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Table of Contents

   Matthew L.M. Fletcher ........................................................................................................... 1–27

2. Tribal Supreme Court Project: Ten Year Report
   Richard Guest .................................................................................................................. 28–78

3. “Indians, in a Jurisdictional Sense”: Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction
   Paul Spruhan .................................................................................................................... 79–98

4. Of Whaling, Judicial Fiats, Treaties and Indians: The Makah Saga Continues
   Jeremy Stevens ................................................................................................................. 99–126

   Heidi K. Adams ................................................................................................................. 127–146

6. Defining the Contours of the Infringement Test in Cases Involving the State Taxation of Non-Indians a Half-Century after Williams v. Lee
   Nathan Quigley ............................................................................................................... 147–160

7. The Jay Treaty Free Passage Right In Theory and Practice
   Caitlin C.M. Smith ............................................................................................................. 161–180
TOWARD A NEW ERA OF AMERICAN INDIAN LEGAL SCHOLARSHIP: AN INTRODUCTORY ESSAY FOR THE AMERICAN INDIAN LAW JOURNAL

Matthew L.M. Fletcher*

The field of American Indian law is both incredibly old and new. It is old because Indian law intruded on the deliberations of the Framers way back in 1787, and it is new because there simply was no significant corpus of Indian law scholarship until the 1970s. American Indian law is a growing, dynamic field, subject to enormous complexity and creativity. The founding of a new law journal dedicated to Indian law – Seattle University School of Law's American Indian Law Journal – compels review of the scholarly field of American Indian law.

Modern Indian law scholarship has passed through two distinct phases – the first phase is one practicality dominated by the practitioners of the 1960s through the early 1980s; the second phase, which began in earnest in the late 1970s and is ongoing, is dominated by scholars (many of whom continue to practice in the field on a limited basis) who are critics of the doctrines of federal Indian law. The temporal framework

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loosely corresponds to the changing fortunes of tribal interests\(^4\) in the United States Supreme Court, with tribal interests enjoying significant success before the Court through the 1960s and into the 1980s, and suffering considerable losses before the Court since the mid-1980s, with tribal interests having lost more than 75 percent of their cases since 1986.\(^5\) A few observers, most notably Sam Deloria\(^6\) and the late Phil Frickey,\(^7\) argue that the current phase of Indian law scholarship is a failed endeavor and

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\(^4\) I use “tribal interests” throughout this article as a general term to mean Indian tribes, but also to mean those entities that may be aligned with Indian tribes. In any given case, that may mean the federal government, private entities, and individual Indians. I intend to exclude those non-tribal parties from this definition in cases where they are not aligned with tribes.


\(^6\) See Sam Deloria, Commentary on Nation-Building: The Future of Indian Nations, 34 ARIZ. ST. L. J. 55, 55-56 (2002) (“The saddest thing of all is the number of Indian academics who basically yearn for a time which never existed, when Indian sovereignty was like Superman in a universe without kryptonite. That never even happened for Superman. Somebody always had a little rock of kryptonite to whip out and Superman was toast. But we have sad, misguided scholars dropping out of what’s happening because, as one said to me, ‘I can’t participate in a project that tells the tribes what they can’t do.’ My God. That’s our money that sent this guy to school. In the old days, when my people sent out some scouts, if they went over the hill and saw 500 Crow Indians standing there cleaning their weapons, were they supposed to come back to the camp and say, ‘No problem, man, nothing happening?’ They would get fired as scouts. Whatever our personnel system was in those days, they wouldn’t be sent out. But we have scholars that want to look over the state of the law and come back and say, ‘Hey, we’ve got unlimited sovereignty, it’s just that we’ve got a screwed up country that won’t recognize it.’ Well, that’s helpful.”). I should add that Deloria’s assessment differs from Frickey’s, and goes to the heart of the subject matter of American Indian law.

\(^7\) See Philip P. Frickey, Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law, 38 CONN. L. REV. 649, 660-61 (2006) (“[W]riting in the field needs to work toward a functional jurisprudence, in which objective, scholarly work interrogates the law and life on the ground, to make
is unpersuasive to the judiciary and policymakers. The main question Indian law scholars have been asking for 20 years or more is – what are we doing this for?

I suspect American Indian legal scholarship is heading toward a crossroads. In the coming years, I believe Indian law scholars must address these questions (and probably many more I have neglected to mention):

- Were Deloria and Frickey right – that most current Indian law scholarship is a failed enterprise in that it fails to persuade the judiciary, and really anyone outside the field? How do tribal advocates change that?

- Who is, and who should be, the audience for American Indian legal scholarship? State and federal judges? The Supreme Court? Tribal court judges? Tribal leaders and constituents? The practicing Indian law bar?

- Is there a link between the shift in American Indian legal scholarship from practical and descriptive work to theoretical and normative work, and the decline in the fortunes of tribal interests in the Supreme Court?

- Are Indian law scholars, who are most distant from the on-the-ground realities of Indian country, less capable of generating useful legal scholarship than current practitioners? Do courts cite practical articles (often written by practitioners) more than theoretical articles (usually written by law professors and law students)?

- What is the best, most useful kind of American Indian law scholarship? Theoretical and doctrinal papers that offer normative prescriptions? Descriptive papers that offer legal, political, economic, and historical context? Normative scholarship that offers realistic solutions for tribal attorneys and tribal leaders? Normative scholarship that offers thoughtful theoretical criticism of the Supreme Court’s Indian law jurisprudence? Practical nuts-and-bolts scholarship for Indian country lawyers, tribal leaders, and tribal court judges? Practical nuts-and-bolts scholarship for federal judges?

transcendental nonsense more difficult to deploy for anyone on any side of a dispute, but especially by the Supreme Court in cases like Duro. Of course, such work might deflate some federal judicial stereotypes about tribes, but might support some others. So be it. Scholarship is not – or should not be – unidimensional in any ideological way. My sense, though, is that such work would tend to support the pragmatic legitimacy of tribes in many circumstances.”; see also Conference Transcript – The New Realism: The Next Generation of Scholarship in Federal Indian Law, 32 AM. INDIAN L. REV. 1, 3-4 (2007/2008) (quoting Phil Frickey: “People like Sam Deloria have said this before, and in some cases, like Sam, for many years.”).

