” and unburdened with worry.\textsuperscript{69} This imaginary person, a European invention, disappeared at the very first encounter with the colonists.\textsuperscript{70} As multiple scholars have noted, Indians must always be the past, not the present or future.\textsuperscript{71}

Brian Dippie’s book, \textit{The Vanishing American} explores much of this pathology and 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, there by washing the white man’s hands of responsibility. An even more satisfactory explanation held that the fate of the aborigines was predestined.\textsuperscript{72}

Throughout the early 1800’s the vanishing Indian became “a habit of thought.”\textsuperscript{73} As Dippie points out, forty novels from 1824-1834 had vanishing Indian “episodes.”\textsuperscript{74}

\begin{footnotes}
\item[67] Dippie, \textit{supra} note 50, at 10 (marking this understanding as gaining the most force after the War of 1812); Robert Clinton, \textit{Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law}, 46 \textit{ARK. L. REV.} 77, 79 (1993); Renato Rosaldo, \textit{Culture and Truth}, 69-71 (1989).
\item[68] Alden T. Vaughan, \textit{White Man to Redskin: Changing Anglo-American Perceptions of the American Indian}, 87 \textit{THE AM. HIST. REV.} 917, 950 (1982); Louis S. Warren, \textit{Vanishing Point: Images of Indians and Ideas of American History}, 46 \textit{ETHNOHISTORY} 361, 365 (1999)(“If 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, not one worth photographing.”); Rosaldo, \textit{supra} note 65, at 71.
\item[70] Warren, \textit{supra} note 68, at 367; Dippie, \textit{supra} note 50, at 20-21.
\item[71] Borrows, \textit{supra} note 63, at 415; O’Brien, \textit{supra} note 50, at xxi-xxiii, 107.
\item[72] Dippie, \textit{supra} note 50, at 12.; Or the Indian tribes’ fault entirely. 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 into their jurisdiction, to become traders, farmers, and to follow professional pursuits.” S. Rep. No. 377, 53d Cong. 2d Sess. (1894).
\item[73] Dippie, \textit{supra} note 50, at 15.
\end{footnotes}
popular by in society through bestselling novels like James Fenimore Cooper’s *The Pioneers,* the understanding that Indians would necessarily disappear in the face of advancing civilization was assumed and encouraged. Both *The Pioneers* and *Last of the Mohicans* are studied today in modern literature studies as examples of this stereotype.

This trope was not limited to popular fiction, but as a “habit of thought” informed most encounters with tribes, either in reality or in history. 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. 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.*” This is contrary to evidence showing that even at the time, while tribes suffered greatly in their encounters with the colonists, they were neither extinct, nor doomed for extinction.

The role of the vanishing Indian idea also shifted with time, and 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. Later attempts to remove tribes west both vanished Indian peoples and tribes from the land coveted by settlers. Still others

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76 O’Brien, supra note 63, at 424.
77 Romero, supra note 74, at 385; see also Jen Camden & Kathryn Fort, “Channeling Thought”: *The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 105-6 (“Although *The Pioneers* predates the Indian Removal Acts of the 1830s, it performed a kind of cultural work by enabling readers to believe that the Indian removal had already happened.”).
believed that Indian peoples themselves would disappear, through famine and war, as a natural part of their encounter with “civilization.” 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.

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

This assumption of extinction informed political leaders from the local to national level. It informed their decision making processes and their policy initiatives. For policy makers, writing this history of Indian tribes was useful to majority culture. In the attempt to maintain all tribes as having the same history, tribal differences flattened out. This method of making all tribes, one tribe, and all Indians, disappearing Indians, also disappeared the specific problems and promises each tribe faced in their separate situations. As Dippie writes about abolitionists and Indian people, “different tribes meant different problems to different people,” thus making the “Indian problem . . . incredibly complex” compared to the relatively simple overarching goal of the abolition of slavery.

