

## JUSTICE AND THE OUTSIDER: JURISDICTION OVER NON-MEMBERS IN TRIBAL LEGAL SYSTEMS

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A quarter of a century ago, the Supreme Court issued its opinion in *Oliphant v. Suquamish Indian Tribe*<sup>1</sup> holding that tribes had no criminal jurisdiction over non-Indians. Since that time, the Court has progressively limited tribal criminal, civil, and regulatory jurisdiction over those that are not enrolled members of the tribe. While the decisions have a veneer of history and precedent, their legal basis is extremely thin—so much so that Justice O'Connor called a 2001 decision “unmoored from our precedents.”<sup>2</sup>

This trend is one of the most important developments in Indian law. It is the focus of sustained attention by scholars, tribes, attorneys, and legislators.<sup>3</sup> A decision regarding criminal jurisdiction over nonmember Indians spurred a congressional reversal in 1991,<sup>4</sup> and the Supreme Court has just heard arguments in a case addressing the nature of this legislative action.<sup>5</sup> Congress, moreover, is debating a broader legislative fix as to civil jurisdiction.<sup>6</sup>

Despite this importance, there has been little empirical work on the workings of contemporary tribal legal systems, and even less on cases

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<sup>1</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>2</sup> *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., concurring).

<sup>3</sup> *See, e.g.*, Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002) (statements of senators, tribal officials and professors regarding legislation to reverse trend).

<sup>4</sup> Pub.L. 90-284, Title II, § 201, 82 Stat. 77 (Apr. 11, 1968), codified at 25 U.S.C. § 1301(2) (1982).

<sup>5</sup> *U.S. v. Lara*, 124 S. Ct. 46 (2003) (granting certiorari); Stephen Henderson, *Indian Sovereignty at issue in case before Supreme Court*, KNIGHT RIDDER—WASHINGTON BUREAU K1183 (Jan. 22, 2004) (reporting on arguments).

<sup>6</sup> Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002).

involving nonmembers. This Article begins to fill this gap. It examines the Court's decisions regarding nonmembers to reveal the non-doctrinal suppositions about tribal legal systems that undergird them. It then tests those assumptions empirically and theoretically to show the ways that they fail to reflect reality.

The Supreme Court's nonmember decisions, I show, are shaped by two beliefs about justice and those considered outsiders to Indian tribes. The first is that jurisdiction over nonmembers should be limited because tribes will treat outsiders unfairly. Tribal courts according to this assumption are unfamiliar places in which outsiders are at a disadvantage, characterized by unwritten customs and traditions and bias toward nonmembers. Subjecting outsiders to their jurisdiction, therefore, would contravene the "great solicitude" of the United States "that its citizens be protected . . . from unwarranted intrusions on their personal liberty."<sup>7</sup>

The second assumption is that jurisdiction over outsiders and issues shaped by outside influence has little to do with tribal self-government. Over the twenty-five year period, the court has repeatedly affirmed the tribal right to self-government. Self-government, however, has been defined according to a stereotypical idea of what tribes are and what they need to survive. Because of this, jurisdiction has been limited to control over tribal members and the power to reproduce practices, such as hunting and traditional ceremonies, understood as traditionally "Indian." The power to regulate new disputes and issues or to engage in the "commonplace" stuff of government, on the other hand, is deemed largely irrelevant.

The remainder of the Article tries to obtain the "view from the reservation" on these assumptions.<sup>8</sup> The empirical part of the project seeks to test the assumptions against the experience of nonmembers in the Navajo Nation courts. With regard to the first assumption, the Navajo Nation court system on its face might appear to be extremely vulnerable to the kinds of "intrusions on personal liberty" the justices fear. The Navajo Nation has no constitution, all of its judges are Navajo, and only one in six judges has a law degree. The court, moreover, aggressively seeks to incorporate Navajo customary in its procedures and decisions. Despite these characteristics, the court is both numerically balanced in its decisions regarding nonmembers—50% of nonmembers win when they appear before the court, and 50% lose—

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<sup>7</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978); *Duro v. Reina*, 494 U.S. 686, 692 (1990); *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J. concurring).

<sup>8</sup> See FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 2-3 (1995) (arguing for an "inside-out" approach to federal Indian law considering the perspective from the reservation context).

and qualitatively balanced, even in areas, such as child custody, employment, and contract disputes, which might seem particularly prone to bias.

With regard to the second assumption, the Article examines the role that outsiders play in tribal legal systems. This role is shaped, in part, by the unique history of tribal courts, which typically came to reservations as tools of acculturation and control rather than as means to address the needs of tribal people. In light of this historical legacy, tribal legal systems have an uphill battle both in tailoring their law to the needs of tribal communities and in overcoming the perception that they are alien and hostile to tribal traditions. Restricting tribal jurisdiction to tribal members both denies courts the opportunity to respond to many of the most significant concerns of tribal members and perpetuates the perception of these courts as inferior bodies designed only for control of Indians.

Jurisdiction over outsiders is also crucial for reasons common to all legal systems. Here, I build on the insight of law and society scholars that formal legal institutions play one of their most important roles not in resolving disputes to which community norms already provide a solution, but in addressing new conflicts that challenge community norms in a way commands the acceptance of the community. This is particularly true for tribes, which must find ways to deal with foreign cultural and economic pressures without losing their coherence as communities. Disputes involving outsiders and the issues arising from the new kinds of commercial and domestic relationships they bring with them, therefore, are exactly the kinds of questions that it is most important that tribal legal institutions resolve.

The case load of the Navajo appellate courts confirms this importance: despite the tiny fraction of nonmembers on the Navajo Nation, 21.2% of the cases decided by the Navajo appellate courts over the last 32 years have involved nonmember litigants, as have over 30% of the cases decided in the last ten years. Without jurisdiction over such cases, the courts would not only be denied jurisdiction over some of the disputes most pressing to Navajo people, but would be forced to forgo their community-building role in forging distinctly tribal solutions to distinctly modern problems.

Finally, jurisdiction over outsiders is necessary to protect the institutional incentives for tribal judges to do their jobs well. In line with work on the importance of role perception in judicial performance, I argue that the good track record of the Navajo courts is a function of its sense of self-importance as the institution that must resolve the full range of conflicts affecting the Navajo people and do so in a way that expresses the ideals of Navajo culture. This institutional pride leads the judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role, and resist temptations to rule based on the status of the parties or political

pressure. Denying the courts jurisdiction over outsiders and the issues they raise would radically diminish both the judges' sense of self-importance and the impetus to take an objective view of Navajo practices. Despite the recent decisions of the United States Supreme Court, tribal legal systems have and will continue to have broad and often exclusive jurisdiction over many disputes arising on reservations. Preserving and enhancing these judicial incentives to fairness, therefore, is a matter of importance to both members and nonmembers of Indian tribes.

Part One of the Article discusses United States Supreme Court opinions regarding tribal jurisdiction over nonmembers, showing both how they diverge from legal precedent and the assumptions about tribes and justice that undergird the decisions. Part Two presents findings regarding decisions involving nonmembers in the Navajo appellate courts, showing the balanced disposition of these cases, even in factual situations one would assume would be particularly prone to bias. Part Three discusses the history of tribal courts in general and the Navajo courts in particular to show the challenges to legitimacy and potential for resistance this history engenders. Part Four returns to my empirical work on the Navajo courts, and discusses the role of outsiders in the development of tribal legal systems and legal systems generally. In conclusion, Part Five argues for a reconceptualization of what tribes are, what those considered outsiders mean for them, and their importance as the Supreme Court and Congress consider jurisdiction over nonmembers in tribal legal systems.

## **I. Judicial Divestiture in the United States Supreme Court**

Over the last 25 years, the Supreme Court has progressively whittled away tribal jurisdiction over those that are not members of their tribes. Scholars have devoted much attention to this trend.<sup>9</sup> While they have reached

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<sup>9</sup> What follows is a partial listing. One of the most recent of these articles is Joseph William Singer's *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENGLAND LAW REVIEW 641 (2003), which highlights the conflict between the Court's jurisprudence in the Indian Law arena with its trends in other areas of decreasing federal power in favor of state sovereignty, and of providing heightened protection for property rights. Similarly, in a 2001 article, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001), Sarah Krakoff points to the relationship between the Indian Law cases and the Court's espousal of a minimalist judicial philosophy. An earlier article, Philip Frickey, *A Common Law For Our Age Of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L. J. 1 (1999), provides an excellent exegesis of many of these cases and points to the link between these cases and the historical colonial project of the United States with respect to Indian tribes. In the same year David Getches, in reviewing all of the Rehnquist Court's

varying conclusions of about the roots of the cases, they almost uniformly agree that they are not accurate reflections of established Indian law doctrine.<sup>10</sup>

Scholars have identified many potential justifications for these opinions. One might simply dismiss this trend as racism or hostility to tribes. More subtly, one can find convincing links between this trend and the colonial project of the United States with respect to Indian nations.<sup>11</sup> One can also find congruence between the Court's Indian law jurisprudence and its rulings in other areas of the law. David Getches, for example, has pointed to the extent to which the trend of ruling against Indian tribes corresponds with the Court's other tendencies of ruling to further state interests, protect majoritarian values, and undermine special minority rights.<sup>12</sup>

But such insights do not fully explain why, within the same period, the Court has been relatively consistent in protecting tribes and their members from state and federal jurisdiction where tribes and their members alone were affected. Nor do they explain why the four more liberal members of the Court—Justices Breyer, Ginsburg, Souter and Stevens—have often joined and

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Indian law cases, not just the ones concerning jurisdiction over nonmembers, explains these cases as part of the general tendency of the Court to favor state's rights, disfavor "special rights" of minorities and other isolated groups, and protect majoritarian values and expectations. David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 277 (2001). L. Scott Gould posits that these cases are evidence of a "consent paradigm," L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996), while Frickey, in another article, argues that although this paradigm may be descriptive of the Court's rhetoric, it does not explain the normative underpinnings of the results. Philip Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997). Alexander Aleinikoff's recent book, *SEMBLANCES OF SOVEREIGNTY* (2002), contains elements all of these approaches, drawing links between the Court's Indian law cases and its other cases in which the United States defined itself as a colonial power, as well as current jurisprudence of the Court drawing lines between those considered legal citizens and those who are members of a community without possessing formal citizenship in the community.

<sup>10</sup> See, e.g., Philip Frickey, *A Common Law For Our Age Of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE. L. J. 1, 8 (1999) ("What I identify is more an unreflective judicial trend rooted in apparent uneasiness with tribal authority than a paradigmatic, entrenched doctrinal shift."); David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (arguing that recent Indian law decisions are result of subjective biases of justices rather than legal analysis).

<sup>11</sup> See Frickey, *Common Law of Colonialism*, supra note 9; Singer, *Cannons of Colonialism*, supra note 9.

<sup>12</sup> David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 277 (2001).

sometimes led the charge to limit tribal jurisdiction over nonmembers. These conflicting trends are best explained by justices' assumptions regarding what jurisdiction over outsiders means both for outsiders and for tribes. More specifically, the decisions are rooted in a dual sense that tribal courts will not be fair to nonmembers, and that jurisdiction over nonmembers, except where such jurisdiction is necessary to protect practices perceived as traditionally Indian, has little to do with the legitimacy of legal systems or tribal self-government. In this section, I describe the developments that led to the conflict over jurisdiction over nonmembers, analyze the cases concerning nonmember jurisdiction and the assumptions behind them, and conclude by summarizing the tribal jurisdiction that remains and the questions left unresolved.

#### **a. Historical Background: Tribal Resurgence**

Tribal sovereignty has seen a renaissance in the latter half of this century.<sup>13</sup> Mobilized by efforts to terminate their existence in the 1950s, inspired by successful group action by African Americans, and aided by federal policy initiatives regarding poverty and group rights, tribes increasingly found ways to assert and exercise governmental power.

After initial resistance, Congress and the Executive largely supported these efforts. First on a piecemeal basis by providing funding under discretionary programs, then through legislation directed at tribes, Congress has generally tried to enhance tribal self-determination.<sup>14</sup> Together, these tribal and federal actions have created a revolution in Indian country.<sup>15</sup>

These actions include both economic and institutional development, each of which has had the effect of subjecting more nonmembers to potential tribal jurisdiction.<sup>16</sup> Tribes increasingly took over management of natural resources and businesses on reservations, resulting in their employing, contracting with, and leasing lands to nonmembers. At the same time, tribes sought to develop tribal governmental capacity, increasing the sophistication of their courts and exercising broader regulatory control over their territories.

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<sup>13</sup> See generally STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* (1988).

<sup>14</sup> CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* at 83 (1987).

<sup>15</sup> See, e.g., Timothy Egan, *Parallel Nations: New Prosperity Brings New Conflict to Indian Country*, *NEW YORK TIMES* (March 8 & 9, 1998).

<sup>16</sup> *Id.*

In the early part of the twentieth century, few tribes exercised significant jurisdiction over non-Indians.<sup>17</sup> Except for tribes such as the “Five Civilized Tribes” of Oklahoma, which had long traditions of written laws, the laws of many tribes were drafted and designed by federal agents.<sup>18</sup> These laws typically limited tribal jurisdiction to tribal members or to Indians generally.<sup>19</sup> Federal regulations governing federally assisted reservation Courts of Indian Offenses did the same.<sup>20</sup> But in the 1950s and 60s, tribes began to focus resources and energy on development of tribal courts and law enforcement. As part of this process, tribes began to amend their constitutions and laws to provide for jurisdiction over all people in their territory.<sup>21</sup> This institutional development had many motives: practically, it responded to a real need to prevent lawlessness and regulate economic activity on reservations; symbolically, it asserted the relative equality of tribal courts; and defensively, it helped to ensure that states and the federal government would not seek broader jurisdiction to fill a perceived jurisdictional gap.<sup>22</sup>

These efforts got encouragement from the United States Supreme Court in 1959. In *Williams v. Lee* a non-Indian trader sued a Navajo couple in state court to enforce a contract arising from the sale of goods on the Navajo Nation.<sup>23</sup> The Court held that the state had no jurisdiction over the dispute:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the

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<sup>17</sup> This was not always true. Tribal judicial authority over non-Indians on tribal land without a federal purpose was recognized in early treaties and federal documents. See Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 App. A (1978-1979) (collecting treaties). Tribal taxes on nonmembers were considered and upheld at the turn of the century. See discussions of Oliphant and Atkinson, below.

<sup>18</sup> See Russel Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, in AMERICAN INDIANS AND THE LAW AT 50-51 (Lawrence Rosen, ed. 1976).

<sup>19</sup> See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134-36 (1982) (discussing amendments to Jicarilla Apache constitution and code to permit taxation of nonmembers); *Thompson v. Lovelady's Frontier Ford*, 1 Nav. R. 282 (Ct. App. 1978) (discussing 7 N.T.C. § 1333 (1958) which provided for “jurisdiction over all civil causes of action in which the defendant is an Indian and is found within the territorial jurisdiction of the Navajo Nation”).

<sup>20</sup> 25 C.F.R. §§ 11.2, 11.22 (1975).

<sup>21</sup> See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97 (1978).

<sup>22</sup> See Part III, *infra*, on these multiple purposes in the development of the Navajo Nation and other tribal legal systems.

<sup>23</sup> 358 U.S. 217 (1959).

transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.<sup>24</sup>

The holding that the plaintiff's nonmember status was irrelevant and the concern for the impact on tribal legal institutions if jurisdiction was upheld provided strong judicial support for the development of tribal courts.

By 1978, about a third of tribal courts exercised jurisdiction over non-Indians and non-tribal members on their reservations.<sup>25</sup> At that time, there was relatively broad recourse to federal court to challenge tribal actions. The Indian Civil Rights Act of 1968 (ICRA) made most of the federal Bill of Rights applicable to tribes,<sup>26</sup> and until 1978 lower courts typically interpreted it as creating a federal cause of action to challenge tribal actions that violated individual rights.<sup>27</sup> But relatively few individuals subject to tribal jurisdiction challenged tribal actions, suggesting relative satisfaction with its exercise.<sup>28</sup>

Despite this experience on the ground, however, many non-Indians were fearful and resentful of tribal authority. While some states and local governments supported these tribal exercises of jurisdiction, welcoming the assistance in the expensive task of policing vast reservation areas, others joined the protests of non-Indians, in part to support their citizens, and in part because of the perceived threat posed by these new assertions of governmental power within their borders.

### **b. The Beginning: *Oliphant v. Suquamish Indian Tribe***

In 1978, the question of tribal jurisdiction over non-Indians was placed directly before the Court in *Oliphant v. Suquamish Indian Tribe*.<sup>29</sup> In some

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<sup>24</sup> *Id.* at 223.

<sup>25</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.7 (1978).

<sup>26</sup> 25 U.S.C. §§ 1301-1302.

<sup>27</sup> *See Dry Creek Lodge, Inc. v. U.S.*, 515 F.2d 926, 933 n.6 (10<sup>th</sup> Cir. 1975) (collecting cases). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court held that the only federal actions permitted to challenge tribal actions under the Indian Civil Rights Act were habeas actions. Today, therefore, one may only challenge federal actions under ICRA in cases challenging tribal custody or detention or threats of custody or detention.

<sup>28</sup> Brief of Amicus Curiae Association of American Indian Affairs at 39, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729); Brief of Amicus National Conference of American Indians at 43, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729).

<sup>29</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).



ways, the facts seemed well designed to illustrate the need for tribal jurisdiction over non-Indians. Mark Oliphant was a resident of the Suquamish reservation that had gotten drunk and got into a fight with non-Indians residing in tribal campgrounds to attend the tribe's Chief Seattle Days celebration.<sup>30</sup> When tribal police went to break up the fight, Oliphant attacked them.<sup>31</sup> Oliphant was arrested and charged with assaulting a police officer and resisting arrest.<sup>32</sup> In response, Oliphant filed a habeas petition with the U.S. District Court.<sup>33</sup> After the district court had denied the writ, tribal police officers observed Daniel Belgarde, another non-Indian, driving his pick-up truck recklessly and speeding across the reservation.<sup>34</sup> When the police signaled to Belgarde to pull over he refused, and instead led the tribal police on a two-hour chase that only ended when he crashed into a tribal police car with which the police had blocked the road.<sup>35</sup> One of Belgarde's two companions on this wild ride was Mark Oliphant.<sup>36</sup> The police released Oliphant and Brad Bray, the other passenger, but arrested Belgarde for reckless endangerment and damage to public property.<sup>37</sup> The police called the Kitsap County Sheriff and the state police to the scene, but they declined to take jurisdiction.<sup>38</sup> Both incidents exemplified the kind of lawlessness that occurred when non-Indians did not recognize the authority of tribal police, and the need for tribal, rather than state or federal, jurisdiction to address it.

But other facts in the *Oliphant* case made it a dismal one in which to test the scope of tribal jurisdiction over non-Indians. Almost the entire habitable portion of the reservation had been allotted and sold to non-Indians, as a result of which non-Indians vastly outnumbered tribal members.<sup>39</sup> The

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<sup>30</sup> Brief for the United States as Amicus Curiae at 6, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729). Before the celebration, in anticipation of the many people that would attend, the tribe had requested assistance in policing the event from the county and the federal Bureau of Indian Affairs, but received assistance of only one county deputy for an eight hour period over the weekend. *Id.* at 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Brief of Petitioner at 17, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Brief for the United States as Amicus Curiae at 7, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729).

<sup>39</sup> At the time of the trial, almost 3,000 non-Indians resided on the reservation, while only 50 to 173 tribal members lived there. *See Oliphant*, 435 U.S. at 193 n.1 (reciting district court findings that there were 2928 non-Indians and 50 tribal members on the reservation); Brief for Amicus Curiae Kitsap County at 7 (although tribal elder had guessed there were 50 tribal

non-Indians, moreover, could not vote in tribal elections or serve in tribal government. Although this extreme population imbalance was as uncommon as it was bizarre,<sup>40</sup> a worse case in which to argue for tribal jurisdiction over non-Indians could hardly be imagined.

The briefs of Oliphant and amici opposing jurisdiction<sup>41</sup> encompassed hundreds of pages. The Court, however, did not accept any of their legal arguments,<sup>42</sup> but instead created something wholly new in Indian law, the principle that simply by incorporation within the United States tribes had been divested of criminal jurisdiction over non-Indians.

How, without any legal arguments that it was willing to uphold, did the Court deny jurisdiction? It did so through a process that Russel Barsh and James Henderson have aptly compared to Lewis Carroll's description of the Hunting of the Snark: "they charmed it with smiles and with soap."<sup>43</sup> By patching together bits and pieces of history and isolated quotes from

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members most recent BIA census found 173 members residing on the reservation).

<sup>40</sup> See Brief of Amici Curiae National Congress of American Indians et al. at 33-34, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729).

<sup>41</sup> The amici included the Attorney General for the State of Washington, the State of South Dakota, and Kitsap County, whose land base included part of the reservation, weighed in against tribal jurisdiction. Interestingly, the Governor of Washington petitioned to be included as amicus to support the findings below—the opposite position taken by the Governor's Attorney General. See *Objection of Petitioners to Motion of Governor of State of Washington for Leave to File Brief as Amicus Curiae* (Jan. 17, 1977), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729).

<sup>42</sup> One of the petitioner's core arguments was that there was no such thing as "independent tribal sovereignty" and that any authority tribes had must come from delegation by the federal government. That term, however, the Supreme Court rejected this argument in a companion case to *Oliphant*, *United States v. Wheeler*. 435 U.S. 313, 322 (1978). The Petitioners also argued that not only must tribal powers come from the federal government, but also that federal law preempted any tribal authority to prosecute non-Indians that did exist. They devoted many additional pages to presenting treaties, statutes, and attorney general opinions, which, they claimed denied tribes criminal jurisdiction over non-Indians. While the Supreme Court agreed that these documents revealed a "commonly shared presumption" that tribes did not have such jurisdiction, it did not hold that the laws themselves took jurisdiction away. 435 U.S. at 206 (statutes and opinions "not conclusive on the issue before us"). Finally, the Petitioners argued that jurisdiction over non-Indians would violate the Constitution, both because such jurisdiction was not provided for in the Constitution and because tribal governments, whose membership was based on descent, could not constitutionally exercise governmental authority. But the Supreme Court did not base its holding on the Constitution or suggest that there were constitutional objections to such jurisdiction. Indeed, its affirmation in *Wheeler* that tribal authority was not subject to constitutional restrictions effectively undermined constitutional arguments about the limitations on tribal jurisdiction.

<sup>43</sup> Russel L. Barsh & James Y. Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609 (1978-1979).

nineteenth century cases, and relegating contrary evidence to footnotes<sup>44</sup> or ignoring it altogether, the majority created a legal basis for denying jurisdiction out of whole cloth.

This approach categorizes the two thirds of the opinion in which the Court discussed historic non-judicial assumptions about tribal jurisdiction over non-Indians.<sup>45</sup> The Court, for example, quoted Felix Cohen's statement that "attempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period."<sup>46</sup> But it elided the fact that this statement described what courts had done after a certain period in federal policy, and failed to cite what Cohen actually wrote about the scope of inherent tribal power. On this score, Cohen wrote that originally a tribe "might punish aliens within its jurisdiction according to its own laws and customs," and that "[s]uch jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government."<sup>47</sup> While this omission might be excused as a mere mistake, a failure to look at every page of a 662 page book, the Court had before it two briefs quoting this language.<sup>48</sup>

This problem is even more glaring in the Court's discussion of much shorter documents. In 1834, Congress considered a bill to regulate the Western Territory beyond the Mississippi to which it was moving eastern Indian tribes.<sup>49</sup> As the Court described the bill, "Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area," citing portions of the bill that

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<sup>44</sup> For example, the Court relied on a single treaty in which the Choctaw Tribe requested the right to punish white men within their limits as evidence of a commonly held assumption that no such jurisdiction existed absent delegation, leaving for the footnotes the many other treaties that acknowledged the right of tribes to punish non-Indians in footnotes. *Id.* at 197-98 & 197 n.8. Barsh and Henderson collect the many other such treaties in the appendix to their article. Barsh & Henderson, *supra* note 17, App. A. Similarly, the Court relied on a 1970 Solicitor General's opinion stating that tribes did not have criminal jurisdiction over non-Indians, only mentioning in the footnotes that the opinion had been withdrawn. 435 U.S. at 201 & 201 n.11.

<sup>45</sup> 435 U.S. at 196-208. For an excellent criticism of the history in this opinion, see Barsh & Henderson, *supra* note 17 at 617-31.

<sup>46</sup> *Id.* at 199 n.9.

<sup>47</sup> FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942) (hereinafter 1942 COHEN).

<sup>48</sup> Brief of Amici Curiae Association of American Indian Affairs, et al., at 13 (quoting 1942 COHEN along with identical language in 55 I.D. 14, 57 (1934)); Brief for Respondents at 57 (quoting 55 I.D. 14, 57 (1934)).

<sup>49</sup> H. Rep. No. 23-474, 23d Cong., 1<sup>st</sup> Sess. (1834), *reprinted in* 263 U.S. Serial Set (hereinafter 1834 House Report).

provided for federal jurisdiction over these two categories of non-Indians,<sup>50</sup> and the statement that such jurisdiction was required by the current “want of fixed laws [and] competent tribunals of justice” in Indian country.<sup>51</sup> Although the Report stated that non-Indians voluntarily settling in the area would be subject to tribal jurisdiction, this fact appears only in the footnotes.<sup>52</sup> Even more misleading is that *Oliphant* presented the bill as concerning whether tribes would be *granted* criminal jurisdiction over non-Indians. The report, however, makes clear that far from granting tribal jurisdiction, Congress saw itself as placing certain limitations on inherent tribal authority over non-Indians, and assumed that absent such limitations a tribe had “jurisdiction over all persons and property within its limits.”<sup>53</sup> This jurisdiction included even the ultimate punishment: the proposed bill did not *provide* that tribes could impose capital punishment on American citizens—this power was assumed—but instead simply limited this inherent power by providing that where tribes sentenced citizens to death, the United States had the power to pardon them.<sup>54</sup> In addition, the 1834 Congress understood the federal jurisdiction it had provided over federal officials and travelers as a protection analogous to protections provided to foreigners in a strange land under international law,<sup>55</sup> not as a response to the lack of tribal jurisdiction. And while the proposed bill said nothing about *granting* tribal jurisdiction over non-Indians outside these categories, the Report makes clear that Congress believed tribes had such jurisdiction: “As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.”<sup>56</sup> All of these statements are on page eighteen of the House Report—the same page that the *Oliphant* opinion cited.<sup>57</sup> But while the opinion stated that the report “suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without inherent jurisdiction to try non-Indians,”<sup>58</sup> the report actually shows the opposite.

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<sup>50</sup> 435 U.S. at 201-202.

<sup>51</sup> 435 U.S. at 202, quoting 1834 House Report *supra* note \_\_\_\_ at 18.

<sup>52</sup> 435 U.S. at 202 n.13.

<sup>53</sup> 1834 House Report, *supra* note \_\_\_\_ at 18.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 435 U.S. at 202.

<sup>58</sup> 435 U.S. at 203. As the *Oliphant* Court itself recognized, one should not place too much weight on an unenacted bill. The Report, however, is interesting not primarily for what the bill provided, but rather for what it reveals about what the House assumed about tribal jurisdiction over non-Indians where federal law was silent.

Similarly, the Court cited an 1855 attorney general's opinion that the Choctaw nation did not have criminal jurisdiction over a non-Indian, ignoring the fact that the Attorney General stated that "it is certain that the Agent errs in assuming the legal impossibility of a citizen of the United States becoming subject in civil matters, or criminal either, to the jurisdiction of the Choctaws,"<sup>59</sup> so that the question was not whether the tribe had inherent jurisdiction, but whether Congress had taken such jurisdiction away.<sup>60</sup> It was only because the Attorney General read the relevant treaties and statutes as preempting tribal criminal jurisdiction over U.S. citizens that he held it did not exist; with respect to civil disputes, as to which the treaties and statutes were silent, he opined that such questions "appertained to the local jurisdiction, whatever maybe the ultimate political sovereignty."<sup>61</sup> The remainder of the Court's discussion of positive sources of law follows this same pattern of partiality and misconstruction.<sup>62</sup>

But then, as if to prevent readers from focusing too closely on the holes in this historical lace, the *Oliphant* Court provides us with more smiles and soap. The Court acknowledged that the historical documents are "not conclusive of the issue before us" and then continues: "But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress."<sup>63</sup> What did these earlier precedents say? First, that Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority,"<sup>64</sup> second, that upon incorporation within the United States, "their rights to complete sovereignty as independent nations, were necessarily diminished,"<sup>65</sup> and finally that "any attempt [by foreign nations] to acquire

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<sup>59</sup> 7 Op. Atty. Gen. 174, 177 (1855).

<sup>60</sup> *Id.* at 178.

<sup>61</sup> *Id.* at 180-81. While the fact that Thomas Cheadle, the white man concerned, had become a citizen of the Choctaw Nation by marriage and thereby gained rights to Choctaw property, affected the court's determination of the fairness of Choctaw jurisdiction, the opinion does not turn on this fact. Rather, the Attorney General declared that "As to the general question of allegiance, it is palpable that this has no necessary connection with judicial jurisdiction. . . . Nay, a Frenchman or Englishman, residing in the United States, has to submit many questions of right to the local courts, as an American must in France or England; but the national allegiance is not touched in either case. . . . [W]e see and acknowledge that the question of allegiance is a non-essential in the question of judicial competency." *Id.* at 181-82.

<sup>62</sup> See Barsh & Henderson, *supra* note 17 at 617-31.

<sup>63</sup> 435 U.S. at 208.

<sup>64</sup> *U.S. v. Rogers*, 45 U.S. at 572 (1846), quoted at 435 U.S. at 208-09.

<sup>65</sup> *Johnson v. M'Intosh*, 8 Wheat. 543, 574, 5 L. Ed. 681 (1823), quoted at 435 U.S. at 209.

their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.”<sup>66</sup>

How did the Court translate these intrinsic limitations on tribal sovereignty into an inability to prosecute non-Indians that violated tribal law on tribal land? By pointing to dicta in a concurrence by a single justice to the Supreme Court’s 1810 opinion in *Fletcher v. Peck*<sup>67</sup> that “the restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amount to the right of governing every person within their limits except themselves.” Although Justice Johnson’s concurrences always expressed radically different views on Indian law than the opinions of the Court,<sup>68</sup> the 1978 Court relied on this slender reed to hold that “the intrinsic limitations on Indian tribal authority” were not restricted to these two hundred year old restrictions on “the tribes’ power to transfer lands or exercise external political sovereignty.”<sup>69</sup> Rather, the Court held, simply by “submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power” to try and punish non-Indian citizens without authorization of this power by the United States.<sup>70</sup>

The Court announced this rule with so little law to support it because of its dual sense that tribal jurisdiction was just not fair to outsiders, and that

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<sup>66</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 17-18 (1831), quoted at 435 U.S. at 209.

<sup>67</sup> 10 U.S. 87, 147 (Johnson, J. concurring) (quoted at 435 U.S. 209).

<sup>68</sup> While the majority opinion in *Fletcher* barely touched on Indian law, Johnson’s concurrence in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), for example, is a concurrence as to result only; while the Court’s opinion by Justice Marshall held that tribes while not “foreign nations” were certainly “sovereign nations,” *id.* at 16, Justice Johnson argued that “I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.” *Id.* at 21 (Johnson, J. concurring). Johnson’s view, however, was not the opinion of the Court. While Johnson might have desired, as he wrote in *Fletcher*, that tribes should have jurisdiction over their own members only, it is only Justice Marshall’s opinions for the majority that have the force of law. In contrast with Johnson’s proposals, these opinions state that Indian nations were “distinct political communities, having territorial boundaries, within which their authority is exclusive,” *Worcester v. Georgia*, 31 U.S. 515, 557 (1832), and that a “person who purchases land from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws.” *Johnson v. M’Intosh*, 21 U.S. 543 (1823). The *Oliphant* Court seems to have been aware of this problem. Although the Petitioner’s cited Johnson’s similar language from *Cherokee Nation v. Georgia*, 30 U.S. at 27 (Johnson, J. concurring) (stating that tribal powers were limited to a right of “personal self-government”), quoted in Brief of Kitsap County at 27-28, the *Oliphant* Court did not cite it, perhaps aware of the contrast between this concurrence and the Court’s opinion in the case.

<sup>69</sup> 435 U.S. at 209.

<sup>70</sup> *Id.* at 210.

the effort to exercise such jurisdiction was a modern upstart of little importance to real Indian tribes. The opinion is infused with suggestions that the exercise of such jurisdiction had little to do with traditional tribal power. The first lines of the opinion question the status of the Suquamish government as either tribal or governmental:

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation.<sup>71</sup>

The government trying to assert its retained sovereignty is thus subtly transformed into a federal creation with little claim to the historical conception of a tribe. Similarly, control over a formal court system is portrayed as a modern, un-Indian creation. Traditionally, the Court tells us, “[o]ffenses 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 on punishment.”<sup>72</sup> Both formal court systems and the attempt to exercise jurisdiction over outsiders were thus creatures of the late twentieth century, and had little to do with the traditional concerns of tribes.<sup>73</sup>

The doubt that tribal governments can exercise jurisdiction fairly figures even more prominently in the opinion. The petitioners and *amici* portrayed a “parade of horrors” should the Court uphold tribal jurisdiction.<sup>74</sup> (Slade Gorton, who later became a famous modern-day “Indian fighter” in the U.S. Senate, wrote the amicus brief as Attorney General of the State of Washington.) While these specific allegations of unfairness do not figure in the reasoning of the Court (and indeed the district court held that Oliphant had thus far been afforded equal protection and due process in the matter<sup>75</sup>), it is clear that uneasiness about tribal jurisdiction does much of the work of the

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<sup>71</sup> Id. at 193.

<sup>72</sup> Id. at 197.

<sup>73</sup> Id.

<sup>74</sup> Brief of Amici Curiae Association of American Indian Affairs at 40, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729). It is interesting to note that many of the attacks on the competency of the tribal justice system derived not from objective unfairness, but from their relative lack of resources and formal education. *See, e.g.*, Petitioners’ Brief at 17, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978) (No. 76-5729). (noting that tribal police wrote that Belgarde was charged with “wreckless” driving and that the “arraignment was held in the back of a former barber shop in an area roughly 8’ x 10’, not physically capable of handling a fair, free and public trial or hearing. The presiding judge appeared to have little knowledge, training or practice in law.”).

<sup>75</sup> Mem. Op. (W.D. Wash. Apr. 5, 1974); J. App. 51-52.