8 Usually, Indian law scholars describe Indian law as heading toward a crossroads. E.g., Symposium: Indian Law at a Crossroads, 38 CONN. L. REV. 593-832 (2006); Clinton, Isolated in Their Own Country, supra note 3, at 979 (“Federal Indian policy is again at a crossroads.”). I must respectfully disagree. Federal Indian law has been incredibly stable since 1970, despite some ugly losses in the Supreme Court. See generally CHARLES F. WILKINSON, BLOOD STRUGGLE (2005).
Does the law review market distort Indian law scholarship and how it is used by the courts?

This essay will address just the tip of the iceberg of the effort to reexamine American Indian legal scholarship and its influence on the Supreme Court, state courts, lower federal courts, and tribal courts and on the legal academy. In 2011, I generated a dataset for Supreme Court citations dating back to the 1958 Term that cited to American Indian legal scholarship in the form of law review articles, books or monographs, and treatises and casebooks. I was curious about whether the early generation of Indian law scholars, most of whom were practitioners forcing huge jumps in the modernization of federal Indian law, were really all that influential. And if so, why?

My initial impressions were that the scholars writing in the 1970s were very influential on the Supreme Court, but that the American Indian legal scholarship citation rate is declining, with the starkest decline being in the Roberts Court. Overall, as we will see, about one-third of the Burger and Rehnquist Courts’ decisions included citations to American Indian legal scholarship. Still, my conclusion is that the Court rarely engages with the normative and prescriptive analyses articulated in the literature, even when the Court does cite to it. What is fairly clear, however, is that there is a judicial ideological connection to Indian law scholarship citation practices, with left-leaning Justices citing to scholarship two-to-four times more often than moderate or right-leaning Justices.

As for the state and lower federal courts (here I only study the years of the early Roberts Court), my initial finding (really, more of an estimate) is that less than ten percent of Indian law decisions involve citations to Indian law scholarship. However, the citation rate goes up considerably when the court is deciding a hard case. In appellate cases, when at least one judge dissents or writes a separate concurrence, the citation rate climbs dramatically. Moreover, I presume, given what I have seen so far, that many more state and lower federal court judges are likely to engage Indian law scholarship on normative and prescriptive matters more than the Supreme Court Justices do.

I additionally engage Professor Frickey’s recommendation that Indian law scholars embark on research designed to bring more “realism” to the field of Indian law. In my view, with deep respect for Professor Frickey, it was not always clear what he

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meant by “realism.” In his powerful *Connecticut Law Review* article on the subject, he wrote as an introduction that “realism”:

> in federal Indian law should be simultaneously more grounded and more theoretical. If doctrine is at least as subject to evolution here as in other fields of law, scholarship should aspire to explain and prescribe Indian law where … it counts—on the ground. What actually happens on Indian reservations concerning the creation, evolution, and implementation of law is a subject about which the broader legal community has few conceptions, and most of those are probably inaccurate. If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.\(^\text{11}\)

I find this description of realism very compelling, most especially the prescription to focus on “a bottom-up consequential calculus.”\(^\text{12}\) I take this description to mean that research into tribal law and tribal governance structures, then, would be at a premium. Empirical research, both qualitative and quantitative, about reservation legal relationships—between tribes and members, between tribes and nonmembers, on tribal court procedural and substantive practices, and “on-the-ground” reservation facts—would be a premium in this calculus.\(^\text{13}\) Of course, it may be especially difficult to parse out articles offering “realism” – some articles truly will derive from Indian country experiences, while others will only partially (and yet importantly) derive from Indian country experiences, while still others may only obliquely derive from Indian country experiences. Others may be “realistic” but derive nothing from Indian country.

Somewhat in contrast I note Sam Deloria’s continuing opposition and criticism of Indian legal scholarship. He, I would think, shares Frickey’s overall criticism of Indian law scholarship – that it is substandard as a general matter. I risk misinterpreting his criticism, but I take from his many unpublished talks and from our many conversations that at least a part of the fundamental problem with Indian law scholarship is the refusal by pro-tribal scholars to satisfactorily acknowledge the very real problems and limitations of tribal governance. Consider the following examples: tribal advocate and tribal leader demands for the recognition of tribal sovereignty beyond what any Indian tribe is capable of exercising at this time; lack of political accountability and general competence of many tribal government leaders; and misdirected focus on sovereignty issues instead of terrible real-world problems like reservation youth suicide. I cannot refute these criticisms by pointing to my scholarship and giving my own examples of how I have avoided this trap we are all in – few (and probably none) of us in the field

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2. *Id.* at 651.
legitimately can – and I am not going to attempt to address them here completely. Here, I can make the effort to discuss how the scholarship in the field is received by the courts. Even that, of course, is limited.

Overall, I suspect that critics like Deloria and Frickey were both right and a little bit wrong. While much of the Supreme Court appears not to be persuaded by Indian law scholars, the state and lower federal courts sometimes are persuaded and, what’s more, occasionally engage scholars on the normative and prescriptive arguments advanced by Indian law scholars. That said, courts still rarely engage and even less often adopt scholarly normative arguments.