80 O’Brien, supra note 63, at 428.
81 O’Brien, supra note 50, at xi-xxvi.
82 See supra pp ___; Sheehan, supra note 69, at 4.
83 Berry, supra note 78, at 52; Sheehan, supra note 69, 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).
84 Dippie, supra note 50, at 82.
Congressional solutions at the time certainly faced the problem of legislating for a disappearing people who would just not disappear. For example, in a land grant from the United States to the Cherokee Nation, the land was granted until the Cherokee nation “abandoned the land or went extinct.”\(^85\) While no other statute uses such obvious language, the federal Indian policy in this timeframe shifts from one of treaty making to assimilation and allotment, demonstrates both the belief and the hope that tribes would disappear. One possible reason there is no other statute with such extreme language was the belief that it was pointless to legislate for the vanishing Indian. For example, as late as 1891, the American Bar Association debated a resolution to provide “for courts and a system of law in and for the Indian reservations.”\(^86\) The response given from Senator Dawes was “[w]hy are you providing for a vanishing state of things?”\(^87\) The ABA speaker countered that it would probably take at least 30-60 years under the Dawes allotment plan for tribes to disappear.

This assumption was not limited to Congress either. A look at the presidential papers of those founding fathers who became presidents illustrates the evolution of the vanishing Indian assumption. As Secretary of War to George Washington, Henry Knox wrote “[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.”\(^88\) 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.

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

\(^{85}\) 148 Stat. 412 (1830).
\(^{86}\) 14\(^{th}\) ABA CONFERENCE ANNUAL REPORT 18 (1891).
\(^{87}\) 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).)
\(^{88}\) Berry, supra note 78, at 52-3.
the new country. Only in Washington’s Seventh Annual Message does the President mention “civilization” with regards to Indians. Finally, in Washington’s final message, he starts by discussing the measures meant to “insure a continuance of the friendship of the Indians,” and argues 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.”

While John Adams has virtually nothing to say in his presidential papers 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. By 1801, the role of the government in civilizing Indian tribes is 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.

Jefferson did appear to believe that the “intermix[ing]” of Indian people and the colonists was the “natural progress of things,” and wrote in a letter it would lead to becoming “one people.” More darkly, though, in the same letter he writes to the recipient that “your reflections must have

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90 John T. Woolley & Gerhard Peters, George Washington’s Seventh Annual Message, THE AM. PRESIDENCY PROJECT (Dec. 8, 1795), http://www.presidency.ucsb.edu/ws/index.php?pid=29437 (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 observation of justice it is indispensable that there shall be competent means of rendering justice to them.”).
92 See SHEEHAN, supra note 69.
95 Id.
led you to view the various ways in which their history may terminate, and to see that this one
[incorporation] is the one most for their happiness.”

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.” 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 starts 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
“in 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.” In these two sentences, the understanding of expansion of civilization as natural and
unpreventable, and the land as a desert, which gives way to visions of swaths of unoccupied
land, the vanishing Indian framework is laid out clearly by the Executive Branch.

By 1818, the language has grown even stronger, and the extinction of “independent
savage communities” in the face of civilized population is “clearly demonstrated.”

96 Id. at 214-15.
97 James Madison, VIII THE WRITINGS OF JAMES MADISON 49 (Gaillard Hunt ed., 1908) (1st Inaugural ed.).
speaks about the progress of a civilized population “invariably terminated in the extinction” of tribes, and that “to civilize them, and even to prevent their extinction, it seems to be indispensable that their independence as communities should cease.”

In Monroe’s 1820 Annual Address, he writes that “Left to themselves their extirpation is inevitable.”

Of course, this mentality reached its apex in the Executive branch under the presidency of Andrew Jackson. Jackson, though not a founding father, is lionized for his plain speaking demeanor, an early bird on the straight shooter express. His writings are not considered founding sources, but he was obsessed with moving Indians off their land and disappearing them from view of the majority. The apex of the vanishing Indian in popular culture coincided with his presidency.

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. 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. However, this narrative framework, or history of tribal peoples, was applied regardless of the situation of specific tribes. Majority culture created one

100 Id.
102 Berry, supra note 76, 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 employed 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.”); Romero, supra note 72, at 119 (“Cooper’s natives . . . expunge imperialist conflict from the Jacksonian cultural memory.”).
103 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.”).
104 O’BRIEN, supra note 50 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.”).
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 tribes would be grouped into one unified “history,” usually to their detriment.