*Oliphant* opinion. The Court held that tribal jurisdiction over non-Indians must be denied because of the “great solicitude” of the United States “that its citizens be protected . . . from unwarranted intrusions on their personal liberty.”<sup>76</sup> Tribal jurisdiction would cause such an intrusion on liberty specifically because of the cultural and racial divide between those exercising jurisdiction and those upon whom it was exercised. The court quoted an 1883 case regarding federal criminal jurisdiction over members of the Sioux tribe to suggest that subjecting the defendant to the tribal court would extend

[O]ver aliens and strangers; over the members of a community separated by race [and] tradition . . . the restraints of an external and unknown code . . . which judges them by a standard made by others and not for them . . . It tries them, not by their peers, nor by the customs of their people . . . but by . . . a different race, according to the law of a social state of which they have an imperfect conception.<sup>77</sup>

The 1883 Supreme Court had not held that this cultural divide was an absolute bar to federal criminal jurisdiction over tribal members,<sup>78</sup> only that it was an additional reason not to construe a vague treaty provision to repeal a statute that clearly prohibited such jurisdiction.<sup>79</sup> The 1978 Court, however, held that these considerations spoke “equally strongly against the . . . contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure.”<sup>80</sup> What was simply a rule of statutory construction where federal jurisdiction over Indians was concerned, with respect to non-Indians was used to justify a new common law doctrine allowing the Court to deprive tribes of jurisdiction in the absence of any statute or provision of law doing so.

### **c. Reaffirming Tribal Control Over Tribal Members**

While these concerns were sufficient to remove all tribal criminal jurisdiction over non-Indians, that same term the Court issued two other

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<sup>76</sup> 435 U.S. at 210.

<sup>77</sup> 435 U.S. at 210-11 (quoting *Ex Parte Kan-gi-shun-ca* (Crow Dog), 109 U.S. 556, 571 (1883)).

<sup>78</sup> Indeed, three years later the Court upheld a federal statute authorizing such jurisdiction. *U.S. v. Kagama*, 118 U.S. 375 (1886).

<sup>79</sup> 109 U.S. 556, 571 (circumstances of case reinforce general rule against repeal by implication).

<sup>80</sup> 435 U.S. at 211.



opinions insulating tribal actions concerning Indians from federal control. In *U.S. v. Wheeler*, a companion case to *Oliphant*, the Court held that the Navajo Nation's power to criminally prosecute a member of the tribe was "part of the Navajos' primeval sovereignty . . . attributable in no way to any delegation to them of federal authority" and therefore did not trigger the Fifth Amendment prohibition on double jeopardy.<sup>81</sup> The Court was careful to distinguish between this retained power over tribal members and power over nonmembers, aspects of which tribes had "implicitly lost by virtue of their dependent status," and coined the term "implicit divestiture" to describe its new doctrine with respect to jurisdiction over nonmembers.<sup>82</sup>

A few months later, in *Santa Clara Pueblo v. Martinez*, the Court denied a tribal member the right to challenge a tribal ordinance that excluded her children from tribal membership on grounds that discriminated on basis of her gender in federal court.<sup>83</sup> Although the opinion turned on the holding that the Indian Civil Rights Act only created a federal cause of action for habeas cases and therefore applied to non-Indians as well,<sup>84</sup> *Oliphant* had insulated these non-Indians from much tribal jurisdiction. With hindsight, one sees in these opinions two separate tracks regarding tribal jurisdiction emerging: where such jurisdiction touched non-Indians, it threatened personal liberty and was not essential to tribal self-government; but when it touched tribal members only explicit federal action was sufficient to overcome the invasion of tribal sovereignty.

**d. The Middle Period: *Colville, Montana, Merrion, National Farmers, Iowa Mutual, and Brendale***

*Oliphant* seemed to concern only criminal jurisdiction. The Court's emphasis on historical assumptions regarding criminal jurisdiction and concerns for personal liberty suggested that civil and regulatory jurisdiction would not be governed by the same rule. In addition, the Supreme Court had upheld imposition of tribal taxes on non-Indians in 1905,<sup>85</sup> and in 1959 had

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<sup>81</sup> 435 U.S. 313, 327 (1978).

<sup>82</sup> 435 U.S. at 326.

<sup>83</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>84</sup> *Id.* (construing 25 U.S.C. §§1301-1303).

<sup>85</sup> *Morris v. Hitchcock*, 194 U.S. 384 (1904). In *Morris*, the Supreme Court sustained a tribal tax imposed on non-Indians grazing cattle on land they owned within tribal territory. An Eighth Circuit decision the following year further explained the nature of this power. In *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905), the court rejected a challenge by non-Indians to tribal taxation of their activities on non-Indian lands within the reservation. The court held that the "authority of the [tribe] to prescribe the terms upon which noncitizens may transact business within its borders . . . was a natural right of that people, indispensable to its

held that a contract action by a non-Indian against an Indian could *only* be brought in tribal court.<sup>86</sup> The year after *Oliphant* was decided, moreover, the Court in *Washington v. Confederated Tribes of Colville Indian Reservation* upheld tribal taxes on non-Indians purchasing cigarettes on tribal land, stating that “federal law to date has not worked a divestiture of Indian taxing power.”<sup>87</sup>

But in 1981, the Court decided *U.S. v. Montana*.<sup>88</sup> Compared to *Oliphant*, *Montana* was a low profile case. It was brought by the United States as an action to quiet title to the bed of the Big Horn River, which ran through the Crow Reservation, and which was claimed both by the State of Montana and by the United States in trust for the Crow Tribe. This issue occupied the first five questions presented to the Court by parties, and was the subject of the bulk of their written arguments.<sup>89</sup> The question of jurisdiction to regulate hunting and fishing by non-members was a “corollary” to this question, and only arose because the federal government sought a declaration that tribal and federal laws preempted concurrent regulation of such activity by the state.<sup>90</sup> But the Supreme Court framed the issues very differently. This was the first sentence of the Supreme Court’s opinion: “This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians.”<sup>91</sup>

*Montana* addressed head on a question that had only been part of the subtext of *Oliphant* case: how should the Court respond to non-Indian land ownership on Indian reservations. In the latter part of the nineteenth century and the beginning of the twentieth century, the United States pursued a policy of allotting reservation land in parcels of up to 160 acres to Indian heads of

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autonomy as a distinct tribe or nation, and it must remain an attribute of its government until agreement of the nation itself or by the superior power of the republic it is taken from it.” *Buster v. Wright*, 135 F. 947, 950 (8th Cir. 1905).

<sup>86</sup> *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>87</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980). While parts of the opinion could be read to suggest that it applied only to tribal trust land, others indicate that it applies to all doing business on the reservation generally. *Id.*

<sup>88</sup> *U.S. v. Montana*, 450 U.S. 544, 549 (1980). The case involved two conflicting presumptions: first, the presumption, based on the equal footing doctrine, that States took title to lands under navigable waters within their borders upon being admitted to statehood, and second, the rule that treaty rights, such as the right to the Crow Reservation recognized by the 1868 Treaty with the Crow Tribe, were not abrogated absent clear and plain intent by Congress to do so. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (forthcoming 2005) (hereinafter 2005 COHEN).

<sup>89</sup> See Petitioner’s Brief, *U.S. v. Montana*, 450 U.S. 544 (1980) (No. 79-1128).

<sup>90</sup> *U.S. v. Montana*, 457 F. Supp. 599, 599 (D. Mont. 1978); 450 U.S. at 549.

<sup>91</sup> 450 U.S. at 547.

households, and selling off the remaining land to non-Indian purchasers.<sup>92</sup> This policy first became coercive, broad-based law with the Indian General Allotment Act of 1887,<sup>93</sup> but had been pursued by the federal government for many years through treaties providing that land could be provided to heads of households in severalty if they chose. Although the policy was intended to civilize Indians by turning them into farmers and property owners, it “quickly proved disastrous for the Indians.”<sup>94</sup> In 1934, Congress declared the end of allotment, and prohibited any further division of Indian lands. But the policy had already wreaked havoc on the tribal landscape. Two thirds of Indian lands had passed from native ownership.<sup>95</sup> Most reservations were now “checkerboards,” dominated by squares of land (so called “fee lands”) owned and occupied by non-Indians.

In response to this problem, Congress took early steps to try to reconsolidate tribal land holdings on such reservations<sup>96</sup> and affirm uniform federal jurisdiction over them.<sup>97</sup> The Supreme Court had affirmed these steps, holding that the federal sale of lands within a reservation, without more, neither diminished the reservation,<sup>98</sup> nor gave states criminal<sup>99</sup> or taxing jurisdiction<sup>100</sup> over the people there. Even before these congressional actions, the Court and the Executive had affirmed tribal jurisdiction over non-Indians on allotted land on reservations. In 1904, the Court had affirmed federal responsibility to enforce tribal tax laws against non-Indians on non-Indian lands within the reservation.<sup>101</sup> In so doing, the Court followed executive branch opinions stating that even when non-Indians purchased land pursuant to federal laws they did so “with the assumption that the purchaser, if he wishes to occupy, will comply with the local laws, just as in other cases. The United States might sell lands which it holds in a State, but it would be a strange contention that this gave the purchaser any immunity from local laws

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<sup>92</sup> See, e.g., Treaty with the Stockbridges, Nov. 24, 1848, 9 Stat. 955; Treaty with the Ioways, May 17, 1854, art. 6, 10 Stat. 186; see generally, FELIX S. COHEN, HANDBOOK ON FEDERAL INDIAN LAW at 98-102, 129-134 (2d ed., 1982) (hereinafter 1982 COHEN).

<sup>93</sup> Ch. 119, 24 Stat. 388 (1887).

<sup>94</sup> *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997).

<sup>95</sup> 1982 COHEN, *supra* note 92 at 138.

<sup>96</sup> 25 U.S.C. § 465.

<sup>97</sup> 18 U.S.C. § 1151.

<sup>98</sup> *Seymour v. Superintendent*, 368 U.S. 351, 357 (1962).

<sup>99</sup> *Id.*

<sup>100</sup> *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478-79 (1976).

<sup>101</sup> *Morris v. Hitchcock*, 194 U.S. 384, 386 (1904).

or local taxation.”<sup>102</sup> In 1934, in its influential opinion on the “Powers of Indian Tribes,” the Solicitor General made clear that tribal jurisdiction over non-Indians on lands they owned was not limited to the power to tax:

Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty. But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable Federal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.<sup>103</sup>

After the 1960s, however, assertions of tribal jurisdiction raised new protests by non-Indian residents who felt subjection to the rules of unfamiliar tribal governments violated their rights as property owners and citizens.

Although the Court’s opinion in *Montana* did not accord with the prior executive branch opinions, it still seemed to strike a middle ground in resolving the dispute between tribes and non-Indians. The Court affirmed tribal civil jurisdiction over non-Indians on tribally owned land:

The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the tribe, and with this holding we can readily agree. We also agree . . . that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits.<sup>104</sup>

In addition, the Court stated that the treaty with the tribe, which provided that the reservation would be “set aside for the absolute and undisturbed use and occupation” of the Indians arguably conferred authority to control hunting and fishing on such lands.<sup>105</sup> But the Court reached an opposition conclusion with

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<sup>102</sup> 23 Op. Atty. Gen. 213, 217 (1900); *see also* 23 Op. Atty. Gen. 528 (1901) (affirming power to impose export tax on hay grown on reservation “even if the shipper was the absolute owner of the land on which the hay was raised”).

<sup>103</sup> 55 I.D. 14, 31 (1934).

<sup>104</sup> *U.S. v. Montana*, 450 U.S. at 557.

<sup>105</sup> *Id.* at 558-59.

respect to fee lands. Although the Court produced no history of assumptions regarding authority to regulate activities of tribal members comparable to that in *Oliphant*, the Court relied on *Oliphant* and Justice Johnson's concurrence in *Fletcher v. Peck* to hold that the same principles "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>106</sup>

Given the history of federal affirmation of tribal civil jurisdiction over non-members, the Court had to acknowledge that tribes retained significant inherent jurisdiction over non-Indians, even on fee lands:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.<sup>107</sup>

This jurisdiction seemed quite expansive. After all, the power to legislate to protect health or welfare of one's citizens is the core of the police powers of a state—a broad power that traditionally has been granted "great latitude."<sup>108</sup> As described in the edition of the Cohen Handbook that came out in 1982, the case seemed only stand for the unproblematic principle that tribes did not have the power to regulate non-Indians on non-Indian land "when no tribal interests were directly affected."<sup>109</sup>

But in hindsight, the opinion contains some troubling suggestions as to how tribal interests would be defined. While Congress and tribes were increasingly defining tribal sovereignty as a modern, dynamic thing, the *Montana* majority seemed to define tribal sovereignty as the creature of a remembered past.<sup>110</sup> The Court began its description of the facts of the case by stating that "[t]he Crow Indians originated in Canada," and had migrated to the United States 300 years ago.<sup>111</sup> The fact that the State of Montana had

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<sup>106</sup> *Id.* at 565.

<sup>107</sup> *Id.* at 565-66 (citations omitted).

<sup>108</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

<sup>109</sup> 1982 COHEN, *supra* note 92 at 245.

<sup>110</sup> This sense that regulation of fishing was not rooted in the past of the tribe also clearly influenced the reasoning of the district court. *See* 457 F. Supp. 599, 602.

<sup>111</sup> 450 U.S. at 547.

traditionally exercised “near exclusive” jurisdiction over hunting and fishing on fee lands on the reservation, and that, until recently, the tribe had “accommodated itself” to this state regulation was core to the Court’s holding that tribal regulation did not impact the self-government of the tribe.<sup>112</sup> In addition, although this fact was important principally in construing the treaty, the Court found that “the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.”<sup>113</sup> The Court did not consider the fact that the tribe now sought jurisdiction over natural resources on the reservation as a means to revitalize its government and the reservation economy; all that was important was that it had not done so in the past. The *Montana* Court seemed to define self-government according to its sense of what tribes had been, not what they could become.

But the Supreme Court’s cases over the next few years did not follow this lead, and instead protected tribal sovereignty as an evolving thing. In 1982, the Court prohibited a state from taxing a non-Indian contractor building an on reservation school in part because it would undermine the modern federal policy of encouraging tribal independence.<sup>114</sup> The next year, the Court held that where a tribe had undertaken substantial development of hunting and fishing resources on its reservation, not only could it regulate such activity by nonmembers,<sup>115</sup> but also that state regulation of hunting and fishing was preempted.<sup>116</sup>

The nonmember jurisdiction cases of these middle years also encouraged cautious optimism about the limited scope of *Montana*. When the Court issued its opinion in *Montana*, it had before it *Merrion v. Jicarilla Apache Tribe*, a case in which non-Indians challenged tribal authority to impose a tax on oil and gas production on lands leased to them by the Tribe for that purpose.<sup>117</sup> If *Montana* stood for the proposition that tribal power to regulate non-Indians derived from the power to exclude, as the *Merrion* petitioners argued, their long-term leases allowing them to enter the land would seem to deprive the tribe of regulatory power.<sup>118</sup> The Supreme Court rejected this argument and upheld the taxes. The Court explained that

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<sup>112</sup> *Id.* at 565 n.13 & 566-67.

<sup>113</sup> *Id.* at 556.

<sup>114</sup> *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

<sup>115</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983).

<sup>116</sup> *Id.* at 338-38.

<sup>117</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). The taxes were part of the recent tribal resurgence: although the tribe had leased the lands to the taxpayers since 1953, it had only amended its constitution to permit jurisdiction over nonmembers in 1968, and had only enacted the taxes in 1976. *Id.*

<sup>118</sup> 455 U.S. at 136-37.

The power to tax . . . does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction.<sup>119</sup>

Even if the authority to tax did derive solely from the power to exclude, moreover, the tribe had not “abandoned its sovereign powers simply because it [had] not expressly reserved them in a contract.”<sup>120</sup>

Justice Stevens wrote a lengthy dissent in which Chief Justice Burger and Justice Rehnquist joined. Although the tribal taxes were lower than state taxes for the same activity, the dissent centered around concern for the non-Indian plaintiffs subject to the vagaries of tribal jurisdiction. Non-Indians were not represented in tribal governments,<sup>121</sup> and tribal governments were not bound by the constitution.<sup>122</sup> Non-Indians contracting with the tribe might find themselves subject to taxes when the contract was half completed.<sup>123</sup> Although the majority had held that secretarial approval of the Jicarilla taxes mitigated the potential for discrimination, the dissenters stated that “ignoring the risk of such unfair treatment” for this reason was to “equate the unbridled discretion of a political appointee with the protection afforded by the rules of law. . . . Neither wealth, political opportunity, nor past transgressions can justify denying any person the protection of law.”<sup>124</sup> But these dissenters did not carry the day—the opinion of Justice Marshall, the Court’s strongest advocate for the rights of minorities, did that.<sup>125</sup>

The question of civil jurisdiction over non-Indians also came before the Court in *National Farmers Union Insurance Co. v. Crow Tribe*.<sup>126</sup> The case concerned a personal injury action by a tribal member filed in tribal court

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<sup>119</sup> *Id.* at 137.

<sup>120</sup> *Id.* at 144-48.

<sup>121</sup> *Id.* at 172-73.

<sup>122</sup> *Id.* at 170-71.

<sup>123</sup> *Id.* at 190.

<sup>124</sup> *Id.*

<sup>125</sup> While Justice Stevens was a concerned advocate for the rights of individuals, and I believe that his Indian law jurisprudence was honestly motivated by this concern, Justices Brennan, Blackmun, and Marshall, the justices that equal Stevens in his concern for fairness and constitutional rights of individuals, consistently voted to uphold tribal jurisdiction.

<sup>126</sup> 471 U.S. 845 (1985).

against a state school district and its insurance company for an accident on land owned by the State of Montana within the Crow Reservation. The non-Indian defendants filed a federal action challenging the tribe's jurisdiction over them. The Supreme Court held that non-Indians challenging civil jurisdiction of tribal courts were required to exhaust tribal remedies before turning to federal court:

If we were to apply the *Oliphant* rule here, it is plain that any exhaustion requirement would be completely foreclosed because federal courts would *always* be the only forums for civil actions against non-Indians. For several reasons, however, the reasoning of *Oliphant* does not apply to this case. First, although Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation. Moreover, the opinion of one Attorney General on which we relied in *Oliphant*, specifically noted the difference between civil and criminal jurisdiction. . . . "*By all possible rules of construction the inference is clear that jurisdiction is left to the Choctaws themselves of civil controversies arising strictly within the Choctaw Nation.*"<sup>127</sup>

The Court concluded that

[T]he answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. . . . Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.<sup>128</sup>

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<sup>127</sup> 471 U.S. 854-55 (quoting 7 Op.Atty.Gen. 175, 179-181 (1855)) (emphasis added by Court).

<sup>128</sup> *Id.* at 855-56.



Two years later, in *Iowa Mutual Insurance Co. v. LaPlante*, the Court affirmed this exhaustion requirement and extended it to cases founded on diversity jurisdiction.<sup>129</sup> The Court also went even further in affirming tribal jurisdiction than it had in *National Farmers*: “Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.”<sup>130</sup> Only Justice Stevens dissented from the opinion, and only on the grounds that exhaustion of state remedies would not have been required had a diversity case been brought in state court.<sup>131</sup>

*Iowa Mutual*, following *National Farmers* and *Merrion*, seemed to signal that while civil jurisdiction on fee land was subject to certain limitations, these limitations were narrow, and the general presumption was that tribes had civil jurisdiction over non-Indians on their reservations. In 1989, however, the Court issued its opinion in *Brendale v. Confederated Tribes & Bands of Yakima*,<sup>132</sup> which considered whether the Yakima Nation could impose its zoning requirements on reservation fee lands owned by nonmembers. Eighty percent of the reservation was held in trust for the tribe, while twenty percent was fee land owned by non-Indians. Most of the fee land was at the edges of the reservation, which had significant commercial and residential development.<sup>133</sup> The parties referred to this land as the “open area.”<sup>134</sup> In contrast, the “closed area” toward the center of reservation was almost entirely in trust, was largely uninhabited, and had maintained a “pristine, wilderness-like character.”<sup>135</sup> Philip Brendale<sup>136</sup> owned a twenty-

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<sup>129</sup> 480 U.S. 9 (1987).

<sup>130</sup> *Id.* at 18.

<sup>131</sup> *Id.* at 20.

<sup>132</sup> 492 U.S. 408 (1989).

<sup>133</sup> 617 F. Supp. at 752.

<sup>134</sup> 492 U.S. at 415.

<sup>135</sup> 617 F. Supp. at 752.

<sup>136</sup> *Brendale* reflects the artificiality of sharp divisions between members and nonmembers. The land had originally been allotted to Brendale’s great-aunt, who was an enrolled member of the Yakima Nation, and had then descended to Brendale’s grandfather and mother, who were also enrolled members, and from them to Brendale. Despite his Yakima descent, Brendale was not himself a member of the Nation. Brief of Philip Brendale, *Brendale v. Confederated Tribes of Yakima Nation*, 492 U.S. 408 (1989), Nos. 87-1622, 87-1697 and 87-1711 at 3. But the tribe and the federal government were equally responsible for reinforcing the distinction between members and nonmembers. In order to preserve the character of the area, in 1954 the tribe had forbidden entry to all but tribal members and those with legitimate business or property interests on the land. 617 F. Supp. 735, 738. The BIA subsequently closed the BIA road leading to the area to all but tribal members and permittees. *Id.* *Brendale*

acre parcel in this closed area, which he proposed to divide into ten 2-acre lots to be sold as summer cabin sites.<sup>137</sup> Stanley Wilkinson, a non-Indian, owned a 32-acre parcel in the open area, which he proposed to develop in 20 lots for family homes.<sup>138</sup> As in *Montana*, although the case was originally brought to seek a declaration that the County's zoning laws were preempted by conflicting tribal law, it quickly turned into a question of whether the tribe had the right to zone the property at all.

The case deeply fractured the Court. The Court issued three opinions, none of which commanded a majority. Different majorities of five justices upheld tribal jurisdiction as to Brendale's land,<sup>139</sup> and rejected it as to Wilkinson's.<sup>140</sup> No opinion gained a majority as to its reasoning. The decisions, therefore, have no precedential value. Rather, the case is important because it signals the contested visions of sovereignty that figure in later cases.

Justice White, joined by Justices Kennedy and Scalia and Chief Justice Rehnquist, would not have upheld zoning jurisdiction over either parcel of land. This opinion, for the first time, stated that *Montana* expressed a "general principle"<sup>141</sup> against tribal jurisdiction over nonmembers and that the situations in which tribes had jurisdiction on fee lands were "exceptions" to the general rule.<sup>142</sup> The plurality would have these two "exceptions" function not as expressions of the general right of a sovereign, but as a kind of legally protected special interest that could be raised in proceedings of other fora. Whether the proposed non-Indian activity had a direct effect on the tribe would be evaluated on a case-by case basis, not as a general category of activity impacting tribal sovereignty. What should have happened in the case at hand, according to the opinion, was that the tribe should have intervened in the county zoning proceedings arguing that with respect to the parcels of land

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had challenged this restriction on equal protection grounds, but lost in district court. *Id.* at n.3.

<sup>137</sup> 492 U.S. at 417.

<sup>138</sup> *Id.* at 418.

<sup>139</sup> 492 U.S. at 433 (Stevens, J., joined by O'Connor, J., announcing the judgment of the Court in No. 87-1622 and concurring in the judgment in Nos. 87-1697 and 87-1711) & 492 U.S. at 448 (Blackmun, J., joined by Marshall and Justice Brennan, concurring in the judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711).

<sup>140</sup> 492 U.S. 408 (White, J., joined by Rehnquist, C.J. and Scalia and Kennedy, JJ., announcing the judgment of the Court in Nos. 87-1697 and 87-1711) & 492 U.S. at 433 (Stevens, J., joined by O'Connor, J., announcing the judgment of the Court in No. 87-1622 and concurring in the judgment in Nos. 87-1697 and 87-1711.).

<sup>141</sup> *Id.* at 426.

<sup>142</sup> *Id.* at 428.

at issue tribal interests were imperiled.<sup>143</sup> Only then would the district court have authority to review the question. This process had been followed in the Wilkinson case. Justice White's opinion did not further review the district court's findings that the proposed use would not threaten the tribe, but simply affirmed it. As county zoning proceedings had not yet been completed with respect to the Brendale parcel, the plurality opined, the district court should not have exercised jurisdiction. The plurality would therefore have vacated the finding of tribal jurisdiction in the case.<sup>144</sup>

Justice Stevens, joined by Justice O'Connor, wrote an opinion concurring in the judgment on the Wilkinson parcel, and announcing the opinion of the Court upholding tribal jurisdiction over the Brendale parcel. Justice Stevens' proposed solution seemed to be motivated by two concerns: the concern for fairness to nonmembers subject to tribal power, and the concern that tribes be able to maintain their "traditional character."<sup>145</sup> Thus, while Stevens found it "difficult to imagine a power that follows more forcefully from the power to exclude than the power to require that nonmembers . . . not disturb the traditional character of the reserved area,"<sup>146</sup> he found it "equally improbable that Congress [in selling reservation land to non-Indians] envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy."<sup>147</sup> This balance would support comprehensive tribal zoning jurisdiction over the closed area:

By maintaining the power to exclude nonmembers from entering all but a small portion of the closed area, the Tribe has preserved the power to define the essential character of that area. In fact, the Tribe has exercised this power, taking care that the closed area remains an undeveloped refuge of cultural and religious significance, a place where tribal members "may camp, hunt, fish, and gather roots and berries in the tradition of their culture."<sup>148</sup>

With respect to the open area, however, time had "produced an integrated community that is not economically or culturally delimited by reservation

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<sup>143</sup> *Id.* at 431.

<sup>144</sup> *Id.* at 432-33.

<sup>145</sup> *Id.* at 435.

<sup>146</sup> *Id.* at 434-35.

<sup>147</sup> *Id.* at 437.

<sup>148</sup> *Id.* at 441 (quoting Amended Zoning Regulations of the Yakima Indian Nation, Resolution No. 1-98-72, § 23 (1972)).

boundaries” and was no longer “a unique tribal asset.”<sup>149</sup> “As a result, the Tribe’s interest in preventing inconsistent uses is dramatically curtailed.”<sup>150</sup> While the tribe “of course” retained the power to regulate trust land in the area, it could not regulate Wilkinson’s fee land.<sup>151</sup>

Justice Blackmun, joined by Justices Brennan and Marshall, concurred in the judgment that the tribe could zone the Brendale parcel, but would have held that the tribe had inherent and exclusive power to zone all reservation lands. Blackmun’s opinion was a stinging criticism of both plurality opinions. First, the opinion pointed out that with “no more than a perfunctory discussion” Justice White had elevated the *Montana* decision to “a general rule, modified only by two narrow exceptions,” that tribes had no authority over non-Indians on their reservations “absent express congressional delegation.”<sup>152</sup> This general rule was all the more “remarkable” given its anomalous nature: “except for those few aspects of sovereignty recognized in the *Cherokee Cases* as necessarily divested, the Court only once prior to *Montana* (and never thereafter) has found an additional sovereign power to have been relinquished upon incorporation.”<sup>153</sup> With respect to civil and regulatory jurisdiction, Blackmun wrote, the Court’s cases before and since “clearly recognize that tribal civil jurisdiction over non-Indians on reservation lands is consistent with the dependent status of tribes.”<sup>154</sup> In light of these cases and in light of *Montana*’s explicit recognition of inherent tribal jurisdiction on fee land in certain circumstances, *Montana* should be read “to recognize that tribes may regulate the on-reservation conduct of non-Indians whenever a significant tribal interest is threatened or directly affected.”<sup>155</sup> White’s case by case approach to the second *Montana* “exception,” moreover, essentially a “newfangled federal nuisance type cause of action” for injunction of particular land uses, would destroy the tribe’s ability to engage in “long-term, active management of land use” that was the “essence of zoning authority.”<sup>156</sup>

But while White’s opinion misconstrued the case law regarding inherent sovereignty, Blackmun wrote, Stevens’ opinion “disregards those decisions altogether.”<sup>157</sup> Those decisions, including *Montana*, plainly

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<sup>149</sup> *Id.* at 444 & 447.

<sup>150</sup> *Id.* at 445.

<sup>151</sup> *Id.*

<sup>152</sup> 492 U.S. 408, 449 (Blackmun, J., dissenting).

<sup>153</sup> *Id.* at 443.

<sup>154</sup> *Id.* at 455.

<sup>155</sup> *Id.* at 457.

<sup>156</sup> *Id.* at 460.

<sup>157</sup> 492 U.S. at 462.

recognized inherent sovereignty separate from the power to exclude non-Indians from the reservation.<sup>158</sup> Nor was the hypothetical intent of the Congress in passing the Dawes Act, which had been repudiated by Congress and the Court, relevant to this inquiry.<sup>159</sup> Practically, moreover, Justice Stevens' standardless distinction between open areas, in which tribes had concurrent jurisdiction, and sufficiently closed areas, in which they had sole jurisdiction, was even less workable than the approach of Justice White.<sup>160</sup>

Justice Blackmun also criticized the crabbed vision of sovereignty Justice Stevens would protect. Stevens' reasons for upholding tribal jurisdiction in the closed area, he wrote, "betray a stereotyped and almost patronizing view of Indians and reservation life."<sup>161</sup> Blackmun argued that protection of tribal authority could not be limited to actions that would protect a stereotypical past: "In my view, even under Justice Stevens' analysis, it must not be the case that tribes can retain the 'essential character' of their reservations (necessary to the exercise of zoning authority) only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically 'Indian' today."<sup>162</sup>

Given the fractured nature of the *Brendale* Court, all one can take from the case is that sometimes tribes can zone nonmember fee land, and sometimes they cannot. Similarly, this middle period of the 1980s raised more questions than it answered. Was *Montana*'s limitation on civil jurisdiction on fee land an exception or a rule? Would the Court's vision of tribal sovereignty conform to the broad, dynamic understanding being promoted by Congress and exercised by tribes? Or would it protect only those exercises of sovereignty that conformed to historical stereotypes of tribes: separate and self-contained, pursuing a culture and needs that were neither related to non-Indian actions nor affected by them. *Montana* could be read either way. *Merrion*, *Colville*, *National Farmers* and *Iowa Mutual* had all suggested that tribes had broad civil jurisdiction over non-Indians, even on fee land, as necessary to govern their territory and their people. The various *Brendale* opinions decided none of these questions, but drew the battleground for the future.

#### **e. Congressional Rejection: *Duro v. Reina***

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<sup>158</sup> *Id.* at 462-63.

<sup>159</sup> *Id.* at 463.

<sup>160</sup> *Id.* at 464.

<sup>161</sup> *Id.* at 464-65.

<sup>162</sup> *Id.* at 465.

In 1990, the Court took a step too far. In *Duro v. Reina*,<sup>163</sup> the Court determined that tribes had no criminal jurisdiction over Indians that were not members of their tribe. Albert Duro was a member of the Torres Martinez Band of Cahuilla Indians of California who lived on the reservation of the Salt River Pima-Maricopa Indian Community with a Pima-Maricopa “woman friend” and worked for the tribe’s construction company.<sup>164</sup> He was charged with shooting Biscuit Brown, a 14-year-old member of the Gila River Pima-Maricopa Indian Community living on the Salt River reservation. After the shooting, Duro fled to California, where the FBI arrested him and brought him to the Salt River tribal jail pending trial.<sup>165</sup> But the federal district attorney declined to prosecute the case,<sup>166</sup> so the tribe decided to prosecute Duro itself.<sup>167</sup> Duro filed a habeas action challenging jurisdiction, and the Supreme Court held that the tribe had no criminal jurisdiction over him.

The *Oliphant* Court had relied heavily on federal laws providing federal jurisdiction over non-Indians committing crimes on Indian land to find a congressional belief that there was no tribal jurisdiction over non-Indians. The same federal laws supported the opposite conclusion with respect to nonmember Indians: they referred to “Indians” generally, rather than to members of tribes,<sup>168</sup> and failed to provide for comprehensive federal jurisdiction over crimes between Indians. Despite its reliance on these laws in *Oliphant*, the majority held that laws regarding federal jurisdiction were not relevant to the question of tribal jurisdiction.<sup>169</sup>

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<sup>163</sup> 495 U.S. 676 (1990).

<sup>164</sup> 495 U.S. at 679.

<sup>165</sup> FERGUS M. BORDEWICH, *KILLING THE WHITE MAN’S INDIAN: REINVENTING NATIVE AMERICANS AT THE END OF THE TWENTIETH CENTURY* at 94 (1996).

<sup>166</sup> *Id.* This is a common practice with the U.S. Attorney’s Office, which typically only prosecutes the strongest cases. This is not a problem for states, which have broad criminal jurisdiction and need not rely on federal prosecution. But for tribes, which are limited by the Indian Civil Rights Act to issuing sentences of up to one year or \$5000 and do not have the same fiscal resources to devote to criminal justice, such extremely selective federal prosecution is a significant problem. The Salt River tribe, however, is relatively affluent, and its police department was said to be “more professional and better equipped than those in most non-Indian Arizona towns of comparable size.” *Id.* at 95.

<sup>167</sup> The tribe sought to prosecute Duro on a misdemeanor gun charge, hoping to collect more evidence on the murder charge to provide to the FBI. *Id.* at 95.

<sup>168</sup> 495 U.S. at 702 (Brennan, J., dissenting). Indeed, in *U.S. v. Rogers*, 45 U.S. 567 (1846), the Court held that this term referred to the “race of Indians,” rather than tribal membership, and therefore provisions exempting crimes between “Indians” from federal jurisdiction did not exempt a crime between non-Indian members of the Cherokee Nation. *Id.* at 573.

<sup>169</sup> The Court had previously held that these federal laws, while excluding state criminal jurisdiction in Indian country, were not enough to exclude state taxing jurisdiction over nonmember Indians. 495 U.S. at 687 (discussing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980)). The inquiry into state jurisdiction,

While the United States, as well as many tribes and tribal advocacy organizations filed briefs in support of tribal jurisdiction, no states or non-Indian rights associations filed briefs in opposition. This contrast with *Oliphant* might be explained by the lesser concern of states for their Indian residents, but is more probably the result of the jurisdictional alternatives to tribal jurisdiction. The Major Crimes Act provides federal jurisdiction over all Indians committing crimes in Indian country, but only covers serious felonies such as murder and rape.<sup>170</sup> And while the Indian Country Crimes Act provides broad federal jurisdiction over all crimes between Indians and non-Indians, it specifically excludes crimes between Indians from its coverage.<sup>171</sup> This exclusion is believed to preempt state jurisdiction over such crimes.<sup>172</sup> Tribal jurisdiction thus did not challenge existing state jurisdiction, and filled a practical and quite likely a legal jurisdictional void. The Supreme Court, however, held that the potential for a jurisdictional void was irrelevant, a matter for Congress and not the courts.

Although the Court declined to be moved by policy considerations with respect to the potential jurisdictional void, it is clear that other policy considerations affected its decision to deny jurisdiction. First, while the Court held that tribes retained the jurisdiction over nonmembers necessary to “the maintenance of tribal integrity and self-determination,”<sup>173</sup> Justice Kennedy’s majority opinion reflected a stereotypical sense of what self-determination meant. This retained sovereignty was that “needed to control their own internal relations, and to preserve their own unique customs and social order.”<sup>174</sup> The modern realities of tribal communities, in which nonmember Indians like Albert Duro and his victim Biscuit Brown helped shape the texture of daily life, were excluded from this vision of tribal governments acting only to preserve unique customs untouched by time.

