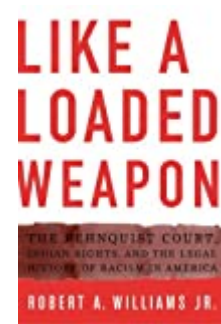




Robert A. Williams, Jr. *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America.* Minneapolis and London: University of Minnesota Press, 2005. Index. \$18.95 (paper), ISBN 978-0-8166-4710-1.



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The Fifth Element

In March 2005 the Supreme Court ruled in an 8-1 decision that the Oneida Indian Nation of New York had waited too long to assert sovereignty over land that was taken from them over two hundred years ago. The Court took into consideration the long-standing Oneida land claim, but made sharp distinctions in what kind of relief the Court would give. The tribe had repurchased land and had considered it “Indian Country” and therefore non-taxable, a position that had been supported by the Bureau of Indian Affairs. The Court disagreed. “Generations have passed during which non-Indians have owned and developed the area that once composed the tribe’s historic reservation,” Justice Ruth Bader Ginsberg wrote for the majority. “The appropriateness of such relief must be evaluated in light of the long history of state sovereign control over the territory.” The decision, *Sherill v. Oneida*, was immediately viewed by tribes and their advocates as further proof of the hostility the Rehnquist Court had shown towards American Indian tribal rights and sovereignty.[1] In his latest book, Robert A Williams illustrates why this ruling was not surprising, given the Supreme Court’s traditional reliance on the nineteenth-century model of Indian rights as outlined by Chief Jus-

tice John Marshall.

Williams, Professor of Law and American Indian Studies at the University of Arizona, is the author of *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990) and coauthor (with David H. Gethches and Charles F. Wilkinson) of *Cases and Materials on Federal Indian Law* (1993). In his previous books, Williams has analyzed the historical, legal, and cultural contexts of federal American Indian law; in *Like a Loaded Weapon*, Williams argues for a way to decolonize it. Williams frames the foundations of federal Indian law in a twenty-first-century context, arguing that Indian rights will never be protected as long as the court continues to talk about Indians as if they are lawless savages. For Williams, the racist language that the Supreme Court continues to use in Indian rights cases is at odds with the professed color-blindness and racial equality that the Court aspires to in 2006. He challenges the Supreme Court by asking whether they should “be relying at all upon cases from an era of white racial dictatorship in deciding Indian rights cases in the twenty-first century” (p. xxx).

Williams argues that this discourse-based approach is a first step in transforming the way the Supreme Court decides Indian rights cases. Language defines and shapes the way the dominant society views minority rights, and is a critical factor in determining how people treat one another. The Court has been well aware of this, and has consciously changed its language and subsequent treatment of some minority groups. Williams argues, however, to be truly effective the Court needs to unambiguously repudiate previous decisions that have used the language of racism to justify limiting the rights of others. To fail to do so gives the principle of racial discrimination a generative power of its own. The argument for this can be clearly seen in Justice Robert H. Jackson's dissenting opinion in the 1944 *Korematsu v. United States*, which provides the inspiration for Williams's title. Jackson criticized the majority decision which upheld the constitutionality of the Japanese internment during World War II. Because of the doctrine of *stare decisis* (like cases should be decided alike), Jackson argued that *Korematsu* "lies about like a loaded weapon" as a rights-destroying precedent (p. 30). Williams reveals the parallels in Indian rights decisions which uphold a legalized racial inferiority for American Indians. Unchecked, Williams suggests, the depiction of Indians as savages becomes self-perpetuating and a justification for limiting tribal rights.

Williams argues that this tendency in rulings pertaining to American Indians contradicts the spirit of other Supreme Court decisions in recent decades, beginning with the watershed 1954 decision, *Brown v. Board of Education*. In a "post-Brown world" the Court has sought to uphold egalitarian principles of racial equality and equal justice. Even though most Americans believe that the racial climate has improved for all minority groups since *Brown v. Board of Education*, it has not gotten that much better for Indians, "at least in terms of keeping all the hostile nineteenth-century racial stereotypes of Indian savagery out of the Supreme Court's opinions of Indian rights" (p. xxi). These racist portrayals of Indians as unsophisticated savages are so deeply embedded in most American minds that they remain unquestioned and reified in public discourse.

Modern federal Indian law and policy trace their origins to Chief Justice John Marshall, whose trilogy of decisions—*Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832)—form the basis for the contemporary interpretation of American Indian rights. Marshall has been venerated by legal scholars and practitioners in an unreflexive, deterministic fashion, and, Williams argues, this is evident in

American Indian rights cases decided by an unquestioning Supreme Court for over 180 years. Williams effectively illustrates how the Marshall model relies on stereotypical assumptions and reinscribes an ingrained racism and subsequent anti-Indianism. Williams argues that the Marshall Model of Indian Rights can be divided into four basic elements. The first recognizes the exclusive right of the United States to exercise supremacy over Indian tribes on the basis of the Indians' presumed racial and cultural inferiority; the second relies on the doctrine of discovery as the correct legal principle to outline the scope of white privilege to all of North America; the third element perpetuates a language of racism that characterizes Indians as savages and justifies their colonization by Americans; and the fourth element absolves the justices for any responsibility in this colonial mindset, given its relationship to the foundations "under which the country has been settled" (p. 58).

