

Implications of the Supreme Court's Embrace of Negative Racial Stereotypes

Robert A. Williams, Jr.

Introduction by DeAnna Marie Rivera

Over time—and especially since beginning my studies in the Indigenous Peoples Law and Policy Program at the University of Arizona—I have come to see the dangerous connections between the stereotypes of indigenous peoples held by mainstream society and the inability of that society to recognize the fundamental rights of aboriginal peoples. If the connections sound extreme, my hope is that after reading the two writings that follow, you will see that the issues in each are inextricably linked. These pieces work in concert to demonstrate precisely how ingrained these stereotypes are in the mindsets of those who make and interpret society's laws as well as highlight just how damaging stereotypes can be when they are used as criteria in legal decisions that impact indigenous peoples, their communities, and their futures.

The dominant culture's embrace of and reliance upon "Indian" stereotypes—whether they are conceived by their adherents as "good" or "bad"¹—opens the door for a sequence of steps that invariably harm indigenous peoples: objectification, appropriation, and de-legitimization. This process has long entrenched itself in various Supreme Court decisions, giving birth to such legal doctrines as "encroachment," which is based upon this absurd premise: if your community doesn't "look Indian" anymore or doesn't "act Indian" anymore, your community no longer needs its "Indian" land bases anymore. In other words, if indigenous peoples don't conform to stereotypical "Indian" icons—those conjured up by mainstream society—their rights are in jeopardy. Rest assured, this is not an exaggeration. Just ask Chief Justice William Rehnquist.

The following two pieces serve as a vivid, if not disturbing, testament to the timely and critical nature of the issues addressed in this special focus edition of RED INK. The issues surrounding Native stereotypes should not be dismissed or diminished as merely "surface" problems. "Indian" stereotypes go to the core of the legal, political and economic struggles that indigenous peoples confront in their work to preserve and strengthen their respective cultures and identities and create brighter futures for themselves and their children and their children's children and so on. By promoting an informed awareness of and a genuine respect for difference—between indigenous peoples and the larger society as well as among the hundreds of indigenous peoples of North America and the hundreds more around the world—we can begin to uproot these damaging stereotypes from our own minds, from the minds of those who purport to work on behalf of indigenous peoples, and, finally, from the minds of those who use them as weapons against indigenous peoples.

The following speech by Indian law scholar Robert A. Williams, Jr. serves precisely this purpose, as it forces us to examine just how deeply imbedded these stereotypes truly are in the minds of all of us, whether we consciously realize it or not.¹ Ian Wilson Record picks up where Williams leaves off with a chronological analysis of how the Supreme Court's complete subscription to these stereotypes has conveniently allowed the Court to ignore two centuries worth of legal precedents and instead develop an insidious legal doctrine that poses a potentially devastating threat to the rights of tribes. Below is a transcript of Williams' speech.

I am advertised as speaking about implications of recent Supreme Court rulings on the environment, natural resources and governance. As co-counsel of one of those recent rulings, *Nevada v. Hicks*², which I and my colleague at the University of Arizona, James Anaya, lost gloriously 9-0 [laughter], I have thought often about those implications, particularly the implications as to my own legal skills as an advocate, but we won't get into that.

I do want to talk about some of the serious implications of a string of recent Supreme Court cases, including *Nevada*

v. Hicks, which rely on negative racial stereotypes of Indians. If you look at the cases on the issue of tribal jurisdiction over non-Indians as well as over non-member Indians, the Court has consistently—since 1978 in a case called *Oliphant v. Suquamish Tribe*³—denied tribes the authority to exercise jurisdiction over non-Indians. So consistently in fact, and so blithely ignoring prior precedent that people like myself, Charles Wilkinson, David Getches and other leading Indian law scholars keep looking at those opinions trying to figure out what is going on. What is the problem that this Court—the Rehnquist Court as I will refer to it—has with Indian people exercising jurisdiction on the reservation over non-Indians?

Particularly having had the experience of intensely preparing for an argument before the Supreme Court and having had to read those cases with a fine-tooth comb and then seeing how the state of the Nevada approached its arguments in that case, one thing has become apparent to me. The most important factor, the most significant implication of all of those decisions on the issue of tribal jurisdiction over non-Indians, is the role being played by negative racial stereotypes that the justices hold about Indians. Not only that, these stereotypes are the same stereotypes that are pervasive throughout the majority culture, and that's what I want to address in my talk today through some slides and some other props.