Part I introduces the notion that the legal academy can somehow influence developments in the law. In Part II, I look at the data relating to Supreme Court citations to Indian law scholarship dating back to 1959. While the Burger and Rehnquist Courts (1968-2005) cited fairly extensively to Indian law scholarship, the early years of the Roberts Court (2005-2012) have seen a dearth of citations. Part III presents data on lower federal and state court citations to Indian law scholarship from the same time frame as the Roberts Court (2005-2012), and suggests that many lower courts continue to take Indian law scholarship seriously. In Part IV, I draw a few conclusions about the future of American Indian legal scholarship. I believe that a legal periodical like the American Indian Law Journal is helpful, and I will explain why.

I. A Note on Scholarship and Judging

The pinnacle for authors of legal scholarship is to write a paper that influences the development of the law, most strikingly in the Supreme Court. Probably only Felix Cohen can stake a claim to writing scholarship that had a dramatic and long-lasting impact on the Supreme Court’s Indian law jurisprudence. Cohen’s Handbook of Federal Indian Law, championed by his friend Supreme Court Justice Felix Frankfurter, is probably one of the most influential treatises in any field. It continues to be cited by the Court long after Cohen’s involvement in the field ended with his early death in 1953.

Cohen’s original Handbook was a hybrid of the kind of scholarship that both restated the law for the ease and convenience of practitioners and courts, and promoted

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law reform. The Handbook, several editions later, has largely embraced its role as a treatise. The Handbook’s efforts at promoting law reform in recent years have not been terribly successful. A treatise must often choose between competing lines of cases in order to present the doctrinal position best suited to the field, but best preserves its position of authority by picking and choosing its fights carefully. In a field like Indian law (perhaps there are no others like Indian law), where so much of the law is arrayed against tribal interests, treatise authors and editors might be compelled to argue for a position no court has adopted because it is the right position to take. A treatise arguing often enough for the impossible (or improbable) may become suspect in the eyes of the judiciary. Cohen’s Handbook, despite being authored and edited exclusively by supporters of tribal interests, retains its authority after all these years.

The Supreme Court continues to trust the Handbook, and even cites it for propositions that might make tribal advocates cringe. But that’s the Handbook’s job.

Traditional law review articles (like the ones to be published by the American Indian Law Journal) tend to be better suited to filling the role of advocacy anyway. Law review articles can take the time to develop a comprehensive theory, delve into the legal history, the legislative history, the jurisprudential history, and make a complete argument on relatively narrow topics. Good law review articles identify the best arguments, address all sides of a dispute, and make fair conclusions from those arguments. No comprehensive treatise can do that as effectively as law review articles.

But writing law review articles is often a thankless task. Treatise authors and editors can take solace in being part of a project that is more likely to be cited in the cases. Law review articles are not as likely to be cited by the courts. A majority of articles are not cited by anyone, anywhere. There are so many articles, and few judges treat the business of judging as a scholarly endeavor. Some judges openly disdain scholarship. Moreover, law reform advocacy is difficult. It is far easier for judges to

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17 Cf. Harold L. Ickes, Foreword, in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW v (1941 ed.) (“Ignorance of one’s legal rights is always the handmaid of despotism. This Handbook of Federal Indian Law should give to Indians useful weapons in the continual struggle that every minority must wage to maintain its liberties, and at the same time it should give to those who deal with Indians, whether on behalf of the federal or state governments or as private individuals, the understanding which may prevent oppression.”).
20 A quick Westlaw search indicates that the courts have cited to various editions of the Handbook in about 900 cases, nearly 300 of them since 2000. The Supreme Court has cited the Handbook in 65 of its cases overall, and in ten since 2000.
22 See Petherbridge & Schwartz, supra note 9, manuscript at 2-3 (collecting anecdotes). See also Conference Transcript, supra note 7, at 13 (quoting Riyaz Kanji, who mentioned a friend who clerked on the Supreme Court; when the clerk presented law review research to the Justice, “The Justice had taken a look at the stack and had unceremoniously dumped them in the garbage can.”). Contra id. at 14 (“When I went to the Court to clerk, I wondered whether Justice Souter would have the same approach to
follow the great weight of authority than to decide difficult questions in accordance with a law professor’s recommendation. A judge might be reversed for that, and no judge wants to do anything out of the ordinary that might encourage reversal.

That said, courts do cite scholarship, and they typically are more likely to do so in close cases and in cases where there is little or no precedent. Indian law often fits that bill. UCLA Vice-Chancellor Carole Goldberg by far has influenced courts more than any other Indian law scholar in the modern era. Her research on Public Law 280’s legislative history, and her conclusions from that research, formed the theoretical basis for two of the most important Supreme Court decisions in the last 50 years, *Bryan v. Itasca County*, the most important Public Law 280 case, and *California v. Cabazon Band of Mission Indians*, the case that institutionalized Indian gaming. While the Supreme Court and lower courts have cited other scholars for their research, no modern scholar has so directly influenced the Supreme Court in the same manner as Vice-Chancellor Goldberg.

In the next sections, we will review some hard data about the Supreme Court’s and lower courts’ citation patterns in Indian law. We will also take a look as to why a court might cite to a piece of scholarship.

II. Supreme Court Citations to Indian Law Scholarship, 1959-2012

A. The Survey

Here, we look to the United States Supreme Court, going back to the 1958 Term, which is generally recognized by American Indian law scholars and commentators as the beginning of the “modern era” of Indian law. As we will see, the Supreme Court’s use of American Indian law scholarship appears to have shifted considerably over the last five decades. The use of Indian law scholarship is highly ideological, with more liberal Justices citing to Indian law scholarship far, far more than conservative or academic articles. Happily for I think everyone in this room, the answer is, no. He was a Justice, and I think more akin to other Justices, who definitely did want to know what was out there in legal writing that was relevant to the cases we were working on.”).

moderate/swing Justices. As the Supreme Court swung toward being more ideologically conservative in the Rehnquist Court era, citations to Indian law scholarship decreased. While it is far too early to tell, in the small number of Indian law cases decided by the Roberts Court so far, it appears that the current Court will rarely cite to Indian law scholarship. This contrasts remarkably with the Burger and Rehnquist Courts, which cited Indian law scholarship a great deal more, although those citations came mostly from the more “liberal” Justices.