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

[w]hat can be more melancholy that 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 the warriors and the youth; the sachem and the tribes; the hunters and their families? The wasting pestilence has not alone done the might 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.

105 John Marshall, 11 THE PAPERS OF JOHN MARSHALL 179, n. 2 (Charles F. Hobson ed., 2002); Justice Joseph Story, Address in Commemoration of the First Settlement of Salem in the State of Massachusetts (“History and Influence of the Puritans” speech) (Sept. 18, 1828); SHATTUCK & NORGREN, supra note 101, 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.”).

106 Corinna Lain, The Countermajoritarian Classics (and an Upside Down Theory of Judicial Review) (Aug. 31, 2010) (unpublished manuscript at 70-73) (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.”).

107 See Siegel, supra note 15, at 239 (discussing the role of popular culture in understanding the Second Amendment and how Heller, consciously or not, echoes the language of popular culture).


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 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.” However, his empathy with the “plight” of the Indians did not, however, change the language Justice Marshall used in Johnson v. M’Intosh, or the “actual state of things” confronting him in the Cherokee Nation case. However, unlike most of the populace, the Court was faced with constant and repeated evidence of the existence of tribes. Though often futile, tribes attempted to bring cases in to the Court. Though the Court held that most dealings between Congress and tribes constituted non-justiciable political questions, the Court still found itself faced with cases involving tribal land or tribal rights. Even in the face of this evidence, the Court continued to write cases for a vanishing people.

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110 WHITE, supra note 108, at 714.
111 21 U.S. 543 (1823).
112 30 U.S. 1 (1831).
113 United States v. Rogers, 45 U.S. 567 (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.”).
114 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 443 (eds. Nell Jessup Newton et al)(“Between 1836 and 1946, Congress enacted 142” acts waiving sovereign immunity for Indian claims.) These claims would just involve between Indian tribes and the federal government. They do not include cases which 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., Butz v. Northern Pac. R. Co., 119 U.S. 55 (1886); Ex Parte Crow Dog, 109 U.S. 556 (1883); United States v. Joseph, 94 U.S. 614 (1876); United States v. Cook, 86 U.S. 591 (1873); Leavenworth, L. & G.R. Co. v. United States, 92 U.S. 733 (1875); Beecher v. Wetherby, 95 U.S. 517 (1877); United States v. Brooks, 51 U.S. 442 (1850); Clark v. Smith, 38 U.S. 195 (1839).
The Court's most famous use of vanishing Indian language was in *Johnson v. M’Intosh*.

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.”

This influential and powerful precedent inscribed vanishing Indian language into federal Indian law, regardless of the reality. 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.

Other cases also used vanishing Indian terminology. One case which particularly illustrates the dissonance in vanishing Indian cases, and the different result when the Court grapples with specific tribal history, is the *Kansas Indians* 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.

The land had been granted to the individual Indians pursuant to a treaty with the United States. The lower court wrote “[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 . . .”

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115 21 U.S. 543 (1823).
116 Id. at 590.
118 Id.
119 See United States v. Kagama, 118 U.S. 375 (1886)(“The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers.”)
120 72 U.S. 737 (1866).
121 The tribes were the Shawnee, Wea and Miami.
122 72 U.S. at 747.
However, the Court was faced with the dilemma. The Indian tribes in this case were not extinct, contrary to policy and cultural understanding. Testimony from tribal leaders made this abundantly clear.\textsuperscript{123} The tribes in question had just signed treaties with the federal government. The Court does use language such as “the small number of Shawnees-the tribe does not now contain over twelve hundred souls . . .”\textsuperscript{124} but is forced to come to the conclusion that the lands cannot be taxed. The Court does so grudgingly, writing that “[i]t may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas.”\textsuperscript{125} The Court also acknowledges 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, in 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.”\textsuperscript{126}