The Court’s concerns about the justice dispensed by tribal governments complemented this limited view of tribal sovereignty. While acknowledging that the federal government could constitutionally legislate

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however, depends on federal preemption and tribal interests, while the question of implicit divestiture, according to the Court, depends on federal assumptions.

<sup>170</sup> 18 U.S.C. § 1153. For overviews of criminal jurisdiction in Indian Country, see 2005

COHEN, *supra* note 88 at Chapter 9 and Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1977).

<sup>171</sup> 18 U.S.C. § 1152.

<sup>172</sup> While the Supreme Court had long held that states had jurisdiction over crimes between non-Indians in Indian country, *see* *Draper v. U.S.*, 164 U.S. 240 (1896), it had never been held that they had jurisdiction over nonmember Indian in such situations, nor had states tried to exercise it.

<sup>173</sup> 495 U.S. at 688.

<sup>174</sup> *Id.* at 685-86.

regarding Indians as a class, the Court emphasized that nonmember Indians were citizens, and, like non-Indians, were “embraced within our Nation's ‘great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.’”<sup>175</sup> The Court thus “hesitate[d] to single out . . . nonmember Indians, for trial by political bodies that did not include them.”<sup>176</sup> Tribes had additional powers over those who consented to membership, but their criminal jurisdiction over nonmember Indians was divested.

The dissent pointed out that neither consent nor a voice in government were required for jurisdiction other contexts; the United States and the individual states regularly exercised jurisdiction over citizens of other states and countries within their borders—the only “consent” necessary was the choice to break the laws while within their borders.<sup>177</sup> In addition the dissent argued that tribal members were also citizens and were entitled to the same rights as nonmembers, and their consent to membership could not waive any constitutional protections to which they were entitled.<sup>178</sup>

Rather than point to a legal basis for making the distinction between members and nonmembers, the majority declared that the “special nature of the tribunals at issue” justified its focus on consent and citizenship.<sup>179</sup> Tribal courts were “influenced by the unique customs, languages, and usages of the tribes they serve,”<sup>180</sup> were often “subordinate to the political branches of tribal governments,” and their legal methods sometimes depended on “unspoken practices and norms.”<sup>181</sup> It was also “significant that the Bill of Rights does not apply to Indian tribal governments” and that the guarantees of the Indian Civil Rights Act were “not equivalent to their constitutional counterparts.”<sup>182</sup>

While the Court cited *Reid v. Covert* for the proposition that the “constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide

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<sup>175</sup> 495 U.S. at 692 (quoting *Oliphant*, 435 U.S. at 210).

<sup>176</sup> *Id.* at 693.

<sup>177</sup> 495 U.S. at 707 (Brennan, J. dissenting).

<sup>178</sup> *Id.*

<sup>179</sup> 494 U.S. at 693. In the one piece of legal support for this distinction, the Court later pointed to dicta in *U.S. v. Rogers* that non-Indians by adoption into an Indian tribe could “become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages.” *Id.* at 694 (quoting *U.S. v. Rogers*, 45 U.S. 567, 573 (1846)). But this language was in the context of stating that adoption was not enough to allow a non-Indian to be treated as an Indian with respect to federal criminal jurisdiction, and thus suggests that adoption should not make a difference with respect to federal law. See *Rogers*, 45 U.S. at 573 (“It can hardly be supposed that Congress intended to” treat whites “adopted” by Indians as fitting within the Indian-against-Indian exception).

<sup>180</sup> 494 U.S. at 693.

<sup>181</sup> *Id.* (quoting 1982 COHEN, *supra* note 92 at 334-335).

<sup>182</sup> *Id.*



constitutional protections as a matter of right,”<sup>183</sup> the Court did not cite any constitutional limitation on tribal court jurisdiction.<sup>184</sup> Rather these allusions to the constitution went to the Court’s policy-based uneasiness with tribal power, rather than the legal basis of the decision itself.<sup>185</sup>

The Court confirmed that it did not see its opinion as having a constitutional basis by inviting Congress to overrule it.<sup>186</sup> Congress responded with alacrity.<sup>187</sup> In 1990, the same year the Court issued the decision, Congress acted to address what it described as an “emergency situation.”<sup>188</sup> Although the legislation as enacted was to expire after one year

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<sup>183</sup> *Id.* at 694 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

<sup>184</sup> Nor could it. *Reid* held that the United States was still bound by the United States Constitution in trying Americans overseas, and that therefore it could not try the wives of service men overseas without providing rights to indictment by grand jury or trial by jury. The Indian Civil Rights Act entitled Duro to the procedural protections he would have received in state court with the exception of provision of counsel by the tribe if he could not afford his own. More important, the *Reid* holding and its legal basis applied only to the federal government. Military tribunals exercise jurisdiction as arms of the federal government, and therefore are bound by all of the constitutional restrictions on its power. *See* *US v. Wheeler*, 435 U.S. 313, 320-31 (1978). Other sovereigns, even when they exercise jurisdiction within the boundaries of the United States, are not bound by these restrictions absent an independent constitutional provision. Thus even states, despite the incorporation of most of the Bill of Rights under the Fourteenth Amendment, are not bound by the grand jury requirement in indicting defendants for capital crimes. *See* *Hurtado v. California*, 110 U.S. 516 (1884). Without overruling its decisions that tribes are not bound by the constitution and do not exercise criminal jurisdiction as arms of the federal government, the Court could not hold that *Reid* or its reasoning applied to tribal prosecutions.

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<sup>186</sup> 495 U.S. at 698 (“If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs.”). The Supreme Court is the final authority on the meaning of the United States Constitution. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803). Where the Court rules based upon its understanding of the Constitution, therefore, Congress has no power to second guess it. *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996) (where Court rules in Constitutional cases “correction through legislative action is practically impossible”) (citations omitted).

<sup>187</sup> *See* P.L. 101-511, Title VIII, §§ 8077(b) & (c), Nov. 5, 1990, 104 Stat. 1892; *see generally* *U.S. v. Enas*, 255 F.3d 662, 669-70 (9<sup>th</sup> Cir. 2001) (describing legislative history of *Duro Fix*).

<sup>188</sup> H. Conf. Rep. No. 101-938, Oct. 24, 1990.

to provide more time to study the issue,<sup>189</sup> the subsequent Congress made the legislation permanent. Congress described the *Duro* opinion as “[r]eversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations,” an exercise which “[t]hroughout the history of this country . . . Congress has never questioned.”<sup>190</sup> This break with precedent had created a jurisdictional void, and tribal courts were the most appropriate fora to fill it.<sup>191</sup>

To address this void, Congress amended the Indian Civil Rights Act. As originally enacted, the Act had defined Indian tribes’ “powers of self-government” as including “all governmental powers possessed by an Indian tribe” and its various branches.<sup>192</sup> The so-called “*Duro* Fix” supplemented this definition by adding “and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”<sup>193</sup> While circuit court judges have disagreed on the legal effect of this provision,<sup>194</sup> and the Supreme Court is reviewing this conflict this term,<sup>195</sup> it is clear that Congress firmly rejected the Court’s vision of tribal jurisdiction.

#### **f. To the Present: *Strate*, *Hicks*, and *Atkinson***

One might think that this Congressional rebuke would make the Court reevaluate whether its tribal jurisdiction opinions in fact reflect federal common law. But after *Duro* the Court lost its strongest advocates for tribal sovereignty. Justice Brennan retired in 1990 and was replaced by Justice Souter. Justice Marshall, in ill health, retired in 1991 and was replaced by Justice Thomas. Justice Blackmun retired in 1994 and was replaced by Justice Breyer. While Justice White, who retired in 1993, was no friend to tribal sovereignty, his replacement, Justice Ginsburg is little better.

That Justice Thomas has continuously voted against tribal rights is not surprising; it is well in line with his pattern of favoring state rights and

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<sup>189</sup> See *id.*, discussing P.L. 101-511, Title VIII, §§ 8077(d), Nov. 5, 1990, 104 Stat. 1892.

<sup>190</sup> *Id.* at 6; H. Conf. Rep. No. 102-261, at 3, Oct. 22, 1991.

<sup>191</sup> *Id.* at 6.

<sup>192</sup> Pub.L. 90-284, Title II, § 201, 82 Stat. 77 (Apr. 11, 1968), codified at 25 U.S.C. § 1301(2) (1982).

<sup>193</sup> 25 U.S.C. § 1301(2), (4), originally enacted at Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892-93 (1990).

<sup>194</sup> Compare *U.S. v. Weaselhead*, 165 F.3d 1209 (8<sup>th</sup> Cir. 1999) (en banc) (Congress was affirming inherent jurisdiction rather than delegating jurisdiction); *U.S. v. Enas*, 255 F.3d 662 (9<sup>th</sup> Cir. 2001) (en banc) (same) with *U.S. v. Lara*, 324 F.3d 635 (8<sup>th</sup> Cir.) (Congress did not have power to affirm inherent jurisdiction once Court denied its existence), *cert. granted* 124 S. Ct. 46 (2003).

<sup>195</sup> 124 S. Ct. 46 (2003) (granting certiorari).

disfavoring minority group rights. That the liberal wing of the Court has often joined him in cases involving nonmembers, and in particular that Justices Souter and Ginsburg have helped to lead it on the campaign to take away tribal jurisdiction over nonmembers, takes more explanation.

Part of the explanation may be that these new justices are simply not familiar with Indian law. David Getches in analyzing the internal memoranda of the justices identified a sense that there was no coherent body of Indian law, leaving the field free for them to impose their policy preferences in decision-making.<sup>196</sup> In particular, the justices appointed in the 1990s were not there during the making of the implicit divestiture cases, and may have believed that *Oliphant* did not emerge fully formed in 1978 but instead reflected longstanding principles of Indian law. In addition, the opinions of Justices O'Connor, Breyer, and even Stevens have more recently taken the Court to task for not faithfully following its Indian law precedents,<sup>197</sup> suggesting that they may have benefited from some on-the-job-training.<sup>198</sup>

But unfamiliarity with the law cannot be the only explanation; judges are charged with familiarizing themselves with unfamiliar laws. Rather, I believe, the new members of the liberal wing of the Court have so easily joined the campaign against tribal jurisdiction precisely because, as for Justice Stevens, they are the liberal wing. For them, tribal jurisdiction is subjection to an unfamiliar government, one with different rules, designed for a different culture, in which nonmembers have no voice and are at a disadvantage. For the same reason, tribes are the bearers only of the same crabbed sort of sovereignty reflected in Justice Stevens' *Brendale* opinion—a sovereignty that is to be protected when it affects tribal members alone, or allows tribes to protect a traditional, insular culture, but that does not adequately serve tribes when they act as modern, changing governments.

In this transformed Court, Justice O'Connor has been the most consistent vote for following existing Indian law precedent. She has been a strong advocate, for example, for the unique canons of construction applicable

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<sup>196</sup> Getches, *Subjectivism of the Supreme Court*, *supra* note \_\_\_\_.

<sup>197</sup> See *Chickasaw v. U.S.*, 534 U.S. 84, 96 (2001) (O'Connor, J. dissenting); *Nevada v. Hicks*, 533 U.S. 353, 387 (2001) (O'Connor, J., joined by Stevens and Breyer, JJ., concurring in part).

<sup>198</sup> Robert Anderson also touched on this theme in testifying before Congress, suggesting that the recent trend in the case law might be explained in part because the Court no longer had justices that cared enough to familiarize themselves with Indian law. Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. at 15 (Feb. 27, 2002). Justice Breyer, however, recently joined Justice O'Connor in accepting an invitation to attend a conference of the National Tribal Court Judges Association, suggesting an admirable willingness to familiarize himself with the subject of the jurisprudence.

to Indian law cases,<sup>199</sup> drafting the Court's opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*<sup>200</sup> in which the canons were deployed to protect off-reservation hunting and fishing rights, and dissenting from Justice Breyer's opinion in *Chickasaw Nation v. United States* construing federal law to allow certain excise taxes on tribal gaming businesses on the grounds that the canons did not permit this construction.<sup>201</sup> Having grown up on a ranch in Arizona, she is more familiar than most justices with Indian tribes.<sup>202</sup> In addition, her tendency to rule with awareness of the effect of law on communities as well as individuals<sup>203</sup> sometimes leads her to rule to protect tribal communities as well. But even her protection of tribal communities has often been limited to tribal actions that fit a stereotypical idea of the tribe. Thus, while *Mille Lacs* upheld traditional hunting and fishing rights, Justice O'Connor joined Justice Stevens' opinion arguing for tribal zoning jurisdiction only over the closed area of the Yakima Nation, and has not faithfully applied the canons of construction in reservation diminishment cases where she found that the areas in question had lost their "Indian character."<sup>204</sup>

This transformed Court has been disastrous for questions of tribal jurisdiction over nonmembers. In 1997 the first case concerning such jurisdiction came before the newly composed Court.<sup>205</sup> *Strate v. A-1 Contractors* involved a personal injury suit brought in tribal court by a non-Indian woman against a non-Indian contractor arising from an accident on a highway running through the reservation of the Three Affiliated Tribes of North Dakota. The plaintiff, Gisela Fredericks, was the widow of a tribal

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<sup>199</sup> These interpretive rules require that "all laws must be liberally construed in favor of the Indians, with all ambiguities resolved to their benefit, treaties and agreements are construed as the Indians would have understood them, and all laws are construed to preserve tribal property rights and sovereignty unless congressional intent to the contrary is clear and unambiguous." 2005 COHEN, , *supra* note 88 at § 2.02.

<sup>200</sup> 526 U.S. 172 (1999).

<sup>201</sup> 534 U.S. 84, 96 (2001) (O'Connor, J. dissenting).

<sup>202</sup> Of course Justice Rehnquist also grew up in Arizona, and he is the creator of the modern doctrines most detrimental to tribal interests. For more analysis of his predilections in Indian law, see BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 412 (1979).

<sup>203</sup> See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

<sup>204</sup> *Hagen v. Utah*, 510 U.S. 399 (1994); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

<sup>205</sup> 520 U.S. 438 (1997).

member, the mother of several tribal members,<sup>206</sup> and resided on the reservation. The defendants, Lyle Stockert and his employer A-1 Contractors, were on the reservation pursuant to a building contract with the tribe. The Supreme Court, in a unanimous opinion authored by Justice Ginsburg, held that the tribal court had no jurisdiction over the case.

The opinion sweepingly declares, “Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”<sup>207</sup> Although *Iowa Mutual* held that civil jurisdiction over non-Indians on reservations “presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,” the Court engaged in a tortured interpretation of the sentence, declaring it to mean no more than that where federal law had granted tribes power to regulate activities of nonmembers on reservations, tribal courts also had the power to adjudicate with respect to those activities.<sup>208</sup>

The Court did “‘readily agree,’” as it had in *Montana*, “that tribes retain considerable control over nonmember conduct on tribal land.”<sup>209</sup> But then the Court tore a gaping hole in previous understandings of what constituted tribal land. Although the highway on which the accident occurred ran over tribal trust land, the tribe had granted the state a right of way for the highway pursuant to federal law,<sup>210</sup> had received compensation for the grant, and had not maintained a “gatekeeping right” to prevent entry onto the road.<sup>211</sup> *Merrion v. Jicarilla Apache Tribe*, of course, concerned equivalent land. There, the nonmember activities took place land leased from the tribe pursuant to federal law, and the tribe had received compensation and had not maintained a gatekeeping right over the leased land.<sup>212</sup> But the *Strate* Court concluded, without reference to *Merrion*, that this right of way rendered the stretch of state highway “equivalent, for nonmember governance purposes, to alienated, non-Indian land.”<sup>213</sup>

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<sup>206</sup> *Id.* at 443. Ms. Fredericks’ children had also sued the defendant for loss of consortium, but the tribal court did not appeal and the Court did not address the question of jurisdiction over that case. *Id.* at 443 n.3.

<sup>207</sup> *Id.* at 445.

<sup>208</sup> *Id.* at 451-53.

<sup>209</sup> *Id.* at 454.

<sup>210</sup> Any grant of rights to tribal land must be pursuant to federal law. See 25 U.S.C. §§ 323-28.

<sup>211</sup> *Id.* at 456.

<sup>212</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-37 (1982).

<sup>213</sup> 520 U.S. at 454.

The Court did similar damage to what it called the *Montana* “exceptions.”<sup>214</sup> Although the defendants had a contract with the tribe and were on the reservation carrying out this consensual relationship, the Court announced that there had to be a direct nexus between the particular consensual relationship and the activity for which tribal jurisdiction was sought. As “Gisela Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident” the case did not fit within the consensual relationship exception.<sup>215</sup> Only, the Court suggested, a party to the consensual relationship litigating to enforce the terms of that relationship could do that.

Nor did the situation come under the second exception, under which tribes retained inherent jurisdiction over conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>216</sup> The Court acknowledged that “[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members.”<sup>217</sup> While this would seem to be enough to satisfy the *Montana* test, the Court held that it did not because “if *Montana*’s second exception requires no more, the exception would severely shrink the rule.”<sup>218</sup> The Court needed the second *Montana* test to remain both an exception and a narrow one. To accomplish this, the Court narrowed *Montana*’s second prong by holding that it implicitly incorporated language earlier in the *Montana* opinion that tribes had only such inherent jurisdiction as was necessary to “protect tribal self-government or to control internal relations.”<sup>219</sup> Jurisdiction over the highway accident, it held, did not meet this test.<sup>220</sup>

In a footnote, the Court also casually undermined the exhaustion rule established by *National Farmers* and *Iowa Mutual*. The Court declared that “[h]ereafter, when it is plain that no federal grant provides for tribal governance of nonmembers’ conduct on land covered by *Montana*’s main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct,” and there would be no requirement to challenge tribal jurisdiction in tribal court before doing so in federal court.<sup>221</sup> *National Farmers*, of course, concerned an accident on “land

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<sup>214</sup> *Id.* at 456.

<sup>215</sup> *Id.* at 457.

<sup>216</sup> 520 U.S. at 457 (quoting *Montana* at 566).

<sup>217</sup> *Id.* at 457-58.

<sup>218</sup> *Id.* at 458.

<sup>219</sup> *Id.* at 459 (quoting *Montana* at 564).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 459 n.14.

covered by *Montana*'s main rule," fee land owned by the state. Again, the Court ignored this inconsistency. In addition, by implying that it was pointless to have tribal courts consider whether the *Montana* exceptions were satisfied, the Court revealed what it was trying to do to the exceptions: narrow them out of existence.

None of these results were required by the Court's prior opinions, and in many cases they did violence to them. Why then did the Court take these steps? The answer lies in the Court's view that, "requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'"<sup>222</sup> Two related ideas are embedded in this clause. First, non-Indians are at a disadvantage in "unfamiliar" tribal courts, and so should only rarely be called before them. The Court reinforced this idea by referring in a footnote to the rule that nonresident defendants may remove cases filed in state court to federal court.<sup>223</sup> The second idea is that the need to exercise jurisdiction over the "commonplace" stuff of government is not properly a tribal matter. To be protected, the opinion suggests, tribal interests cannot be commonplace, but must satisfy judicial notions of what is uniquely tribal.

In 2001, the Court further reshaped Indian law to deny tribes commonplace governmental powers in *Shirley v. Atkinson Trading Post*.<sup>224</sup> The case concerned the power of the Navajo Nation to collect a hotel tax from non-Indian guests at a hotel owned by a non-Indian on fee land on the Navajo reservation. As discussed above, the case law had suggested either that taxing jurisdiction would not be subject to the *Montana* test or that if it was, it would be found easily to meet the test. The Court in *Colville* had already stated that "federal law to date has not worked a divestiture of Indian taxing power,"<sup>225</sup> upholding taxes on non-Indians on trust land. *Merrion v. Jicarilla Apache*

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<sup>222</sup> *Id.* at 459 (quoting *Montana* at 566) (footnote omitted).

<sup>223</sup> *Id.* at 459 n.13 (citing 28 U.S.C. § 1441). Of course the result in *Strate* went beyond this removal option: the Court did not grant A-1 the right of removal, but instead denied Gisela Fredericks the option of having the case heard by the court in her place of residence altogether. Nor do the two provisions stem from the same source: federal diversity jurisdiction is based on a Congressional statute explicitly providing for such jurisdiction; limitations on inherent tribal civil jurisdiction are founded on vague judicial ideas of tribal sovereignty that often conflict with congressional policy. For more on the analogy to diversity jurisdiction, see Part I.g.

<sup>224</sup> 532 U.S. 645 (2001).

<sup>225</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 153 (1980). While parts of the opinion could be read to suggest that it applied only to tribal trust land, others indicate that it applies to all doing business on the reservation generally. *Id.*

*Tribe*<sup>226</sup> had held that tribes retained the power to tax non-Indian activities on land from which they had no right to exclude as an extension of “the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services . . .”<sup>227</sup>

*Atkinson*, however, dismissed this language as dicta.<sup>228</sup> The Court stated that even with regard to taxing power, “we apply *Montana* straight up.”<sup>229</sup> “Straight up,” for the Court, meant not only applying *Montana*, but applying it so narrowly that neither of the two *Montana* exceptions authorized the tribal tax. Following *Merrion*, the Navajo Nation argued that by choosing to avail itself of “the advantages of a civilized society” and governmental services the tribe provided to businesses within its borders,<sup>230</sup> on-reservation businesses entered into consensual relationships sufficient to justify tribal taxes.<sup>231</sup> It pointed to evidence that the hotel benefited from police, emergency medical treatment, and fire protection.<sup>232</sup> But the Court held that the consensual relationship must stem from “‘commercial dealing, contracts, leases, or other arrangements,’ and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection.”<sup>233</sup> Why not? The answer is the same as that in *Strate*: “If it did, the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the ‘advantages of a civilized society’ offered by the Indian tribe.”<sup>234</sup> The Court was apparently not troubled by the irony that to avoid swallowing the *Montana* rule as it saw it, it had cast aside the rule of *Merrion* that these same advantages justified broad tribal taxing power over non-Indians on tribal land.<sup>235</sup>

In the same term, in *Nevada v. Hicks*,<sup>236</sup> the Court pushed the presumption against tribal jurisdiction over nonmembers even further, holding that even on tribally owned trust land, tribal courts did not have jurisdiction over a suit against state officials alleging that they had violated his rights in

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<sup>226</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

<sup>227</sup> *Id.* at 137.

<sup>228</sup> 532 U.S. 645, 652-653 (2001).

<sup>229</sup> *Id.* at 654.

<sup>230</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 137-38 (1982).

<sup>231</sup> *Atkinson*, 532 U.S. at 654-55.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 655 (quoting *Montana*, 450 U.S. at 565).

<sup>234</sup> *Id.* (quoting *Merrion* at 137-38).

<sup>235</sup> *Merrion*, 455 U.S. at 137-38 (tribe justified in requiring non-Indians to contribute to costs of tribal government through taxation because non-Indians “avail[ed] themselves of the ‘substantial privilege of carrying on business’” on the reservation,” benefiting from ‘the advantages of a civilized society’” that are assured by the existence of tribal government.”)

<sup>236</sup> 533 U.S. 353 (2001).



searching his house. The state pursued the case largely to get a declaration that state officials had official and qualified immunity in tribal courts.<sup>237</sup> As in *Montana* and *Brendale*, however, the Court took the case as an opportunity to address wide-ranging issues of tribal inherent jurisdiction.

Justice Scalia's majority opinion followed the trend of minimizing tribal interests where they conflicted with the interests of nonmembers. The Court focused on the harm to state interests should tribes be able to limit the execution of state process for crimes committed off the reservation.<sup>238</sup> This discussion was wholly hypothetical. State and tribal officials assumed that tribal approval was needed for states to execute warrants on tribal lands and had accommodated themselves accordingly.<sup>239</sup> Indeed, in the *Hicks* case, this accommodation was a boon to the state: after the tribal courts approved execution of the state warrant, tribal police assisted the state wardens in their search, and later provided evidence leading to the second warrant and search.<sup>240</sup> Nor did the case law support a finding of state jurisdiction in such matters. The Supreme Court had persistently disapproved of state jurisdiction over tribal members on reservations,<sup>241</sup> and even with respect to off reservation crimes, the Eighth and Ninth Circuits had suggested that states were bound by the need to respect tribal governments in executing state criminal process on reservations.<sup>242</sup>

In the absence of contemporary case law or facts supporting state jurisdiction, the opinion relied on dicta taken out of context from opinions of the late nineteenth century. First, the Court quoted language from *Utah &*

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<sup>237</sup> Questions regarding sovereign immunity, for example, comprised the first two of the three questions presented and the majority of the petition for certiorari. *Petition for Certiorari, Nevada v. Hicks*, 533 U.S. 353 (2001), No. 99-1994.

<sup>238</sup> *Id.* at 364-65.

<sup>239</sup> The Nevada state judge, for example, made the search warrant "subject to obtaining approval from the Fallon Tribal Court," who understood that his court "has no jurisdiction on the Fallon-Paiute Shoshone Reservation." 533 U.S. 353, 356 (2001).

<sup>240</sup> *Id.* (majority opinion) & 397 (O'Connor, J. concurring) (state and tribal officials "acted in full cooperation to investigate an off-reservation crime"). No contraband was found during either search.

<sup>241</sup> *Williams v. Lee*, 358 U.S. 217 (1959) (no state jurisdiction for civil action against tribal member for act occurring on reservation); *McClanahan v. Arizona*, 411 U.S. 464 (1973) (no state jurisdiction to tax income earned by tribal member on reservation); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (no state jurisdiction to tax tribal gas retailers in Indian country).

<sup>242</sup> *Arizona v. Turtle*, 413 F.2d 683 (9<sup>th</sup> Cir. 1969); *Davis v. Mueller*, 643 F.2d 521 (8<sup>th</sup> Cir. 1981). State Supreme Courts, however, had held that where a tribe had not created formal extradition and warrant approval procedures, state cooperation with tribal government was not necessary, as state action would not violate any tribal laws, and therefore would not violate the tribal right to self government. *See State v. Matthews*, 986 P.2d 323 (Idaho 1999).

*Northern Railroad Co. v. Fisher*, an 1885 case holding that the territory could tax a non-Indian railroad company incorporated within the territory for its activities on land withdrawn from the reservation. In *Utah & Northern* the Court stated that “[i]t has . . . been held that process of [state] courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance.”<sup>243</sup> But it is plain that by this language the Court meant only state process against non-Indians on the land. The Court had, a few years before, held that states had jurisdiction over crimes between non-Indians on reservations,<sup>244</sup> but had consistently excluded state power over Indians. Indeed, in language conveniently not quoted by *Hicks*, *Utah & Northern* acknowledged that full execution of territorial laws on the land “would undoubtedly interfere with the enforcement of the treaty provisions, and might thus defeat provisions designed for the security of the Indians.” The authority of the territory, therefore, only extended to “matters not interfering with that protection.”<sup>245</sup>

*Hicks* then quoted from *U.S. v. Kagama*, which, in holding that Congress had the power to subject certain crimes between Indians to federal jurisdiction, stated that the law “does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.”<sup>246</sup> But the *Hicks* Court omitted the language that followed *Kagama*’s brief reference to state process. In context, it is clear that the *Kagama* Court held that the law did not interfere with state process because states had absolutely no jurisdiction over the Indians there. The *Kagama* Court stated that, “Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies,” then cited *Worcester v. Georgia*<sup>247</sup> for its holding that “the state could not, while they remained on [Indian] lands, extend its laws, criminal and civil, over the tribes; . . . the tribe was under [federal] protection, and could not be subjected to the laws of the state, and the process of its courts.”<sup>248</sup> The *Kagama* opinion next cited *Fellows v. Blacksmith*,<sup>249</sup> *The Kansas Indians*,<sup>250</sup> and *The New York Indians*,<sup>251</sup> as additional support for the

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<sup>243</sup> 533 U.S. at 363 (quoting *Utah & Northern Railroad Co. v. Fisher*, 116 U.S. 28, 31 (1886)).

<sup>244</sup> *U.S. v. McBratney*, 104 U.S. 681 (1881).

<sup>245</sup> 116 U.S. at 31.

<sup>246</sup> 533 U.S. at 363 (quoting *U.S. v. Kagama*, 118 U.S. 375, 383 (1886)).

<sup>247</sup> 31 U.S. 515 (1832).

<sup>248</sup> *U.S. v. Kagama*, 118 U.S. at 384 (emphasis added).

<sup>249</sup> 60 U.S. 366 (1856).

<sup>250</sup> 72 U.S. 737 (1866).

<sup>251</sup> 72 U.S. 761 (1866).

proposition that states had no power to enforce the law against Indians.<sup>252</sup> What chutzpah to claim, as the *Hicks* Court did, that this testimonial to immunity of tribal members from state law “suggest[s] state authority to issue search warrants in cases such as the one before us.”<sup>253</sup>

On the basis of this ill-founded suggestion, the Court held not only that states could exercise process on reservations, but also that “tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations.”<sup>254</sup> State interest was the only justification for this conclusion: “The State’s interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe’s self-government than federal enforcement of federal law impairs state government.”<sup>255</sup> (The analogy was misplaced. While the federal government may serve federal warrants in state boundaries, states have jurisdiction to hear actions challenging the conduct of such federal officials. The analogous power, however, was denied tribal courts, without analysis of the impact on tribal self-government.)

While the majority opinion, without explanation, interpreted tribal jurisdiction as dependent on the interest of non-tribal governments in freedom from tribal authority, it is unclear what its effect on Indian law will be. Although the Court held that tribal ownership of lands “is not alone enough to support regulatory jurisdiction over nonmembers” of the tribe, it agreed that it remains a factor in the analysis, and “may sometimes be a dispositive factor.”<sup>256</sup> The *Hicks* majority opinion also emphasized that the “holding in this case is limited to the question of tribal court jurisdiction over state officers enforcing state law” and left “open the question of tribal court jurisdiction over nonmember defendants in general,”<sup>257</sup> acknowledging that actions by state officials unrelated to their law enforcement duties were “potentially subject to tribal control.”<sup>258</sup> Justice Ginsburg, who joined the majority opinion, specially concurred to underscore this point.<sup>259</sup>

Justice Souter, joined by Justices Kennedy and Thomas, concurred to urge the Court to go further still. Justice Souter would hold that land status was not a “primary jurisdictional fact,” but was only relevant in determining

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<sup>252</sup> U.S. v. Kagame, 118 U.S. at 384.

<sup>253</sup> 533 U.S. at 363-64.

<sup>254</sup> 533 U.S. at 364.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 360.

<sup>257</sup> *Id.* at 358 n.2.

<sup>258</sup> *Id.* at 373.

<sup>259</sup> *Id.* at 386 (Ginsburg J. concurring).

whether the nonmember conduct met one of the two *Montana* exceptions.<sup>260</sup> Despite the fact that both *Montana* and *Strate* had “readily agree[d]” that tribes “retain considerable control over nonmember conduct on tribal land,”<sup>261</sup> he would read these cases to establish a “rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers.”<sup>262</sup> He would hold that civil jurisdiction for on reservation activities “depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.”<sup>263</sup>

It is plain that the perceived “special nature of [Indian] tribunals”<sup>264</sup> motivated this reading of the case law. While Souter acknowledged that the federal Indian Civil Rights Act imposed “a handful” of protections analogous to the Bill of Rights on Indian tribes (in fact the law imposes almost all of the Bill of Rights on tribes<sup>265</sup>), he cited the “definite trend by tribal courts” toward the view that they “ha[ve] leeway in interpreting the ICRA’s due process and equal protection clauses and need not follow U.S. Supreme Court precedents jot-for-jot.”<sup>266</sup> He also was concerned that “tribal law is still frequently unwritten, being based instead ‘on the values, mores, and norms of a tribe and expressed in its customs, traditions and practices. . . .’”<sup>267</sup> The resulting law “would be unusually difficult for an outsider to sort out.”<sup>268</sup> The rule he proposed was further confirmed by the “fact that ‘[t]ribal courts are often ‘subordinate to the political branches of tribal government.’”<sup>269</sup> For Souter, the “presumption against tribal-court civil jurisdiction” he advocated “squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be “protected... from unwarranted intrusions on their personal liberty.”<sup>270</sup>

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<sup>260</sup> *Id.* at 375-76 (Souter, J., concurring).

<sup>261</sup> *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997); *U.S. v. Montana*, 450 U.S. 544, 557 (1981).

<sup>262</sup> *Nevada v. Hicks*, 533 U.S. at 376-77 (Souter, J., concurring).

<sup>263</sup> *Id.* at 381.

<sup>264</sup> *Id.* at 383 (quoting *Duro v. Reina*, 495 U.S. 676, 693 (1990)).

<sup>265</sup> See 25 U.S.C. § 1302 (imposing all provisions except the prohibition on establishment on religion, the grand jury requirement, and the right to have counsel paid for if indigent).

<sup>266</sup> 533 U.S. at 384 (Souter, J. concurring) (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n.238 (1998)).

<sup>267</sup> *Id.* (quoting Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-131 (1995)).

<sup>268</sup> *Id.* at 384-85.

<sup>269</sup> *Id.* at 385 (quoting *Duro* at 693).

<sup>270</sup> *Id.* at 384 (quoting *Oliphant*, 435 U.S. at 210).

Justice O'Connor, joined by Justices Stevens and Breyer, concurred with an opinion that the majority recognized as "in large part a dissent."<sup>271</sup> Although Justice O'Connor concurred in the holding that *Montana* governed questions of tribal jurisdiction on tribal trust lands, she recognized that the Court's opinions had not been consistent on this point. She believed, however, that establishing this rule was necessary to obtain coherence in the Court's jurisprudence.<sup>272</sup> Given the contrary indications in the Court's opinions, however, she took the Court to task for failing to acknowledge the significance of its holding.<sup>273</sup>

The rest of the majority opinion, she declared, was "unmoored from our precedents."<sup>274</sup> Nothing in the case law supported the majority's casual decision that consensual relationships between governments, such as the joint activity with regard to the warrant, could not fit within the first *Montana* exception.<sup>275</sup> The concurrence was even more damning with respect the majority's treatment of the second exception. The majority's assertion that not all state law was barred from tribal land did "not mean the tribal interests are to be nullified through a *per se* rule."<sup>276</sup> If *Montana* was to "bring coherence to [the] case law," moreover, land status had to be a "significant factor" in the analysis of tribal jurisdiction.<sup>277</sup> Because state official action might involve significant tribal interests, Justice O'Connor would remand for determination as to whether the case satisfied the *Montana* factors, and whether the state officials were entitled to official or qualified immunity.<sup>278</sup>

Justice Stevens, joined by Justice Breyer, also wrote separately to emphasize that the Court's analysis of whether tribal courts had jurisdiction to adjudicate claims under 42 U.S.C. § 1983 was "exactly backwards."<sup>279</sup> They would recognize the question of a tribal court's jurisdiction as one of tribal law unless federal law dictated otherwise.<sup>280</sup> With respect to Section 1983, Stevens saw "no more reason for treating the silence in § 1983 concerning tribal courts as an objection to tribal-court jurisdiction over such claims than there is for treating its silence concerning state courts as an objection to state-court jurisdiction."<sup>281</sup>

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<sup>271</sup> *Id.* at 370.