Let me talk a minute about the power of stereotypes, particularly negative racial stereotypes, and how they work to construct the social reality that we all know and live and breathe in from an early age on. Most of the scholarly literature on stereotypes says that we encounter these negative stereotypes at a very early age and that they really become hotwired into our brains. They program the way that we see the world. There is an excellent book by Professor Jody Armour of University of Southern California Law School called *Negrophobia and reasonable racism: the hidden costs of being Black in America*⁴ in which he explores some of the stereotypes about blacks and how they are picked up at a very early age not only by non-blacks but by blacks as well. He cites one particularly compelling example about the power of negative racial stereotypes with the story of a three-year-old white child with her mother in the park. The white child sees another black mother with a baby carriage and in that baby carriage is a black baby. That three-year-old child walks over to that baby carriage and says to the mother, "Look Mom, a baby maid." Armour's story gives you somewhat of an idea of just

how quickly these stereotypes are assimilated at such an early age.

There are other dangers of negative racial stereotypes and I think the events of September 11th have made us much more sensitive than we might be ordinarily, so I think this is a particularly opportune time to talk about the power and dangers of negative racial stereotypes in our society. Imagine for example: how would you like to be an Arab-American who has to go to an airport to fly somewhere now in the United States? Be honest with yourself: How would you feel if you were at an airport and saw somebody for example in a turban or who looks like an "Arab"? How would you feel about getting on an airplane with that individual? We know of incidents where passengers have gone up to boarding agents and said, "I don't want to board because there's an Arab on the plane."

I think that the issue of military tribunals, which have been so hotly debated in the press, has reminded us of another era in our history which no one is very proud of, and that involves World War II and the internment of large numbers of Japanese Americans on the West Coast. That's an amazing story, and what's even more amazing is that the Supreme Court affirmed the U.S. government's establishment of concentration camps for anyone of Japanese ancestry who lived on the Pacific Coast, in Nevada, Utah, the Mountain West. They were ordered by military authorities to leave their homes and go to administrative centers, where they'd be assessed as to whether or not they should be moved to a relocation center. It was illegal not to report to those centers. If you reported to that center there was a very good chance that you'd never go home again, that you'd be shipped off to a relocation camp. Mr. Fred Korematsu challenged that policy. The government defended those internment camps and those relocation orders by citing a whole host of negative racial stereotypes. The general who authorized those detentions justified them by explaining that everyone knew that Japanese Americans were emperor worshippers, disloyalists who lived in small, isolated, "cliquish" communities, that they refused to assimilate and could not be trusted. And when the general who issued that order had to testify to Congress to justify it, he was asked, "How do we know that Japanese Americans are disloyal?" He said—this is almost a direct quote from the Congressional testimony, "We know they are disloyal because we have had people watching them and we have not seen any activity so we know they must be up to *something*." It's right in the

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Congressional record and it is also directly cited in the *Korematsu* case.⁵

We begin to better understand the power of these negative racial stereotypes. Armour's *Negrophobia and reasonable racism* talks about the negative racial stereotypes of the young black male in this culture and the association that so many people have with young black males as being violent. He cites Jesse Jackson, who was quoted as saying, "There is nothing more painful to me at this stage in my life than to walk down the street and hear footsteps and start thinking about robbery—then look around and see somebody White and feel relieved" (Armour: 35). If Jesse Jackson has bought into the stereotype of the violent young black male, imagine the effect it has on the rest of us. How many of you going down into a city, an urban area for example, late at night, by yourself, seeing a group of two or three young black males approach you—how many of you would just walk on by? Or perhaps smile? How many of you would want to cross the street? How many of you would run for your lives? That is the issue that we all need to confront. I am not going to ask you to raise your hands and admit to it. But I think that we all understand the power of these stereotypes even if we believe that we are liberal and good-hearted and don't buy into them, you have no choice—you have to buy into them. These stereotypes order and construct the world for us.