The Marshall Model of Indian Rights thus essentially upholds a nineteenth-century white racial dictatorship that severely limits tribal rights, Williams argues. The Supreme Court's 2005 decision in *Sherrill v. Oneida Indian Nation* supports Williams's analysis, particularly in its reliance on the doctrine of discovery. Williams conclusively traces the continuing legal history of racism against American Indians in the twentieth century, as embodied in cases such as *Tee-Hit-Ton v. United States* (1955), *Oliphant v. Suquamish Indian Tribe* (1978), and *United States v. Sioux Nation of Indians* (1980). With each of these cases, Williams relentlessly identifies and deconstructs the language the Court relies upon that characterizes Indians as savages and therefore as less deserving of rights than white Americans. He outlines his "singularity thesis," what he perceives as the essential difference in the "measured separatism" that tribal Indians are arguing for. This separateness, in contrast to the individual equal rights aspired to by other minority groups and represented by the arguments of *Brown v. Board of Education*, represents a significant difference in ideas about racial equality. This desire for measured separatism is fundamentally difficult for Americans to accept (for most Americans "equal" means "same"), and manifests in the language that they use to talk about basic rights for American Indians. Additionally, Williams argues, most people do not see anything wrong with racial stereotyping of American Indians in legal decisions because ultimately they feel there are no "real Indians" left. This "fact" is either tragic or beneficial but always absolute. The Supreme Court, though continually presented with contrary evidence that positions American Indians

as dynamic and viable communities with both U.S. and international legal rights, continues to uphold the racist assumptions of the American public through *stare decisis*. Only when we consciously call attention to this language, Williams contends, can we expect to change the underlying assumptions.

Many Indian rights lawyers and activists view such deconstructionist arguments with marked skepticism. The skeptics' argument is as follows: it does not matter so much that the Supreme Court is racist (of course it is), but we need to be realists here—the Marshall decisions and subsequent federal Indian law have allowed tribes a limited form of sovereignty, and that is the best tribes can ever get. In keeping with this line of thinking, and in the presence of active opposition towards tribal Indian rights manifested in recent Supreme Court decisions, some tribal lawyers and legal scholars have advocated staying away from federal courts until the make-up of the Court changes. Williams disagrees, for even when tribes have a “win” with a more sympathetic Supreme Court, the decision still affirms the racist language of the Marshall decisions, and the continued colonization of American Indians (p. 157). He goes further to address the skeptics' argument by outlining his vision for what he calls the neglected “Fifth Element” of the Marshall Model, which looks to contemporary international law of indigenous people's human rights as a way to interpret Indian rights in the United States. Chief Justice Marshall used this approach, but this fifth element has been neglected by contemporary Supreme Court justices in their use of the Marshall model (pp. 161-171).

Defying the racist language which the Court relies on is a “postcolonial approach to Indian law [that] asserts that the justices need to be directly confronted with the fact that a Supreme Court decision on Indian peoples' most important human rights is an action that ought to involve a great deal of serious thought, instead of unconscious racial stereotyping” (p.163). When the justices realize the ways in which the Marshall Model perpetuates a jurispactic, rights-destroying form of racism against American Indians, they will then be open to what Williams calls a “mental correction,” that is, the desire to consciously consider a nonracist way of defining Indian tribal rights.

If the justices are made to critically evaluate the racist assumptions in their decisions that permeate the language in prior Indian rights decisions, they can repudiate them and make changes. Perhaps the justices are not consciously aware that they hold these racist ideas because they are unquestioned in larger society, or perhaps

there is a refusal to question their beliefs. But if we do not believe that the Supreme Court justices can change their minds and be open to a just way of deciding Indian rights cases, then we are as limited and narrow-minded as we accuse the justices of being, Williams says. Or, critics may argue, Supreme Court justices are all too aware of their racist assumptions and wish to keep them because to do otherwise fundamentally threatens American ideas about property and white privilege. In either case the question seems to be, why would the justices make the conscious choice for a mental correction to legalized racism? That is a question that Williams does not fully answer, but he acknowledges the difficulty of the task, even as he argues for the centrality of the discourse-based approach. He addresses Derrick Bell's “interest convergence dilemma” at the outset, making it clear that he does not believe that real change will come about with simply deconstructing the language of the Court (p. xxxiii). Nonetheless, Williams makes the case quite effectively that until a new courtroom strategy is applied that actively resists this racist language and advocates using international law to interpret indigenous peoples' rights, we will never know if the justices (at least five of them) will be willing to bravely chart a new course of anti-racist decisions.

Williams' clear and meticulously researched arguments are strengthened by his passion, even apparent anger, at Court decisions that have limited Indian tribal property rights, cultural autonomy, and self governance. However, he also provides the reader a hopeful plan of action that acts as a counterbalance to the deconstruction he employs—he does not merely criticize, but initiates an alternative. Advanced undergraduates and graduate students will find this a valuable tool for understanding the foundations of federal Indian law. Practitioners will find this book of use as well. After all, Williams says, if we can consciously change the way we talk about American Indians (or our acceptance of the way others talk) by first paying attention to the language we use, and next changing our own language, we can effectively challenge the language of others. Until we do so, we cannot hope that the Supreme Court will issue decisions that affirm the tribal rights of American Indians in the twenty-first century. In *Like a Loaded Weapon*, Professor Williams has shown again why his books are read with such interest and why he is doing such important work in American Indian law.

Note

[1]. *City of Sherrill, New York v. Oneida Indian Nation of New York et al.* 337 F.3d 139 (2005).

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