A DIFFERENT POINT OF VIEW: Neil Gorsuch Speaks Up for Native Americans

Supreme Court Justice Neil Gorsuch has again proved he is a friend of American Indians.

In 2020, he wrote the Court's majority opinion in *McGirt v Oklahoma* — a criminal case about a child rapist (Jimcy McGirt, a Seminole Indian) which resulted in the Court ruling that nearly half of the State of Oklahoma rightfully belongs to the Creek Indian Nation.

If you aren't inclined to read that entire case, I wrote about it here.

This past week, Gorsuch again spoke up for American Indians. Unfortunately, this time he was in the dissent. (The dissent begins on page 22.)

I agree with Gorsuch (as I explain below), but as a legal educator I feel constrained to point out that most media reports mischaracterize what this case decided. The Court did NOT deny water rights to the Navajo Indians. The decision merely upheld federal bureaucratic intransigence.

The case is about the rights of the Navajo Indians living on their reservation to water from the Colorado River under a treaty they signed in 1868. The dissent chronicles the ugly history of the conduct of the government leading up to that treaty, and how the government's misconduct – though not a brutal now – continues up to the present.

All the parties, including the US government, agree the Navajo have rights to Colorado River water, and that those rights are held in trust for the Indians by the government. But it seems no one knows exactly what those rights are, and the Court says that (in this case) the Indians can't find out – because the government doesn't have to tell them.

If that sounds to you like the epitome of federal bureaucracy run amok, Justice Gorsuch agrees with you. He wrote that the Navajo "efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another."

In 1868, the Navajo signed a treat with the United States government for what is now their reservation in northwest New Mexico and northeast Arizona. The area of the reservation has been expanded by subsequent acts of

Congress. But from the beginning the present western boundary of the reservation was “alongside a vast stretch of the Colorado River.”

Water (riparian) rights have always been a contentious issue in the western US. Who gets water from the Colorado river basin, and how much, is currently being contested — as several *Daily Post* contributors have detailed in recent articles.

Those articles describe how officials from various states in the Upper and Lower Basins of the Colorado are trying to decide how much of the shrinking water supply each are entitled to. Left out of discussion of who gets how much water from the Colorado are the Navajo.

The objective of the lawsuit, by the Navajo, that resulted in last week’s Supreme Court decision was to require the government to define their rights. Without that determination, the Navajo have no way of knowing if those who are dividing up the water from the Colorado River are infringing Navajo rights.

This is what’s known as a “suit in equity”, which seeks to have rights defined.

Learning the difference between “law” and “equity” is a fundamental part of first year law school. I’ll do my best to

put it in terms those who've not been cursed with attending law school can understand.

As our current legal system emerged from middle-age England, it became ever more apparent that written laws can't anticipate every situation that may arise. In some cases the law, as written, requires outcomes that are fundamentally unfair.

A remedy for that unfairness evolved — in part as a result of an on-going power struggle between the English monarch, and the powerful barons of the realm. Here is an extremely abbreviated history of that evolution.

Following the Norman conquest of England in 1066, England was ruled by a monarch, but in the continental tradition from whence the Normans came, local 'barons' had nearly absolute authority over their pieces of the kingdom. So long as they contributed military support, 'fealty' (and some taxes) to the monarch, the barons were essentially left alone to run their turf pretty much as they saw fit — including having their own courts of law.

There was a legal system in place on the continent (Salic Law) which the Normans brought with them to England because it's what they knew. But just as the Normans intermarried with the native Britons and Saxons, so did the Salic law co-mingle with the 'common law' tradition of the

natives.

What emerged over time was a complicated, rigid system, which too often lead to unjust results that worked to the advantage of the rich barons who could afford the best lawyers. (Some things never change!) That's when the monarch saw an opportunity gain an advantage in the on-going contest for power with the barons.

The monarch set up royal courts to offer a way for the common folk to get "the king's justice" when the baronial courts either weren't accessible to them, or reached unfair results based on the rigid law. The way "the king's justice" remedied unfair results was through "equity".

Equity is defined in Black's Law Dictionary as "The recourse to principles of justice to correct or supplement the law as applied to particular circumstances ..... developed and administered by the High Court of Chancery". That 'high court' was the King's. By creating this alternative to the baronial courts, the King gradually gained political support among the common folk, to the detriment of the political power of the barons.

Equity derives its principles from 'Natural Law'. I've briefly written about natural law in this forum before in another context... and then in response to a reader's critic of that column, I explained further.

In my response to that critic, I quoted a principle of equity familiar to every child: “Do unto others what you would have them do unto you.”

That may sound like an aspirational platitude, but it underlies other doctrines of equity, such as “he who seeks equity must do equity,” and “those who come to equity must come with clean hands.”

I’ll use a contract as an example of these principles. If you enter into a contract, the law binds you to fulfill your part of the bargain if the other party fulfills theirs.

But suppose after the other party has “performed” their part of the deal, you learn that you were lied to by that other party in negotiating the contract – which will result that fulfilling your part will be far more expensive than you bargained for. Under the ‘law of contract’ you would still have to live up to your end of the bargain. This is where equity can provide you a remedy.

If it’s proven that you were lied to, the contract can be nullified and you relieved of your duty to fulfill your end. But you can’t ask for such “equitable relief’ if, during the negotiations leading up to the bargain, you also lied – or if you never intended to fulfill your end to begin with, and are now just trying to get out of living up to your part of the deal.

From *A Guide to Equity Law:* "In a civil lawsuit, the court will award monetary damages, however, equity was formed when monetary damages could not adequately deal with the loss." Which brings us back to the Navajo Indians lawsuit which ended up before the Supreme Court.

The Indians filed a "suit in equity" for a "declaratory judgement" requiring the U.S. government to tell the Navajo what their rights are to water from the Colorado river. They weren't asking for money from the government. They were asking for the Court to order the government to define the rights — which the government acknowledges the Navajo's have.

The Court declined to do so — which is what drew Justice Gorsuch's ire. But Gorsuch points out there is a "silver lining" to the Court's decision. He wrote:

After today, it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim.

What he means is that even though the Navajo lost this case, there is no longer any legal basis to deny them the right to be included in consideration of water rights as they have been in the past.

Where I disagree with the Court's decision is that considering the dubious reasons (as meticulously detailed by Justice Gorsuch) the Navajo lost the case, the Court could just as easily have streamlined what Gorsuch says is the inevitable vindication of the Indian's rights, by simply telling the government to do its job, right now.

But the Court's 5-4 majority said that bureaucratic red tape must prevail *uber alles*.

Gary Beatty

Gary Beatty lives between Florida and Pagosa Springs. He retired after 30 years as a prosecutor for the State of Florida, has a doctorate in law, is Board Certified in Criminal Trial law by the Florida Supreme Court, and is now a law professor.