Ten years later, in the case \textit{Beacher v. Weatherby},\textsuperscript{127} 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.\textsuperscript{128} The question was whether the federal or state patent granted title.\textsuperscript{129} There was also a question as to whether the section in question had been reserved to the Menomonee tribe. The Court found that 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.\textsuperscript{130}

\begin{footnotes}
\item \textsuperscript{123} \textit{Id.} at 744 (attorney’s argument).
\item \textsuperscript{124} \textit{Id.} at 752.
\item \textsuperscript{125} \textit{Id.} at 756.
\item \textsuperscript{126} \textit{Id.} at 758 (emphasis added).
\item \textsuperscript{127} 95 U.S. 517 (1877).
\item \textsuperscript{128} \textit{Id.} at 521.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 525 (emphasis added).
\end{footnotes}
As the Court moved away from specific language and to general narrative (“Indian tribes,” “State, as in other States”) the Menomonee tribe loses. 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. He argues that assimilation shifted thought from literal disappearance of Indian people to the disappearance “only of race and culture, and not the individuals.” 131 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 one Indian alive.” 132 Indeed, Jean O’Brien writes “’[c]ivilization’ for Indians meant literal or figurative death—there is no other conceivable outcome.” 133

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131 DIPPIE, supra note 50, at 137.
132 Id.
133 O’BRIEN, supra note 50, 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.134

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.”135 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,136 the influx of government operating funds from gaming and other economic development and the continued pressure from tribal citizens for their inherent rights of self-governance and respect continued to slowly raise awareness in majority culture.

134 See, e.g., Richard Warren Perry, The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity, 28 IND. L. REV. 547, 555-6 (1995) (“A theme of vanishing Indian identity 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.”). 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.”).

135 Warren, supra note 66, at 370; but cf. Jennings, supra note 79.

The work to diminish Indian nations by the Court happens even as the legislative and executive branches continue to endorse a path of tribal self-governance. Indeed this erasure and diminishment is happening at a time when tribes are consistently increasing in population and exercising their rights of self-governance. 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 at the Supreme Court at an alarming rate. Many scholars have discussed why this is happening, but how it is also useful to consider how this is happening. 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, but his histories in federal Indian law cases are some of the worst examples of writing narrative history. His work, along with others on the Court, attempts to erase tribes from the American history, and negate their role today.

In fact, the Supreme Court has returned to the operating assumption of the vanishing Indian touchstone. While the Court’s language may not be blatant as it has been in the past, its holdings continue to treat tribes as less and less significant within the history of America. The

140 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. He also makes no mention of Indians or tribes anywhere in the book.).
141 Perhaps the Court never moved beyond it.
Court does this in different ways, both obvious and more subtle. The obvious ways include holdings which explicitly attempt to diminish tribal sovereignty, particularly in their authority over non-Indians on or within the borders of tribal lands. More subtle adoption of this understanding expresses itself though choices in citations and quotes, and the erasure of tribes and their history from decisions which directly affect them. 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 put themselves in the position of rewriting the same bad history.

Following the dual strands of the vanishing Indian trope from the 19th century, the inevitable extinction of tribes (through disappearance or “civilization”) and the romanticism of a perfect pre-contact tribes,142 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 work143 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 underlies all of its

142 Borrows, supra note 63, at 417.
143 Camden and Fort, supra note 77, at 105-6.
legal dealings with Indian tribes. The history the Court writes seeks to minimize the unique status of tribes within the federal legal system.\textsuperscript{144}

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 in the 1868 Treaty of Fort Laramie, the end result applies to all tribes, in this case, no tribal civil jurisdiction over non-Indians with narrow exceptions.\textsuperscript{145} This happens regardless of the fact that each tribe has a unique treaty history.\textsuperscript{146} 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—fades into the background. 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 \textit{Montana}\textsuperscript{147} 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 19\textsuperscript{th} century vanishing Indian writing\textsuperscript{148} and John Borrows writes about it informing today’s understanding of Indian peoples.\textsuperscript{149} The Supreme Court continues to use this understanding when interpreting treaty

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\textsuperscript{144} See also Philip P. Frickey, \textit{A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers}, 109 \textit{YALE L.J.} 1, 80 (1999) (“If the judges borrow concepts from the general law, not simply from constitutional values and general congressional purposes associated with particularly statues, 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.”).


\textsuperscript{146} A similar example is \textit{Oliphant v. Suquamish Indian Tribe}, 435 U.S. 191 (1978), 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 also \textit{Osage Nation v. Irby}, 597 F.3d 1117 (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 \textit{Solem v. Bartlett}, 465 U.S. 463 (1984), and \textit{DeCoteau v. District County Court}, 420 U.S. 445 (1975).