<sup>272</sup> *Nevada v. Hicks*, 533 U.S. 353, 389 (O'Connor, J. concurring).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 387.

<sup>275</sup> *Id.* at 392.

<sup>276</sup> *Id.* at 395.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 401.

<sup>279</sup> 533 U.S., 353, 402 (Stevens J., concurring).

<sup>280</sup> *Id.* at 403.

<sup>281</sup> *Id.* at 404.

### **g.The Actual State of Things<sup>282</sup>**

What is the law now with respect to tribal jurisdiction? Is the game up? Far from it. First, despite judicial inroads on tribal jurisdiction where non-Indians are defendants, well-settled case law establishes that for many litigants, tribal court is the only option. Lawsuits arising on a reservation in which the defendant is a tribal member can only be heard in tribal fora.<sup>283</sup> Even where the cause of action arises off reservation, actions against tribes themselves must also be brought in tribal courts absent a waiver of tribal sovereign immunity.<sup>284</sup> Despite the actions of the Supreme Court, therefore, the number of cases in which non-member litigants appear in tribal courts will only increase as tribes and their members become increasingly involving in commercial and other relationships with nonmembers.

Even where defendants or subjects of tribal jurisdiction are nonmembers, relatively little is clear. *Hicks* established that ownership of land did not automatically provide for civil jurisdiction over nonmembers, but gave little guidance on how questions of jurisdiction over activities on trust land will be decided. The Court's decisions acknowledging inherent tribal jurisdiction over non-Indians on trust land,<sup>285</sup> as well as its suggestions that federal treaties and laws setting aside land for tribes might constitute a federal grant of jurisdiction,<sup>286</sup> would seem to create a wide arena of protected jurisdiction.

Even on non-Indian owned land, tribal jurisdiction over nonmembers will be protected when the dispute arises from a consensual relationship with a tribe or its members, or where jurisdiction is necessary to protect the right of tribes and their members to "self-government."<sup>287</sup> What self-government

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<sup>282</sup> This is Justice Marshall's phrase from *Worcester v. Georgia*, 31 U.S. 515, 533 (1932) calling on the Court to focus on practice on the ground as well as the pure expression of judicial statements.

<sup>283</sup> See *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>284</sup> See *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998).

<sup>285</sup> *Strate* and *Montana* acknowledged tribal jurisdiction to regulate non-Indian hunting and fishing on this land, *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997); *U.S. v. Montana*, 450 U.S. 544, 557 (1981), a majority in *Brendale* recognized tribal zoning jurisdiction on trust and certain fee land, *Brendale v. Confederated Tribes of the Yakima Nation*, 492 U.S. 408, 445 (1989) (Stevens, J. concurring in part and announcing the opinion in part); 492 U.S. at 449 (Blackmun, J. dissenting in part and concurring in the judgment in part), and *Merrion* and *Colville* both recognized tribal taxing jurisdiction on trust land. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>286</sup> *U.S. v. Montana*, 450 U.S. 544, 558-59 (1981).

<sup>287</sup> See *Nevada v. Hicks*, 533 U.S. 353, 359 & n.3 (2001).

means in this context remains relatively open. The Supreme Court has decided questions regarding nonmember jurisdiction on an incremental, case-by-case basis, and has established few firm rules. Rather, it has acted in accordance with its assumptions about what tribal court adjudication of nonmembers means both for those considered outsiders and those considered insiders to the tribes. The answer in both cases is the same: nothing good. Nonmembers will find themselves at a disadvantage, and tribes will not appreciably gain in self-government by the exercise. The remainder of this Article examines these assumptions both empirically and theoretically.

## **II. The Experience of Outsiders in the Navajo Nation Appellate Courts**

The empirical part of this project examines decisions involving outsiders in the Navajo Nation appellate court. In my examination, I find that the court is surprisingly balanced in hearing the rights of outsiders, even areas that might appear particularly prone to bias.

### **a. The Navajo Nation Court System**

I chose the Navajo court system for several reasons. First, it is the court system I am most familiar with. Having worked for three years as a lawyer on the Navajo Nation, I have litigated many cases in the tribal court system, know many of the actors, and have a better, although still limited, sense of the texture of life on the Navajo Nation than I do of most other Indian nations.

Second, the materials necessary for the survey are both accessible and sufficiently voluminous to examine. All of the Navajo Nation's appellate court opinions from 1969 to the present are now on-line.<sup>288</sup> While several other tribal courts also have opinions on line or in printed form, the Navajo Nation publishes virtually all of its non-summary opinions, limiting the problem of judicial selection biases. There are over five hundred of these opinions, providing a broad enough sample to show valid patterns.

Third, the experience of nonmembers on the Navajo Nation is disproportionately important in evaluating the experience of nonmembers in tribal legal systems generally. With 13% of the total Indian population in the United States and about one-third of the total land base over which any tribe may exercise jurisdiction, the Navajo legal system potentially has jurisdiction over a significant proportion of disputes regarding nonmembers arising on reservations. Not surprisingly, therefore, the Navajo Nation figures

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<sup>288</sup> The decisions are available on [www.versuslaw.com](http://www.versuslaw.com).

prominently in the debates and litigation concerning jurisdiction and non-members. Several of the Supreme Court's most important jurisdictional cases—*Williams v. Lee*,<sup>289</sup> *Warren Trading Post v. Arizona Tax Commission*,<sup>290</sup> *McClahahan v. Arizona*,<sup>291</sup> *U.S. v. Wheeler*,<sup>292</sup> *Kerr-McGee*,<sup>293</sup> and *Atkinson Trading Post v. Shirley*<sup>294</sup>—have arisen on the Navajo Nation, and the Nation is an important voice in current discussions on the subject.

There are, of course, disadvantages in focusing on the Navajo Nation, as there would be in focusing on any single tribe. The United States recognizes 562 Indian tribes.<sup>295</sup> While some tribes, such as the various Sioux tribes of the Dakotas, reflect federal divisions of single tribes,<sup>296</sup> most have different indigenous languages and cultures. Tribes also have vastly different physical and social circumstances. While the Cherokee Nation of Oklahoma, the most populous tribe, has over 300,000 members<sup>297</sup> most tribes have fewer than 1,000 members and many have fewer than 100. Their land bases also differ widely. While the Navajo Nation is the approximate size of the State of West Virginia or the Country of Ireland, and several other reservations are the approximate size of my state, Connecticut, other reservations encompass only a few hundred acres. In addition, 226 of the 562 tribes recognized by the United States are Alaska Native Villages,<sup>298</sup> whose land is not considered “Indian country.”<sup>299</sup> Generalizations are therefore dangerous.

The Supreme Court, however, has created general tests for tribal jurisdiction. While it has left open the possibility that individual treaties and laws may create different rules, in practice it has given short shrift to legal or factual differences between tribes. The failure of one tribe, particularly one of the size and significance of the Navajo Nation, to conform to its judicial assumptions should make the Court more cautious in assuming a policy-making role with respect to tribal jurisdiction.

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<sup>289</sup> 358 U.S. 217 (1959).

<sup>290</sup> 380 U.S. 685 (1965).

<sup>291</sup> 411 U.S. 164 (1973).

<sup>292</sup> 435 U.S. 313 (1978).

<sup>293</sup> 471 U.S. 495 (1985).

<sup>294</sup> 532 U.S. 645 (2001).

<sup>295</sup> Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328-01 (July 12, 2000). The term “tribe” is inappropriate for the 226 Alaskan Native Entities, which prefer the term Native Village, and is rejected by some other groups on the list, which prefer the term “nation.” As a generic term, however, I generally use the term tribe for the sake of clarity and simplicity.

<sup>296</sup> See 1982 COHEN, *supra* note 92 at 6.

<sup>297</sup> U.S. Census, Top 25 American Indian Tribes for the United States: 1990 and 1980 (1995).

<sup>298</sup> These villages reject the term “tribe” as appropriate to them, and reject the term Indian in favor of “Alaskan Native.”

<sup>299</sup> *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998).



In addition, all tribes struggle with the problem of establishing legitimate and just governmental systems in the face of a history of American colonialism. A close study of the challenges this poses to one tribal legal system is therefore meaningful both for other tribes and for judges and policy makers considering tribal jurisdiction.

The Navajo Nation, moreover, is a paradigmatic example of the kind of tribal court system the Court is concerned about. While students of tribal courts often look to the Navajo Nation Supreme Court as a model, in some ways it seems a breeding ground for the horror stories about tribal court systems. All of the judges, at both the trial and Supreme Court levels, are Navajo.<sup>300</sup> One of the qualifications for judicial service is fluency in the Navajo language,<sup>301</sup> effectively ensuring that judges will be drawn from the more traditional portion of the population. A J.D., however, is not a requirement for judgeship,<sup>302</sup> and only a minority of Supreme Court justices, and even fewer trial court judges, have been law school graduates.<sup>303</sup>

The court has also pioneered one of the bugaboos of those opposing tribal court jurisdiction over outsiders, the incorporation of tribal customary or common law in dispute resolution.<sup>304</sup> Navajo customary or common law is “comprised of customs and long-used ways of doing things”<sup>305</sup> that gain the status of law, like the Anglo common law catalogued by Blackstone.<sup>306</sup> Since the judicial reforms of 1959, the Navajo Code has provided for use of Navajo customary law in legal proceedings,<sup>307</sup> and judicial opinions have discussed

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<sup>300</sup> 7 N.N.C. § 354(a).

<sup>301</sup> 7 N.N.C. § 354(e).

<sup>302</sup> 7 N.N.C. § 354(c) (applicants must have minimum of high school education). Applicants must also have a minimum of two years experience in a law related area. 7 N.N.C. § 354(d).

<sup>303</sup> In 2002 three out of eighteen Navajo court judges were law school graduates. Testimony of Robert Yazzie, Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002). One of the most influential and successful courts (that of Justices Tom Tso, Homer Bluehouse, and Raymond Austin) had only one law school graduate. See Jim Maniaci, *Panel Extend's Justice's Probation; King-Ben Gets Year to Get Better*, GALLUP INDEPENDENT (July 3, 2003).

<sup>304</sup> For a fine and nuanced article on the tribal common law movement, see Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law*, TRIBAL LAW JOURNAL.

<sup>305</sup> Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989).

<sup>306</sup> Estate of Belone (Dawes v. Yazzie), No. A-CV-01-85 (Navajo 07/10/1987).

<sup>307</sup> 7 N.T.C. § 204 (1959) provided that:

(a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinance or customs of the Tribe, not prohibited by such Federal laws.

custom since the Navajo Nation began publishing opinions in 1969.<sup>308</sup> In the late 1970s and early 1980s, the justices of the Navajo Nation began to place new emphasis on Navajo common law, applying it beyond the domestic relations arena in which its use had always been sanctioned, to questions of judicial review,<sup>309</sup> personal injury lawsuits,<sup>310</sup> and restrictions on freedom of speech.<sup>311</sup> Today common law is the “law of preference” in the Navajo courts.<sup>312</sup> The tribal common law movement is, at some level, a rejection of Anglo-American standards as the best or most appropriate way to resolve disputes arising on reservations, and the use of such customary law helps to undergird the sense that tribal courts are unfamiliar, foreign places, where those not part of the traditional culture will find themselves at a disadvantage.<sup>313</sup>

One might also expect that because of the unique circumstances of the Navajo Nation, adjudication of the rights of nonmembers would play a relatively small role in Navajo law. The Navajo reservation is the largest in the country. Unlike the vast majority of reservations, very little of this land has been “allotted” or sold by the United States to non-Indian settlers. While on heavily allotted reservations a substantial proportion and sometimes the vast majority of residents may be non-Indian, Navajos compose over 90% percent of the reservation population.<sup>314</sup> Only 3.5% of the 145,843 people

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(b) Where any doubt arises as to the customs and usages of the Tribe, the court may request the advice of counselors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie.

Ironically, this provision is in large part the product of federal influence—this language was taken essentially verbatim from the federal code of regulations for tribal courts. As part of the court reforms of 1985, the Navajo Nation reenacted this choice of law provision and modified it to make clear that it applied in all cases, not simply civil ones, and that in cases where Navajo and federal law was silent the court “may” not “shall” apply local state law. 7 N.N.C. § 204.

<sup>308</sup> In re Trust of Benally, 1 Nav. R. 10, 12 (Ct. App. 1969); see Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. IND. L. REV. 379 (1993) (discussing development of common law in the Navajo courts).

<sup>309</sup> Halona v. McDonald, 1 Nav. R. 189 (1978).

<sup>310</sup> Benally v. Navajo Nation, 5 Nav. R. 209 (Window Rock Dist. Ct. 1986).

<sup>311</sup> Navajo Nation v. Crockett, No. SC-CV-14-94 (Navajo 11/26/1996).

<sup>312</sup> Navajo Nation v. Platero, No. A-CR-0491 (Navajo 12/05/1991).

<sup>313</sup> Duro v. Reina, 494 U.S. 676, 693 (1990); Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J. concurring).

<sup>314</sup> 1990 Census Population and Housing Characteristics of the Navajo Nation, Table NN04 (1993).

living on the reservation are non-Indian, and only 6.5% are nonmember Indians.<sup>315</sup> And although Native Americans in general are the most exogamous of American ethnic groups, a fairly small proportion of the on-reservation Navajo population marries outside the tribe.

Navajo custom and tradition also remain deeply embedded in daily life. The appropriate way to introduce oneself, for example, is to give not only one's name but the clans of both one's mother, father, and grandparents, acknowledging not only one's individuality, but one's traditional heritage and relationships.<sup>316</sup> While ensuring the vitality of the Navajo language among younger members is a concern for the tribe, as it is for most tribes with living languages, as of 1990 Navajo was spoken at home by 142,886 members of the Navajo Nation,<sup>317</sup> and it is still the only language of many Navajo elders.

The Navajo Nation is almost unique in its degree of independence from non-Navajo society. Interactions with outsiders might seem to compose little of the work of the courts, and to be relatively unimportant to Navajo self-government. The Navajo Nation thus provides an excellent opportunity to test the accuracy of the Supreme Court's vision of tribes as largely isolated from nonmembers and dedicated to preserving customs and culture unrelated to the outside world.

## **b. Focus on Appellate Decisions**

Written appellate decisions, of course, are not necessarily representative of disputes in a particular society. Individuals transform only a small fraction of disputes into articulated grievances and a smaller fraction of those into legal actions; an even smaller fraction of those result in litigated legal decisions and a yet smaller fraction result in appellate decisions.<sup>318</sup> Although there is an intuitive sense that reported decisions reflect the

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<sup>315</sup> *Id.*

<sup>316</sup> See, e.g., Claudeen Bates-Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L. J. 21, 21 (2002). In beginning her remarks, Bates-Arthur provided her clan (which is her mother's clan), and the clans of her father and her grandparents, saying, "That is who I really am." *Id.* The importance of these traditional ties is also reflected in the saying to condemn the behavior of an individual, "He acts like he has no relatives." Arizona Public Service Co. v. Office of Navajo Labor Relations, No. A-CV-08-87 (Navajo 10/08/1990).

<sup>317</sup> U.S. Census, Characteristics of American Indians by Tribe and Language, Table 18: American Indian Languages Spoken at Home by American Indian Households, By Age and Sex (1994).

<sup>318</sup> See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Out Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 11-36 (1983) (discussing the "dispute pyramid" of grievances to litigation).

underlying activity in society, the relationship between activity, litigation, and decisions is not so direct.<sup>319</sup> Not all injuries are sensed as wrongs, and even fewer as legal wrongs. Disputes litigated to decision are more likely than others to involve “hard cases,” those in which both parties predict relatively equal chances of success.<sup>320</sup> In addition, as discussed further below, litigation disproportionately reflects situations in which there is no common agreement on the way disputes should be resolved, or in which the parties do not have common social ground, resulting in a turn to formal legal institutions for resolution.<sup>321</sup>

This lack of representativeness, however, is not a significant problem for the study. While many disputes do not even come before the courts, it is tribal formal legal institutions that have come under the scrutiny and criticism of the United States Supreme Court. More important, it is perhaps more relevant in determining the relative bias of the courts to see what they do in adjudicating hard cases rather than easy ones. The indirect relationship between disputes and litigated claims, moreover, only increases the likelihood that disputes that are litigated reflect the friction points in society, the areas in which parties feel themselves particularly aggrieved and need to turn to a hopefully objective third party for resolution.

In addition, to the extent one can tell from the published trial court decisions and discussions of the decisions below in the appellate court decisions, the primary differences between trial and appellate level decisions are not the extent of bias against nonmembers. While in some instances

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<sup>319</sup> See William A. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC. REV. 631 (1980-81) (discussing factors in transformation of disputes into litigation). This is certainly true for the Navajo court system. Although 70,338 cases were filed in the Navajo courts in the 2001-2002 fiscal year, only 65 cases were filed in the Navajo Supreme Court, and the court issued only 14 published decisions.

<sup>320</sup> The seminal article articulating this theory is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUDIES 1 (1984).

<sup>321</sup> See Part IV(a) below; see also LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* at 144 (1975); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOCIETY REV. 551 (1987), reprinted in *THE LAW & SOCIETY READER* 13 (Richard L. Abel ed. 1995) (plaintiffs in personal injury lawsuits were outsiders to rural Illinois community; insiders either chose not to litigate or were able to quickly settle their disputes); Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOCIETY REVIEW 891 (1979), reprinted in *THE LAW & SOCIETY READER* 36 (Richard L. Abel ed. 1995) (reliance on court in urban housing project occupied by different ethnic groups with little social common ground).

decisions against nonmembers below seem to clearly violate the law,<sup>322</sup> the differences between the trial and appellate courts appear to reflect different visions of the role of the court rather than greater or lesser bias against nonmembers. Thus while the appellate court has reversed decisions that the Navajo courts lacked jurisdiction over claims against non-Indians, these decisions appear motivated by the belief that the court has and should have broad jurisdiction over all actions arising on the reservation rather than bias against the nonmember.<sup>323</sup> Similarly, the appellate court appears to have a greater preference for the application of Navajo common law, and has reversed decisions in favor of non-Indians where it held that state law rather than common law inappropriately formed the rule of decision.<sup>324</sup>

### **c. Who Wins When Nonmembers Go Before the Courts?**

Since 1971, the Navajo appellate courts have issued 513 written opinions. Each of these was reviewed to determine which involved parties that could be identified as involving nonmembers of the tribe, whether because the opinion identifies them as such, because of the names of the parties, because of knowledge of the parties, or because of the status and location of the parties.<sup>325</sup> Where the identity of the litigant could not be determined to a reasonable degree of certainty, the case was assumed to involve only Navajos.

Through this method, 109 cases involving non-Navajo litigants were identified. Nine of these cases involve Indians that are not members of the Navajo tribe, and the rest, 91.7% of the total, involve non-Indians. The cases were read and categorized as to who won or lost the case and the subject matter of the case. The cases run the gamut in subject matter: they include

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<sup>322</sup> See, for example, *Deal v. Blatchford*, 3 Nav. R. 159 (1982), in which the appellate court reversed the trial court for granting punitive damages of \$250 and compensatory damages against a non-Indian found liable for a car accident without evidence that the act was willful or malicious or evidence of the financial damages other than the plaintiffs' testimony. (The decision as to liability seems straightforward—the non-Indian hit the plaintiff's car with her motorcycle while the plaintiff was stopped at a red light.)

<sup>323</sup> See, e.g., *In re Custody of S.R.T.*, 6 Nav. R. 407 (S. Ct. 1991) (reversing dismissal of custody case for lack of jurisdiction and remanding for more facts).

<sup>324</sup> See, e.g., *Nez v. Peabody Western Coal, Inc.*, 7 Nav. R. 416 (S. Ct. 1999).

<sup>325</sup> In doing this, I assumed that litigants with common Navajo names such as Kee, Yazzie, or Begay were Navajo absent other evidence to the contrary and that off-reservation businesses such as Babbitt Ford were non-Indian. In more difficult cases, I did research regarding the party before determining whether they were Navajo or not. So, for example, where Edker Wilson, a provider of livestock for rodeos was sued for injuries caused by one of his bulls at the Northern Navajo Fair, *see Wilson v. Begay*, 6 Nav. R. 1 (S. Ct. 1988) I found an article profiling him before categorizing him as non-Indian.

cases regarding contracts, torts, child custody, employment law, practice of law, trusts and estates, and taxation. The majority of cases involve non-Indian companies, whether as employers, vendors, alleged tortfeasors, taxpayers, or insurers.

Out of these cases, in 16 neither party won or the results were too mixed to say one party won or lost,<sup>326</sup> in four non-Navajos were on both sides, and in three non-Navajos and Navajos were on the same side. The remaining 86 cases were perfectly equally divided: in 43 the non-Navajo party won, and in 43 the non-Navajo party lost. This radical equality would almost suggest that it is intentional,<sup>327</sup> except that the evenness of the decisions is only apparent when the results are aggregated. In no five-year period except one are the win and loss rates the same. But over the 32-year period the numbers of wins and losses become equal. The results are shown in Table I.

Table I: Win-Loss Rates of Non-Members						
	1971-81	1981-87	1987-92	1992-97	1997-2003	Total
Nonmember wins	13	11	6	7	6	43
Nonmember loses	9	6	13	7	8	43
No party won or lost or results substantially mixed	3	7	3	1	2	16
Nonmembers on both sides			1		3	4
Nonmember and Navajo on same side			1	1	1	3

<sup>326</sup> These included, for example, cases in which the decision simply reported that the matter had been dismissed by stipulation of the parties, cases responding to requests for opinions on certified questions, and cases in which the Supreme Court simply certified the presentation of candidates for admission to the bar. They also, however, included a few substantive cases such as *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000), in which the court affirmed that the tribe had jurisdiction over a non-Indian employer and that the employer had failed to create an atmosphere free from harassment, but reversed the damages, civil penalty, and the award of attorney fees because it agreed with the employer that requiring it to prove substantial justification for firing the employee by clear and convincing evidence violated due process and that the civil penalty was improper for lack of notice in the complaint.

<sup>327</sup> It is widely believed, for example, that the Bureau of Indian Affairs Branch of Acknowledgement and Research strives for numerical equality because the numbers of tribes whose recognition is approved always equals those whose recognition is disapproved. This kind of balance is plainly easier to achieve for the BIA, which has decided only about 25 petitions in the same period in which the Navajo Supreme Court has decided 513.

Total cases involving nonmembers	25	24	24	16	20	109
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This kind of equality is evident across various kinds of cases. Whether the issue is child custody, torts, contracts, or employment, Navajo litigants win some, and non-Navajo litigants win some. This is true whether the court is deciding on procedural or substantive grounds, whether the decision affirms or reverses the district court, even whether the opposing party is the Navajo Nation or not.

According to an influential theory developed by George Priest and Benjamin Klein, this 50-50 win-loss rate is what one would expect from litigated decisions.<sup>328</sup> Assuming that parties have relatively accurate information regarding their chances of success, they will settle cases in which they agree that one party is significantly more likely to win. It is only where the likely outcome is subject to a large degree of uncertainty, where each party appears to have a relatively equal ability to win, that parties will go to trial. Other factors being equal,<sup>329</sup> therefore, one would expect the results to approach a 50-50 win-loss rate for any set of parties.

But where judges are influenced by legally irrelevant factors such as bias against a particular kind of party or claim, it skews the results. Parties that make an accurate assessment of the law and facts in their favor will nevertheless lose disproportionate numbers of cases. While Priest & Klein predicted that parties would adjust their litigation decisions to account for this bias, thus maintaining the 50-50 win-loss rate, subsequent studies do not confirm their thesis.<sup>330</sup> Parties appear to continue to rely on their assessment that the law and facts are in their favor, and only very slowly, if at all, effectively strategize to avoid a court biased against them.

<sup>328</sup> George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUDIES 1, 51-52 (1984).

<sup>329</sup> Differing stakes between the parties, for example, will shift their interest in litigation, and therefore may shift the proportion of cases won by any party. Priest & Klein. Repeat players in litigation systems, moreover, should have greater flexibility in choosing not to litigate cases in which the facts may lead to negative outcomes, and therefore may be expected to win a greater proportion of cases litigated. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

<sup>330</sup> See, e.g., Vicki Schultz & Stephen Petterson, 59 U. CHI. L. REV. 1073 (1992) (plaintiffs disproportionately losing employment discrimination cases in which defendants alleged a lack of interest defense); James Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 U.C.L.A. L. REV. 479 (1990) (plaintiffs disproportionate loss of products liability cases).

Indian law cases decided by the U.S. Supreme Court provide a nice example of this. David Getches has calculated the win-loss rate of tribes in Indian law cases decided by the United States Supreme Court. He found that while the win-loss rates in the Burger Court were relatively balanced, in Indian law cases decided by the Rehnquist court (those since 1986) tribal interests lose 77% of the time. It is only now, after almost twenty years of this clear, extremely high profile trend, that tribes are actively seeking to avoid the United States Supreme Court, and still find themselves often unable to do so as opposing parties refuse to settle.<sup>331</sup> Bias in lower level courts should be even more difficult to detect and address through litigation behavior.

To summarize, the Navajo appellate courts are as likely to rule in favor of nonmembers as they are to rule in favor of members. This figure suggests that parties are able to make a relatively accurate assessment of their chances of winning before the court, and that legally irrelevant factors do not significantly influence the court's decisions in ways that disadvantage nonmembers. Indeed, a non-Navajo going before the Navajo Supreme Court can be much more confident of winning than can a tribe going before the highest court in the land. While not conclusive as to the "fairness" of the courts, these statistics should at least provide some reassurance to those concerned about bias.

#### **d. Closer Analysis of Cases Vulnerable to Bias**

Closer reading of the cases supplements the suggestion that the court is acting in a relatively balanced manner. While not everyone would agree with the reasoning or method of the court in every case (indeed almost by definition each decision will disappoint a litigant who thought that he or she should win) the cases appear uniformly governed by thoughtful attempts to determine the relevant law, policies, and facts. There are some decisions in which the court reaches questionable legal results, but the source of the errors does not appear to be bias against the parties, nor do the errors disproportionately disadvantage nonmembers. While I do discuss one troubling custody case below, it appears that the basis of decision was Anglo common law. In other cases, the status of the litigant appears to have made the court particularly careful to ensure fairness.<sup>332</sup>

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<sup>331</sup> There were, for example, significant, but unsuccessful, efforts to settle both *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) and *U.S. v. Navajo Nation*, 123 S. Ct. 1079 (2003).

<sup>332</sup> *In re Practice of Battles*, 3 Nav. R. 92 (S. Ct. 1982), for example, considered a challenge made by William Battles to a new rule that required membership in a state bar for non-Navajos seeking to practice in the Navajo courts. (The rule is intended to ensure that the courts will benefit from Navajo practitioners that either are educated in Navajo legal traditions



To supplement the data, I will now discuss the decisions of the court in three areas in which one might expect that decisions would be tainted by the biases or unfamiliarity of the courts: decisions involving Navajo common law, decisions involving commercial relations, and custody disputes involving custody of children with Navajo heritage.

### **1. Non-member Decisions Involving Navajo Common Law**

The Supreme Court has repeatedly cited the use of indigenous common law as a justification for denying tribal courts jurisdiction over nonmembers. It might also seem that such concepts would be relevant only to disputes that closely resemble those the tribe engaged in pre-contact.<sup>333</sup> An examination of the use of one prominent Navajo common law concept, that of *nalyeeh*, debunks the notion that indigenous common law need not and cannot be fairly applied to contemporary disputes involving non-Indians. Indeed, in this example, the use of common law adds to the fairness of the courts by

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or can compliment their lack of knowledge of such traditions with knowledge of Anglo law and a legal education that enables them to familiarize themselves with unfamiliar laws.) Battles had practiced in the Navajo courts for several years and had passed the newly instated Navajo bar exam two years before the rule was promulgated. When Battles sought to represent an individual challenging an extradition agreement between the Navajo Nation and the State of Arizona, however, the Navajo prosecutor sought to disqualify him based on his ineligibility to practice under the rule.

In the words of the court, “Mr. Battles is a rather controversial figure. He passed the first bar examination administered by the Navajo Courts, along with 79 other individuals. . . . The following year Battles filed a \$12.2 million lawsuit in our courts against Raymond Tso, the prosecutor in this case. . . . Later participation in controversial suits, proceedings and disputes has made Battles a figure disliked by some, but neither the decisions of the District Court nor this court are based upon Mr. Battles' notoriety.” The court held that Battles long practice in the Navajo Nation courts gave him an equitable right to continue to practice there despite the new rule. (During my time on the Navajo Nation over a decade later, Mr. Battles continued to prosecute in the Navajo courts, and was even a Domestic Violence Commissioner in the court system. He was also a presenter in the mandatory course on Navajo Common Law for new bar members, where he regaled students with stories of his 12.2 million dollar lawsuit against the Navajo Nation.)

<sup>333</sup> Some tribes deliberately segregate the use of indigenous justice ways to more “traditional” disputes. The Mohegan Tribe, for example, has two court systems, a Gaming Disputes Court that hears cases arising from its successful casino and whose procedural and substantively law closely mirror state and federal law, and a Mohegan Tribal Court, which hears disputes concerning tribal members and which has more freedom to apply Mohegan common law. MTC. The Navajo Nation does something similar with its Peacemaker Court, which hears primarily family disputes and whose procedures, hearkening to traditional dispute resolution methods, involve an attempt to obtain consensus through talking through of the problem with the mediation of an elder. NTC.

creating legal guarantees of justice in situations in which tribal codes have not yet created them.

*Nalyeeh* is the traditional concept of making restitution for wrongs.<sup>334</sup> The concept includes not only the payment itself, but the proper process for negotiating and making payment.<sup>335</sup> The focus is distinctly equitable:<sup>336</sup> the concern is not with the amount of damages, but on what kind and manner of restitution is “fair,” so as to “fix the victim’s mind.”<sup>337</sup> Although the concept has long been part of traditional law practice on the Navajo Nation,<sup>338</sup> *nalyeeh* apparently first appeared in a written opinion in 1986.<sup>339</sup> The case involved a wrongful death action against the Navajo Nation by the mother of a Navajo child who died after being hit by a truck driven by a tribal employee.<sup>340</sup> The Navajo Nation argued that that under Anglo common law there was no action for the negligent death of a human being, so the right to bring such an action must be provided by statute.<sup>341</sup> Although most states have enacted wrongful death statutes, the Navajo Nation had not. But the district court held that the common law concept of *nalyeeh*, under which Navajos could seek compensation for the death of a relative, allowed the action to go forward.<sup>342</sup> In addition, although traditionally *nalyeeh* damages were paid in livestock and goods, the court recognized that “[m]ore Navajos work for money today” and “[p]ayment in material goods is no longer adequate.”<sup>343</sup>

Since 1986, the Navajo courts have used *nalyeeh* to resolve a range of distinctly modern disputes, including election of remedies in worker’s compensation cases,<sup>344</sup> “stacking” of uninsured motorist insurance coverage,<sup>345</sup> and requests for prejudgment interest in tort cases.<sup>346</sup> Seven out

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<sup>334</sup> *Singer v. Nez*, No. SC-CV-04-99 (Navajo 07/16/2001); *Benally v. Navajo Nation*, 5 Nav. R. 209 (W.R. Dist. Ct. 1986).

<sup>335</sup> *Benalli v. First National Insurance Co. of America*, 7 Nav. R. 329 (S. Ct. 1998).

<sup>336</sup> *See id.* (comparing concept of *nalyeeh* to English concept of equity).

<sup>337</sup> *Benally v. Navajo Nation*, 5 Nav. R. 209, 212 (Window Rock Ct. 1986).

<sup>338</sup> The efforts of parties and the Navajo police to resolve a rape case by negotiated compensation rather than imprisonment almost led to a rebellion by the Navajo people in the 1890s, *see* text accompanying footnotes \_\_ to \_\_ below, and informants spoke of current use of resolution according to *nalyeeh* in the early 1970s. DAN VICENTI, LEONARD B. JIMSON, STEPHEN CONN, M.J.L. KELLOGG, *THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ’ÁANII, A BICULTURAL APPROACH TO LEGAL EDUCATION FOR NAVAJO STUDENTS* at 121, 159, 198 (Ramah Navajo High School Press 1972).

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 209.

<sup>341</sup> *Id.* at 210.

<sup>342</sup> *Id.* at 210.

<sup>343</sup> *Id.* at 213.

<sup>344</sup> *Benally v. Broken Hill Property Ltd.*, No. SC-CV-79-98 (Navajo 09/21/2001).

<sup>345</sup> *Benalli v. First National Insurance Co. of America*, 7 Nav. R. 329 (S.Ct. 1998).

of the eleven cases concerning *nalyeeh* now on -line involve non-Indians, mostly as defendants. In three of the seven, the non-Indian party lost. In *Bennalli v. First National Insurance Co.*,<sup>347</sup> the court used the concept of *nalyeeh* as an aid in reading an insurance contract to find, against the arguments of the non-Indian insurance company, that the driver of a car insured in an accident with an uninsured motorist was entitled to stack the uninsured motorist coverage provided in the policies of each of the cars of the insured in order to receive full compensation for her injuries. In *Jensen v. Giant Industries, Arizona, Inc.*,<sup>348</sup> the court reversed a grant of summary judgment in favor of a non-Indian gas station chain that was sued after the plaintiff was injured by a third party in the parking lot of one of its stations. While Giant had argued successfully below that *nalyeeh* prohibited recovery from third parties, the court held that a single affidavit by a medicine man was not enough to establish a common law prohibition on such recovery.<sup>349</sup> The court remanded for more evidence.

And in the controversial case of *Nez v. Peabody Western Coal Co., Inc.*,<sup>350</sup> the court reversed a grant of summary judgment against a Navajo who sued a non-Indian company in tort after accepting worker's compensation for his injuries. Federal law provides that state worker compensation schemes apply to individuals working for private companies on federal lands,<sup>351</sup> and has been interpreted to apply to private employers in Indian country as well.<sup>352</sup> But while the Navajo Supreme Court agreed that this application of state law was authorized, the court held that, just as the worker's compensation remedies of one state did not automatically deprive another state of jurisdiction over a common law tort based on the claims,<sup>353</sup> it did not deprive

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<sup>346</sup> *Singer v. Nez*, No. SC-CV-04-99 (Navajo 07/16/2001).

<sup>347</sup> 7 Nav. R. 329 (S.Ct. 1998).

<sup>348</sup> No. SC-CV-51-99 (Navajo 01/22/2002).