The first graph demonstrates the number of cases and the number of articles to which the Court cited, organized in chronological order by the name of the Chief Justice:

| Modern Era Supreme Court Citations to Indian Law Scholarship (1959-Present) |
|-----------------|----------------|----------------|----------------|
| Cases | Cases Citing Articles | Articles Cited | Total Citations |
| Warren Court | 15 | 1 | 1 | 6 |
| Burger Court | 75 | 27 | 46 | 12 |
| Rehnquist Court | 50 | 16 | 31 | 9 |
| Roberts Court | 9 | 2 | 2 | 2 |

The graph shows that the Burger Court was somewhat more likely than the Rehnquist Court to cite to American Indian legal scholarship – about 36 percent of Burger Court cases have at least one citation, while about 32 percent of Rehnquist Court cases cited to an Indian law scholarly work. And the intensity of the Burger Court’s citations was somewhat more significant than that of the Rehnquist Court – a Burger Court opinion citing to an Indian law article or other work averaged about 2.8 citations, while a Rehnquist Court opinion averaged about 2.4. Note that each Court is successively more conservative than the Court before it.

29 The methodology, such as it is, for this portion of the study is that I simply read each Supreme Court opinion in Indian law located on Turtle Talk – Supreme Court, Turtle Talk blog page, available at http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/. I included as a citation any Indian law article or monograph. I was probably more inclusive here than in my study of lower court decisions, especially in that I included a few works that were more history than law. I excluded from my count any secondary source that did not have as its focus Indian law.
Ideologies matter in citation patterns. The next graph takes into account generally recognized judicial ideologies, borrowing from *Oyez* 30 and the *Supreme Court Compendium*. 31 I divided the Justices into two groups – the so-called “liberals”32 and the so-called “conservatives,” into which I added the moderate or “swing” Justices. 33 For the sake of convenience I included Justices Blackmun and Stevens in the “liberal” grouping, though in their early years on the Court they were not considered liberal Justices. 34

![Modern Era Supreme Court Citations by Justices' Generally Recognized Ideologies](image)

This chart demonstrates that there is a wide ideological divide between the Justices in the citation of American Indian legal scholarship. “Liberal” Justices are two-and-a-half to three times more likely to cite to Indian law scholarship than “conservative” or swing Justices throughout the entire study period (OT 1958 to OT 2011). This divide makes some sense, as the vast, vast majority of Indian law scholarship is pro-tribal. However, an alternate explanation may be that Indian law precedents tend to disfavor tribal interests, and so resort to scholarly criticism of those precedents is helpful to less conservative Justices.

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32 In this group, I include Chief Justice Warren, and Associate Justices Blackmun, Brennan, Breyer, Clark, Douglas, Ginsburg, Marshall, Souter, and Stevens.
33 In this group, I include Chief Justices Burger, Rehnquist, and Roberts, and Associate Justices Alito, Frankfurter, Harlan, Kennedy, O’Connor, Powell, Rehnquist, Roberts, Scalia, Stewart, Thomas, White, and Whittaker.
The next chart breaks down the same data by the eras of the Chief Justices, only for actual articles cited:

### Modern Era Supreme Court Citations by Article Using Generally Recognized Ideologies

<table>
<thead>
<tr>
<th></th>
<th>Warren Court</th>
<th>Burger Court</th>
<th>Rehnquist Court</th>
<th>Roberts Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Liberal&quot;</td>
<td>0</td>
<td>37</td>
<td>20</td>
<td>2</td>
</tr>
<tr>
<td>&quot;Conservative&quot; or Swing</td>
<td>1</td>
<td>11</td>
<td>11</td>
<td>0</td>
</tr>
</tbody>
</table>

During the Burger Court era, conservative and swing Justices were less likely to cite to Indian law scholarship than their liberal colleagues – about four times less. Rehnquist Court-era conservative and moderate Justices were somewhat more likely to cite to Indian law scholarship than their Burger Court-era colleagues, and only trailed the liberals about two-to-one.
The next chart breaks down the same data by eras of Chief Justices in terms of the number of total citations:

| Modern Era Supreme Court Total Citations Using Generally Recognized Ideologies |
|---------------------------------|-----------------|-----------------|-----------------|-----------------|
|                                 | "Liberal" | "Conservative" or Swing |
| Warren Court                    | 0         | 1                |
| Burger Court                    | 46        | 18               |
| Rehnquist Court                 | 25        | 11               |
| Roberts Court                   | 2         | 0                |

Once again, we have similar results. Liberal Justices were far more likely in the Burger Court to cite to Indian law scholarship, more than 2.5 times likely, than their conservative or moderate colleagues. During the Rehnquist Court, the trend was similar, with liberals 2.3 times more likely to cite to scholarship.
The next chart shows the number of articles cited and total citations by the various Justices in alphabetical order:

![Citations by Justice (1959-Present)]
This chart demonstrates again the liberal-conservative/moderate divide in citations to American Indian legal scholarship. The Justices with the highest citation counts are, in order, Blackmun (18), Marshall (11), Brennan (10), Ginsburg (10), and Stevens (9). Justice Kennedy is the first conservative/moderate to make this list, coming in tied for sixth place with Justice Souter, with eight citations. Notably, several conservative/moderate Justices with long tenures have zero citations, including Chief Justice Burger, and Justices Scalia and Thomas.\textsuperscript{35}

The analysis here has avoided discussing the Warren and Roberts Courts. The Warren Court, with its 15 cases but only one citation, was temporally located in an era when there was relatively minimal citation to legal scholarship and relatively few Indian law articles to cite.\textsuperscript{36} The Roberts Court may be another matter altogether. That Court has only decided nine cases on the merits, but in only two of those cases are there citations to Indian law scholarship. The $n$ is very low, but if there is the beginning of a trend, it may demonstrate a significant decline in the influence of American Indian legal scholarship on the Supreme Court.