\textsuperscript{147} \textit{Montana}, 450 U.S. 544.

\textsuperscript{148} \textit{O’Brien}, supra note 50, at 118-9 (“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.”).

\textsuperscript{149} Borrows, supra note 63, 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.

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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 contemplating holding a treaty right to fish. 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 there is a generic narrative for tribes requiring them to exist only in a non-existent past, other narrative methods the Court uses to erase tribes simply reinforces this idea. Justice Rehnquist in particular uses a form of erasure by focusing on every legal issue in a case except the tribal interest, even when the tribe is a party. This is true even in cases where the tribe wins. When the tribe is a named party, the Court manages to come to a decision without involving any tribal context. Most famous among these cases is *Seminole Tribe v. Florida.* Taught in Constitutional law classes as an example of Eleventh Amendment jurisprudence, the case provides no context for the statute at issue, 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 there is no history regarding the purpose of the Indian Gaming Regulatory Act, and only briefly discusses the Indian Commerce Clause.

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,* first the Court states that the case does not require a “review of history.” Then, however, the opinion reviews one of the worst cases of law office history in federal Indian law, *Oliphant v. Suquamish Indian Tribe.* In addition,
when the Court does attempt to find a historical record regarding treaty histories, it cites to a student comment and a student note for the proposition that “scholars” are “divided in their conclusions” regarding nonmember jurisdiction in historical sources.

The problems inherent with history used in the Oliphant case have been detailed elsewhere, 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 quotes an 1834 memo from the Commissioner of Indian Affairs stating “Indian tribes are without laws . . .” Then the Court goes on to cite a 1830 treaty with the Choctaw tribe, or the treaty of Dancing Rabbit Creek. 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, was the one Justice Rehnquist choose 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.

Not only does the Court cite to vanishing Indian treaties and sources, it cites to cases using vanishing Indian terms, thus bringing forward vanishing Indian narrative histories. Of course, the Court cites to racist federal Indian law cases repeatedly, but ones which specifically use vanishing Indian language accomplish a slightly different kind of narrative

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156 Duro, 495 U.S. at 690.
158 Oliphant, 435 U.S. at 197 (which may remind the reader of the ABA’s similar concern in 1891, supra note 84).
159 7 Stat. 333 (Sept. 27, 1830).
160 Barsh and Henderson, supra note 157, at 617.
161 WILLIAMS, supra note 54, at 89-160.
work. In his dissent in *Washington v. Colville Tribe*, Justice Rehnquist cites to a case discussed *supra, The Kansas Indians* case. In *Kansas Indians*, the Court and attorney’s 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.

When the Court decides to avoid presenting any contextual history for a case, plain meaning statutory construction eliminates the need for “complicated” legal and factual backgrounds, which, one assumes, includes the history between tribes, individual Indians and the federal government. Recently the Court decided a case where the “plain meaning” of the language precluded any complex understanding of the varied relationships between tribes and the United States. 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.

Still another example of both erasure quoting primary sources which use vanishing Indian terminology include *Nevada v. U.S.* where the case rested on the creation of the Paiute Tribe’s reservation and the water rights between the tribe and later settlers. The opinion uses a primary source to describe the first settler’s description of Pyramid Lake, and goes on to quote at length from a 1926 Bureau of Indian Affairs letter which uses vanishing Indian language:

> If their ultimate welfare depends in part on 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. 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.”

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163 *Supra* note 119.
165 *Id.* at 114-5.
166 *Id.* at 135.
Using this type of evidence, the Court held that the settlers had better claim to the water rights than the tribe.

However, it is possible to do subtle close readings of opinions where the writing itself reflects back on and resonates with earlier narratives. Justice Ginsberg’s opinion in *City of Sherrill v. Oneida Indian Nation*\(^{169}\) does this in a couple of ways. For example, the Court uses the word “ancient” eight times in discussing the tax case.\(^{170}\) This reinforces the 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.”\(^{171}\) In addition, one quote uses vanishing Indian language, where the Court refers to the “wilderness” of the land where Sherrill now sits.\(^{172}\) Wilderness necessarily implies emptiness, and a lack of population.\(^{173}\) Finally, one of the most infamous quotes of the case, where the Court writes 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*,\(^{174}\) 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.\(^{175}\)

\(^{169}\) 544 U.S. 197 (2005).