That leads me to my next topic—what are the stereotypes that we have about Indians? In this slide of a *Far Side* cartoon, we have a cartoon of a chief, an Indian chief holding up a string of beads and he says, "To begin I'd like to show you this. Isn't it a beaut?" The bottom caption says, "New York 1626—Chief of the Manhattan Indians addresses his tribe for the last time." How many people get that joke? [Laughter] Thank you very much. Where did you learn that? How long have you known about the mythological sale of Manhattan for some beads and trinkets by Indians? It's part of the cultural mindset that is perpetrated—not intentionally, it's just out there. It's a story that everybody knows.

The amazing thing is that it is not *really* true but it's true enough. It may as well be true because the majority society accepts it, and even many Indians know the same story. So the fact that you get that joke shows you that you are familiar with this racial stereotype many people have of Indians. What's the stereotype? They didn't understand the value of land; they were easily duped in the treaties. There is a whole set of negative stereotypes about treaty relations between Indians and

whites that have significant consequences for modern Federal Indian Law and the way the Supreme Court approaches that topic. Because if you get the joke, I can guarantee you that the Justices of the U.S. Supreme Court also get that joke. We have this mentality that Indians really weren't as sophisticated as whites.

We all know the saying about the Black Hills, right? How many of you in fact have seen the movie with Val Kilmer, *Thunderheart*? You can't avoid movies. You go to see them and here's one about Indians and it was pretty cool—it was taken off of Peter Matthiessen's book *In the Spirit of Crazy Horse*⁶—and you remember that famous saying where he says, "The Black Hills are not for sale."

Now this idea that the Black Hills are not for sale again plays into this Indian mythology, this negative racial stereotype that Indians thought about land differently, that when they negotiated with whites it really wasn't on a level playing field. At the suggestion of my colleague Vine Deloria, I went back and took a look at the Black Hills treaty minutes. What I found was that the old chiefs knew what was going to happen, they knew they couldn't fight back—even despite the Seventh Cavalry and Custer's Last Stand. They knew they couldn't beat the U.S. Army—they had guns, they had a lot of men. The railroads were coming. What really happened when the U.S. approached the Sioux after gold was discovered in the Black Hills was that the Sioux had a pretty good sense of exactly what that land was worth. The government approached the Sioux chiefs and this is what they said when the U.S. asked them about selling the Black Hills:

Little Bear: "If a man owns anything, of course, he wants to make something out of it to get rich on. You gentlemen were sent from our Great Father's house. You are looking for something good, of course, and we are the same and we are glad to speak to you. There will be persons like myself, Indians, on the earth as long as the Whites live. I want you to feed them and give them rations every year—and annuities."

Spotted Tail: "As long as we live on this earth, we will expect pay. We want to leave the amount of the present as interest forever. By doing that I think it will be so that I can live. I want to live on the interest of my money..."
This guy is way ahead on 401K, okay [laughter]. This is a supposedly ignorant Indian, right, who doesn't appreciate anything about land sales and he's talking about annuities! "...The amount must be so large that the interest will support us. Part of this each year I can trade

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for something to eat. I will trade part of it for enough annuity goods to go around. I'll trade some of it for stock to raise cattle. If even only two remain, as long as they live they will want to be fed just as they are now. As long as they live they want tobacco and knives. Until the land falls to pieces we want these things."

Spotted Bear: "Our great father has a big safe. And so have we. This hill is our safe. As long as we live, I want our Great Father to furnish us with blankets and things that we live upon. We want \$70 million for the Black Hills. Put the money away some place in interest so that we can buy livestock. That is the way the white people do."

I tell my Indian law students to go back and read the treaties. The tribes were fairly sophisticated. Just so you think this isn't an isolated example, there was a very famous treaty conference at Albany in 1754, where the tribes were called together by the English Crown because of the French and Indian War. The Crown instructed the colonies to try to make peace with the Indians because the Indians were siding with the French in the French and Indian War. The French were interested in trading for furs, whereas the English were interested in getting at the Indians' land. Sure enough, the King told the colonies to hold a treaty conference with the tribes and the colonists proceeded to turn it into a treaty conference for the sale of land.