Finally, we look at the characteristics of the scholarship cited by the Supreme Court. Out of curiosity, I wondered whether the source of the scholarship mattered. For example, does it matter if the author of the article was a law professor, a legal practitioner (including judges), or a law student (including recently-graduated judicial clerks)? One suspects that courts would cite to law professors and their propensity for deeply detailed articles more than the others. Students, as we all know, are inexperienced. Legal practitioners write far fewer articles than either of the above, and are less likely to have the time or resources to treat a subject with the same kind of depth. Practitioners, however, have the benefit of incorporating their real-world experience into their scholarship. In Indian law, perhaps more than in other fields, practice means a great deal. Some Indian law professors never practiced in Indian country, or did so only for a short time, and simply do not have the background that practitioners have. Occasionally in the literature, it shows. Finally, the earliest Indian law scholars in the modern era were practitioners, so I would expect that courts would cite to the practitioners more in the early years.

I also wanted to know, after sitting on a few panels with state and federal judges who claimed to not care who the author was or how prestigious the law review that published an article was,\textsuperscript{37} whether the publication outlet mattered. Many law

\textsuperscript{35} Justice Scalia, it should be noted, did cite to one of the more radical historical monographs in the field, Wilcomb Washburn’s \textit{Red Man’s Land/White Man’s Law} (1971). See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 255 (1992).

\textsuperscript{36} Cf. Chester A. Newland, \textit{Legal Periodicals and the United States Supreme Court}, 3 MIDWEST J. POL. SCI. 58, 58 (1959) (noting contemporaneous increase in Supreme Court citations to legal scholarship).

\textsuperscript{37} E.g., Jeff Amestoy, Address, American Association of Law Schools Committee on Research Program, Uses of Legal Scholarship by Courts and Media (Jan. 7, 2012), \textit{podcast available at http://www.aals.org/am2012/podcasts/6_A10b_R2_RESEARCHPRGRM_Edited.mp3}. See also Richard Brust, \textit{The High Bench vs. the Ivory Tower}, ABA J., Feb. 1, 2012, \textit{available at http://www.abajournal.com/magazine/article/the_high_bench_vs._the_ivory_tower/} (“When it comes to law review articles, ‘all I ask for is good analysis that instructs and sometimes persuades,’ [Judge Thomas
professors believe that an elite placement for their law review article is the only goal, and literally will do anything to game the law review article selection system to meet that goal. Does the publication outlet matter in Indian law cases?

The following graph looks to classifications of the authors as professors, practitioners (including judges), and students (including law clerks).

In general, the Supreme Court cited to more law professor articles than any of the others – 40 of the 84 citations (48 percent)\(^\text{38}\) are to law professor-authored papers. Twenty (24 percent) are to student-authored papers. And 24 (29 percent) are to practitioner-authored papers. The percentages are consistent with my understanding of how many articles are published that are written by professors, students, and practitioners – in other words, about half or more of articles in law reviews are professor-authored, and the remaining articles are split between students and practitioners. The break-down in Supreme Court citations is consistent with authorship patterns. However, as I predicted given the percentage of early Indian law articles authored by practitioners, practitioner citations were neck and neck to law professor citations in the Warren/Burger Courts.

L. Ambro wrote in 2006 in *The American Bankruptcy Law Journal*. "Who it comes from and where it appears adds not a whit to its content."

\(^\text{38}\) Here, one “citation” means any citation to any article or other scholarly work. A work might be cited multiple times in a particular opinion, but it counts only as one here. If the Court cites it in another case, it will count again.
As could be expected, the Supreme Court cites Indian law articles published in the top 20 law reviews more than other outlets, such as the rest of the general law reviews, secondary and bar journals, and books, book chapters, and other publications. The Court cited to 29 articles published in the top 20, accounting for 34 percent of the citations. Top 20 articles accounted for far, far more citations in the Warren and Burger Courts, accounting for 25 of the 50 citations, or 50 percent. The top 20 article share has dropped considerably since then.

Overall, lower tier general law reviews accounted for 33 percent of citations, and secondary and bar journals accounted for 13 percent. They combined for 46 percent of overall citations. However, their share has increased at the expense of the elite reviews. In the Warren/Burger Courts, these articles combined for only 36 percent. In the Rehnquist/Roberts Courts, these articles combined for 60 percent. What gives? Well, for one, there are many, many more secondary journals now than there were in the 1970s.

In short, publication outlet and author characteristics do not seem to matter all that much to the Supreme Court. There probably is a real bias in favor of the elite law reviews, but it is blunted by the sheer number of lower tier and secondary journal articles available. Lower tier and secondary journal articles are at least as influential. But very little of this scholarship has apparently been persuasive to the Roberts Court Justices.

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Numerous briefs by the parties and their amici in Supreme Court cases have cited to Indian legal scholarship, and American Indian law professors have authored or co-authored amicus briefs in their capacities as scholars. The Supreme Court rarely engages those scholarly arguments. But that is a study for another day.
B. Looking Beyond the Bare Stats

When the Supreme Court cites to Indian legal scholarship, what kind of scholarship attracts its attention? Is the Court interested in normative legal theories? Is the Court interested in historical background, in terms of tribal histories, Indian affairs history, and Indian legal jurisprudential history? Does the Court look for public policy arguments or, as Frickey suggested, evidence of “realism”? 

It appears that, even given the very small sample, the Rehnquist and Roberts Courts’ citations are almost exclusively toward the historical background. These articles tend to be descriptive, often lacking much serious theoretical argument. Moreover, even where there is a serious argument, the Court seems to be citing only to the descriptive aspects of those articles. Normative articles, even those that meet Frickey’s “realism” test, so far have had no place in the Supreme Court’s opinions.