<sup>349</sup> In *Jensen*, the district court had granted summary judgment in the defendant's favor in part because the plaintiff had not presented evidence to rebut the evidence of the medicine man. *Id.* The court found that to accept such evidence as binding on the court, particularly without the court satisfying itself as to the expertise of the affiant, would contravene the proper role of evidence regarding Navajo common law as a guide rather than an adversarial tool which must be rebutted. *Id.*

<sup>350</sup> 7 Nav. R. 416 (S.Ct. 1999).

<sup>351</sup> 40 U.S.C. § 290.

<sup>352</sup> See *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311 (9th Cir. 1982) (holding that § 290 allows state workers' compensation laws to apply to employees of private employers on Indian reservations).

<sup>353</sup> *Nez v. Western Peabody Coal* at 419 *citing* *Carroll v. Lanza*, 349 U.S. 408 (1955)) (holding that full faith and credit clause does not compel one state to enforce the exclusive remedy provision of another state's workers' compensation law) *and* *Garcia v. American Airlines, Inc.*, 12 F.3d 308 (1st Cir. 1993) (holding that the forum state had jurisdiction over

the Navajo Nation of jurisdiction over claims for remedies that were “substantially different” than the worker’s compensation.<sup>354</sup> Although the court vacated the dismissal and remanded to the lower court, it held that the Navajo law would bar the action if the plaintiff had waived the right to seek further recovery, the action was barred by collateral estoppel, or the action would unduly prejudice the defendant.<sup>355</sup> The court also left open for the district court the question whether Navajo common law itself barred plaintiffs from seeking damages twice for the same injuries.<sup>356</sup>

While the decision created significant concern regarding potential impact on reservation employers,<sup>357</sup> when the issue subsequently came before the court, it held that *nalyeeh* did not permit additional recovery.<sup>358</sup> In *Benally v. Big A Well Service Co.*,<sup>359</sup> the first such case, the court emphasized that *nalyeeh* had

A deeper meaning of a demand to "make right" for an injury and an invitation to negotiate what it will take so that an injured party will have "no hard feelings." . . . In most

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an employee's common law tort suit even after the employee had received benefits under another state's workers' compensation program).

<sup>354</sup> *Id.* at 420.

<sup>355</sup> *Id.* at 420-21.

<sup>356</sup> *Id.* at 421.

<sup>357</sup> This concern was significant enough that the Navajo Nation Council, four months after the decision, enacted the following resolution:

1. The Navajo Nation Insurance Services Program Workers Compensation Program is directed to begin development of a comprehensive workers compensation statute to cover all employers operating within the territorial jurisdiction of the Navajo Nation.
2. Until such time as the Navajo Nation develops a comprehensive workers compensation law covering all employers within the jurisdiction of the Navajo Nation, the Navajo Nation Council recognizes existing workers compensation coverage, whether under a state statutory scheme or under Navajo statutory law to be the exclusive remedy for covered injuries to employees occurring in the work place.

The court rejected this apparent restriction on its institutional authority, holding that given the presumption against ex post facto deprivations of remedies in existing cases and as the resolution did not take the prescribed form legislative enactments, the resolution should be interpreted as a statement of policy rather than a rule to be applied to pending cases. In re Certified Question from the U.S. District Court for the Dist. of Arizona, No. SC-CV-49-2000 (Navajo 07/18/2001); *see Benally v. Big A Well Service Co.*, No. SC-CV-27-99 (Nav. 8/28/2000).

<sup>358</sup> *Benally v. Broken Hill Property Ltd.*, No. SC-CV-79-98 (Navajo 09/21/2001); *Benally v. Big A Well Service, Co.*, No. SC-CV-27-99 (Navajo 08/28/2000).

<sup>359</sup> No. SC-CV-27-99 (Nav. 8/28/2000).

instances where an employee receives a workers' compensation award, the *nalyeeh* principle should be satisfied, because there is a method of determining the nature of the injury and the monetary needs of the worker. . . . [S]uch benefits may not be the same as an award in a personal injury action, but at the same time, workers have a prompt remedy, they do not have to face the defenses of contributory or fellow worker negligence, and costs in terms of money and time are minimal.<sup>360</sup>

In a subsequent case, the court elaborated on this reasoning, declaring that while *nalyeeh* was similar to Anglo-American concepts of compensation,

*Nalyeeh* has an additional procedural aspect which addresses relationships. *Nalyeeh* does not simply require restitution or reparation, but calls upon the person who has caused an injury or is responsible for an injury to talk out both compensation and relationships. . . . It is not simply a legal equitable doctrine to be applied by a court as an impartial decision-maker, but a relationship value. . . . In the case before us, the district court chose to ignore the parties' contentions on the cause of the death and the amount of damages which resulted using a commonsense doctrine that it would be unfair for the appellants to choose one remedy, receive its benefits, and then seek another. . .

We have said that Navajo common law requires people to keep their word and honor their promises. . . . In this particular situation, the appellants' decedent went to work at a coal mine understanding that if he was injured, the mining company would pay for the injury under a workers' compensation program. The appellants sought and received death benefits under that program, and the company kept its word by paying them, as agreed. The wrongful death suit attempted to reject the agreement the parties reached and thus broke it. Accordingly, the district court was correct in dismissing the wrongful death suit on equitable principles as a matter of Navajo common law.<sup>361</sup>

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<sup>360</sup> *Id.*

<sup>361</sup> Benally v. Broken Hill Property Ltd., No. SC-CV-79-98 (Navajo 09/21/2001).

Thus, Navajo common law, far from a trap for the unwary in tribal courts, became a tool to ensure comparable protections to those in state courts even in situations where tribal codes had not yet provided protection. But by finding these guarantees in Navajo traditions, they become part of the general code of conduct appropriate for the Navajo people rather than foreign restrictions on action imposed because of a need to model non-Indian courts.

## 2. Cases Arising from Business Relationships

The cases involving outsiders largely arise from business relationships, the most common situation in which non-Indians find themselves in Navajo courts. Sixty out of the 109 cases involving non-Navajos, or approximately 55% of the total cases, arise from employment, contract, and worker's compensation disputes alone. In most of these cases, non-Indians appear as powerful institutions, as employers, sellers, or lenders, while Navajos typically appear in their individual status. The Navajo Nation has a significant interest in protecting its members from predatory practices by such institutions, and indeed has passed several laws, including a law prohibiting self-help repossession without judicial approval<sup>362</sup> and the Navajo Preference in Employment Act,<sup>363</sup> which prohibits termination of employees without just cause, in order to protect Navajo individuals in their business relationships. One might fear that this concern would result in bias against such institutions when they appear in court. At least one litigant, the Atkinson Trading Company, current owner of the Cameron Trading Post, sought (unsuccessfully) to avoid exhausting a claim in tribal court by arguing that the court was biased against it.<sup>364</sup>

Review of the decisions regarding such cases reveals that the court is balanced in hearing cases against non-Indian businesses. As reflected in the chart below, after subtracting cases in which non-Navajos were on both sides and there was no clear winner, non-Indian businesses won 29 of the cases and lost 23. If the numbers are adjusted to reflect the two cases in which Hopi employees were involved in disputes with non-Indian businesses, both of which the Hopi litigants won, non-Indian businesses lost 25 of the cases.

Table II: Disputes Arising from Commercial Relationships with Non-Indians					
	Non-Navajo Won	Non-Navajo Lost	Non-Navajos on both sides	Results mixed or no win or	Total

<sup>362</sup> 7 N.N.C. § 607.

<sup>363</sup> 15 N.N.C. §§ 601-619.

<sup>364</sup> See *Atkinson Trading Company v. Shirley*, 210 F.3d 1247 (10<sup>th</sup> Cir. 2000).

				loss	
Contract-consumer goods & services	12	9	1	1	23
Contract-with Navajo Nation	3	5			8
Contract-other	1	2			3
Total Contract Cases	16	16	1	1	34
Employment	10	7/9 <sup>365</sup>	4/2 <sup>366</sup>		21
Worker's compensation	3	1		1	5
Total	29	23/25	6/4	3	60

Even the Atkinson Trading Company seems to have gotten a fair shake. While the court has twice rejected claims that it has no inherent jurisdiction over the company,<sup>367</sup> in the one case deciding on the merits of a case it reversed an employment decision in favor of a Navajo employee, holding that the lower court was improper in requiring the defendant to prove just cause for termination by “clear and convincing evidence.”<sup>368</sup>

Comparison of the likely results in state and federal courts provides further evidence that non-Indian businesses are not overly disadvantaged in the Navajo courts. Several of the cases regarding contracts for consumer goods involve either federal or state consumer protection laws.<sup>369</sup> These

<sup>365</sup> The numbers before the slash include only cases in which the employee was Navajo; the numbers after the slash include both those where the employee was Navajo and the employee was Hopi.

<sup>366</sup> The numbers before the slash include cases in which a Hopi was on one side and a business was on the other.

<sup>367</sup> *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000) and *In Re Atkinson Trading Co.*, 7 Nav. R. 275 (S.Ct. 1997).

<sup>368</sup> *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000).

<sup>369</sup> In interpreting federal statutes, the court takes a stance similar to that of state or federal court. It accepts decisions of the U.S. Supreme Court regarding federal laws as binding, but accepts lower court decisions only as guidance, and considers itself to have the same power to interpret such laws as would a state or federal court. *See Manygoats v. General Motors Acceptance Corp.*, 4 Nav. R. 94 (1983). With respect to state law, the court relies state courts to determine the proper interpretation of state statutes, but in the absence of such

cases provide an opportunity to examine what other courts did with similar claims. In *Smoak v. Chevrolet*,<sup>370</sup> for example, the court considered whether provisions for acceleration of installment payments were “charges” that needed to be disclosed on the face of contracts for consumer goods under the Truth in Lending Act.<sup>371</sup> The court held that while an acceleration clause that simply accelerated the rate of payment need not be disclosed, one that provided the seller with an unearned benefit by allowing the seller to keep unearned interest or other finance charges was the equivalent of a charge, and therefore required disclosure.<sup>372</sup> In so holding, the court declined to follow decisions by the Third, Fifth, and Tenth Circuits that such provisions need not be disclosed.

While at first glance this result might seem to suggest a less favorable climate for non-Indian businessmen, further examination counters this suggestion. First, the court noted that the Third Circuit relied on a state statute providing that unearned finance charges and interest could never be retained in the face of acceleration, and agreed that where state law required such rebates, there was no charge that needed to be disclosed.<sup>373</sup> Second, the Fifth Circuit subsequently met *en banc* to reverse its prior decision, reaching essentially the same decision as the Navajo court.<sup>374</sup> The Ninth Circuit subsequently reached a more radical position than the Navajo Court, (one previously adopted by several district courts) holding that acceleration clauses must always be disclosed to inform the consumer of their effect on unearned finance charges.<sup>375</sup> Finally, the Federal Reserve Board, the agency charged with administering the Truth in Lending Act, itself interpreted the Act as the Navajo Nation had, an interpretation implicitly adopted by the U.S. Supreme Court when it overruled the Ninth Circuit.<sup>376</sup> Thus the Navajo Nation, rather than adopting an unusually pro-consumer stance, instead struck a middle ground ultimately consistent with the holdings of the majority of circuits as well as the administering agency.

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interpretations makes its own attempt to determine the intent of the legislature. *See* General Electric Credit Corp. v. Becenti, 4 Nav. R. 34, 34-36 (Ct.App. 1983).

<sup>370</sup> 1 Nav. R. 153 (1977).

<sup>371</sup> 15 U.S.C. §§ 1638-1639.

<sup>372</sup> 1 Nav. R. at 159.

<sup>373</sup> *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 268-69 (3d Cir. 1975).

<sup>374</sup> *McDaniel v. Fulton National Bank of Atlanta*, 571 F.2d 948 (5<sup>th</sup> Cir. 1980) (*en banc*) (acceleration clause alone not charge but provision permitting retention of unearned interest charge requiring disclosure).

<sup>375</sup> *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9<sup>th</sup> Cir. 1977).

<sup>376</sup> *Ford Motor Company v. Milhollin*, 444 U.S. 555, 563 n.8 (1980) (discussing administrative interpretations).



In other cases, the Navajo courts reached positions more favorable to businesses than those of surrounding courts. The court held, for example, that counterclaims under the Truth in Lending Act were barred by the Act's one year statute of limitations,<sup>377</sup> although a slight majority of state courts, including the New Mexico Supreme Court, had reached the opposite conclusion.<sup>378</sup> In 1980, Congress amended the statute to permit such counterclaims after the expiration of the statute of limitations; only then did the Navajo court reverse its prior position.<sup>379</sup>

And while very few of the businesses that find themselves before the court are run by Navajos, the court appears very aware that an anti-business climate will not serve the Navajo people. In one employment case, for example, the court rejected an interpretation of the Navajo Preference in Employment Act that would require companies to grant preference to "potentially qualified" applicants, and thereby require the employer to delay hiring until potentially qualified Navajo applicants had been given a mandatory welding test.<sup>380</sup> The court found that such a requirement would discourage businesses from locating on the Navajo Nation, reduce employment opportunities, and thereby defeat the ultimate intent of the law.<sup>381</sup> In another case, the court upheld the Navajo Nation's claim of sovereign immunity, but encouraged the Navajo Nation Council to waive sovereign immunity in its contracts to encourage economic development on the Navajo Nation.<sup>382</sup> In developing its judicial system, the Navajo Nation seeks both to protect Navajo individuals and to encourage non-Indian business to invest and participate in economic development. The court appears to be aware that the best way to accomplish both goals is to provide a forum that merits the trust of all parties.

### 3. Child Custody Cases

Another area in which one might fear bias is in cases involving child custody. The Navajo Nation, like many Indian nations, sees maintaining a connection with Navajo children as necessary to safeguard its future. The Navajo Nation court has declared that "[t]he most precious resource of the

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<sup>377</sup> *Smoak v. Chevrolet*, 1 Nav. R. 153, 160-61(1977).

<sup>378</sup> *A-1 Mobile Homes, Inc. v. Becenti*, 2 Nav. R. 72, 75 (C.P. Dist. Ct. 1979) (collecting cases).

<sup>379</sup> *Manygoats v. General Motors Acceptance Corp.*, 4 Nav. R. 94, 97 (1983) (discussing P.L. 96-221, Title VI, Sec. 615, 94 Stat. 180).

<sup>380</sup> *Largo v. Gregory & Cook, Inc.*, 7 Nav. R. 111 (S.Ct. 1995).

<sup>381</sup> *Id.* at 114-15.

<sup>382</sup> *TBI Contractors, Inc. v. Navajo Tribe of Indians*, 7 Nav. R. 57 (S.Ct. 1988).

Navajo Nation is indeed its children,” and interprets the Navajo Nation Children's Code as designed “to protect this vital resource of the Navajo Nation.”<sup>383</sup> It would not be surprising if this concern resulted in a bias against non-Navajo parents when they seek custody of children born in relationships with Navajos, or in favor of the jurisdiction of Navajo courts over custody determinations.

The federal Indian Child Welfare Act (ICWA)<sup>384</sup> provides the Navajo courts with broad, controversial jurisdiction over these custody disputes. Congress enacted ICWA in 1978 to address the startling and disproportionate rates at which Indian children were being removed from their homes and placed with non-Indian families. One of the central means through which the Act tried to curb this trend was to increase tribal court jurisdiction over custody decisions<sup>385</sup> involving Indian children.<sup>386</sup> The Act provides tribes with exclusive jurisdiction over such cases where the children are domiciled on reservations or are wards of the tribal court, and presumptive jurisdiction where the children are domiciled off reservation.<sup>387</sup> Concern that tribal courts given jurisdiction will favor tribal retention of Indian children over the children's best interests or the rights of the parent involved appears to motivate much ICWA litigation in state courts.

The Navajo Nation has one of the most active Indian Child Welfare offices in the country and in the 1980s obtained a landmark decision from the Utah Supreme Court affirming its jurisdiction over a Navajo child that had never lived on the reservation and had been placed since birth with a non-Indian adoptive family.<sup>388</sup> Its aggressive enforcement of the Act surely brings children with connections to non-Indian guardians and relatives into the Navajo courts. Despite this, not one of the 513 Navajo appellate cases on line

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<sup>383</sup> In re A.O., No. 4 Nav. R. 121 (Sh.R.Dist.Ct. 1987); *see also* In re Custody of S.R.T., 6 Nav. R. 407, 411 (S.Ct. 1991) (“There is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently, we have a special duty to ensure their protection and well-being.”)

<sup>384</sup> 25 U.S.C. §§ 1901-1931.

<sup>385</sup> The definition of child custody cases excludes both those arising from disputes between parents and those arising from criminal acts by minors. 25 U.S.C. § 1903(1).

<sup>386</sup> An “Indian child” is one that is either an enrolled member of a federally recognized tribe, or the biological child of an enrolled member and eligible for enrollment in the tribe. 25 U.S.C. § 1903(4).

<sup>387</sup> 25 U.S.C. § 1911(a) and (b). Under Section 1911(b), even where a case arises in state court, the court must notify the relevant tribe, and, upon a request by the tribe or the child's parent or guardian, must transfer the case to tribal court absent an objection by one of the child's parents or “good cause” to the contrary.

<sup>388</sup> In re Adoption of Holloway, 732 P.2d 962 (Utah 1986). The U.S. Supreme Court quoted extensively from the Holloway case in reaching the same holding. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

arises under ICWA.<sup>389</sup> This alone suggests that when the Navajo Nation courts exercise jurisdiction in custody cases involving nonmembers, parties tend to be satisfied with the results.

Additional evidence comes from the custody cases the court has decided. Custody disputes arising between parents are not governed by ICWA, and the Navajo courts have decided several of these. Of the six on-line appellate decisions involving custody of children of both Navajo and non-Navajo parents, non-Navajos won four. The earliest of these is *In re Chewiwi*,<sup>390</sup> a 1977 case concerning custody of the daughter of an Isleta Pueblo man and a Navajo woman.<sup>391</sup> During their marriage, the couple lived on the Isleta Pueblo, and enrolled their daughter, Catherine Chewiwi, with the Pueblo.<sup>392</sup> When Catherine was five, both her parents were killed in an auto accident and the Isleta Pueblo court appointed her paternal uncle as her guardian.<sup>393</sup> A few months later, while Catherine was visiting her Navajo maternal relatives on the Navajo Nation, they filed a petition for guardianship with the Navajo courts. The trial court granted them temporary guardianship, and the Chewiwis appealed.<sup>394</sup>

The Navajo Court of Appeals vacated the order. The court held that although it had jurisdiction over any Navajo child properly on the reservation, and the child was on the reservation with the consent of her legal guardian, “[t]he mere fact that the child visited relatives within the Navajo Nation cannot by itself confer on a Navajo court the subject matter jurisdiction to determine this child’s status.”<sup>395</sup> As to the Isleta Pueblo order, the court held that although the Navajo Nation was not a party to the U.S. Constitution, and therefore not bound to grant full faith and credit to foreign orders, the order would be recognized as a matter of comity.<sup>396</sup>

Subsequent decisions also recognize the rights of non-Navajo relatives in child custody disputes. In 1982 in *Lente v. Notah*,<sup>397</sup> the court vacated a district court order granting a Navajo father custody of his child with a Comanche woman. Although the parents had agreed to a divorce decree

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<sup>389</sup> Four cases, including three district court cases, mention the Act, but only to use its findings as guidance or to say that the cases are not brought under the Act. While none of the district court cases on line arise under the Act either, given the limited publishing of district court decisions one should not draw significant conclusions from this statistic.

<sup>390</sup> 1 Nav. R. 120 (1977).

<sup>391</sup> Id. at 120.

<sup>392</sup> Id. at 124.

<sup>393</sup> Id. at 120-21.

<sup>394</sup> Id. at 121.

<sup>395</sup> Id. at 124.

<sup>396</sup> Id. at 126-26.

<sup>397</sup> 3 Nav. R. 72 (1982)

stipulating that Ms. Lente would have custody, two years later Mr. Notah filed for custody claiming that she had given him the child saying she did not want her anymore.<sup>398</sup> The trial court granted temporary custody without granting the mother proper notice, an order the court found denied her “basic rights guaranteed by the Navajo Bill of Rights and common sense.”<sup>399</sup> Although Ms. Lente had later been given notice and participated in the hearings leading to the final custody order, she had preserved her right to object to jurisdiction and the appellate court held that the subsequent hearings were not enough to cure the initial improper order.<sup>400</sup> Although the appellate court vacated the order, it held that because the child likely formed psychological bonds with her father in the four years she had lived with him, she should not be removed pending rehearing. The court ordered that upon rehearing the lower court should obtain expert evaluations of the best interests of the child, and listed thirty-four factors it should consider in making its decision.<sup>401</sup> While the mother argued that the Navajo custom of matrilocality should determine the case in her favor, the court held that this was a decision for the trial court, which had the power to determine whether it was appropriate to follow common law under the circumstances.<sup>402</sup> (In a subsequent custody dispute between Navajo parents, the court held that following the common law presumption of custody in favor of the mother would violate the Navajo Equal Rights Amendment.<sup>403</sup>)

The next case, *Yazzie v. Yazzie*<sup>404</sup> concerned an action filed by a Navajo father for divorce of his Comanche wife and custody of his four children. At the time of the filing, his wife and their children had not resided on the reservation for some time.<sup>405</sup> After initially filing a motion challenging jurisdiction, the mother did not further participate in the proceedings.<sup>406</sup> The judge, therefore, granted the divorce and decided as to the division of property and custody of the children by default.<sup>407</sup> The appellate court reversed. It held that while the trial court had jurisdiction over the marriage as the father resided on the Navajo Nation, it did not have custody over the children or

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<sup>398</sup> *Id.* at 72.

<sup>399</sup> *Id.* at 75.

<sup>400</sup> *Id.* at 74.

<sup>401</sup> *Id.* at 78-79.

<sup>402</sup> *Id.* at 79-80. In *Matter of Chewiwi* the court had recognized an order placing a child with her non-Navajo paternal relatives, an order that would go against this customary tradition. Common law, however, does not appear to have been raised in the case.

<sup>403</sup> *Help v. Silvers*, 4 Nav. R. 66 (S.Ct. 1985).

<sup>404</sup> 5 Nav. R. 66 (S.Ct. 1985).

<sup>405</sup> *Id.* at 67.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

property off the reservation.<sup>408</sup> While affirming the divorce, therefore, the court vacated the remainder of the order for lack of jurisdiction.

The court has also made substantive custody determinations that favored non-Navajo parents. In *Pavenyouma v. Goldtooth*,<sup>409</sup> the lower court found both the Hopi mother and Navajo father to be suitable parents,<sup>410</sup> but after the parents could not agree on a plan for joint custody of their five children ordered that the mother would have custody of two of the children and the father would have custody of the other three. The appeals court reversed, finding that while it was preferable for parents to agree on arrangements for joint custody, it was the obligation of the court to step in if they could not.<sup>411</sup> The court ordered that the mother would have custody of all children during the school year, while the father would have custody during the summer, and ordered the father to pay child support while the children were with their mother.<sup>412</sup>

The one troubling case is *In re Custody of S.R.T.*,<sup>413</sup> in which the court upheld a default order granting a Navajo mother custody over her child against the claims of a non-Indian that claimed to be the father. Although the child was an enrolled member of the Navajo Nation, he was living in Texas with the sister of the non-Indian alleged father at the time the petition for custody was filed.<sup>414</sup> The non-Indian father had received notice of the petition and had retained local counsel before the hearing.<sup>415</sup> Neither the father nor his attorney, however, showed up for the hearing. The attorney had mailed a motion for continuance to the court on the day before the hearing, and it was not received until the day after the hearing.<sup>416</sup> The appellate court found that the father had proper notice of the hearing and no excuse for failing to appear.<sup>417</sup>

The Navajo Supreme Court did, however, examine the limited evidence of paternity presented on appeal. The mother's name alone was on the birth certificate and the child had the mother's name, and the couple had only lived together briefly before the appellant began living with another woman.<sup>418</sup> The only written evidence of any family relation with the

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<sup>408</sup> *Id.* at 70-71.

<sup>409</sup> 4 Nav. R. 17 (Ct.App. 1984).

<sup>410</sup> *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (1982)

<sup>411</sup> 4 Nav. R. at 18-19.

<sup>412</sup> *Id.* at 20-21.

<sup>413</sup> 6 Nav. R. 407 (S.Ct. 1991).

<sup>414</sup> *Id.* at 407.

<sup>415</sup> *Id.* at 408.

<sup>416</sup> *Id.*

<sup>417</sup> *Id.* at 412.

<sup>418</sup> *Id.* at 410.

appellant was a letter authorizing his sister to consent to medical care for the child, and the court found this was not enough to establish paternity.<sup>419</sup> As to jurisdiction, the court found that as the child was born out of wedlock, because the father had made no efforts to establish paternity his domicile for jurisdictional purposes was the same as that of the natural mother.<sup>420</sup> While the jurisdictional decision seems unfair to the off-reservation father, the principle that domicile of an illegitimate child was that of the child's mother regardless of whether the child had ever been present in the jurisdiction derives from Anglo-American law.<sup>421</sup>

While the appellate court has decided one additional case, *In re A.O.*,<sup>422</sup> in a way unfavorable to a non-Navajo parent, this was an intermediate decision. In the case, the court reversed a lower court's dismissal of a petition for custody and remanded for more facts as to jurisdiction.<sup>423</sup> On remand the district court affirmed the denial of jurisdiction.<sup>424</sup> The child had been made the ward of the court based on a petition alleging abuse, a fact that would ordinarily grant the court jurisdiction. The district court found, however, that the order of wardship was based on a fraud on the court, as the petitioners had not notified the court of the pending New Mexico court case.<sup>425</sup> Under these facts, the court ceded to the concurrent jurisdiction of the New Mexico courts.<sup>426</sup> Two other district court cases involving non-Navajo parents are also on-line, and both reveal the same reluctance to accept questionable jurisdiction.<sup>427</sup>

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<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 409-411.

<sup>421</sup> The U.S. Supreme Court affirmed this as a principle of federal common law in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) holding that illegitimate children were domiciled on the reservation where mother lived although had never been there. *See also* *Matter of Appeal in Pima County Superior Court Action No-S903*, 635 P.2d 187 (Ariz. Ct. App. 1981); 25 Am. Jur. 2d Domicile § 41 (2003).

<sup>422</sup> 4 Nav. R. 121 (Ct.App. 1987).

<sup>423</sup> *Id.* at 123-24.

<sup>424</sup> 4 Nav. R. 285 (S.R.Dist.Ct. 1987).

<sup>425</sup> *Id.* at 290-91.

<sup>426</sup> *Id.* at 291.

<sup>427</sup> *In re Custody of B.N.P.*, 4 Nav. R. 155 (1983), for example, involved a custody dispute between a Mescalero Apache mother and a Navajo father. The couple obtained a divorce decree in Mescalero Apache court, and originally stipulated to custody in the father. Two years later, however, while the children were on the Mescalero Apache reservation visiting their mother, the mother returned to the Mescalero court and, under the pretext of the presence of the children, had the decree modified. Some months later, when the children were visiting the father, he went to the Navajo Nation court for custody using the same pretext. The court recognized the delicacy of the dispute, stating that "this court is called upon to make a decision on which of the two Indian governments should exercise the power and duty to protect children under their care. The foremost consideration for this court must be the best

In sum, therefore, even in the vital issue of custody of children with Navajo heritage, the court appears to have been equitable to non-Navajo parents, and not to have asserted a broad jurisdiction that would deprive parents of their rights.

#### **e. Conclusion**

The data regarding the experience of nonmembers in the Navajo courts do not support the assumption of the United States Supreme Court that nonmembers will be at a disadvantage in tribal courts. Nonmembers win half of the time they appear before the courts, and the decisions reveal few troubling assessments of law or fact. This is true even in cases involving matters that would seem particularly vulnerable to bias. More work needs to be done regarding nonmembers in other tribal court systems. But given the disproportionate size and population of the Navajo Nation and the fact that more than most tribal courts it has the characteristics particularly troubling to the U.S. Supreme Court, data regarding the Navajo courts are of particular relevance.

The relative fairness of the courts, however, does not speak to the second assumption of the Supreme Court, that adjudication of outsider rights has little to do with “self-government,” or the legal and governmental integrity of tribes. The following sections of the Article will discuss the particular historical position of tribal legal justice systems, additional statistics regarding nonmembers in the Navajo courts, and theoretical insights regarding the role of formal legal institutions to challenge this assumption.

### **III. Origins of Tribal Courts and the Struggle for Legitimacy**

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interests of the children who come before it, and after that considerations of governmental relations come into play.” It declared that it was uncomfortable with the parental kidnapping on both sides, but declined to recognize the modified Mescalero Apache decree as jurisdiction was fraudulently obtained. Deciding the case on the merits, the court held that because the children had always lived on the Navajo Nation, and said they were afraid to live with the mother because of her drinking, the court ordered custody in the father with reasonable visitation in the mother. In *In re Adoption of S.C.M.*, 4 Nav. R. 167 (1983), the court denied a Navajo uncle of a Canadian Indian child the right to an adoption and temporary custody order. Although the parents had signed consent to adoption in Canada, it was not clear why the adoption had not been pursued in Canadian court, or that the Navajo Nation courts even had jurisdiction over the child under the applicable rules of domicile and personal jurisdiction. Nor could the uncle have the investigation for adoption waived, although a Canadian report appeared to be attached to the affidavits of consent. Instead, the uncle was required to prove that the Navajo Nation court, and not the Canadian courts, was the appropriate forum.

Tribal courts in the United States have an ambiguous meaning in Indian communities. They have been both tools of acculturation, intended to undo indigenous culture and contribute to assimilation of Indian people, and tools of resistance to the colonial project, means of asserting sovereignty, warding off foreign interference, and finding uniquely tribal ways of dealing with the clash between tribal and non-tribal cultures. The history of the Navajo Nation court system repeats these themes of colonialism and resistance. This distinctive history shapes the present struggle to develop legitimate and functioning legal systems, and the role of outsiders within this struggle.

#### **a. Tribal Courts as Tools of Acculturation**

The current denigration of tribal justice systems is not new. Federal policy makers have long portrayed Indian people as without meaningful law,<sup>428</sup> even when there was ample evidence to the contrary. Thus in 1834, Congress declared that the Indian country beyond the Mississippi was characterized by a “want of fixed laws, of competent tribunals of justice,”<sup>429</sup> despite the fact that the southeastern tribes it had settled there had police, constitutions, written codes, and trial and appellate courts as sophisticated as many territorial courts.<sup>430</sup> Similarly, in 1883 the Supreme Court described Brûlé Sioux methods of dealing with murderers as “red man’s revenge,”<sup>431</sup> although federal officials knew that the tribe had already resolved the matter through Sioux justice methods of mediation and symbolic compensation,<sup>432</sup> a mode of punishment at least as civilized as the hanging in vogue in non-Indian courts of the time.

This constructed absence of law served federal purposes well. For a country whose most important legal decision proudly declares that “[t]he government of the United States has been emphatically termed a government of laws, and not of men,”<sup>433</sup> to be without law was automatically to be inferior. In addition, it was easier for the federal government to continue to

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<sup>428</sup> See, e.g., Carole E. Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1410-11 (1997).

<sup>429</sup> H. Rep. No. 23-474, 23d Cong., 1<sup>st</sup> Sess., 18 (1834), reprinted in 263 U.S. Serial Set.

<sup>430</sup> When these legal systems were examined by independent observers, they confirmed their fairness and efficiency. See, e.g., Bethany R. Berger, “Power Over this Unfortunate Race”: *Race, Politics and Indian Law in U.S. v. Rogers*, WILLIAM & MARY L. REV. (forthcoming 2004) (discussing independent reports on Cherokee courts, police, and legal codes).

<sup>431</sup> *Ex Parte Crow Dog* (Kan-gi-shun-ca), 109 U.S. 556, 571 (1883).

<sup>432</sup> SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* at 103-05 (1994).

<sup>433</sup> *Marbury v. Madison*, 5 U.S. 137, 161 (1803).



believe itself worthy of the “high appellation” of a government of laws<sup>434</sup> if it could pretend that it was not breaking the laws of another people in taking their property and sovereignty. The perceived absence of law thus created a vacuum that justified the extension of federal power.<sup>435</sup>

These policy makers were also well aware of the ways that law transforms consciousness. They saw acceptance of Anglo law as both necessary and instrumental to acceptance of Anglo civilization. In 1832, the first Commissioner of Indian Affairs, Elbert Herring, declared that, “the absence of *meum* and *tuum* in the general community of possessions, which is the grand conservative principle of the social state, is a perpetual cause of the *vis inertiae* of savage life.”<sup>436</sup> By the 1850s, when the Indian Department was formulating its policy of forcible assimilation, it was advocating for imposition of legal systems on tribes.<sup>437</sup> Treaties of the time allowed the President to prescribe systems of law for the Indians, and administrators advocated for dictation of civil as well as criminal laws as a necessary step in the assimilationist project.<sup>438</sup>

In the 1860s, federal agents on Indian reservations began to experiment with using Indian people as tools for imposition of legal order on reservations. They appointed Indians as police officers, and set themselves or trusted Indians as judges. While federal officials quite early began to place Indians in positions of power in reservation legal systems, they did not do so to empower tribal people. By appointing tribal members as judges and police, federal agents not only saved money and gained staff, they made tribal people

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<sup>434</sup> *Id.*

<sup>435</sup> See, e.g., Berger, *Power Over this Unfortunate Race* at \_\_\_\_ (describing fabrication of jurisdictional gap in order to justify criminal jurisdiction over intermarried white citizen of Cherokee nation); Carole E. Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406-1415 (1997) (describing effect of misperception of lawlessness in passage of P.L. 280); HARRING at 100-01 (describing creation of appearance of absence of law and order to justify Major Crimes Act extending federal jurisdiction over crimes between Indians).

<sup>436</sup> WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL at 9 n.8 (1966).

<sup>437</sup> Annual Report of the Commissioner of Indian Affairs for 1851, S. Execdoc. No. 1, 31<sup>st</sup> Cong., 1<sup>st</sup> Sess., Doc. 41 at 416-17 (1851), *reprinted in* 613 U.S. Serial Set (report of Gov. Alexander Ramsay, Superintendent of the Minnesota Superintendency).