Now we all know the stereotype of Indians never living for tomorrow, right? They always live for today; they always live in the present; they don't understand the future. That's one of the familiar negative racial stereotypes about Indians that we've all heard at one time or another. Hendrick, a very famous Iroquois chief, tells the Albany Congress with respect to an offer to purchase Iroquois land, "What we are going to say now is a matter of great moment, which we desire you to remember as long as the sun and moon last." Now we think that Indians don't talk like that, but they really do. In the treaty literature, they actually use a lot of those metaphors. But then look what comes next:

"We are willing to sell you this large tract of land for your people to live upon, but we desire this may be considered as part of our agreement that when we are all dead and gone, your grandchildren may not say to our grandchildren that your fathers sold the lands to our forefathers and therefore be gone off of them. This is wrong. Let us all be brethren as well as after as before of giving you deeds for land. After we have sold our land we in a little time have

nothing to show for it but it is not so with you. Your grandchildren will get something from it as long as the world stands. Our grandchildren will have no advantage from it. They will say we were fools for selling so much land for so small a matter and curse us. Therefore let it be part of the present agreement that we shall treat one another as brethren 'til the latest generation, even after we shall not have left a foot of land."

That's really what you find in the spirit of the treaties, that oftentimes the chiefs realized that if they did not try to get the best deal they could, the whites were going to take it away anyway. So what you find the chiefs negotiating for oftentimes is to get enough land so that they could keep living the way that they were used to living in perpetuity, trying to cut the best deal possible. That's one of the reasons why treaties mean so much to Indian people—they are ongoing, perpetual documents. When white people bought lands from Indians, to them it was just like buying a house: You tell the sellers to get the hell off. Once the deal is closed, you don't want them around anymore. But Indians had a much different conception of a treaty relationship and because of this negative racial stereotype of Indians not understanding the future, of Indians not understanding the value of land, what you tend to find is that society generally denigrates the status of Indian treaties. If society does that—as I will show you in various cases that I will talk about—so does the Supreme Court.

What I have tried to do is set up this argument that there are negative racial stereotypes of Indians that go way back into our history—all the way into the colonial period—that still affect the way that we think about Indians. What I want to talk about next is how it affects you in ways that you don't even realize. I teach Indian law at Arizona and Harvard. I give my students at both law schools the same test at the beginning of every course because I want to see how infected and polluted their minds are with racial stereotypes. [Laughter] I ask them for the names of five Indian leaders alive today. I make it easy for them. I show them a picture of Wilma Mankiller [former Principal Chief of the Cherokee Nation]. I ask them, "Who is this?" They don't know.

Then I ask them to name five different Indian tribes for me. If it's the Harvard students, they always name the Pequots of Connecticut because they've all gambled there. [Laughter] Then they go through what I call the famous TV tribes and the famous Hollywood tribes. They know the Apache, they know the Sioux—sometimes they know the Navajo. And the Mohicans.

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And I explain to them, "But they all died!" "Oh, but I saw the movie," they say. So then I ask them to name five contemporary Indian tribes. They respond, "Aw gee, professor, is this going to count toward the final grade?" [Laughter] Then I say, "I am going to show you some slides. Write down what you think it is." [Shows a series of slides of Indian sports mascots like the Washington Redskins, Cleveland Indians and Atlanta Braves] How is it that my students can't even name a contemporary tribal leader, can't name five contemporary Indian tribes, but even my women students, who usually get mad at me for talking about sports in class, do okay on this test?

So it's pervasive. Go back through those images. If these are the images that our young children know about Indians and they don't know anything else, what are you reinforcing? Chief Wahoo of the Cleveland Indians. Is that a great image? For those of you who are trying to build modern tribal economies, is the stoic Indian on the Washington Redskins insignia something that really encourages what you are trying to do? The fierce brave fighting for the Atlanta Braves with the tomahawk chop—does that really further the cause of Indian self-government? But if you can't name any Indian governments and if that is all that you really know about Indians, because that's what's in your head, and nothing else, then that's what's in the heads of the Supreme Court.