\(^{170}\) *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”).

\(^{171}\) 21 U.S. 543, 518 (1823).

\(^{172}\) 544 U.S. at 215.

\(^{173}\) *RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY* 1525 (1991)(“a wild, uncultivated, uninhabited region, as of forest or desert”).

\(^{174}\) *COOPER*, *supra* note 75.

\(^{175}\) *Id.*
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.176

The Court also rarely fails to reference tribes’ “incorporation into the American republic”177 as an explanation for tribe’s diminished sovereignty. In 2008, the Court used it the phrasing twice in the same case, stating first that by incorporation the tribes lost the right of governing non-Indians,178 and that “by virtue of their incorporation into the United States, the tribe’s sovereign interests are now confined to managing tribal land.”179 As others have pointed out, there is no constitutional basis for this incorporation.180 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.

The Supreme Court’s writing based on stereotypes goes beyond the Indian law cases and into cases involving railroads and land grants, for example. Even though Indians or tribes are not even mentioned in the cases (which further illustrates this point), the story of the American west

176 City of Sherrill was expanded by the Second Circuit in Cayuga Indian Nation of New York v. New York, 413 F.3d 266 (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 the 7th Annual Indigenous Law Conference, East Lansing, Michigan, Persuasion and Ideology, (October 8, 2010).
177 Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316, 328 (2008); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 199 (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.”); Atkinson Trading Co., Inc. 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. U.S., 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.”); 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.”).
179 Id. at 334.
180 POMMERSHEIM, supra note 38; see Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction, 81 U. COLO. L. REV. 974, 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 the laws of their own making and enforcement.”).
is told in the Court’s writings. 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 “every school boy knows” the history, there is no reason for sources.\textsuperscript{181}

Even liberal justices writing in the dissent have a strange way of incorporating Indian stereotype into cases. The \textit{Heller} decision, discussed earlier, reinforces the idea of the frontier and savage Indians as late as 2008,

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, \textit{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.\textsuperscript{182}

An excellent example of this general, public history is Justice Rehnquist’s opinion in \textit{Leo Sheep Company},\textsuperscript{183} a case relating to the Quiet Title Act, railroads and land patents. Justice Rehnquist writes a history of the “west” from the Louisiana Purchase through 1865 without a single mention of tribes, tribal peoples or treaties.\textsuperscript{184} Land granted to the Union Pacific Railroad by the United States has been under suit in other cases involving Indian tribes\textsuperscript{185} 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 concedes, writing that

\[\text{[t]his is one of those rare cases evoking episodes in this country’s history that, if not forgotten, are remembered as dry facts and not adventure. Admittedly the issue is mundane: Whether the Government has an implied easement to build a road across}\]

\footnote{\textit{Tee-Hit-Ton Indians v. United States}, 348 U.S. 272, 289 (1955).}
\footnote{554 U.S. 570, 715 (2008) (Breyer, J., dissenting) (emphasis added).}
\footnote{\textit{440 U.S. 668} (1979).}
\footnote{\textit{Id.} at 670-677.}
\footnote{\textit{United States v. Union Pac. Ry. Co.}, 168 U.S. 505 (1897); \textit{Kindred v. Union Pac. R.R. Co.}, 225 U.S. 582 (1912); \textit{United States v. Santa Fe Pac. R.R. Co.}, 314 U.S. 339 (1941); see also \textit{Wilkins supra} note 113, at 52 (“In the report issued by the Senate’s Committee on the Pacific Railroad, Senator William Steward (R., Nevada) wrote that tribes ‘can only be permanently conquered by railroads. The locomotive is the sole solution of the Indian question . . . .’”).}
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 sprit we relate the events underlying passage of the Union Pacific Act of 1862.”

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.” He doesn’t need to use the words “vanishing Indian” or even “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 . . .” 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

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187 Id. at 670.
Court discussed the holding of *Leo Sheep* at length. 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 Founders in Constitutional interpretation and the understanding of “post-racial” America come together in a disturbing mix for tribes and tribal sovereignty.