<sup>438</sup> See *id.* (describing need for “the prescription of laws, which shall not alone punish criminal offenses, but which may also protect the delicate and complicated rights which arise when the relations between man and man are carried to a high degree of perfection.”); HAGAN, *supra* note 436 at 9 (“Until the rights of property, the distinctions of *meum* and *tuum*, are recognized; until the wrongdoer himself can be made to feel the punishment due to his misdeeds, it will be vain to expect that reform, morally or physically, so much desired by our government.”) (quoting 1851 Report of Commissioner of Indian Affairs).

agents of their own acculturation. These tribal members were more effective in enforcing the will of the colonizers than the government itself could ever be. Seduced by the hope of gaining power and prestige in a federal system intent on depriving them of traditional sources of pride, Indian people were wonderfully efficient at policing, hunting, and capturing their own.<sup>439</sup> But the Indian Department was not satisfied with even this level of tribal involvement in Indian control, and sought the extension of all federal laws over Indians.<sup>440</sup> Congress would not accede to this violation of tribal sovereignty, and instead simply authorized funding for tribal police in 1878.<sup>441</sup>

The first federally sanctioned tribal courts did not have even this minimal congressional support. Rather, they were the result of direction by H.M. Teller, the newly appointed Secretary of the Interior, to create institutions to help put an end to a variety of practices he saw as obstacles to tribal assimilation: religious dances, polygamy, use of medicine men, and the custom of abandoning and destroying the homes of the dead.<sup>442</sup> By April 10, 1883, a few months after this order, Commissioner Hiram Price had promulgated regulations establishing of Courts of Indian Offenses<sup>443</sup> along with a code forbidding each of these expressions of indigenous culture.<sup>444</sup> In 1888, the District Court of Oregon called these courts “mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian.”<sup>445</sup>

While the district court stated that the courts were a “laudable effort . . . to educate these Indians in the habit and knowledge of self-government,”<sup>446</sup> policy makers in the East hoped that they would destroy tribal governments. One Commissioner of Indian Affairs declared that the tribal police force was “a power entirely independent of the chiefs. It weakens, and will finally destroy, the power of tribes and bands.”<sup>447</sup> Indian police and courts were used to round up children for boarding schools, to sanction tribal members that did

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<sup>439</sup> HAGAN, *supra* note 436 at 26-27, 31, 35-36. As the Agent of San Carlos Apache boasted, “our little squad of Indian Police have done more effective scouting. . . . than General Kautz has done with all his troops and four companies of Indian scouts.” *Id.* at 37.

<sup>440</sup> HAGAN, *supra* note 436 at 42.

<sup>441</sup> *Id.*

<sup>442</sup> Report of the Secretary of the Interior, House Exec. Doc. No. 1, part 5, 48<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Dec. 2, 1882), *reprinted in* U.S. Serial Set 2190.

<sup>443</sup> 1883 Report of the Commissioner of Indian Affairs (April 10, 1883), *reprinted in* 2191 U.S. Serial Set.

<sup>444</sup> U.S. v. Clapox, 35 F. 575, 576 (D. Ore. 1888).

<sup>445</sup> *Id.*

<sup>446</sup> *Id.*

<sup>447</sup> HAGAN, *supra* note 436 at 79.

not carry out BIA work assignments, and capture those that rebelled against federal policies.

Nor were there any guarantees of neutrality in the justice dispensed. While one of the contemporary complaints is that tribal courts are not independent from tribal political branches,<sup>448</sup> it appears that the blurring of judicial and political roles is an inheritance from this early period of federal domination. The federal superintendent or agent typically appointed the Indian judges, sometimes acted as prosecutor, and all of the decrees of the court were subject to his approval. At many agencies, congressional failure to appropriate any funding for judges' salaries until 1888, or adequate funding thereafter, necessitated that tribal police double as judges, arresting a suspect, bringing him in, and then changing hats and sentencing him.<sup>449</sup> In 1891, the Board of Indian Commissioners declared that the courts were "more in the nature of courts martial than civil courts, and practically register the decrees of the Indian agent."<sup>450</sup>

While by 1900 two thirds of Indian agencies had Courts of Indian Offenses,<sup>451</sup> this was the height of their existence, and by 1928 there were only 30 remaining.<sup>452</sup> As part of the Indian New Deal of the 1930s, federal officials worked with tribes to create "tribal courts" with the freedom to draw up their own codes.<sup>453</sup> Indian Services officers were prohibited from "controlling, obstructing, or interfering with the function of Indian Courts," and tribal approval was needed for appointment or removal of judges.<sup>454</sup> By 1978, when *Oliphant* was decided, out of 133 tribal courts, only 33 were Courts of Indian Offenses.<sup>455</sup> But despite the name changes, the new tribal courts were still creatures of federal influence,<sup>456</sup> and the heritage of western

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<sup>448</sup> *Duro v. Reina*, 494 U.S. 676, 693 (1990); *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J. concurring).

<sup>449</sup> *Id.* at 111.

<sup>450</sup> *Id.* at 110.

<sup>451</sup> HAGAN, *supra* note 436 at 109.

<sup>452</sup> INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION at 769 (1928) (hereinafter MERIAM REPORT).

<sup>453</sup> HAGAN, *supra* note 436 at 137.

<sup>454</sup> FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS at 954 (1984) (quoting 1836 report of Commissioner of Indian Affairs John Collier).

<sup>455</sup> Brief of Amicus Curiae National American Indian Court Judges Association, *Oliphant v. Suquamish Indian Tribe* at 6.

<sup>456</sup> Robert Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUMBIA HUMAN RTS. L. REV. 235, 270 (1997).

style courts as tools of the federal agents directed at assimilation still colors the perception and the reality of these courts on many reservations.<sup>457</sup>

## **b. Tribal Courts as Tools of Resistance**

But there is an alternative history to tribal courts. In this history, tribal courts are tools of resistance, ways both to ward off outside interference with tribal affairs and win the right to achieve tribal solutions to modern problems. Even where the institutions were designed by outside forces hostile to tribes, tribal people often found ways to subvert these purposes and validate their culture in the foreign forms. By doing so in institutions recognizable by non-Indians, moreover, they created a space and means for resistance.

The first western style tribal courts were those created by the Cherokee Nation in 1820.<sup>458</sup> The courts and the code they enforced may be criticized as voluntary assimilation, an example of more assimilated members of the community hijacking the Cherokee government and forcing it to turn from traditional law ways.<sup>459</sup> But as Rennard Strickland has shown, Cherokee adoption of a centralized legal authority and many of the laws subsequently adopted were not an accession to federal efforts at assimilation, but instead a response to the need for unity in the face of attempts to take Cherokee land.<sup>460</sup>

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<sup>457</sup> See POMMERSHEIM, *supra* note 8 at 67; Porter at 263 (criticizing “all modern tribal court systems” as “direct descendants of the Anglo-American legal tradition”).

<sup>458</sup> Although these courts were the result of western influence, at the time of contact, Cherokee villages already had well understood legal rules, with several specialized systems of adjudicating and punishing offenses against the law, including a white court for domestic matters, a red court for matters of war or external relations, and a women’s council for offenses against regulations of special concern to women. RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* at 24-26 (1975).

<sup>459</sup> See Porter, *supra* note 456 at 264-65.

<sup>460</sup> The Cherokee Constitution of 1827, for example, contains elements that suggest rejection of the Cherokee legal culture in favor of American culture, see *LAWS OF THE CHEROKEE NATION ADOPTED BY THE COUNCIL AT VARIOUS PERIODS* at 118-30, & (1852) (Scholarly Resources, Inc. reprint 1973). The constitution adopts the American tripartite governmental system, Art. II, Sec. 1, parts of the federal Bill of Rights, Art. V, Sec. 14-15 & Art. VI, Sec.3, requires belief in “a God,” and “a future state of rewards and punishment.” Art. VI, Sec. 2. But the first, and probably the most important portion of the Constitution, declares that “the boundaries of this Nation, embracing the lands solemnly guarantied and reserved forever to the Cherokee Nation by the Treaties concluded with the United States . . . shall forever hereafter remain unalterably the same,” then extensively describes these boundaries, and declares that “the sovereignty and Jurisdiction of this Government shall extend over the country within the boundaries above described, and the lands therein are, and shall remain, the common property of the Nation.” *Id.* at Art. 1; see STRICKLAND, *supra* note 458 at 65; see also Theda Perdue (discussing tension between assimilationist and traditional elements of constitution). Coming at the height of the pressure to remove Cherokees from their

While not all laws had this land-preserving justification, the early history of the Cherokees' western legal system shows that it often supplemented rather than displaced Cherokee law ways. The parties before the court were largely relative outsiders—assimilated mixed blood Cherokees, intermarried whites, and blacks<sup>461</sup>--and the disputes before it were largely those involving new problems that Cherokee customary law did not address.<sup>462</sup> At the same time, traditional Cherokee law ways often continued to govern the situations for which they were designed. In other cases the new Cherokee laws were designed to protect Cherokee people from the opposing legal customs of outsiders. One of the earliest laws, reenacted several times, provided that a white man could not, by marriage, gain the right to dispose of a Cherokee woman's property without her consent,<sup>463</sup> a law that both protected Cherokee land from white usurpation and preserved traditional marital property laws.<sup>464</sup>

The western structure also created a space in which traditional law ways could be expressed. The unassimilated Cherokee-speaking majority tended to elect judges like themselves who were able to resolve disputes according to more traditional norms.<sup>465</sup> Jurors as well tended to represent the

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homelands, these declarations of sovereignty and property rights, and the implicit statement that the Cherokee Nation was a government equal to any other, were the height of resistance.

<sup>461</sup> STRICKLAND, *supra* note 458 at 75.

<sup>462</sup> In particular, these concerned questions of commerce and transmission of wealth. *Id.* at 75 & 84. As traditional Cherokee culture condemned the accumulation of wealth beyond ones needs, WILLIAM G. MCLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* at 326-27 (1983), there were no laws to regulate the wealth of those that had adopted a capitalist market economy.

<sup>463</sup> See LAWS OF THE CHEROKEE NATION ADOPTED BY THE COUNCIL AT VARIOUS PERIODS at 10 (1852) (Scholarly Resources, Inc. reprint 1973) (enacted Nov. 19, 1819) (*hereinafter* LAWS OF THE CHEROKEE NATION).

<sup>464</sup> Traditionally, Cherokee women were considered the owners of the home, buildings, and farmlands of the family, Theda Perdue, *Southern Indians and the Cult of True Womanhood*, in *THE WEB OF SOUTHERN SOCIAL RELATIONS* 37 (Walter J. Fraser et al. eds., 1985), and her property descended to her maternal relatives. McLoughlin, *Cherokee Renascence* at 13, 31 & 330.

<sup>465</sup> See STRICKLAND, *supra* note 458 at 154-56 (describing Cherokee judge resolving Cherokee language contract dispute according to "desire to prevent destruction of long friendships and family ties").

traditional majority.<sup>466</sup> Trials were thus conducted in part in Cherokee,<sup>467</sup> and might incorporate tradition in other ways invisible to non-Indians.<sup>468</sup>

None of this is to say that the resulting legal system always met this goal of addressing the new conflicts posed by this clash of cultures,<sup>469</sup> or that some of the Cherokees crafting it did not intend for the laws to help displace the more traditional Cherokee culture.<sup>470</sup> But it is clear that the adoption of a western legal system was much an effort at resistance and survival under changed circumstances as it was one of assimilation, and that while styled in a western mold, it came to reflect traditional practices as well.

Even the federally imposed Indian police and Courts of Indian Offenses created space for resistance. The Indian police were often willing participants in their own colonization, helping federal officials complete tasks inimical to tribal identity. But they also at times resisted such tasks. The Shoshone and Bannock police force, for example, resigned en masse rather than round up school children or arrest the parents that failed to send them.<sup>471</sup> The Ute police chief was fired after he led the opposition to the boarding schools.<sup>472</sup> The Jicarilla Apache police force also resigned rather than be forced to capture renegade members of another Apache clan.<sup>473</sup>

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<sup>466</sup> See JOHN HOWARD PAYNE, INDIAN JUSTICE: A CHEROKEE MURDER TRIAL AT TAHLEQUAH IN 1840 at 51 (Grant Foreman, ed. 2002) (listing names of jurors).

<sup>467</sup> The record of an 1840 trial in which the defendant, judge and attorneys might all be considered part of the pro-assimilation segment of the population, indicates that all of these parties addressed the jury in Cherokee. *Id.* at 34-35, 39, 55, 87-88.

<sup>468</sup> For example, a detailed report of an 1840 Cherokee trial reflects that throughout the trial the defendant smoked a pipe, which both the judge and jurors at times shared. *Id.* at 51. While the white reporter transcribing the proceedings was bewildered by this conduct, it is likely this was a traditional practice intended to influence the proceedings.

<sup>469</sup> One scholar has declared of this early period, "The more the law meddled with tradition, trying to reconcile old and new, the more puzzling life became. Rules and regulations governing social life often produced more confusion than clarity." McLoughlin, *Cherokee Renaissance* at 333.

<sup>470</sup> Over seventy years after this initial period, one assimilated Cherokee commentator stated that "The policy of our fore-fathers in establishing our present government was largely paternal. The educated and enlightened Indians [intended] to foster and guard the interests and rights of the full blood while he was gradually being led, by precept and example, into the way he should go. . ." STRICKLAND, *supra* note 458 at 73 (quoting Cherokee Advocate of 1895). This statement, made so much after the fact, should not be taken as reflecting the reality. But it is true that the early part of the nineteenth century was one of significant conflict between the assimilated and traditional portion of the population, and the business of writing laws largely fell to the assimilated minority. See McLoughlin, *Cherokee Renaissance*.

<sup>471</sup> HAGAN, *supra* note 436 at 74-75.

<sup>472</sup> *Id.* at 78.

<sup>473</sup> *Id.* at 81.

In addition, while Eastern policy makers envisioned the Indian police as furthering the assimilationist goals of the administration, in practice much of their time was spent controlling non-Indians that preyed on the tribes.<sup>474</sup> While it had been a federal crime to trespass on Indian lands or property since 1790,<sup>475</sup> federal officials had never had the will to effectively enforce these laws.<sup>476</sup> The Indian police forces had no such compunctions. The Kiowa and Comanche police spent their days riding the Texas range noting the brands of cattle that white ranchers let graze without permission so that fines could be charged against their owners.<sup>477</sup> Policemen also enforced prohibitions against poaching on Indian lands, in one instance confiscating 114 quail stolen for export to New Zealand,<sup>478</sup> and seizing and destroying shipments by liquor smugglers.<sup>479</sup>

The Indian police and courts also replaced more coercive efforts at federal domination. Agents originally turned to Indian police to decrease the influence of the U.S. military,<sup>480</sup> and were able to use their existence to justify removal of troops from Indian agencies.<sup>481</sup> While federal statements as to the wishes of Indian people are often more reflective of federal rather than Indian desires, commonsense gives credence to federal reports that Indians were not eager to be supervised by federal troops.<sup>482</sup> Indian police and courts were also authorized in a time of intense pressure by the Indian Department to extend full federal jurisdiction over Indian people.<sup>483</sup> The Indian institutions, while also coercive, at least preserved some measure of self-government.

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<sup>474</sup> *Id.* at 52-53, 127.

<sup>475</sup> 1 Stat. 137 (1790).

<sup>476</sup> See e.g., Carole E. Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1413 (1997)

<sup>477</sup> HAGAN, *supra* note 436 at 52-53.

<sup>478</sup> *Id.* at 53-54.

<sup>479</sup> *Id.* at 55.

<sup>480</sup> Major Indian wars in the aftermath of the U.S. Civil War lead to a vehement and nearly successful campaign to transfer the Indian Office back from the Department of the Interior to the War Department. PRUCHA, *supra* note 454 at 482. Indian agents were thus under pressure to show that their methods, which relied on more subtle coercion of Indian people, were at least as successful as military force in preserving order.

<sup>481</sup> HAGAN, *supra* note 436 at 30-31, 50.

<sup>482</sup> See Annual Report of the Comm'r of Indian Affairs, H. Exec. Doc. 1 at 472, 40<sup>th</sup> Cong., 3<sup>rd</sup> Sess. (1868), reprinted in 1366 U.S. Serial Set (Commissioner Taylor reporting that he had consulted with leaders of many tribes in past year and "without exception, they have declared their unwillingness to have the military among them.").

<sup>483</sup> Hagan, *supra* note 436 at 42. See also Harring at 134-36. In 1885, the Indian Department did win a partial victory when Congress enacted the Major Crimes Act extending federal jurisdiction over certain crimes between Indians. Harring at 134.

Nor did the courts function as the controlled educational instruments federal policymakers envisioned. For example, although the only firm prerequisite for judgeship was that the judge not be a polygamist, agents were often required to waive this requirement in order to secure the services of individuals that actually commanded the respect of their tribes. The Comanche leader Quannah Parker, for example, began his judgeship with six wives and married a seventh during his tenure.<sup>484</sup> While Parker was an advocate for adoption of Anglo concepts of property and commerce, he also defended the use of peyote, which he himself used, and refused to support the abolition of Indian dances.<sup>485</sup> The record of one of his cases shows how little Parker enforced Anglo prescriptions against polygamy and adultery. A man had been charged with having seduced a woman away from her husband. The husband had another wife, but she was ill. The man was found guilty, but was not fined or sentenced.<sup>486</sup> The woman was told to return to her husband, but only until his other wife had recovered.<sup>487</sup>

The Kiowa and Comanche court was not the only Court of Indian Offenses whose operation was better tailored to tribal than federal conceptions of justice. While the courts of Indian offenses were criticized as paramilitary tribunals of despotic agents, the 1928 Meriam Report found that they were “more open to criticism for lenity than for severity,”<sup>488</sup> and that when the superintendent wished to be “particularly severe on a particular Indian, the usual means of attaining his desire [was] to turn the individual over to the state or United States courts for attention.”<sup>489</sup> Proceedings before the courts were informal, and were conducted in the language of the tribe with only a brief record in English,<sup>490</sup> effectively denying federal officials much control over the proceedings. At most Courts of Indian Offenses, they found, the “decision of the Indian judges [was] untrammelled.”<sup>491</sup> Probably in response to this minimal level of control, at ten agencies superintendents had abandoned Courts of Indian Offenses and assumed the judgeship themselves.<sup>492</sup> Nor were decisions shaped by the federal regulations for

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<sup>484</sup> HAGAN, *supra* note 436 at 135-38.

<sup>485</sup> *Id.* at 133.

<sup>486</sup> *Id.* To do otherwise would have been rank hypocrisy—the judge’s seventh wife had also been married to another man until she left him for Parker. *Id.* at 137.

<sup>487</sup> *Id.* at 135.

<sup>488</sup> INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION at 17 (1928) (the report is commonly called the Meriam Report after the director of the study, Lewis Meriam) (hereinafter MERIAM REPORT).

<sup>489</sup> *Id.* at 773.

<sup>490</sup> *Id.* at 770-71.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.* at 772.



Courts of Indian Offenses. In the courts the investigators observed, “[t]he decision rendered . . . depends not upon code or precedent, but upon that subtle quality of the mind called common sense and upon an understanding of the current native ideas of property and justice.”<sup>493</sup>

In part, the necessity for these courts came from the fact that traditional justice systems had either been destroyed by the colonial process, or did not have the respect of the outside forces to which tribal members had to present formal evidence of marriage, inheritance, or criminal punishment. But while the need for such courts may have been created by outside influence, the courts responded to this need in a way accessible to and desired by at least some tribal people. Even as federal support for Courts of Indian Offenses declined in the early 1900s, therefore, some tribes advocated for their establishment. The Umatilla Tribe, for example, asked for permission to reestablish their court, as they needed a formal system to resolve disputes but “it is an unheard of occurrence for an Indian to prosecute another Indian in civil courts, where they have to employ lawyers and pay cutthroat fees.”<sup>494</sup> Others turned against the Bureau interference but independently adopted western police and court systems, such as the Mission Indian Federation that was active in California at the beginning of the twentieth century.<sup>495</sup> While these groups felt the need of a legal system that in some ways resembled the Anglo one, they also wanted a system tailored to the needs of their communities. The Meriam Report took a similar position, adopting the view of one Indian commenter<sup>496</sup> that

When an Indian offender is brought before the Court of Indian Offenses, neither he nor his family feels under obligation to retain an attorney or to go to any other special expense in the matter. If on the other hand he is taken before a white man’s court, either state or federal, he and his family, if not his friends, will spend all they can raise in his defense, because to them imprisonment in the white man’s institutions, even if only

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<sup>493</sup> *Id.* at 769.

<sup>494</sup> HAGAN, *supra* note 436 at 144.

<sup>495</sup> Carole E. Goldberg, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1414 (1997)

<sup>496</sup> The report describes him as an “exceptionally able mixed-blood Indian employee of the government,” MERIAM REPORT at 773, a description that was undoubtedly intended to commend him to a white audience, but that requires caution in evaluating whether his views reflect those of most Indian people.

for a few months, is an extremely severe penalty, as it goes so counter to Indian nature.<sup>497</sup>

For the Meriam Report authors, as for the Congress of the late nineteenth century, the existence of such courts also enhanced the argument against extension of jurisdiction by state or federal courts.<sup>498</sup> The former, it was agreed, were irremediably hostile to Indian interests,<sup>499</sup> and the latter would not be able to as “as wisely or as surely administer justice among the Indians” as the Indian judges themselves could.<sup>500</sup>

Thus despite the overtly colonial intentions behind federal desires to “bring law to the Indians,” the impact of the tribally administered western styled legal systems was mixed. In part, they performed a gap filling function, creating a forum for disputes for which traditional legal norms and procedures were not designed. In particular, their hybrid nature allowed them to address disputes involving those, such as whites and assimilated tribal members, who were less tied to traditional norms. The norms and procedures used to resolve these disputes, moreover, were not pale imitations of western concepts; traditional tribal conceptions of justice were often incorporated, and new ones were developed in response to changing tribal needs. By doing so in a forum that was recognizable by outsiders, these tribal legal institutions also became a force for asserting tribal sovereignty and warding off incursions against it. The heritage of contemporary tribal courts is thus distinctly ambivalent, one of both acculturation and resistance. It is this legacy that modern tribal justice systems must grapple with in the difficult struggle for legitimacy and efficacy.

### **c. The Navajo Experience**

The above themes repeat in Navajo legal history. The Navajos’ first experience with a western legal system came at the time of their most severe domination by the United States. In 1864, after centuries of successful resistance to Spanish, Mexican, and American forces,<sup>501</sup> Navajo leaders

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<sup>497</sup> *Id.*

<sup>498</sup> While the Report did advocate extension of such jurisdiction in certain matters, and particularly for the more assimilated classes of Indians, it also recommended continuation of Courts of Indian Offenses for others.

<sup>499</sup> *Id.* at 774, 775-56.

<sup>500</sup> *Id.* at 777-78

<sup>501</sup> Although Spain had first begun to colonize the Southwest in the 1500s, RAYMOND FRIDAY LOCKE, *THE BOOK OF THE NAVAJO* 154 (5<sup>th</sup> Ed. 1992), and the Mexicans in their stead had waged a campaign of raiding and slavery against the Navajo for many decades, *id.*, when the United States claimed the territory after the Mexican War of 1846, the Navajos still lived independently, and few had entered the depths of their country. *Id.* at 207.

finally accepted defeat at the hands of Kit Carson and his troops. Under siege and threat of starvation if they did not leave their canyon strongholds, about half of the Navajo population took the “Long Walk”<sup>502</sup> to Fort Sumner in Bosque Redondo, New Mexico. Heartsick at their forced separation from *Dinetah*, the Navajo homelands, and dependent on the federal superintendent for inadequate rations,<sup>503</sup> Navajos became subjects in a failed experiment at forced colonization. Used to living in isolated compounds far from other family groups, they were forced to live in closely spaced houses aligned along rectilinear streets.<sup>504</sup> While the Navajos had long been successful farmers, at the ill-situated Fort they were made to clear bitter mesquite brush on diseased, alkaline soil to plant crops that failed for four successive years.<sup>505</sup> Deprived of most of their horses and weapons, the people were preyed upon by raiding Comanche.<sup>506</sup> Women aborted their children rather than see them die of

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<sup>502</sup> Like the better known Trail of Tears walked by the Five Civilized Tribes across the Mississippi, many died on this four hundred mile trip. In the words of one historian, “By the second day of the march coyotes began to follow the long line of Navajos, marching a few abreast in family groups, and hawks and crows circled overhead, weakened and stumbled, and as soon as they fell they were slaughtered and the meat divided among the hungry Dineh. Without the horses, many of the aged, too weak to keep up, were left behind. Their relatives gave them a little food and marched on with tears in their eyes.” LOCKE at 363. More than one in ten that began the journey died before its completion. *Id.* at 362-63.

<sup>503</sup> Futilely counting on harvests that never materialized, *see* S. Exec. Doc. 36 at 3, 38<sup>th</sup> Cong., 1<sup>st</sup> Sess., (1864) reprinted in 1176 U.S. Serial Set (expectation that would soon become self-sustaining); too busy with the civil war and its aftermath to devote enough resources to feed the many Navajos, Congress never appropriated enough to provide the Navajos with even half of the rations they needed. LOCKE, *supra* note 501 at 365-67. The rations that were provided were sometimes composed of rancid bacon and weevily flour, supplies that had been declared unfit for the federal soldiers to eat. *Id.* at 372.

<sup>504</sup> *Id.* at 370.

<sup>505</sup> *Id.* at 366-68, 372, 380. These problems only worsened as time went on and the limited resources of the land were depleted. In 1867, the Superintendent for the New Mexico Indian Agency described their plight with these words: “The soil is cold, and the alkali in the water destroys it. The corn crop this year is a total failure. Last year 3,000 bushels only was raised on 3,000 acres, and year before last six thousand bushels, continually growing worse rather than better. The self-sustaining properties of the soil are all gone. The Indians now dig up the muskito root for wood, and carry upon their galled and lacerated backs for 12 miles. . . . The water is black and brackish, scarcely bearable to the taste, and said by the Indians to be unhealthy, because one-fourth of their population have been swept off by disease, which they attribute mainly to the effects of the water. What a beautiful selection this is for a reservation.” Annual Report of the Acting Comm’r on Indian Affairs, H. Exec. Doc. 1, 40<sup>th</sup> Cong., 2d Sess., Attachment No. 48 at 190 (1867), reprinted at 1326 U.S. Serial Set.

<sup>506</sup> *See, e.g.*, Annual Report of the Acting Comm’r on Indian Affairs, H. Exec. Doc. 1, 40<sup>th</sup> Cong., 2d Sess., Attachment No. 52 at 199 (1867), reprinted at 1326 U.S. Serial Set. There was some evidence that Mexican traders, opposed to the Bosque Reservation, incited the Comanches to make these raids. Annual Report of Comm’r of Indian Affairs, H. Exec. Doc.

hunger.<sup>507</sup> All were convinced that having left their homeland between the four sacred mountains, their gods had deserted them.<sup>508</sup>

It was in this atmosphere of despair that the federal government began its first experiments to “introduce” the Navajo people to the rule of law. The people were divided into twelve villages, each with a principal chief charged “to carry out and enforce all laws given to him for the government of his village, or any instructions he may receive at any time from the commanding officer.”<sup>509</sup> Together with his subchiefs, each chief presided over a trial level court for arbitration of disputes and adjudication of criminal offenses.<sup>510</sup> The commanding officer would serve as the court of appeal, with the principal chiefs serving as jurors.<sup>511</sup>

In part, the courts may have been a response to the breakdown of Navajo governmental structure accompanying military defeat and imprisonment; the officers recommended that “[i]n order to wean the Indians from their present helpless dependence on the military power . . . in future all complaints must be submitted to the respective chiefs and their courts for redress and settlement, and not as heretofore to the post commander.”<sup>512</sup> But the offenses the military officers designed were more appropriate to a labor camp than a court of law, and included imprisonment, lashes, or hard labor for such “crimes” as refusing to work, destroying agricultural tools provided by the government, destroying farm produce, absence from the reservation, and absence from one’s assigned village between 7 p.m. and 5 a.m. in winter, or 8

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1, 39<sup>th</sup> Cong., 2d Sess., Attachment No. 47 at 151 (1866) (Report of Superintendent Norton to Commissioner Cooley, July 31, 1866).

<sup>507</sup> LOCKE, *supra* note 501 at 382. The military doctor noted that the rate of abortion was so high that it would “decrease the number of the tribe and finally wipe them out of existence,” but failed to recognize the reason for this unwillingness to have children. Annual Report of Comm’r of Indian Affairs, H.Exec. Doc. 1, 39<sup>th</sup> Cong., 2d Sess., Attachment No. 46 at 150 (1866). His opinion might also have been shaped by the fact that an enormous portion of the patients he saw were those that had contracted syphilis, presumably after becoming prostitutes to U.S. soldiers. *Id.* at 151 (out of 331 patients in the year, 235 were cases of syphilis). Because of the strong Navajo prohibition against entering dwellings where others had died, most Navajos that still clung to traditional norms would have shunned the hospital.

<sup>508</sup> LOCKE, *supra* note 501 at 364-65.

<sup>509</sup> Proceedings of a Board of Officers at Fort Sumner, New Mexico, April 26, 1865, *reprinted* in Robert A. Roessel, Jr., *Pictorial History of the Navajo from 1860 to 1910* at 22 (1980); *see also* James Zion, *Civil Rights in Navajo Common Law*, 50 U. KANSAS L. REV. 523, 533 (2002).

<sup>510</sup> *Id.* at 23.

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 25.

p.m. to 4 a.m. in summer.<sup>513</sup> The drafters also made clear their disdain for Navajo ideas of law. The proposed code, they declared,

[H]as embraced only such offenses as are particularly applicable to these people in their present transition state. . . . It may appear unjust to punish people for a violation of laws which they do not only not understand, but have heretofore been taught to regard as the highest virtue to break. But it must be recollected that these Indians have got to be made to respect the bonds which unite civilized society, and the only practical way of doing this is by inflicting a punishment, however light, for the first offence, and increasing the punishment in proportion to the increase of knowledge, until its severity would prevent further repetition. This is the only possible mode of instructing them on the subject of the law.”<sup>514</sup>

After four years of imprisonment, the enormous expense of the experiment and the reports of misery of the Navajos moved even federal policy makers. Although federal officials had hoped to remove the Navajos to the Indian Territory in Oklahoma, they ultimately acceded to the pleas of the Navajo people and agreed that they could return to the *Dinehtah*.<sup>515</sup> In the Treaty of 1868, the United States solemnly promised that a portion of their former lands would be “set apart for the use and occupation of the Navajo Tribe of Indians.”<sup>516</sup>

Soon after their return, the agent set up a Navajo police force to control Navajos that were leaving the reservation to raid Mexican livestock. While the force might be seen as another instance of Navajos being tempted by federal dollars and uniforms to turn against their own,<sup>517</sup> the force was led by Barboncito, Ganado Mucho, and Manuelito,<sup>518</sup> all powerful leaders of the Navajo people who were equally concerned with the raids, which they saw as a violation of the promises they had made in the Treaty of 1868.<sup>519</sup> In part, therefore, federal support for these police forces facilitated the ability of the

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<sup>513</sup> *Id.* at 24.

<sup>514</sup> *Id.* at 23-24.

<sup>515</sup> LOCKE, *supra* note 501 at 383-84.

<sup>516</sup> Treaty with the Navaho, Art. 2, 15 Stat. 667 (1868).

<sup>517</sup> William Hagan, for example, in his study of Indian police as courts as instruments of control, states that the police were necessary because the Navajo “had not been completely broken of their wild, free habits.” HAGAN, *supra* note 436 at 26.

<sup>518</sup> LOCKE, *supra* note 501 at 397.

<sup>519</sup> *Id.* at 393-94.

Navajo leadership to enforce what they saw as Navajo law. Perhaps dismayed at the effectiveness of this police force, the administration in Washington quickly disbanded it, although local agents intermittently found ways to reinstate the force without official funding.

An incident at the beginning of the twentieth century poignantly illustrates the conflict between external and internal legal constraints in the development and practice of these legal institutions. The incident arose from the alleged rape by a Navajo man of a young Navajo woman. The Navajo policeman originally informed of the crime had already resolved it according to Navajo tradition: he had the families of the victim and the offender agree on a restitution payment of one white horse and had taken the horse to the family of the girl.<sup>520</sup> But the federal agent to the Navajos, Reuben Perry, insisted that the offender be arrested and imprisoned.<sup>521</sup> When he tried to arrest the man, Navajos detained Perry himself, and two thousand Navajos, hearing of the incident, gathered at a Yei-bi-chei ceremony in St. Michaels to participate in the resistance.<sup>522</sup> But Chee Dodge, a rising Navajo leader whose mother had died on the Long Walk and who later served three times as chairman of the Navajo Nation, addressed the crowd:

The President has given you a long rope so that you may graze wherever you please. If a man has a good horse and pickets him out he gives him a long rope in good grass and lets him graze as far as he can; but if he has a mean horse he gives him a short rope with his head tied close to a post so he can get but a little feed. The President has given you a long rope. Some of you have a very long rope . . . others . . . have a shorter rope; but the President has a rope on every one of you, and if you do not appreciate the good treatment you are given, if you try to make trouble, he will pull on all the ropes and draw you fellows all together in a tight place . . . You will lose your stock and you will be wiped out, and you will be guarded by troops, and everybody will laugh at you and say 'See what a large tribe this was and this is all that is left of them.'<sup>523</sup>

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<sup>520</sup> DAN VICENTI, LEONARD B. JIMSON, STEPHEN CONN, M.J.L. KELLOGG, *THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ'ÁANII, A BICULTURAL APPROACH TO LEGAL EDUCATION FOR NAVAJO STUDENTS* at 121 (Ramah Navajo High School Press 1972).

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*

<sup>523</sup> *Id.* at 122 (quoting AUBREY WILLIAMS, *THE NAVAJO POLITICAL PROCESS* 14 (1970).)

In response to the speech, the Navajos that had seized Perry released him and delivered the defendant themselves.<sup>524</sup> In the incident we see the ambivalent history of legal institutions among the Navajo people: the policeman who uses his federally funded position to implement Navajo traditional law, the non-Indians who reject this tradition, and the Navajos that comply with non-Indian law because of their keen awareness of the federal rope around their necks.

A Navajo Court of Indian Offenses was created in 1892<sup>525</sup> after a federal report that “if conducted it would serve to teach the tribe the white man’s manner of dealing out justice and give them an idea of law and legal procedure.”<sup>526</sup> The Navajo court and police quickly became associated with alien federal practices.<sup>527</sup> Shortly before the court was created, Black Horse, the leader of the Rough Rock portion of the Reservation, led a federal siege against the agent and his Navajo police when they came to forcibly collect Navajo children to send to boarding school.<sup>528</sup> The Navajo police and courts also enforced the infamous federal stock reduction programs of the 1930s.<sup>529</sup> By taking away Navajo livestock, these federal attempts to reduce overgrazing on the Navajo Nation tore at the deep structure of Navajo economic and cultural life.<sup>530</sup> The legal system also played into the factionalism of Navajo politics, with the police and the courts occasionally serving as tools for harassment of political opponents.<sup>531</sup>

But the Navajo courts also performed much needed law and order functions. Because of the failure of federal officials to adequately prosecute crimes under the Major Crimes Act, between 1957 and 1958, 12 out of 14 manslaughter cases, 12 out of 14 rape cases, 45 out of 48 cases of assault with a deadly weapon, and 16 out of 18 burglary cases were prosecuted in the Navajo courts.<sup>532</sup> In addition, social change had created both problems and segments of the population not amenable to the social control provided by the

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<sup>524</sup> *Id.* at 122.