I do another test for my students. They love this. This is my Karnak the Magnificent routine. I say, "Close your eyes. Relax. Imagine an Indian. What is he wearing?" [Shows slide of nineteenth-century Plains Indian chief in full regalia including full-length headdress] Then I say, "Open your eyes. Does he look like this guy? If not, what about this guy?" [Shows slide of Jay Silverheels, who played Tonto in *The Lone Ranger* television series] [Laughter] Do you recognize him?" They all know that guy! They all say, "Tonto." I say, "But do you know his real name?" They say, "No." I say, "Do you know the horse's name?" They respond, "Sure, that's Silver!" [laughter] I give up! You know the horse, you know Clayton Moore, who played the Lone Ranger. How is it that that's all you know about Indians? At this point, the students are really feeling uncomfortable and wanting to know about the drop/add slip. They're thinking: *This guy is really in my face. I don't know anything about Indians.* [Laughter]

Then I will say, "Close your eyes. Think about where Indians live." They all write down "teepee." Except my

Indian students. They all write down "double-wide." [Laughter] And then my Harvard students say, "What's that? Is that going to be on the exam?" Then I tell my Indian students, "Don't tell them what a double-wide is, okay?" [Laughter]

I am Lumbee. My dad though is full-blood Polish American, a white serviceman. My mom is from Pembroke, North Carolina. So I guess I don't look like a "real Indian" to some people. In fact, I used to go through life interviewing for jobs and going to conferences and hearing people say, "You don't look Indian." So I came up with a solution. [Takes toy store Indian headdress from podium and places it on his head] Isn't that better? [Laughter] Wherever I go, I show up in this and it's not a problem anymore. You get my point. This culture has frozen Indians into this image of savages in buckskin; the stoic, noble Tonto; the Washington Redskins sports logo—but they don't know anything about what goes on in Indian Country. They know nothing about the daily struggles. They know nothing about what the Supreme Court is doing to Indian rights. They know nothing about what George Bush and his administration are doing to Indian rights. They don't care. All that comes up on the radar screen is all this junk. And these things do make a difference.

I want you to close your eyes. Now think about a cultural group that has a really groovy reputation and that gets out of fighting wars. Put the image of a Quaker in your mind. [Shows slide of William Penn] Does he look like this guy? If not, how about that guy?! [Shows slide of Quaker Oats cereal box] [Laughter] The first slide was William Penn, a real Quaker! You don't know who the hell he is! That's your Quaker! [Refers to the second slide]. Smiling right at you while you're eating that horrible oatmeal. But that's the benign image we have of Quakers in this country. Imagine when a Quaker applies for an exemption from the draft versus when a Native American says, "I don't want to fight for a colonial government." How is it going to play with the draft board? How is it going to play before a court? These images have a funny way of mutating over time. [Shows slide of Notre Dame Fighting Irish] The Notre Dame Fighting Irish. I ask my Irish students, "Are you offended by that?" They say, "Hell no, I like that." But you have to understand at one point in time the idea of being "fighting Irish" was like Tom Cruise and Nicole Kidman in *Far and Away*. How many of you have seen that movie, where he [Cruise] comes off the boat literally *fighting*? So Indians aren't the only group subject to these racial stereotypes, but we have to pay

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attention to how each group lives with these stereotypes and how their own reality in this society is constructed by those stereotypes.

So what we do about these stereotypes? [Pulls out bag of toys and other products that stereotypes Indian peoples]. "Frontier Warrior." I go to yard sales and buy this stuff so nobody else can have it. I try to hide it. [Laughter] This is one of my favorites—a Native American air freshener doll. [Laughter] This is great. You can buy this at casinos. It's called "Money House Blessing." If you are at the casino and there is a lot of smoke, you spray it in the air. "Indian Fruit." Where does it come from? From that tribe in Piscataway, New Jersey, of course! Then there's my favorite, the funky lady on the Land O'Lakes Butter. I'm in an airport, right. This is what I pick up—Don Coldsmith's *The Changing Wind*:

"...He was called White Buffalo, and he would be the greatest medicine man the people had ever known. The spirit of the ancient gods beat in him like a savage drum. A mystical power as old as the land, as primeval as primitive man himself. But even as he fought to lead his people out of the darkness of the Stone Age, his world trembled on the brink of a great and terrible transformation. It would be a century swept by the inevitable winds of change, a time when ignorant, evil men like the Royal Greywolf of the Headsplitters would seek bloody vengeance and when one man would fight against all odds to save his tribe and his heritage from brutal destruction!"

Why bother?! [Laughter] Then there's another favorite, found on a reservation which will go unnamed—Crazy Horse Malt Liquor.