There are only two citations to Indian legal scholarship in the Roberts Court, so let’s begin there. The most recent citation is by Justice Breyer in Carcieri v. Salazar. He cited to an article surveying the law and history of the federal acknowledgement practices, most especially as they related to eastern tribes that did not have a direct treaty relationship with the United States, like the Narragansett Tribe that was the subject of Carcieri. Justice Breyer cited this article’s descriptive portion for the proposition that “following the Indian Reorganization Act’s enactment, the Department [of Interior] compiled a list of 258 tribes covered by the Act; and we also know that it wrongly left certain tribes off the list.” The Quinn citation largely was descriptive, but supported Breyer’s normative view that the federal government’s federal recognition practices were historically “wrong.” This is a powerful citation, blunted by its placement in a concurrence.

Four years earlier, Justice Ginsburg cited to an article on tribal-state tax agreements in her dissent to Wagnon v. Prairie Band Potawatomi Nation. She cited to the article for the proposition that “[m]ore than 200 Tribes in eighteen states have resolved their taxation disputes by entering into intergovernmental agreements.” This is largely descriptive, more so than the Quinn citation. And it is in a dissent.

The two Supreme Court majority opinions that have cited to the most Indian law scholarship during the most recent era are City of Sherrill v. Oneida Indian Nation and Duro v. Reina. Justice Ginsburg’s majority opinion in Sherrill cites to three pieces of

41 Id. (citing William W. Quinn, Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 AM. J. LEGAL HIST. 331, 356–359 (1990)).
43 Id. (quoting Richard J. Ansson, State Taxation of Non-Indians Who Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective States, 78 OR. L. REV. 501, 546 (1999)).
scholarship – two law review articles and a book chapter.\footnote{See Jack Campisi, The Oneida Treaty Period, 1783–1838, in THE ONEIDA INDIAN EXPERIENCE: TWO PERSPECTIVES 48, 59 (Jack Campisi & Lawrence Hauptman eds. 1988); Robert N. Clinton & Margaret Tobey Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 ME. L. REV. 17, 23–38 (1979); Gerald Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal–State Relations, 8 BUFFALO L. REV. 1(1958–1959).} Her citations to these articles – the Court cited two of the three in previous cases involving the Oneida Indian Nation\footnote{See County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (citing Clinton & Hotopp, supra note 46); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (citing Gunther, supra note 46).} – were exclusively for historical background about the Oneida land claims and its treaty relationship with the State of New York.\footnote{E.g., Sherrill, 544 U.S. at 204 n. 2 (citing Clinton & Hotopp for general background on the history of Indian affairs); id. at 205 (citing Campisi and Gunther for background on the New York—Oneida treaty relationship); id. at 214 (citing Gunther for the proposition that “the United States largely accepted, or was indifferent to, New York’s governance of the land in question and the validity vel non of the Oneidas’ sales to the State”).} In short, the Court’s interest in this scholarship had little to do with the normative arguments presented in each paper,\footnote{E.g., Clinton & Hotopp, supra note 46, at 19 (“Because section 177 is a cornerstone of the modern federal trusteeship over all Indian land, the federal role is instrumental in enforcing the statutory restraint on alienation, as it was in creating the restraint. Section III pays close attention to the federal role in treating the problems of federal court jurisdiction over land claims, federal government status and tribal status as proper parties plaintiff, and allocation of the burden of proof in actions seeking judicial enforcement of the statutory restraint.”).} but more with the excellent histories each presented.

Similarly, Justice Kennedy’s opinion in \textit{Duro} cited to six pieces of scholarship.\footnote{See Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 505 (1976); Comment, Jurisdiction Over Nonmember Indians on Reservations, 1980 Ariz. St. L. J. 727; ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1970); NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE 48 (1978); NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, NATIVE AMERICAN TRIBAL COURT PROFILES (1984); Note, Who is an Indian?: Duro v. Reina’s Examination of Tribal Sovereignty and Criminal Jurisdiction over Nonmember Indians, 1988 B.Y.U.L. Rev. 161.} Four of the authorities are merely for background.\footnote{See \textit{Duro}, 495 U.S. at 680 n. 1 (citing Clinton, supra note 50, “[f]or a scholarly discussion of Indian country jurisdiction”); id. at 689 (citing \textit{INDIAN COURTS AND THE FUTURE}, supra note 50, at 48, for the proposition that “[c]ases challenging the jurisdiction of modern tribal courts are few, perhaps because ‘most parties acquiesce to tribal jurisdiction’ where it is asserted”); id. at 681 n.2 (citing NATIVE AMERICAN TRIBAL COURT PROFILES, supra note 50, for background on tribal courts); id. at 691 (citing DEBO, supra note 50, for background on the Indian Reorganization Act).} The other two citations, to student-authored pieces, acknowledge that there is scholarly dispute over the question presented in \textit{Duro}.\footnote{See id. at 690 (comparing Note, supra note 50, and Comment, supra note 50).} There is no discussion of or engagement with the normative principles. Other Supreme Court citations to scholarship in the Rehnquist Court follow the same pattern.\footnote{I leave out for now discussion of Justice Souter’s concurring opinion in \textit{Nevada v. Hicks}, 533 U.S. 353 (2001). It has been covered too many times already, and he voted in favor of tribal court jurisdiction in Plains Commerce Bank v. Long Family Land and Cattle Co., 554 U.S. 316 (2008).}
However, the Supreme Court doesn’t really have the same need for legal scholarship. The Court has the benefit of amicus briefs, many of them authored by law professors and other experts in the Indian law field, and so an article providing legal or historical background in the area might not be as acutely useful as it could be for lower court judges without the benefit of regular amici.

Let’s turn to the lower courts.