<sup>525</sup> Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Courts*, 76 JUDICATURE 15, 15 (1992).

<sup>526</sup> 1890 Census, at 159.

<sup>527</sup> Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. IND. L. REV. 329, 333 (1976).

<sup>528</sup> HAGAN, *supra* note 436 at 77.

<sup>529</sup> Conn at 333.

<sup>530</sup> DONALD L. PARMAN, *THE NAVAJOS AND THE NEW DEAL* at 65-66 (1976). Antagonism to this program, and the association of it with John Collier, was the main reason the Navajo people rejected the Indian Reorganization Act and thereby forewent almost one million dollars in federal assistance. *Id.* at 77.

<sup>531</sup> PARMAN at 179-80.

<sup>532</sup> Conn at 334, n.27.

clan system.<sup>533</sup> Young men returning from military service overseas brought with them problems not easily dealt with by traditional ceremonies,<sup>534</sup> and a disdain for the informality of the Navajo courts and the lack of formal education of their judges.<sup>535</sup> Local communities asked that their members be deputized to control increasing crime.<sup>536</sup> The Navajo Tribal Council therefore lobbied Congress for funds, and when this failed dedicated scarce tribal resources to expanding their legal system in response to the demands of the Navajo community.<sup>537</sup>

The shape of this expansion, however, was in part defined by external ideas of law. In the late 1940s, termination of the distinct political status of Indian people and tribes became the goal of federal policy. As part of this policy Congress proposed giving states criminal and civil jurisdiction over Indians on reservations. In 1949, members of Congress attempted to condition passage of Navajo-Hopi Rehabilitation Act<sup>538</sup> upon extension of state jurisdiction over the Navajo Nation.<sup>539</sup> The amendment was supported by the non-Indian attorney for the tribe, and was initially approved by the Navajo Tribal Council.<sup>540</sup> But fear of the prejudice of non-Indian legal actors against Navajos<sup>541</sup> created a grassroots opposition so strong that the tribal

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<sup>533</sup> *Id.* at 339.

<sup>534</sup> Conn at 339. For an extraordinary literary depiction of the problems of returning Laguna Pueblo veterans, see Leslie Marmon Silko, *Ceremony* (1977).

<sup>535</sup> Conn at 342.

<sup>536</sup> *Id.* at 339.

<sup>537</sup> *Id.* at 340.

<sup>538</sup> P.L. 81-474, 64 Stat. 44 (1950) (codified as amended at 25 U.S.C. §§ 631-640c-3).

<sup>539</sup> S. 1407, 81<sup>st</sup> Cong., 1<sup>st</sup> Sess. Sec. 9.

<sup>540</sup> Conn at 342 & 344-45.

<sup>541</sup> This fear was well founded. Prejudice was not only rampant in the public, but among state officials. Arizona and New Mexico were the last two states in the union to grant Indians the right to vote, *Harrison v. Laveen*, 196 P.2d 456, 458 (1948). At the time the extension of state jurisdiction was proposed, the Arizona was still fighting to justify this practice. *Id.* Even then, state and local governments sought repeatedly to dilute the right of Indians living on reservations to elect representatives of their choice, and to seek and hold elected office. *Ely v. Klahr*, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971); *Klahr v. Williams*, 339 F.Supp. 922 (D. Ariz. 1972); *Goodluck v. Apache County*, 417 F.Supp. 13 (D. Ariz. 1975), *aff'd* 429 U.S. 876 (1976); *Shirley v. Apache County*, 109 Ariz. 510, 513 P.2d 939 (1973), *cert. denied* 415 U.S. 917 (1974). The State is still subject to strict oversight under section 5 of the Voting Rights Act, 42 U.S.C. § 1973b(b) because of its history of using overtly discriminatory tests and devices to prevent Native Americans and other minorities from fully participating in the electoral process. *State of Arizona v. Reno*, 887 F. Supp. 318, 320 (D.D.C. 1995), *appeal dismissed*, 516 U.S. 1155 (1996). Until losing legal actions between the 1930s and 1950s, moreover, state agencies denied Indians living on reservations disability benefits, *State of Ariz. ex rel. Ariz. State Bd. Public Welfare v. Hobby*, 221 F.2d 498, 499 (D.C. Cir. 1954), motor carrier licenses, *Bradley v. Arizona Corporation Comm'n*, 60 Ariz. 508, 141 P.2d 524



council asked President Truman to veto the entire aid package rather than allow the passage of the amendment.<sup>542</sup> Declaring himself “greatly influenced” by the preference of the tribe to forgo the benefits of the bill (which included 88 million dollars in aid), President Truman vetoed the bill as

[I]n conflict with one of the fundamental principles of Indian law accepted by our Nation, namely, the principle of respect for tribal self-determination in matters of local government. The Congress and the executive branch have repeatedly recognized that so long as Indian communities wished to maintain, and were prepared to maintain, their own political and social institutions, they should not be forced to do otherwise.”<sup>543</sup>

The fight against extension of state jurisdiction was not over. In 1949, Congress gave New York criminal jurisdiction over Indians within the

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(Ariz. 1943), and hunting and fishing licenses, *Begay v. Sawtelle*, 53 Ariz. 304, 88 P.2d 999 (1939). As late as 1975, Navajos were denied emergency care at New Mexico hospitals and sent to the federal Indian hospital 45 minutes away, *Penn v. San Juan Hospital*, 528 F.2d 1181 (10th Cir. 1975), and the state and New Mexico municipalities have repeatedly be found guilty of discrimination in provision of services to Indians in the state. *See Navajo Nation v. New Mexico*, 975 F.2d 741 (10th Cir. 1992), *cert. denied* 113 S. Ct. 1583 (1993) (discrimination in Title XX funding); *Natonabah v. Board of Ed. of Gallup-McKinley County School Dist.*, 355 F. Supp. 716 (D.N.M. 1973) (discrimination in education funding)

<sup>542</sup> Conn. at 343-45.

<sup>543</sup> Veto Message on the Rehabilitation of the Navajo and Hopi Tribes of Indians, S.Doc. 119 at 1-3, 81<sup>st</sup> Cong., 1<sup>st</sup> Sess. (Oct. 17, 1949), reprinted in 11310 U.S. Serial Set. Ser. 11310. Truman did not by any means cede the superiority of western legal systems over Navajo ways or culture. Indeed, he believed that,

Ultimate acceptance of State jurisdiction is a natural consequence of our policy of assisting the Indians to develop their natural talents and physical resources that will enable them to participate fully in our free, but vigorously competitive, society. . . Yet the desirability of this result is no reason for compelling the Navajos and Hopis to accept legal integration long before they have been prepared for such a consequence through the orderly course of social and economic integration. Premature steps for tribal dissolution have invariably revealed that the process of cultural adjustment cannot be hastened, and may be retarded, by attempts at legal compulsion.” *Id.* at 3.

The lack of education or English language of the and “primitive background of social concepts” were additional “circumstances which tend to make their tribal governments a necessary instrument for their continued progress in civilization. It would be unjust and unwise to compel them to abide by State laws written to fill other needs than theirs.” *Id.*

state,<sup>544</sup> citing the inadequacy of tribal legal systems.<sup>545</sup> The House Report attached a letter of the U.S. Attorney for the Western District of New York showing the anti-Indian biases behind the law:

[T]here have been numerous instances . . . of disorderly conduct on the part of the Indians, which have been most provoking. . . . Indians get drunk and beat their women and get into fights. Recently a white man was severely beaten by drunken Indians. Theoretically these petty offenses are within the jurisdiction of so-called Indian courts but there is no provision made for their punishment even if such Indians are tried by said local Indian courts. It is a deplorable situation. Something should be done to rectify this unbelievable situation.<sup>546</sup>

The law was followed by a 1950 Act giving New York State civil jurisdiction over causes involving Indians,<sup>547</sup> and in 1953 by P.L. 83-280, which extended state civil and criminal jurisdiction over the tribes in several states and gave the remaining states the option of assuming such jurisdiction.<sup>548</sup> The Senate Report on P.L. 280 stated that while enforcement of law and order on reservation had “been left largely to the Indian groups themselves,” many “tribes are not adequately organized to perform that function” and willing states were best positioned to fill the resulting “hiatus in law-enforcement authority.”<sup>549</sup>

Navajo Tribal Council members of this period clearly understood that unless they developed a legal system that satisfied outside observers, either Arizona would take jurisdiction or the federal government would thrust it upon the state.<sup>550</sup> They therefore put even further resources and energy into legal reform. Some of the reforms were intended to make the legal system more expressive of local sentiment, such as the 1950 reform instituting local

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<sup>544</sup> P.L. 80-881 (1949).

<sup>545</sup> H. Rep. No. 80-2355, 2284 (June 15, 1948) (“Indian tribes do not enforce the laws covering offenses committed by Indians . . . and law and order should be established on the reservations when tribal laws for the discipline of its members have broken down.”).

<sup>546</sup> *Id.* at 2286 (Jan. 27, 1948 letter of Hon. George L. Grope).

<sup>547</sup> P.L. 81-785 (1950).

<sup>548</sup> P.L. 83-280, 67 Stat. 588 (codified as amended 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, 28 U.S.C. § 1360).

<sup>549</sup> S. Rep. No. 83-699, 2411-12 (July 29, 1953).

<sup>550</sup> Conn at 335; Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Courts*, 76 JUDICATURE 15, 15 (1992).

election of judges instead of appointment by the federal superintendent.<sup>551</sup> Others, such as the adoption of state traffic laws,<sup>552</sup> procedures for seizure of property to enforce debt judgments,<sup>553</sup> and the requirement that marriages between Navajos and non-Navajos comply with state or foreign law,<sup>554</sup> appear more directly designed to appease the fears of outsiders.

In 1959 these efforts brought the tribe a tremendous legal victory. In *Williams v. Lee*<sup>555</sup> the United States Supreme Court reversed the Arizona Supreme Court to hold that the state court had no jurisdiction over an action by a non-Indian trader to collect a debt against Navajos for goods sold on the Navajo Nation. Citing in part the fact that the the Tribe itself had “in recent years greatly improved its legal system”<sup>556</sup> the Court held that there could “be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”<sup>557</sup> The same year, the Secretary of the Interior approved a comprehensive Navajo judicial reform package. The tribe dates the existence of a tribal court system independent from the federally imposed Court of Indian Affairs from that year.

#### **d. Challenges for Navajo Justice**

But this triumphant cap on judicial reform does not mean that the resulting legal system is a successful one. Scholars have long realized that the most important work of law occurs beyond the eyes of judges and police. As Karl Llewellyn and E. Adamson Hoebel observed in their study of the Cheyenne legal system,

The success of any legal system depends upon its acceptance by the people to whom it applies. Insofar as the system is an integrated part of the web of social norms developed within a society’s culture . . . it will be accepted as a parcel of habit-conduct patterns in the social heritage of the people. . . . Law-in-action exists only because less stringent methods of control

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<sup>551</sup> *Id.* at 346.

<sup>552</sup> *Id.* at 350.

<sup>553</sup> *Id.* at 355.

<sup>554</sup> 9 Nav. T.C. § 2 (1957), discussed in *In re Validation of Marriage of Francisco*, No. A-CV-15-88 (Navajo 08/02/1989).

<sup>555</sup> 358 U.S. 217 (1959).

<sup>556</sup> *Id.* at 222.

<sup>557</sup> *Id.* at 223.

have failed to hold all persons in line or in harmony, on points of moment.<sup>558</sup>

The more that law on the books or law in the courts diverges from popular conceptions of justice, the less efficient it is in regulating human behavior. Individuals will fail to follow the law except when directly observed or coerced by representatives of the state. Few governments can afford the cost of this constant surveillance, and even paid governmental representatives will often diverge from the announced view of the law in their duties.<sup>559</sup> Equally important, the perceived tension between justice and the government leads to corruption and other rent-seeking behavior detrimental to the community as a whole.<sup>560</sup>

There is evidence that the formal legal system created by the Navajo Tribal Council was, at least initially, not well incorporated in the hearts, minds, or lives of the Navajo people. In 1972, a study of Navajo law reported that

Law (*bee haz'aanii*) in the Navajo language is distinguished from 'a way of living' in the religious sense (*mahagha*) or the way that people think or plan (*nahat'a*). Anglo law is not, then, a code that one addresses himself to when he decides how to act or tells other people how to act, as it may well be for the

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<sup>558</sup> KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* at 239 (1941). Even new legal principles may have their greatest impact outside legal enforcement structures. A recent book on the effect of the Americans with Disabilities Act, for example, found that while new legal rights had a significant impact on the sixty people with disabilities interviewed for the study, the impact was due to transformation of the self perception of the interviewees and voluntary compliance on the part of their employers and coworkers rather than formal legal assertion or enforcement of rights. DAVID ENGEL & FRANK MUNGER, *RIGHTS OF INCLUSION* (2002).

<sup>559</sup> This process is apparent, for example, in the implementation of rape reforms of the 1970s and 1980s. While states have generally reformed their laws to remove requirements for corroboration of the victims' testimony, use of force against the victim, and injury to the victim, the laws have not appreciably increased rape convictions because prosecutors, judges, and juries continue to rely on these factors in determining whether to prosecute or convict. See Julie Horney & Cassia Spohn, 25 *LAW & SOCIETY REVIEW* 117 (1991).

<sup>560</sup> See, e.g., Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache*, 33 *ECONOMIC INQUIRY* 402 (July 1995). While I believe that Kalt and Cornell wrongly attribute the governmental instability and resulting economic failure of the Oglala Sioux Tribe to the failure of its governmental structure to mimic the traditional tribal structure of the nineteenth century, I believe they are correct in pointing to its problems as an effect of a community that does not respect its government or its representatives.

middle class white person . . . Thus while an Anglo might say to a child seen removing an object from a pick-up, ‘Don’t do that Johnny. That is against the law,’ a Navajo might say “Don’t do that son. That is not how to act.”

Anglo law is best understood by Navajos as the forceful activity of the courts, the police and others upon whom the authority has been placed. It is descriptively the function of these institutions. It is not the business of ordinary people.<sup>561</sup>

Distance between the law and “the business of ordinary people” is not necessarily incompatible with a functioning legal system. The sense of the separateness, almost sacredness, of law is a common Anglo perception of law,<sup>562</sup> and may even be part of what gives force to the idea of the “rule of law.”<sup>563</sup> But to the extent that the legal system is perceived not only as separate from ordinary people, but also as without relevance to the rules that govern a good life, it loses much of its efficacy.

The Navajo Nation and tribes generally must struggle with the legacy of colonialism in trying to achieve internal legitimacy. On the one hand, their governments and courts may be perceived as tools of the colonizers, implementing a law that is almost by definition illegitimate. On the other hand, seen through eyes colored by years of non-Indian education, they may be perceived as illegitimate because they lack the formality, the resources, or the education of non-Indian courts. Frank Pommersheim eloquently lays out this dilemma in his book *Braid of Feathers*:

Identifiable segments of most tribes have at times refused to consider tribal courts legitimate. In this regard, many tribal courts are vilified as ‘white men’s’ creations . . . . The courts are seen as instruments of outside forces and values that are not traditional and therefore not legitimate.

By contrast, some segments of most tribal populations (and local non-Indian populations) view tribal courts as illegitimate because they fall, or appear to fall, far below recognized state and federal standards in such matters ranging

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<sup>561</sup> Vicenti at 156-57.

<sup>562</sup> See PATRICIA EWICK AND SUSAN S. SILBEY, *THE COMMONPLACE OF LAW: STORIES FROM EVERYDAY LIFE* 47, 77 (1998) (describing one understanding of law as separate from and transcending everyday life).

<sup>563</sup> See PAUL KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 19-24 (1997) (arguing that the rule of law must be the rule of no one and no time).

from the institutional separation of powers to the provision of civil due process and enforcement of judgments.<sup>564</sup>

Two studies of the Navajo courts from the 1970s reveal internal legitimacy problems attributable to these factors. Samuel Brakel examined the Navajo courts in his 1978 book *The Cost of Separate Justice*. One of the essential problems that Brakel found with the Navajo courts as with the two other tribal court systems he studied was that a sense of inferiority led the relatively uneducated tribal judges to rely heavily on legal technicalities and on the urging of legally educated counsel. This judicial insecurity, he found, deprived the courts both of the ability to administer justice, to hear both sides fairly, or to express any kind of local or customary sense of justice. While Brakel argued for the abolishment of tribal courts, Dan Vicenti and his coauthors on the 1972 *The Law of the People: Diné Bibee Haz'áanii*,<sup>565</sup> argued for their preservation and greater independence from non-tribal law. But like Brakel the authors found that Navajo judges in their efforts to appear just as good as non-Indian courts relied too heavily on non-Indian attorneys and practiced a kind of rigid formality that had little to do with justice.<sup>566</sup>

The authors also presented evidence that the courts were either not appreciated by or accessible to the Navajo population. They cited the fact that in 1959, the Navajo courts handled 9,555 criminal cases, but only 690 civil actions, and that a 1960s study of the work of one Navajo judge in the 1960s reported that the judge handled 2,216 criminal cases and only 275 civil cases.<sup>567</sup> As individuals are generally forced into criminal court by the choices of the government, these statistics suggested that very few Navajos voluntarily used tribal courts as a means for the resolution of disputes, whether, as Brakel believed, because they preferred state or federal courts, or, as Vicenti and his co-authors suggested, because they preferred to rely on traditional, extra-judicial systems of dispute resolution.

Contemporary statistics show a somewhat more balanced division between civil and criminal cases in the Navajo Nation.<sup>568</sup> There is a similar trend in other tribal courts as tribal members begin to choose and guide their

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<sup>564</sup> POMMERSHEIM, *supra* note 8, at 67-68.

<sup>565</sup> DAN VICENTI, LEONARD B. JIMSON, STEPHEN CONN, M.J.L. KELLOGG, *THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ'ÁANII*, A BICULTURAL APPROACH TO LEGAL EDUCATION FOR NAVAJO STUDENTS (Ramah Navajo High School Press 1972) (hereinafter *THE LAW OF THE PEOPLE*).

<sup>566</sup> *Id.* at 184-86.

<sup>567</sup> *Id.* at 158.

<sup>568</sup> Judicial Branch of the Navajo Nation, Fiscal Year 2002, Annual Report at 22 (2003).

involvement with tribal law.<sup>569</sup> On the Navajo Nation, this may be because of tribal laws passed in recent years that address significant legal needs of Navajo people, among them a comprehensive child support law, the Navajo Preference in Employment Act, and the Navajo Repossession Act. In part it may also be the result of significant efforts to incorporate traditional Navajo law ways into formal Navajo legal institutions, both through use of common law concepts in decision-making, and through the creation of Peacemaker courts that are intended to replicate traditional methods of dispute resolution.<sup>570</sup>

But the Navajo Nation, like other tribal courts, must still struggle with its historical legacy in building its legal system. Its decisions are still shaped by the very real fear that should it fail to conform to outsider ideas of law, non-Indian actors will diminish its power,<sup>571</sup> and the knowledge that some tribal members will perceive the court as illegitimate for these reasons as well. On the other hand, the court is also aware that to the extent it is perceived as only a pale shadow of non-Indian courts, it will lose legitimacy both in the eyes of other tribal members and many of those that argue for the preservation of tribal courts. At the same time, the courts continue to provide significant practical and symbolic possibilities for resisting the pressures of colonization and encouraging the revitalization of Indian tribes. By co-opting western style courts as vehicles for the enforcement of tribal visions of law, Indian tribes can express and protect tribal interests and independence in a way recognized by non-Indian institutions.

The ambivalent legacy of tribal courts thus presents tribes with opportunities as well as challenges. In the next section, I discuss the ways that jurisdiction over disputes involving nonmembers is crucial to exploiting this opportunity.

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<sup>569</sup> Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 Conn. L. Rev. 1003, 1037-38 (1995).

<sup>570</sup> See Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Courts*, 76 JUDICATURE 15, 15 (1992) (describing efforts to incorporate Navajo common law); Justice Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M.L. REV. 175, 1867-87 (1994) (describing peacemaker courts). It is difficult to determine the extent to which either effort in fact replicates traditional law ways. The ways that common law concepts are employed may owe as much to Anglo ideas of law as they do to traditional justice concepts, and the Peacemaker courts handle only a small fraction of the matters filed in the Navajo courts each year. The "authenticity" of these efforts in the sense that they replicate the law ways of Navajo people hundreds of years ago is less important than their reflection of current Navajo ideas of justice and their success in creating a sense of ownership of law among the Navajo people.

<sup>571</sup> Justice Robert Yazzie elaborates on this theme in *Watch Your Six: An Indian Nation Judge's View of Where We Are, Where We Are Going*, 23 AMERICAN INDIAN LAW REVIEW 497 (1999).

#### IV. The Role of the Outsider in Tribal Legal Systems

The recent United States Supreme Court cases regarding jurisdiction over nonmembers are colored by the assumption that the most important work of justice lies in adjudicating disputes among those that are formally enrolled in the community and that concern matters traditionally of unique importance to the tribe. This assumption accords well with much political theory, which tends to begin with an imagined community with fixed boundaries and has less often grappled with questions of how community boundaries are drawn, and the obligations caused by varying levels of community membership. While there are, of course, exceptions,<sup>572</sup> for much mainstream political and legal theory the outsider is an exceptional case, troubling the polity and its rules for distribution of goods and rights but not meaningfully contributing to its development.<sup>573</sup> In this section of the Article, I want to build on theoretical work regarding the development of law, and draw on my own research to suggest that this is particularly true for today's Indian tribes.

Much of formal law everywhere is the product of conflict,<sup>574</sup> a means to address disputes to which existing norms and relationships do not provide a resolution. Where informal controls, whether the pressure of clan relatives or internalized moral or religious norms, are sufficient to regulate individual behavior, there is little need for formal legal institutions.<sup>575</sup> This is not possible where a community includes diverse groups that do not share common norms or relationships,<sup>576</sup> or where external factors create situations to which community norms do not present a clear solution.<sup>577</sup> At this point, formal legal institutions must step in, to draw on their institutional legitimacy to resolve disputes in a way that will be respected by the community of which

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<sup>572</sup> For a broad based political theory that has always incorporated questions of membership, see MICHAEL WALZER's *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-64 (1980). Feminist theory has also long questioned assumptions that citizenship is a straightforward category of belonging. See, e.g., IRIS YOUNG: *JUSTICE AND THE POLITICS OF DIFFERENCE* 7-11 (1990) (drawing from feminist and critical race theory to develop a theory questioning categories of inclusion). The increasing mobility of people, jobs, and culture has also generated a wealth of literature on the different kinds of membership in our polities. See, e.g., *THE CITIZENSHIP DEBATES: A READER*, Chs. 8-10 (Gershon Shafir ed. 1998) (collecting essays).

<sup>573</sup> See also BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* at 2-3 (2001).

<sup>574</sup> See FRIEDMAN, *supra* note 321 at 143 ("Formal law presupposes [a] climate of conflict").

<sup>575</sup> *Id.* at 144.

<sup>576</sup> See David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 L. & SOCIETY REV. 551 (1987), reprinted in *THE LAW & SOCIETY READER* 1, 23-24 (Richard L. Abel ed. 1995).

<sup>577</sup> FRIEDMAN, *supra* note 321 at 145.



they are part. Thus, despite the assumptions of both opponents and some advocates of tribal jurisdiction, in some ways it is precisely to address the conflicts involving outsiders and, more broadly, changes brought about by outside influences, that formal legal institutions exist.

Evidence regarding other tribal court systems supports this thesis. As discussed above, Rennard Strickland discovered in studying the Cherokee legal system of the 1820s and 1830s that disputes exclusively between Cherokees arising from familiar tribal activities could more frequently be resolved without resort to the courts, while the courts disproportionately handled cases involving intermarried white men, and economic and social disputes arising from contact with Anglo culture.<sup>578</sup> In addition, much of the work of the Indian police of the late nineteenth century involved controlling non-Indians trespassing on Indian lands and game.<sup>579</sup>

My research regarding the Navajo Nation provides more evidence of the importance of outsiders in tribal legal systems. As discussed in Part II, the Navajo Nation has a high degree of insularity relative to most Indian tribes. Culturally, demographically, and geographically, it is one of the tribes that most closely matches the archetype of the homogenous and traditional tribe. Despite this, 21.2% of the cases decided by the Navajo Nation appellate court over the last thirty-two years have involved non-Navajo litigants. This figure has little to do with the numbers of non-Navajos residing on the Navajo reservation. For example, while non-Navajo Indians compose about 6.5% of the reservation population and non-Indians compose only 3.5%, almost all of the cases involving outsiders, 19.5% of the total cases decided by the Navajo appellate courts, involve non-Indians. Cases involving non-Navajos, on the other hand, compose only 1.7% of all cases.<sup>580</sup>

Table III: Percentage of Navajo Appellate Cases Involving Nonmembers						
	1971-81	1981-87	1987-92	1992-97	1997-2003	Total
Total cases involving	25	24	24	16	20	109

<sup>578</sup> STRICKLAND, *supra* note 458 at 75.

<sup>579</sup> Hagan, *supra* note 436 at 52-55.

<sup>580</sup> Interestingly, most of the non-Navajo Indian cases arise from family relations with Navajos such as custody and domestic violence, while relatively few of the non-Indian cases do. This appears to confirm the assertion of advocates of the *Duro Fix* legislation, that non-member Indians often occupy a different role on reservations than do non-Indians, and are more integrated in the social life of tribal communities. See Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Nonmember Indians*, 38 FED. B. NEWS & J. 70 (1991).

nonmembers						
Total cases in period	147	151	95	53	67	513
Percent of cases involving nonmembers	17.00%	15.89%	25.26%	30.18%	30.76%	21.12%

If one looks at cases over only the last ten years, the figures become even more striking. Since 1992, non-Navajos have been parties in over 30% of the cases decided by the Navajo Supreme Court, and non-Indians have been parties in 28%. It is not clear that this figure represents an increase in the number of cases involving nonmembers, as during the same period the court stopped publishing opinions decided on a summary basis,<sup>581</sup> which might increase the percentage simply by reducing the number of cases for which identification of the parties is not possible, or filter out cases that do not raise novel questions of law. It does indicate, however, that over the last ten years almost one in three of the cases significant enough to require a publishable opinion have involved non-Indians.

These statistics are a reflection of the reality of Navajo life. Even on the Navajo Nation, the tribal community that looks most, in some ways, like an independent state, neither the tribe nor the people are isolated from outside influences. This interaction is reflected even in the clan system that is perhaps the most central aspect of Navajo culture.<sup>582</sup> Among the Navajo clans are the Nakai or Mexican clan, and clans named after the Utes, the Zunis, and the Flat Foot Paiute, all named for members of these groups that incorporated with the Navajos.<sup>583</sup>

The Navajo people have incorporated elements borrowed from Europeans and Americans deep within their culture in other areas as well.<sup>584</sup>

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<sup>581</sup> These include, for example, appeals dismissed for failure to timely file or dismissed according to a stipulation of the parties. They also include a case I filed on my own behalf, successfully challenging the Crownpoint District Court's power to appoint me to represent parties outside my judicial district.

<sup>582</sup> See Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M.L. REV. 175, 182-84 (1994) (discussing significance of clanship system in traditional Navajo law).

<sup>583</sup> ROBERT A. ROESSEL, JR., PICTORIAL HISTORY OF THE NAVAJO FROM 1860 TO 1910 at 146-47 (1980) (reprinting August 22, 1890 Report of the Navajo Agency, Agent C.E. Vandever); see also Means v. District Court of the Chinle Judicial District, 8 (Navajo 05/11/1999) (listing clans); In re Marriage of Garcia, No. A-CV-02-84 (Navajo 02/20/1985) (discussing contributions of intermarried Mexicans).

<sup>584</sup> In the words of former Chief Justice Tom Tso, "Navajos are . . . a flexible and adaptable people. We find there are many things which we can incorporate into our lives that do not

The result is not a watered down culture, but instead one that is still uniquely Navajo and that has enabled the Navajo Nation to survive and even thrive. For example, although Spanish settlers originally introduced sheep to Navajo agriculture, sheep have become an essential part of Navajo society.<sup>585</sup> The federal program of stock reduction in the early part of this century was a flashpoint for anger at federal interference with Navajo culture.<sup>586</sup> While today overgrazing prohibits most people from making a living entirely off sheep herding, many Navajos keep some sheep to supplement their income,<sup>587</sup> and mutton is part of a traditional Navajo meal,<sup>588</sup> and sheep wool is necessary for the woven rugs for which Navajos are famous. Ownership and care of the sheep herd are also deeply integrated in Navajo understandings of the world. Sheep are used, for example, to teach children values of responsibility and survival, and patterns of inheritance and division of sheep reflect and shape Navajo ideas of property and descent.<sup>589</sup> One of the required portions of the annual Miss Navajo Nation contest (which, in contrast to non-Indian beauty contests, does not include a bathing suit contest and emphasizes academic and cultural accomplishment more than physical attractiveness) includes sheep butchering. These and other fusions of culture have enhanced rather than diluted the distinctiveness and cohesion of Navajo society.<sup>590</sup>

This interaction continues today. As the above statistics reveal, a large number of Navajo business relationships are with non-Indians. Many Navajo people living on reservations have been educated, lived, or worked in off-reservation communities. Even when they live and work on the reservation,

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change our concept of ourselves as Navajo.” Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 227 (1989).

<sup>585</sup> See JOHN J. WOOD ET AL., ‘SHEEP IS LIFE’: AN ASSESSMENT OF LIVESTOCK REDUCTION IN THE FORM NAVAJO-HOPI JOINT USE AREA (1982). While the 20 years between this study and the present has probably reduced the percentage of Navajos involved in sheep herding, my experience confirms that sheep remain an integral part of Navajo culture, even for people that do not keep sheep themselves.

<sup>586</sup> DONALD L. PARMAN, *THE NAVAJOS AND THE NEW DEAL* at 65-66, 77 (1976).

<sup>587</sup> *Id.* at 26 (noting that 36% of Navajos used sheep as source of income).

<sup>588</sup> *Id.* (44% used livestock in ceremonies both as part of meal for participants and in symbolic role). During my time on the Navajo Nation, holding a mutton feast was the common way to raise money for a colleague hit by hard times, and the weekly mutton buffet was a well-attended event at the Navajo Nation Inn.

<sup>589</sup> *Id.* at 25-26. The importance of sheep keeping is also reflected in the bitter legal disputes over grazing land.

<sup>590</sup> See AUBREY WILLIAMS, *THE NAVAJO POLITICAL PROCESS* 2 (1970) (“The cultural history of the Navajo is replete with references concerning the various cultural items and techniques borrowed and incorporated from other people. Yet each of the historical and cultural accounts . . . mentions the distinctive character of Navajo culture through time, in spite of the influx of ideas from different cultures.”)

Navajos will frequently interact with non-Navajos. Non-Indian mining companies, such as Peabody Coal, and stores and customer service industries, such as Basha's Supermarket and Cameron Trading Post, are among the most significant on-reservation employers. Given the lack of economic development on the Navajo Nation, moreover, most Navajos rely on off-reservation businesses for their consumer needs. Navajo people and those from other nearby reservations flood the off-reservation town of Gallup, New Mexico on weekends, making its mammoth Super Wal-Mart among the most successful in the United States.

Similarly, although the tribe is very aware and proud of its sovereignty and separateness from the United States, serving in the U.S. military is an important and honored part of Navajo life. As on most reservations, a procession of veterans carrying the U.S. flag is a solemn opening to public celebrations and fairs. Again, military service does not represent only a capitulation to Anglo culture, but a celebration of Navajo accomplishments.<sup>591</sup> Navajo code-talkers, who played an important role in World War II by using the Navajo language to form an unbreakable code, are heroes not simply because of their military service but because that service valued the unique and formerly oppressed Navajo language.

The outside world influences ideas of law as well. If you ask a classroom of Navajo students about the Navajo Nation Bill of Rights, you'll probably get blank looks; but ask them what the cops on TV say when they arrest someone, and you'll get a chorus: "You have the right to remain silent, if you choose to give up that right anything you say or do can be used against you in a court of law . . . ." And while the clan system retains significant importance in Navajo life, it is no longer the primary source of property or economic support. While property formerly descended through the maternal clan and individuals depended on matrilineal relatives for support in cases of divorce or death rather than on what Anglo society calls the immediate family, today many Navajo people expect to inherit from their spouses and expect an equitable division of property and future support in the event of divorce.

Mark Rosen, in his study of Indian Civil Rights Act cases in tribal courts over the last 15 years suggests that a similar influence can be seen in judicial decisions.<sup>592</sup> While tribal courts are engaged in a process of tailoring ICRA guarantees to tribal traditions and circumstances, they typically rely on federal decisions as guidance in this process, and even when they do not cite

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<sup>591</sup> While many Indians voluntarily sign up for military service, the mandatory draft has been objected to as a violation of sovereignty rights. *See Ex Parte Green*, 123 F.2d 862 (2d Cir. 1941).

<sup>592</sup> Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Tribe Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 526 (2000).

federal decisions or law, their interpretations often use federal constitutional terms, such as due process, fundamental rights, or equal protection, suggesting a deep integration of federal understandings of rights.<sup>593</sup> Rosen notes that even in Navajo Nation decisions that rely heavily on customary ways to interpret ICRA guarantees, traditions are read through a lens colored by Anglo legal understandings. Thus, in interpreting the due process guarantee, the Navajo court derived the right to notice and a hearing from traditional practices of resolving disputes by a collective decision at a public gathering led by an elder statesman and attended by the wrongdoer, rather than rights to collective decision-making or arbitration by an elder statesman.<sup>594</sup>

Mobility between on and off reservation communities has also shaped the legal problems faced by the tribe. In the 1990s, for example, as the influence of gangs and drugs was decreasing in urban centers, it was increasing on the Navajo Nation as returning residents brought these things back from the cities. The Navajo Nation is dotted with hundreds of open uranium mines, leftovers from days when the BIA granted mining companies almost unfettered access to Navajo lands. The extended families that formerly supported Navajo children are often scattered by the need to find work elsewhere and by partial adoption of the Anglo emphasis on the nuclear family. Federal policies of removing children from their homes and sending them to schools that sought to generate shame in Navajo culture and language have created generations that lack either appropriate family skills or education, and that are firmly grounded neither in Anglo or Navajo tradition. Exposure to Anglo ideas of the good life have also created conflict within Navajo society regarding the extent to which Navajo ideals should be pursued above the material goods valued by mainstream society. The point is not that European American culture has been a boon to Navajo culture—indeed, one could persuasively trace many current social problems to European American influence<sup>595</sup>—but that it has importantly shaped the legal and social issues facing the Navajo Nation and the range of cultural acceptable solutions for resolving them.