You get my point. In your own mind, come up with a *positive* image of Indians that's pervasive in the culture. You can't. There are none. That brings me to the Supreme Court. As pervasive as these stereotypes are in our dominant culture, they are even more pervasive in the opinions of the Supreme Court. The following is a quote from George Washington. In 1783, the Revolution is over. One of the first things that Congress says is, "Hey, we've got all of this land between the Appalachian Mountains and the Mississippi River now under the Peace of Paris that Great Britain has given us. The problem is that there are a lot of Indians there. What should we do?" The southern states say, "Just go in and wipe them out." The New England states say, "That's going to cost a lot of money and we're not

really interested in doing that." So they ask George Washington for advice. His response becomes the single most important document of early federal Indian policy. This is what Washington writes back to Congress:

"For I repeat it, again, that policy and oeconomy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beast of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expense [sic], and without the bloodshed, and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them."

Washington had this idea that the U.S. should treat with Indians because they are a doomed race. *They're savages. And everybody knows that when civilization confronts savagery, civilization wins. The Indians will eventually move westward.* That idea becomes the model for treaty-making between the U.S. and tribes from the U.S. perspective. [Shows slide of nineteenth-century map of North America] The dates of statehood for each state show a steady progression westward. You can see how successful it is. Washington was absolutely right. This stereotype of the savage as the wolf becomes embodied in policy, and when you put the power of the U.S. military behind it—and the Supreme Court—that stereotype becomes reality.

So in 1823, Chief Justice Marshall of the Supreme Court is asked in the first great case of U.S. Indian law, "What are the rights of Indians in the lands that they possess?" And Marshall says, "Everybody knows that Indians are savages and they have no rights." So he writes in *Johnson v. McIntosh*⁸,

"On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom

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the superior genius of Europe might claim an ascendancy.”

So where does the Doctrine of Discovery come from? Where does the Congressional Plenary Power doctrine come from? It comes from *Johnson v. McIntosh* as any Indian law scholar will tell you, and what *Johnson v. McIntosh* tells you is that the reason that Indians have inferior rights is because of their “character and religion.” The negative racial stereotype of inferior Indian people is bred into the very core of U.S. Indian law. The Supreme Court—the case that I had, *Nevada v. Hicks*, is an example—cites *Johnson v. McIntosh* all of the time. Can you imagine them [the Justices] citing *Plessy v. Ferguson*⁹, which held that blacks are not equal? They don’t cite *Korematsu*. They cite *Johnson v. McIntosh* all of the time. Because we don’t have problems with the negative racial stereotypes of Indians upon which that opinion is grounded.

The next major case that comes along actually tests one of those treaties that was signed between the Cherokee Nation and the U.S. government. The problem was that Georgia was not paying any attention to that treaty and its citizens were invading Cherokee lands. So the Cherokees go before Chief Justice John Marshall and his Supreme Court in 1831 and say, “We want our treaty enforced. We get to sue the state of Georgia to stop them from violating the federal treaty.” And Marshall asks, “Well, where do you get your jurisdiction to sue a sovereign state in the courts of the United States?” The Cherokees respond, “Well, you look at the Constitution and the Constitution gives the Supreme Court original jurisdiction to hear lawsuits between states and foreign nations. We are a foreign nation. We assert our sovereignty.” In Marshall’s opinion, he states, “Though the Indians are known to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations.”¹⁰ He calls them “domestic, dependent nations” and the relationship is that of a guardian to a ward. Here we see this legal status for the first time enunciated in a Supreme Court opinion—the guardian-ward relationship, the trust relationship. Therefore, since the U.S. is the guardian for the tribes, they don’t have a right to sue. How does Marshall know that? How does he know that the Constitution doesn’t contemplate Indian tribes when it talks about foreign nations? He states:

“These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the Courts of the union to controversies between a state or the citizens thereof, and foreign states...In considering this subject the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong had, perhaps, never entered into the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government.”

There you go—stereotypes. This is how Indians settled their disputes with whites—with a tomahawk. And guess what? For the next 150 years, Indians weren’t allowed to bring suits against states in the courts of the United States. Why? Because of that racial stereotype embedded into early Federal Indian Law. And *Cherokee Nation v. Georgia* still stands for the proposition that Congress has plenary power over tribes—and exclusive authority—and tribes have no rights that they can assert against states without the permission of the federal government.