III. Federal, State, and Tribal Court Citations to Indian Law Scholarship (2005-2012)

A. The Survey

This portion of the study addresses most directly whether Indian law scholarship influences the federal and state judiciaries in recent years. I look at the citation patterns of the lower courts dating back to the beginnings of the Roberts Court (and slightly earlier), back to 2005. There are far more citations by lower courts than by the Supreme Court, a fact that can be explained in part by the sheer number of lower court cases. But it also appears that lower court judges are more likely to actively engage with Indian law scholarship.

Lower court citations to Indian law scholarship are steady in number during 2005-2012. As the chart below shows, between 13 and 21 federal, state, and tribal court opinions cite to Indian law scholarship each year. There were a total of 294 citations during this period, an average of 36.8 per year. Each opinion citing Indian law scholarship cites about 2.1 articles.

54 Adam Liptak thoughtfully pointed this out. See Adam Liptak, Address, American Association of Law Schools Committee on Research Program, Uses of Legal Scholarship by Courts and Media (Jan. 7, 2012), podcast available at http://www.aals.org/am2012/podcasts/6_A10b_R2_RESEARCHPRGRM_Edited.mp3.

55 Naturally, this study does not encompass all of 2012; it ends on August 20, 2012.

56 Here, the methodology is this. I searched Westlaw for federal, state, and tribal court cases with either a headnote that had the word “Indians” in it, or any opinion in which the phrase “Indian tribe” appeared between January 1, 2005 and August 20, 2012. I narrowed that down to include any case that had the following phrases: “l. rev.,” “l.rev.,” “l.j.,” “l.j.,” “pol’y,” and “b.j.” As with the Supreme Court study, I excluded non-Indian law articles from my count.

57 These figures are skewed somewhat by two opinions authored by Judge Jenkins in McArthur v. San Juan County, 391 F. Supp. 2d 895 (D. Utah 2005); 566 F. Supp. 2d 1239 (D. Utah 2008). These two opinions cite to dozens of articles.
While I am estimating, it appears that lower court judges cite to Indian law articles in somewhere between five and 10 percent of their opinions.\textsuperscript{58} This low percentage is attributable to the many easy, noncontroversial cases that judges hear, even in Indian law. The citation rate goes up considerably when there is a non-unanimous appellate court decision, with at least one judge writing a separate concurrence or dissent. In 26 appellate cases with at least one separate opinion, the court cited to Indian law scholarship.

As with the Supreme Court, I look toward the sources of Indian law scholarship as well. First, I look at the different classes of authors (professors, students, and practitioners).

\textsuperscript{58} A quick Westlaw search showed that federal and state courts issued 176 published Indian law-related opinions in 2011, meaning that about eight percent of published opinions included at least one citation to an Indian law article.
As expected, the large majority of citations are to law professors, about 56 percent. Students and law clerks account for 25 percent and practitioner-authored works about 19 percent. The figures are similar to those of the Supreme Court citations during the Rehnquist and Roberts Court eras.

B. Looking Beyond the Bare Stats

Like the Supreme Court, most lower court citations are to articles useful for legal and historical background, rather than for any normative or other analytical purpose. For example, the Supreme Court of Alaska cited two articles for the proposition that a scholarly debate exists over the status of Indian country in Alaska after the John v.
Baker decision. Judge Bybee, dissenting in an important Ninth Circuit gaming case, Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, cited to nine scholarly authorities, merely to suggest that the issue at hand was uncertain and important (and perhaps to mock the academy).

However, there is far more discussion about and engagement with normative scholarly positions in the lower courts. Judges that cited to normative or prescriptive Indian law scholarship often do so in dissent, as in two cases out of the Washington and Minnesota Supreme Courts, but those arguments are at least present in the discussion. Similarly, one federal judge dealing with a tribal court jurisdiction case cited virtually every major Indian law professor in a pair of decisions, in one of which he held in favor of tribal jurisdiction and was reversed by the Tenth Circuit, accounting for dozens of citations.

And yet Indian legal scholarship is making an impact. The Kansas Supreme Court recently overruled itself on an important Indian Child Welfare Act question, relying in part on nine law review articles in the field. The Colorado Supreme Court held that

59 See Native Village of Tanana, 249 P.3d at 750 n. 120 ("The debate continued among commentators after the decision.") (citing John v. Baker, 982 P.2d 738 (Alaska 1999)).
60 602 F.3d 1019 (9th Cir. 2010) (Bybee, C.J., dissenting).
62 See In re R.S., 805 N.W.2d at 66 (Anderson, J., dissenting) (quoting Kunesh, supra note 64, at 78); Eriksen, 259 P.3d at 1087 (Alexander, J., dissenting) (quoting Pommersheim, supra note 2, at 50 ("[T]he United States Supreme Court changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians.").
tribal immunity prevented the state attorney general from investigating tribal payday lending practices, relying in part on two articles.65 Perhaps most strikingly, two lower courts adopted Professor Kanassatega’s argument rejecting tribal immunity from discovery in federal courts.66 Even though a court might reject a theory proposed in an academic paper, it may still engage with those theories, as the court did in *Garcia v. Gutierrez.*67

Perhaps lower courts are not frequently turning to Indian law scholarship to answer all the controversial open questions, but it does happen. Importantly, the courts are turning to Indian law scholarship in large numbers for background information. Unlike the Supreme Court, lower courts usually do not have the benefit of amicus briefs. Anecdotally, former appellate court clerks and other practitioners have told me that appellate judges devour amicus briefs in Indian law cases because they have fewer resources available to them. Even if the court cites to an article for noncontroversial background, presumably the court read and internalized some other aspects of the article.

A few conclusions can be drawn with a grain of salt. First, the courts’ citation to descriptive scholarship is consistent with the assumption that many judges are not familiar with the legal and historical underpinnings of American Indian law, and perhaps that judges rely upon descriptive historical scholarship for background in a case from a non-party scholar. Second, it is also consistent with the possibility that judges are turning to Indian law scholarship in difficult cases; although in the small 2005-2012


sample, the judges citing to normative and prescriptive Indian law scholarship did so largely in separate concurring or dissenting opinions.