As discussed at length *supra*, the Founders, specifically Madison and Monroe, and later writings by Jefferson, contemplate the end of tribes as tribal people are first killed through wars and disease, and the few remaining become integrated into society. Certainly the continued existence of tribes 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.

This understanding puts the Court at least 50 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. The current era of “judicial termination” runs polar opposite to current Congressional and Executive policy.

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191 *Cf Lain, supra* note 106.
This understanding of the Founders as the arbiters of history has extended beyond the Court\textsuperscript{192} and into popular culture. In some ways, it is easier to see the web of history and law in articles about the Tea Party. The Tea Party historians (a term used loosely) adhere to one particular history with no interest in moving forward.\textsuperscript{193} 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.\textsuperscript{194} Of course, if society cannot be modern, then Indian tribes \textit{certainly} are not modern. An adoption of values, mores and law of the late 1700’s and early 1800’s is an adoption of the vanishing Indian stereotype.

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,\textsuperscript{195} the Court is also echoing an understanding of history which celebrates and

\textsuperscript{192} Wilson, \textit{supra} note 29, at 66 (noting that the use of The Federalist papers in Court opinions jumps dramatically in the 1960’s and remains high through the mid-1980’s).

\textsuperscript{193} Randall Stephens, \textit{The Past is No Foreign Country}, HIST. 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.”); Goldstein, \textit{supra} note 189, at 22 (“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”); LEPOR, \textit{supra} note 3, at 124-5.

\textsuperscript{194} Goldstein, \textit{supra} note 189, at 24 (“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 frame work for resolving differing political views; the Constitution itself resolves those differences.”).

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 rhetoric embraces are not limited to the time of the Founding, but through the 1800’s, further reinforcing the importance of a era highlighted by the vanishing Indian concept and the actual Indian removals. Not only does a certain segment of the populace want to remain in an ideological past, it puts Indian tribes into a past where they do not exist.

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 certainly exists. 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 in the Court. For example, Justice Thomas’s dissent in *United States v. Lara* illustrates part of this problem. Justice Thomas cannot find basis in the Constitution for Congress’s plenary power over Indian tribes. This plain finding would probably have support from many Indian law scholars. The problem comes from where Justice Thomas would go with 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. As he writes, “the States (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.” Tribes, not considered long for this world by the drafters of the Constitution, also cannot exist today, at least to those with originalist blinders.

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197 *Id.* at 215 (Thomas, J., concurring) (“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.”).
198 *Id.* at 219.
Oddly, this movement in federal Indian law combines both the Founders understanding of the world with the belief that the election of President Obama means the country is now “post-racial.” However, the Court’s move to eliminate affirmative action,199 and its acknowledgement of so-called reverse discrimination200 requires an extra step in the area of federal Indian law. Dismantling over a hundred years of federal Indian law based on treaty relationships and tribes as political entities has to happen before tribal citizens can be evaluated under the law as one other group.

Though it does not always fit into the same rubric, the Supreme Court’s jurisprudence in federal Indian law has some things in common with “post-racial” jurisprudence going on in the larger field. Specifically, the Court is removing all context from the history it presents. The Court treats the cases as fundamentally ahistorical, stubbornly keeping context at bay, 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, unanchored. An excellent example of this in federal Indian law is the Sherrill case. Discussed supra, that case looked at the “history” of the tribe’s sovereignty for the past two hundred years, but ignored all context. 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 was based on the actions of the federal and state government, trying to destroy the tribe, preventing the tribe from coming to court, and preventing the tribe from hiring objective counsel.201 These reasons are separate even from the social, economic and political inequity the tribe suffered from for those 200 years.

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

V. Conclusion

To quote an award winning historian, this article is “not just a banal moral point that stereotype is 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.”202 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.

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 no vanished. Some say 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 will continue long after the last Supreme Court Indian law decision. Relying on stereotypical histories to describe tribes and their people is lazy, and obscures this truth.

202 GORDON-REED, supra note 47, at 10-11.
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 the past it cannot leave behind. The Courts 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.\textsuperscript{203}

\textsuperscript{203} See, Matthew L.M. Fletcher, \textit{supra} note 180.