Now this idea of the Indian as savage and inferior reached its zenith in the nineteenth century. We have cases like *Crow Dog*¹¹, which hold that it would be unfair to apply the white man’s criminal law to the Indian because he was too savage to understand it. Congress didn’t like that decision and so a few years later passed the Major Crimes Act, which imposed federal criminal jurisdiction over Indians. In imposing federal criminal jurisdiction over Indians, the Supreme Court, affirming the Major Crimes Act, said, “Congress can do whatever it wants to these people. They are savages and helpless wards of the government.” Finally, the *Lone Wolf* case¹²—which upholds the Allotment Act and its abrogation of Indian treaty rights—says that Congress can abrogate an Indian treaty and it is a political question. Why? Because these tribes are savage and helpless. So the nineteenth-century Supreme Court reinforces this notion of the Indians as savage.

Now in the twentieth century, we still have this notion of the Indian as savage playing itself out in Federal Indian Law. In 1955, the year I was born, the Supreme Court decided *Tee-Hit-Ton*.¹³ *Tee-Hit-Ton* is the case in Alaska asking whether Alaska Natives had any land rights in all of Alaska. They had only been there since time immemorial. And the Supreme Court writes,

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"Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."

Then of course comes the good times in the 1960s and 70s, when the Warren Court actually recognized Indian rights as protected under U.S. law. Any constitutional law scholar will tell you that the Warren Court of the 1960s and 70s was just a total aberration. Tribes were lucky enough to have some very good advocates—people like my colleagues David Getches and Charles Wilkinson, the Native American Rights Fund, for example—who came in and litigated some very important cases. And what you find during this era of heightened racial sensitivity and sensitivity on the part of Court toward racial stereotypes is that the language of savagery disappears from Supreme Court Indian law. And what you find is when that language of savagery disappears and those stereotypes can no longer be spoken about Indians, Indians win.

But that is not what has happened with the Rehnquist Court. The Rehnquist Court has reintroduced the language of savagery with a vengeance. Beginning with *Olipant*—in which the Suquamish Tribe tried to exercise criminal jurisdiction over a non-Indian—the Rehnquist Court stated,

"The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians...is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than punishment."

The Court follows that up with *Montana v. U.S.*¹⁴, which raises the issue of whether or not Indian tribes have civil jurisdiction over non-Indian fee-holders. *Can you regulate hunting and fishing on the reservation if a white person owns an allotment?* In a nutshell, the Supreme Court said, "The same considerations that applied in *Olipant* apply here. These white folks don't belong to the tribal government. They are not represented. They won't get a fair shake. Therefore, the

state has jurisdiction."

This case was followed by the 1997 case of *Strate v. A-1 Contractors*¹⁵, in which the issue was whether or not tribes had tort jurisdiction over a traffic accident on a road running directly through the reservation. For those of you who think that this is just Republican problem, it's not. Justice Ginsburg was on the board of the American Civil Liberties Union during the *Martinez* case¹⁶, which says that the Indian Civil Rights Act does not open up tribal courts to review by the federal government. Justice Ginsburg opposed the tribe in that case because being a good white liberal, she had problems with tribal courts and tribal justice—*because you can't get a fair cross-section of the jury, these people are clannish, they are all related, you are not going to get a fair shake*. Paraphrasing *A-1 Contractors*, Ginsburg said, "It doesn't matter that the land on which the road ran through the reservation was Indian land, tribes don't have jurisdiction there."

We knew all of this in the case that I was involved with, *Nevada v. Hicks*. We knew what we were confronting. The issue was whether or not the tribal court had civil jurisdiction over a tort suit filed by a member, Floyd Hicks. A state game warden had broken into his trailer with a faulty warrant and taken a sheep's head, thinking it was an endangered species. It wasn't an endangered species. The sheep's head was returned all cut up. Floyd got mad and filed suit against the warden in tribal court. The state of Nevada, understanding which way the wind blows, immediately removed to federal court, got the case thrown into the Supreme Court, and the Supreme Court, in a 9-0 decision authored by Justice Scalia, ruled that there are real concerns with subjecting non-Indians to tribal court jurisdiction unless they *voluntarily* agree. Therefore the Court overturned tribal jurisdiction in that case.