#### **a. Jurisdiction Over Nonmembers and Institutional Legitimacy**

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<sup>593</sup> *Id.*

<sup>594</sup> *Id.*

<sup>595</sup> This is by no means a radical perspective. In 1928, the Brookings Institution, commissioned by the Secretary of the Interior to write a report on Indian Administration, concluded that the United States was obliged to help the Indian that wished to live according to his traditional culture, because “the old economic basis of his culture has been to a considerable extent destroyed and new problems have been forced upon him by contacts with the whites.” MERIAM REPORT at 88 (1928).

Given this importance of outsiders to contemporary tribes, jurisdiction over nonmembers becomes crucial in shoring up tribal legitimacy for two reasons: first, so that tribal legal systems can address the everyday legal and social problems of concern to Indian people; second, so that tribal legal systems are perceived as respected legal institutions.

### **1. Jurisdiction Over Nonmembers and Utility of Tribal Legal Systems**

Given the interrelationships between Navajo and non-Navajo society, jurisdiction over nonmembers is crucial in preserving the practical utility of tribal legal systems. As the above statistics show, even on a reservation as large and homogenous as the Navajo Nation a large portion of the commercial actors are non-Indian. Non-Indians are the employers, the insurers, and the merchants. They are the building contractors and the mining companies. While the Navajo Nation, like other tribes, is actively pursuing economic development, given the disparity in capital, experience, and education between Indian and non-Indian people this need to turn to non-Indian businesses is not likely to change any time soon. Nor should tribes or their members be forced to rely solely on tribal businesses in order to ensure tribal jurisdiction. This would impair tribal economies, discourage cooperation between tribes and states and non-Indian businesses, and increase non-Indian concern that tribes unfairly grant preference to their members.<sup>596</sup>

Without jurisdiction over non-Indian businesses, however, tribes lose the ability to pursue uniform economic policies on their reservations or protect their members in their interactions with outsiders. The Court's decision in *Shirley v. Atkinson Trading Post*<sup>597</sup> provides a good example. The inability to tax hotel guests at the Atkinson Trading Post did not undermine the taxing ability or revenues of the Navajo Nation as greatly as it would for other Indian nations, as the Nation is primarily composed of tribal and member owned land. Despite this, Navajo hotel occupancy tax revenues dropped 15%, by \$181,179 in 2002, and are estimated to be reduced by \$506,170 or 44% for

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<sup>596</sup> While many tribes, including the Navajo Nation, granted preferences to tribally owned businesses, and these preferences have the approval of the federal government, 25 U.S.C. § 452, these preferences are only for qualified tribal businesses, and in practice tribes must often rely on the businesses of non-members.

<sup>597</sup> 532 U.S. 645 (2001) (holding that Navajo Nation could not tax nonmember hotel guests at nonmember owned hotel on nonmembers' fee land).

2003.<sup>598</sup> Its impact will be much more severe on most other reservations, where much more land is in non-Indian hands, and where these lands are the most significant sites of economic activity. Eliminating taxing and other economic regulatory jurisdiction over these lands would deprive the tribe of the ability to set taxes with sufficient uniformity to be meaningfully enforced. Governments have enough trouble getting compliance with their tax laws and overcoming the perception that evading taxes is common and just. Imagine the multiplication of this difficulty if your neighbors had no need to pay taxes simply because of who owned title to their land. And while tribes seek to invest in infrastructure to create a favorable climate for economic development, without taxing jurisdiction they cannot force businesses on fee land to contribute to the costs of this infrastructure. In the words of Navajo Nation Chief Justice Robert Yazzie, “[t]he fee land businesses, for all practical purposes, receive a free ride.”<sup>599</sup>

In addition, jurisdiction over nonmember businesses is crucial to protect tribal members. Jurisdiction over contracts between tribal members and nonmember businesses, whether those contracts are for employment or for purchases of goods and services, seems firmly protected by *Montana*’s consensual relationship exception. Encouraged by the Court’s recent cases, however, non-Indian employers are increasingly challenging tribal exercises of jurisdiction over them.<sup>600</sup> Even if the consensual relationship exception ensures jurisdiction where non-Indians employ tribal members, to the extent that it denies similar jurisdiction over nonmembers it will encourage invidious distinctions by both nonmembers and tribes. Non-Indian employers will have incentives to avoid hiring or entering into business relationships with tribal members to avoid tribal jurisdiction. Tribes, moreover, will be encouraged to see themselves as legislating only for the protection of tribal members, as it is only they and not the broader community of reservation residents for whom their laws can be enforced.

The absence of jurisdiction also undermines tribal efforts to address crime on Indian reservations. Lack of jurisdiction encourages non-Indians to perceive reservations as places to flaunt disdain for the law and hostility to Indian people. Oliphant and Belgarde’s actions—punching a tribal police

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<sup>598</sup> See [www.navajotax.org/new\\_page\\_7.htm](http://www.navajotax.org/new_page_7.htm) (reporting and estimated revenues collected from various taxes) (last accessed 1/29/04).

<sup>599</sup> Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002) (written testimony).

<sup>600</sup> See, e.g., *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128 (9<sup>th</sup> Cir. 1995) (successfully challenging tribal jurisdiction to strike down company anti-nepotism law); *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000) (challenging tribal jurisdiction over action by terminated employee).

officer that tried to stop a brawl, engaging with tribal police in a high speed chase--might be seen as examples of this. But even today non-Indians engage in flagrant speeding across tribal lands, apparently relishing the perceived lack of jurisdiction over them.<sup>601</sup>

A more disturbing example comes from statistics regarding crime against Indians, particular against Indian women. The average annual rate of rape is 3.5 times higher among Native women than it is for other ethnic groups, and one in three Native women will be raped in her lifetime.<sup>602</sup> But while for other ethnic groups, most offenders are of the same race as their victims, 90% of Indian women are attacked by an offender of a different race.<sup>603</sup> (In general, 70% of Indian victims of violent crime are attacked by an offender of a different race, again in sharp contrast with the preponderance of intra-racial violent crimes among other ethnic groups.) Although the federal government has jurisdiction to prosecute these crimes to the extent they take place in Indian country,<sup>604</sup> it rarely does: the U.S. Attorney's office declines to prosecute 50 to 85% of the cases that are reported, and many of those it does accept are child sexual abuse cases.<sup>605</sup>

The lack of tribal jurisdiction over non-Indians thus creates a significant practical gap in law enforcement, which may help to create and perpetuate the high rates of interracial violence in Indian country.<sup>606</sup> It appears to contribute to a loss of faith in the efficacy of law on the part of victims as well. While sexual assault is significantly underreported across all ethnic groups, Native women are even less likely to report such crimes.<sup>607</sup> Given the small chance that a successful prosecution will result, the choice not

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<sup>601</sup> Testimony of Robert Yazzie, Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002). This perception is not necessarily accurate. Many tribes, including the Navajo Nation, have cross-deputization agreements with their surrounding states, under which tribal police have authority to stop and ticket non-Indians for traffic violations on behalf of the state. Under these agreements, of course, states must agree to prosecute the tribally issued charges.

<sup>602</sup> Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, KANSAS J. LAW & POLICY (forthcoming 2004).

<sup>603</sup> *Id.*

<sup>604</sup> In Indian country, the federal government has jurisdiction over all crimes committed by a non-Indian against an Indian under the Indian Country Crimes Act, and jurisdiction over Indians committing sixteen "major" crimes, including rape and sexual assault, under the Major Crimes Act. 18 U.S.C. § 1153. One significant problem with the statistics regarding sexual assault of Indian women is that they do not reflect whether attacks take place in Indian country or outside it, and so lack necessary guidance regarding the jurisdictional regime that applies.

<sup>605</sup> Deer, *supra* note \_\_\_\_.

<sup>606</sup> *Id.* at \_\_\_, quoting Dr. David Lisak.

<sup>607</sup> *Id.*



to report is understandable. But it too contributes to the general failure of any legal system to address violent crime on Indian reservations.

## **2. Jurisdiction Over Nonmembers and Internal Legitimacy**

Jurisdiction over outsiders is also integral to the internal legitimacy of tribal legal systems, the extent to which tribal communities accept them as valid institutions. This perceived legitimacy is of significant practical importance to Indian communities, because it helps to dictate the extent to which legal dictates will be complied with absent perfect surveillance or application of force.<sup>608</sup>

This kind of symbolic legitimacy, of course, is not independent of the practical efficacy discussed in the previous section. Perceived legitimacy stems in part from very utilitarian concerns. If a legal system in general is perceived to preserve safety, protect property, and contribute to prosperity it gains the allegiance of the community it serves.<sup>609</sup> Even where individuals believe the exercise of the law to be ineffective or arbitrary in isolated cases, the reservoir of belief in the overall utility of the legal system helps to ensure compliance and respect. Where, however, a legal system cannot address concerns of significant impact to the community, it loses both its purpose and its legitimacy.<sup>610</sup> To the extent that tribal legal officials cannot address the everyday questions of law and order—to take examples from recent cases, zoning, reckless driving on reservation roads, regulation of on-reservation businesses, or searches of private property by law enforcement—they lose this source of legitimacy.

Power over non-Indians is also crucial for reasons distinct to tribal legal systems. As described above, western style government institutions came to most reservations as a means of controlling Indian people. While tribes often used these federal sanctioned institutions as a means to control non-Indians poaching on their lands, in the minds of federal policymakers the purpose of these institutions was to teach and assimilate Indians. To the extent modern day tribal courts perpetuate a jurisdictional divide between members and nonmembers, they confirm the opinion of segments of

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<sup>608</sup> See POMMERSHEIM, *supra* note 8, at 66-67 (discussing legitimacy with respect to tribal legal systems); FRIEDMAN, *supra* note 321 at 112-116 (discussing importance of legitimacy generally).

<sup>609</sup> See, e.g., FRIEDMAN, *supra* note 321 at 143 (“Law is right because it is useful.”).

<sup>610</sup> Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOCIETY REV. 891 (1979), reprinted in THE LAW & SOCIETY READER 36, 56 (Richard L. Abel ed. 1995) (noting that inability of courts to resolve disputes in urban housing project actually increased violence in community).

reservation populations that they are simply tools in a continuing colonial project.

But loss of jurisdiction over non-Indians undermines tribal courts in the eyes of all segments of reservation populations. Indian people, with a foot each in reservation and non-reservation worlds, are not deaf to the message sent by limiting tribal adjudication to them: Indian courts are inferior, good enough for Indians but not for white folks. This message contributes to mistrust and alienation from tribal courts and institutions among tribal members. As John St. Clair, the Chief Judge of the Shoshone and Arapahoe Tribal Court of the Wind River Indian Reservation, testified to the Senate Indian Affairs Committee, “[t]his double standard of justice creates resentment and projects an image that non-Indians are above the law in the area where they choose to reside or enter into.”<sup>611</sup> When the federal government declares that the courts of subordinate tribal governments cannot have jurisdiction over members of the dominant society, it cannot help but undermine the legitimacy of the courts in the eyes of the communities they serve.

## **b. Jurisdiction Over Outsiders and Institutional Fairness**

The previous section focused on the importance of jurisdiction over outsiders in ensuring that tribal legal systems are effective. This section will focus on the importance of jurisdiction over outsiders in ensuring that they are just. If tribal courts did not have power to adjudicate outsider rights, I will argue, they would not be so fair. Despite the recent inroads into tribal jurisdiction over outsiders, in many cases tribal courts will be the only fora in which they can assert their claims. Fairness of tribal court systems, therefore, is of significant concern both for tribal members and nonmembers.

### **1. Jurisdiction Over Outsiders and Conceptions of the Judicial Role**

Somewhat counterintuitively, it appears that the best explanation for the evenhandedness of the Navajo courts is the sense of self-importance held by its decision-makers. Political scientists have long examined judicial “role orientations,” or judicial understandings of the institutional role of courts and judges,<sup>612</sup> as one factor influencing judicial behavior.<sup>613</sup> Particular conceptions

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<sup>611</sup> Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. at 15 (Feb. 27, 2002).

<sup>612</sup> James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. Politics 104, 108 (1981).

of the judicial role may lead judges to depart in judicial behavior from individual preferences, whether it is to cater to the needs of a particular group,<sup>614</sup> to attempt to strictly follow prior judicial precedent,<sup>615</sup> or to defer to other governmental institutions.<sup>616</sup> Navajo justices' conception of the court's institutional role appears to be a significant factor behind the court's relatively good track record. This conception, in turn, is importantly connected to the scope of their jurisdiction.

As an institution, the Navajo court thinks a lot of itself. Its decisions are replete with references to the important role of the court in providing a just and distinctly tribal resolution to disputes that come before it, and its judges traverse the country and even the world arguing for the preservation of the courts and for the dissemination of the legal values promulgated by it.<sup>617</sup>

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<sup>613</sup> See John M. Scheb, II et al., *Judicial Role Orientations, Attitudes and Decision Making: A Research Note*, 42 *Western Pol. Q.* 427, 427 (1989) (collecting citations).

<sup>614</sup> Such an orientation could be clearly wrong, as when a judge sees herself of serving the interests of her particular race or class, or more acceptable, as when a judge sees the judicial role as protecting the powerless from oppression by the majority.

<sup>615</sup> Much work has been devoted to trying to determine the existence and importance of such "activist" or "restraintist" attitudes toward the appropriate judicial role. See, e.g., Victor E. Flango et al., *The Concept of Judicial Role: A Methodological Note*, 19 *Am. J. Pol. Sci.* 277 (1975); J. Woodford Howard, Jr., *Role Perception and Behavior in Three U.S. Courts of Appeals*, 39 *J. Politics* 916 (1977); John M. Scheb, II et al., *Judicial Role Orientations, Attitudes and Decision Making: A Research Note*, 42 *Western Pol. Q.* 427, 427 (1989). This work is not of great significance to the inquiry as to tribal judicial treatment of nonmembers. The supposed restraintist-activist divide conceals the general judicial agreement that restraint and creativity both have appropriate roles in decision-making and the narrow range of cases (about 10% of cases according to one survey of appellate judges) judges consider offer some scope for creativity. J. Woodford Howard, Jr., *Role Perception and Behavior in Three U.S. Courts of Appeals*, 39 *J. POLITICS* 916, 922 (1977). There is general agreement, in other words, that both creativity and interpretation are appropriate judicial behaviors, and the differences are ones of time and place. *Id.* Rather, the concern about tribal courts is that they will be swayed by factors that are generally agreed to be judicially inappropriate, in particular the status of the parties and political pressure by tribal communities. It is the importance of judicial role orientations in resisting these pressures that is more important.

<sup>616</sup> See Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 *Nw. U. L. Rev.* 1437, 1479-80 (2001).

<sup>617</sup> One can see this by reviewing a few of the many articles and speeches by Robert Yazzie and Tom Tso, who together were Chief Justices of the Navajo Nation courts during almost the entire period I examine. See Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3 *N.Y. CITY L. REV.* 105 (1998); Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Courts*, 76 *JUDICATURE* 15 (1992); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 *ARIZ. L. REV.* 225 (1989); Robert Yazzie, *Watch Your Six: An Indian Nation Judge's View of Where We Are, Where We Are Going*, 23 *AM. INDIAN L. REV.* 497 (1999); Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 *N.M.L. REV.* 175 (1994); Testimony of Robert Yazzie, Hearing Before the Committee on Indian Affairs, S. Hrg. 107-338, 107<sup>th</sup> Cong., 2d Sess. (Feb. 27, 2002).

This sense of self-importance is also evident in the one exception to the general even-handedness of the Navajo Supreme Court. Where a litigant challenges the inherent jurisdiction of the Navajo Nation, the litigant is probably going to lose.<sup>618</sup> While in many cases the Navajo courts will cede jurisdiction to another forum, whether in a child custody case because the child was wrongly taken from another jurisdiction,<sup>619</sup> an employment case against a state school district in which the court deferred to the state courts as a matter of comity,<sup>620</sup> or a tort case where the litigant had already chosen state worker's compensation remedies,<sup>621</sup> in each case raising the question whether the Navajo Nation courts as a matter of inherent jurisdiction had the power to regulate a particular dispute, in every single one the court held that it did, even in cases in which federal courts might reach a different conclusion.<sup>622</sup>

This insistence on tribal inherent jurisdiction provides support for the importance of Navajo justices' role orientations in another way, by discounting the importance of strategic motivations in their decision-making.<sup>623</sup> The justices, it might be argued, rule in favor of non-Indians only to avoid federal judicial and legislative restrictions on their jurisdiction. But questions of jurisdiction over outsiders are among the few tribal court

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<sup>618</sup> This does not mean, however, that the court will be biased against the litigant as to the substantive issues. As discussed above, in a 1999 employment case involving an employer that had repeatedly challenged the jurisdiction of the Navajo Nation in a variety of contexts, the court held that the Nation did have jurisdiction to regulate the company's employment practices, but reversed the lower court's holding that those practices violated Navajo law. *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98 (Navajo 01/14/2000).

<sup>619</sup> These cases are discussed in Part II.d.3.

<sup>620</sup> *Hubbard v. Chinle School District Nos. 24/25, Apache County, Arizona*, 3 Nav. R. 167 (Navajo 12/22/1982).

<sup>621</sup> These cases are discussed in Part II.d.1.

<sup>622</sup> *See, e.g., McArthur v. San Juan County*, 309 F.3d 1216 (10<sup>th</sup> Cir. 2003) (Navajo district court improperly exercised jurisdiction over non-Indian insurance company); *Arizona Public Service Company v. Aspaas*, 77 F.3d 1128 (9<sup>th</sup> Cir. 1995) (Navajo court improperly found tribal jurisdiction over non-Indian employer). Of course, as U.S. Supreme Court has increasingly departed from precedent to limit tribal jurisdiction, Navajo Nation decisions may be seen as a more faithful reflection of precedent, and have been upheld by reviewing lower federal courts only to find the decision reversed by the Supreme Court. *See, e.g., Atkinson Trading Company v. Shirley*, 210 F.3d 1247 (10<sup>th</sup> Cir. 2000) (holding as had Navajo Nation Supreme Court that Navajo Nation had jurisdiction to tax Atkinson).

<sup>623</sup> The strategic model for explaining judicial behavior suggests that while judges act primarily to forward their individual preferences, they do so strategically, aware that their behavior is constrained by the power of other institutional actors. *See* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 *Nw. U. L. Rev.* 1437, 1446 (2001).

decisions that can always be challenged in federal court.<sup>624</sup> While the justices are keenly aware of their vulnerability to federal control,<sup>625</sup> they apparently choose to consistently rule against non-Indians in the one area in which the federal courts may exercise significant control and even respond by restricting their jurisdiction. This suggests that where role orientations and strategic goals conflict, ideas of the institutional importance of the Navajo courts rather than the desire to avoid federal control of their actions hold sway.

Rather than create incentives to despotism, this sense of self-importance has only enhanced the institutional imperatives to ensure that all litigants can be heard, and that decisions are not unduly influenced by factors perceived as inconsistent with the judicial role such as political pressures or the membership status of the parties. This sense of self-importance is a large part of the reason that the Navajo court carefully scrutinizes the facts and law before it and tries to rule justly in response. It is the reason that the court not only often rules in favor of non-Navajo parties, but also a substantial portion of the time rules against the Navajo Nation itself. It has led the court, with no constitutional separation of powers, to construe Navajo common law and the Indian Civil Rights Act to create a right of judicial review of governmental actions.<sup>626</sup> It has also led it to threaten to create judicial waivers of tribal sovereign immunity until the Navajo Nation Council created a legislative waiver.<sup>627</sup>

The deliberate effort to incorporate Navajo customary law has only enhanced this concern for justice. In creating a jurisprudence of Navajo common law, the court sees itself as expressing the ideals not of aliens or colonizers, but of the Navajo people. Each articulation of a Navajo common law concept, therefore, is a public declaration not only to Navajo people but to the wider community, "This is the best of who we are." Justice Robert Yazzie once commented that the reaction to one of his speeches was "Yazzie is

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<sup>624</sup> *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985) (establishing federal jurisdiction to hear challenges to tribal jurisdiction over nonmembers).

<sup>625</sup> Robert Yazzie, *Watch Your Six: An Indian Nation Judge's View of Where We Are, Where We Are Going*, 23 AM. INDIAN L. REV. 497, 500 (1999) ("It is difficult being a judge when you have to watch your rear to make certain that those folks do not push you into something that can be the basis for review of one of your decisions by a federal court, or meat for testimony in Congress about how bad your court may be.")

<sup>626</sup> *Halona v. McDonald*, 1 Nav. R. 189 (1978).

<sup>627</sup> *Keeswood v. Navajo Tribe*, 2 Nav. R. 46 (S.Ct. 1979) (urging tribe to waive sovereign immunity); *Johnson v. Navajo Nation*, 4 Nav. R. 192, 195-96 (Ct.App. 1987) (holding immunity waived under Navajo Sovereign Immunity Act passed "perhaps at the 'urging' of the Court").

bashing the courts again.”<sup>628</sup> But this kind of “bashing” suggests that tribal judges will use the freedom to diverge from Anglo legal standards as an opportunity not to lower but to raise the bar in protecting those that appear before them. While tribal judges likely exaggerate the differences and superiority of tribal over state and federal legal systems, an empirical study of tribal court decisions regarding fundamental rights suggests that the results of tribal court adjudication are at least as fair as those that would be expected in non-tribal courts.<sup>629</sup>

Eliminating the power to adjudicate rights of outsiders, and to do so with a relative degree of independence from outsider legal standards, would greatly diminish this sense of self-importance. The jurisdiction of tribal courts would then be radically less than state and federal courts, and the disputes before them would not include many of those in which, I have argued, law does its real work. The impetus to act in accordance with the role of the judge, independent from immediate pressures and prejudices, would be greatly reduced.

## **2. Jurisdiction Over Outsiders and Grappling with Difference**

Jurisdiction over outsiders may also enhance the justice of the courts and the broader Navajo community in another way, by forcing judges to consider and resolve real conflicts in Navajo society. Despite the claims of some advocates of tribal courts that tribal traditional dispute resolution is always just, both traditional tribal norms and modern tribal laws, like those of any legal system, may reinforce unequal power structures.<sup>630</sup> Tribal communities are not homogenous—they are composed of men and women, of traditionally powerful families and traditionally powerless ones, of those with Anglo education and those with traditional education. Tribal politics and laws, whether they reflect pre-contact traditions or modern developments, may favor one group over another. Separated from the demands of the broader community in which tribes are situated, uncritical valorization of

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<sup>628</sup> *Watch Your Six: An Indian Nation Judge's View of Where We Are, Where We Are Going*, 23 AMER. INDIAN L. REV. 497 (1999).

<sup>629</sup> Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Tribe Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 578-90 (2000). Rosen found that tribal courts have “interpreted the ICRA in good faith, . . . take federal case law seriously and tend to deviate from federal doctrines only for good reasons,” and that among the 194 cases “[t]here are no outcomes that flatly violate [the right of] Protection, and only one case’s reasoning is clearly problematic.” *Id.* at 578.

<sup>630</sup> See also BRUCE G. MILLER, *THE PROBLEM OF JUSTICE: TRADITION AND LAW IN THE COAST SALISH WORLD* at 11 (2000).

tradition may prevent tribal communities from examining this inequality. By continually facing litigants and contexts involving a wide variety of perspectives, however, judges are forced to reexamine how traditional norms and their modern iterations accord with the ideals and reality of the community.

Anthropologist Bruce Miller notes this effect in his study of courts run by three different tribes composed of the indigenous Coast Salish people of the Northwestern United States. Miller found that the courts functioned best when they had jurisdiction over subjects creating real conflict among tribal members. So the Upper Skagit tribal court system, which was created to regulate and adjudicate individual disputes regarding the fishing rights won by the tribe in 1974 functioned much better than the South Island Justice Project or the Sto:lo Justice Project, both of which were created to provide a forum for supposedly harmonious and consensus based law ways rather than to fill a meaningful distributive or punitive function.<sup>631</sup> Miller concludes that “these three cases suggest that it is a dialectical process, an interchange between abstractions of past practice and specifics of current disputes, rather than simply the contemplation of past practices, that enable tribal justice institutions to become effective and acceptable to community members.”<sup>632</sup>

At the same time, the demands of outsiders may provide judges with greater freedom to institute legal change than they might otherwise possess. A significant criticism of tribal legal systems is that the small size of tribal communities and the importance of clan relationships among community members present an obstacle to objective resolution of legal disputes. This obstacle may not be significantly greater than it is in small towns, in which judges, lawyers, and parties typically know each other well. But the presence of individuals not tied to the Navajo Nation by bonds of kinship and familiarity may enable judges to revitalize legal rules to better respond to the disputes before them.

One can see the value of the confrontation with difference in the decisions of the Navajo appellate court. In several cases, judicial review of cases involving outsiders has led to changes that tend to equalize Navajo statutory law. As mentioned above, one of the statutes passed as part of the Navajo law “reform” of the 1950s provided that while Navajo couples could legally marry in a traditional Navajo ceremony, Navajos could only marry non-Navajos in accordance with procedures conforming to state law. In two cases, Navajos came before the court seeking validation of their customary

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<sup>631</sup> *Id.* at 7-9.

<sup>632</sup> *Id.* at 12.

marriages to their deceased non-Navajo spouses.<sup>633</sup> In both cases, the court refused to grant the petitions, citing the clear language of the statute. In each case, however, the court expressed its concern with the law. In 1985, in *Marriage of Garcia*, while refusing to validate the marriage between a Navajo and a Mexican-American, the court declared that it was

impressed by the arguments of counsel for the petitioner which recounted a history of non-Navajos adopting a Navajo way of life and becoming a part of their community. One particular example was Jesus Arviso, a man of Mexican origin who became a Navajo leader. The Court recognizes the contribution and importance of many non-Navajos but finds that the provisions of the Navajo Tribal Code require it to affirm the decision of the trial court.<sup>634</sup>

In 1989, the court called for change of the rule:

[S]aying that marriages between Navajos and non-Navajos can only be contracted in compliance with state law, “allows outside law to govern domestic relations within Navajo jurisdiction. Such needless relinquishment of sovereignty hurts the Navajo Nation. The Navajo people have always governed their marriage practices, whether the marriage is mixed or not, and must continue to do so to preserve sovereignty. [The law] enacted in 1957, has outlived its usefulness.”<sup>635</sup>

The Navajo Nation Council subsequently changed the law.

In 1999, the court considered a challenge to its criminal jurisdiction over a non-Navajo Indian.<sup>636</sup> The Navajo Nation sought to prosecute Lakota activist Russell Means for the battery of his father-in-law, Leon Grant, a member of the Omaha tribe and his brother-in-law, Jeremiah Bitsui, a member of the Navajo Nation.<sup>637</sup> Means alleged that because the tribe could not prosecute a similarly situated non-Indian, jurisdiction over him was founded in race and violated the equal protection provisions of the Indian Civil Rights

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<sup>633</sup> In re Validation of Marriage of Francisco, 6 Nav. R. 134 (SCt. 1989); In re Marriage of Garcia, No. A-CV-02-84 (Navajo 02/20/1985).

<sup>634</sup> 5 Nav. R. at 30-31.

<sup>635</sup> In re Validation of Marriage of Francisco, 5 Nav. R. 30 (Ct.App. 1985).

<sup>636</sup> Means v. District Court of the Chinle Judicial District, 7 Nav. R. 382 (S. Ct. 1999) (Navajo 05/11/1999).

<sup>637</sup> Id. at 382.



Act, the Navajo Nation Bill of Rights, and the Fifth Amendment to the United States Constitution.<sup>638</sup> The court rejected the challenge. While it could have relied on the federal Duro Fix to justify its jurisdiction, it chose not to, and relied instead on the legal relationship with outsiders created by the Navajo Treaty of 1868 and by Navajo common law.

First, the court found that the treaty language, interpreted as the Navajo negotiators would have understood it,<sup>639</sup> granted the tribe jurisdiction over non-member Indians. It pointed to the concern of Navajo treaty negotiators and the reassurance of the treaty commissioners that the tribe would be able to accept non-members onto their lands and that those outsiders would be subject to tribal jurisdiction.<sup>640</sup> Second, the court pointed to the Navajo common law concept of membership by voluntary affiliation:

While there is a formal process to obtain membership as a Navajo . . . that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). . . The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. . . A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. . . We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane*, consented to Navajo Nation criminal jurisdiction. This is not done by "adoption" in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.<sup>641</sup>

While a loss for the non-Navajo litigant, by overcoming the largely federally-created distinction between enrolled members and non-enrolled residents the decision created a tribally legitimate basis for incorporating non-members into the Navajo community.

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<sup>638</sup> Id. at 383.

<sup>639</sup> Id. at 389. This rule of treaty interpretation is one of the fundamental Indian law canons of construction. 2005 Cohen, *supra* note 88 at § 2.02.

<sup>640</sup> 7 Nav. R. 382, 390-91.

<sup>641</sup> Id.

More recently, in *Staff Relief, Inc. v. Polacca*,<sup>642</sup> the court judicially amended a Navajo statute to provide remedies to a non-Navajo. There, a non-Indian headhunter had offered a member of the Hopi Tribe a job with the Indian Health Service, but then denied him the job after he had accepted and moved to the area. Mr. Polacca sued the headhunter under the Navajo Preference in Employment Act, and the headhunter argued that Polacca had no standing to sue because the Act limited the right to file a complaint to Navajos. The Navajo Supreme Court declared this limitation was enacted “[f]or reasons beyond the knowledge of this court” and “rectif[ied] that shortcoming by ruling that under basic principles of equal protection of law, any person who is injured by a violation of NPEA may file a claim with the Commission.”<sup>643</sup> The court relied both on federal constitutional jurisprudence declaring that a court might broaden coverage of a statute otherwise constitutionally defective, and on the Navajo Treaty of 1868 that recognized the power of the Navajo Nation “to admit non-Navajos to its territorial jurisdiction and thus its protection, or to deny entry. Once an individual obtains the right to enter the Navajo Nation, due process of law requires that the Navajo Nation extend the protection of its law to all individuals.”<sup>644</sup> This decision may not have arisen purely from the court’s sense of justice. In hearing the case, the Navajo Nation was surely aware of contemporary challenges to tribal jurisdiction and tribal protection of rights.<sup>645</sup> But the decision was chosen by the court, and thus became an expression of sovereignty and Navajo values rather than a resented intrusion of outside law.

In each of these decisions, we see the ways that allowing judicial determination of cases involving outsiders enhances the fairness of the law. By considering broad-based statutes as applied to the individual circumstances of non-members on the Navajo Nation, the court is moved to criticize and amend aspects of the laws that do not treat them fairly. By struggling to understand the position of outsiders in the Navajo community, the court recovers traditions in which members and nonmembers were not separated by artificial legal rules. Far from permitting arbitrary control to the disadvantage

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<sup>642</sup> No. SC-CV-86-98 (Navajo 08/18/2000).

<sup>643</sup> *Id.*

<sup>644</sup> *Id.*

<sup>645</sup> See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000) (invalidating qualifications based on Native Hawaiian ancestry for voting on trustees for land held in trust for Native Hawaiians); *Dawavendawa v. Salt River Power and Improvement Project*, 154 F.3d 1117 (9<sup>th</sup> Cir. 1998) (invalidating application of Navajo Preference in Employment Act to Hopi Indian as discrimination based on national origin); *Williams v. Babbitt*, 115 F.3d 657 (9<sup>th</sup> Cir. 1997) (striking down protections for Alaska Natives in Reindeer Act of 1937 as race-based);

of outsiders, judicial jurisdiction appears to reveal and correct some of the arbitrariness of the position of outsiders in the Navajo community.

## **V. Conclusion**

In the American imagination, Indian tribes function as the bearers of history for a country uneasy about its lack of history, a symbol of tradition and culture for a country struggling with its aggressive modernity. Supreme Court jurisprudence has reflected and contributed to this image, emphasizing the foreignness of tribal courts, and denying tribes the ability to shape their negotiations with the outside world.

My findings suggest a need to reconceptualize tribes and reconceptualize what jurisdiction over outsiders means for them. Just as the Navajo people are importantly intertwined with non-Navajo society, the genius of Indian tribes lies not in being living museums, but rather, in adapting in the face of change to survive without losing their culture or disintegrating as communities. Sovereignty must be understood in this light: not as the right to stand still in a mythicized past, but as the power to change so as to maintain and strengthen one's community when many of the historic bonds between that community have disappeared. The challenge of federal Indian law, then, is to create an arena in which tribes can combine their past, present, and future to create norms and institutions that can sustain tribal communities.

Jurisdiction over those considered outsiders to tribes is crucial in allowing this process to occur. It is precisely cases in which both worlds are brought together that tribal courts best perform their community-building role, by translating traditions eroded by generations of colonization into living rules meaningful to the modern Indian community—a process Nell Newton calls “reversing the politics of erasure.”<sup>646</sup> Through determining the rules of interaction between tribal members and nonmembers, tribal courts use the institutional forms of the colonizer to reinvigorate the voice of the colonized and make it heard. Were tribal courts limited to adjudicating the rights of their members, they would lose their important role in defining that sovereignty and ensuring its preservation.

At the same time, jurisdiction over outsiders is crucial in preserving the fairness of tribal courts, both for members and nonmembers. Justice is not created by ensuring that decision-makers have power only over those that are just like them. Rather, it lies in ensuring that judges have enough pride in their judicial role to fairly adjudicate the cases before them, as well as the

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<sup>646</sup> Unpublished manuscript on file with author.

opportunity to scrutinize laws and practices against a variety of perspectives. In the tribal context, jurisdiction over outsiders, along with a measure of independence in exercising it, preserves both this necessary institutional self-importance and the impetus to examine tribal practices and ensure they conform to tribal ideals.

Whether this jurisdiction will be preserved depends, in part, on whether the Court maintains the assumptions that color the opinions of the last twenty-five years. Because the Court has proceeded in a haphazard, incremental fashion in depriving tribes of such jurisdiction, there remains much that can be preserved in future cases. If the Justices continue to perceive tribal courts as unfair, unfamiliar places, they will continue to bend the law and ignore the facts to find that tribes have no jurisdiction over tribal members. If they continue to perceive self-government as the power to protect practices that are untouched by time and the outside world, they will continue to read actions that touch on nonmembers as unrelated to the self-government that the Court is bound to protect.

These questions are equally applicable to Congress. As the Court continues to undermine congressional and executive efforts to support tribal self-determination, tribal advocates will turn to Congress to correct this judicial policy-making cloaked in the mantle of federal common law. Congress, more aware of the contemporary realities of tribal life, has not fallen into the same traps as the Court. But in considering whether to statutorily protect tribal jurisdiction over non-Indians, Congress will need evidence that this move is necessary and that it will not result in injustice to those affected.

In the past, the Court has made decisions regarding jurisdiction over nonmembers against a backdrop of untested beliefs. This Article is a beginning step in testing those beliefs and raising questions as to their accuracy. It is hoped that it will contribute to the ongoing effort to create a more informed basis for legal action, one that will fulfill the commitment to tribal self-government embodied in federal law.