In summary, my advice to you as tribal leaders is that we need to accept the fact that this Court—as well as many others in the federal government—harbor these types of stereotypes which hold that Indians aren't as good as white people are, that Indian systems of government and justice aren't as good as white systems, that white people won't be treated fairly, that Indians will take revenge, and so white people must be protected from Indian jurisdiction. That's a reality that we are going to have to face for a long time given the age composition of this Court. What can we do about it? I think that the stereotypes of Indians as savage, dumb, brooding, lawless and primitive need to be attacked head-on. Most of the scholarly literature says that when

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you confront people, you shame them with their stereotypes. If you are going to be working with a non-Indian business, give them my test. If the attorney you are going to hire for \$200 per hour can tell you what the Cleveland Indians logo is but can't tell you who Wilma Mankiller or your own tribal chairman is, I'd be careful. If the people you are going to be dealing with harbor these stereotypes, they need some education. My Indian law students always ask me, "Why do we have to do that?" *Because nobody else will.* Whether you like it or not, you have got to confront people and their stereotypes. You have got to confront the Court. You have got to start early—remember the story of the white child seeing the black baby in the carriage. This effort has to be as much a part of nation building as anything you do in your daily lives. And you need to educate Indians as well as non-Indians. I am a tribal judge and I work with and train tribal judges and I read tribal court opinions. Tribal judges do stupid things sometimes that play into stereotypes. That's not a good thing. I am always amazed at the poor amount of budgeting that goes into tribal courts. I know that tribes have a lot of needs, but oftentimes your tribal court is your most important interface with the white world. It is where the white business community interacts with you. It's their perception of what goes on in Indian Country. I know so many tribal courts where if you call for a copy of decision, they won't give it to you. *Why?* I understand why—they're afraid. But it just plays into stereotypes. You need to look at your own institutions not only in tribal government but throughout the reservation and try to identify where you are playing to your weakness and where you are playing to your strength, and how you go against stereotypes, and how you convince people that you operate with dignity according to your own cultural traditions. You *do* have an obligation to explain your cultural traditions and the way you do things to other people if you want to survive in this world, if you want to change the direction of the Supreme Court's jurisprudence.

I leave you with some language from *Korematsu* to underscore how important this task of educating non-Indians and Indians alike about the harmful effects of these negative stereotypes truly is. Justice Jackson wrote an incredible dissent in *Korematsu*. We now appreciate what it means for a Justice of the Supreme Court—in the midst of World War II—to write a dissent to the federal government's plan to lock up Japanese Americans. We understand that incredible act of courage—to put your name on an opinion and say, "This is wrong and here's why. And I don't give a damn. *I got*

life tenure." [Laughter] Even with life tenure, it's an incredible act of courage:

"A military order, however unconstitutional, is not apt to last longer than the military emergency. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim or an urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes."

Notes

1. Williams delivered his speech before 200 tribal leaders, administrators and advocates at the conference "Building Native Nations: Environment, Natural Resources, and Governance." Held in Tucson, Arizona in December 2001, the conference was organized by the Udall Center for Studies in Public Policy's Native Nations Institute for Leadership, Management, and Policy (NNI) at the University of Arizona.
2. *Nevada v. Hicks* (2001), 121 S.Ct. 2304.
3. *Oliphant v. Suquamish Indian Tribe* (1978), 435 U.S. 191.
4. Armour, Jody D. *Negrophobia and reasonable racism: the hidden costs of being Black in America*. New York: New York University Press, 1997.
5. *Korematsu v. United States* (1944), 323 U.S. 214.
6. Matthiessen, Peter. *In the Spirit of Crazy Horse*. New York: Viking Press, 1983.
7. *Letter from George Washington to James Duane, Sept. 7, 1783*.
8. *Johnson v. McIntosh* (1823), 21 U.S. (8 Wheat.) 543.
9. *Plessy v. Ferguson* (1896), 163 U.S. 537.
10. *Cherokee Nation v. Georgia* (1831), 30 U.S. (5 Pet.) 1.
11. *Ex Parte Crow Dog* (1883), 109 U.S. 556.
12. *Lone Wolf v. Hitchcock* (1903), 187 U.S. 553.
13. *Tee-Hit-Ton Indians v. United States* (1955), 348 U.S. 272.
14. *Montana v. United States* (1981), 450 U.S. 544.
15. *Strate v. A-1 Contractors* (1997), 117 S.Ct. 1404.
16. *Santa Clara Pueblo v. Martinez* (1978), 436 U.S. 49.