Third, there appears to be evidence that the courts continue to cite to descriptive historical articles, and at least acknowledge (if not adopt) the normative and prescriptive positions that scholars are taking in the field. However, the results often are consistent with these critics’ views that American Indian legal scholarship is not terribly influential. Even so, despite the Supreme Court’s apparent disinterest in American Indian legal scholarship, the lower courts are citing to more and more articles and other scholarly works. At least in the lower courts, where 2005-2012 data suggest that judges are more likely to cite to Indian law articles in close cases, American Indian legal scholarship may have some continuing utility, both in terms of providing legal and historic background.

What is plain is that the courts, even the lower courts, are not citing much to the normative or prescriptive analyses that often is the heart of legal scholarship. A cursory review of American Indian legal scholarship will inform even the least experienced observer that the vast, vast majority of Indian law articles favor tribal interests. Often, the only scholarly debates are how far the courts should go in supporting tribal interests. And so it makes perfect sense that the field of American Indian legal scholarship would be less useful to conservative Justices on the Supreme Court, and presumably to conservative judges in the lower courts.

IV. Conclusion: Where’s the Realism?

The results of my survey suggest that lower courts are citing to Indian law scholarship to a substantial extent, even if the Supreme Court is not. Most of the citations are for historical background, but occasionally and dramatically, the lower courts have reformed American Indian law to the benefit of tribal interests, relying on doctrinal legal scholarship. And yet there have been only a few successes for tribal interests.

In most of these citations to Indian law scholarship, what is missing is the realism. Sure, some courts cited to papers that brought a practical, nuts-and-bolts version of realism, often written by practitioners. But while there were many examples

68 E.g., In re A.J.S., 204 P.3d 543 (Kan. 2009).
of professor-authored realism, the courts rarely delved into the realism aspects of these important papers.

In November 2006, when Phil Frickey brought many of the new generation of American Indian legal scholars to Berkeley, including myself, my spouse and colleague Wenona Singel, and many others, we talked about doing the kind of academic research that would bring a realistic, pragmatic story to federal and state judges. Frickey and representatives from the National Congress of American Indians stressed empirical research as a means of bringing much needed realism to the academy.

I confess to at first being considerably disappointed in the tenor of the meeting. There had been a great deal of realism in Indian legal scholarship prior to Frickey’s meeting, although perhaps not so much empirical research. But the realism was published in secondary journals, lower tier general law reviews, and in bar journals. Apparently, it was invisible. Then as now, I suspect that elite law reviews do not reward papers highlighting realism in Indian country with publication. Maybe law professors are not rewarded by writing realism in American Indian law, and so they refuse to do it. Maybe it’s too hard to research tribal law, and so there isn’t much scholarship out there about tribal law.

In the years following Frickey’s meeting, several of the young law professors published papers incorporating more realism (and by that, I mean tribal law and governance) into their work. Some of them even published papers with a significant

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71 See Conference Transcript, supra note 7.


75 E.g., Kristen A. Carpenter, Interpretative Sovereignty: A Research Agenda, 33 Am. Indian L. Rev. 111 (2007) (describing research on tribal interpretations on Indian treaty rights); Wenona T. Singel, Institutional Economics of Tribal Labor Relations, 2008 Mich. St. L. Rev. 487 (reviewing tribal labor laws and why nonmembers may or may not choose to comply with them); Hannah Bobee, Allison Boisvenu,
empirical bent. Aspects of realism have made their way into the Indian law papers published in the elite law reviews, but even those papers must wrap their tribal law prescriptions into broader theoretical and doctrinal subject areas in order to be considered for publication by elite law reviews looking to make a national imprint. Papers that delve more directly into tribal law and practice, for example, are too narrow (and, impliedly, unimportant) to the elite law reviews. I assume that is the case because there has never been a law review article authored by a law professor or practicing lawyer focusing on tribal law and practice published in an elite, top 20 law review.

There may be another problem. It may be that federal and state judges will not know what to make of Indian country realism. One of the few times the Supreme Court ventured into the law reviews and learned about tribal court jurisprudence and court practice, it drew horrifically inaccurate conclusions. And yet, I am happy to report that at least one Supreme Court Justice has integrated aspects of realism into her opinions. Justice Sotomayor’s dissent in Match-E-Be-Nash-She-Wish Band of


One student-authored paper, Fredric Brandfon, Tradition and Judicial Review in the American Indian Tribal Court System, 38 UCLA L. REV. 991 (1991), is the lone exception.


See Matthew L.M. Fletcher, Quick and Dirty Commentary on Patchak, Turtle Talk blog post (June 8, 2012), available at http://turtle talk.wordpress.com/2012/06/18/quickanddirtycommentaryonpatchak/ ("Justice Sotomayor proved today in her masterful and enlightening dissent that she is serious about knowing the practical realities of Indian country. With the only possible contender being Justice Blackmun, Justice Sotomayor may be the only Justice in American history that cares deeply enough about what happens in Indian country to learn about the impacts of the Court's decisions. This is a
Pottawatomi Indians v. Patchak\textsuperscript{81} demonstrated deep understanding and respect for the realistic and pragmatic impacts of the Supreme Court’s decision.\textsuperscript{82} This is a Justice that will listen to the tribal perspective, a Justice interested in realism.

In conclusion, I offer my views on the charge of the American Indian Law Journal. If I am right and American Indian legal scholarship is at a crossroads, then the Journal will have an important role to play. I hope the Journal seeks articles by a mixture of academics and practitioners. I hope to see articles by tribal, state, and federal judges. I hope to see forward-thinking articles that challenge tribal governments and, most especially, tribal attorneys to work to earn sovereign authority. I hope to see articles expressing the views of the traditional adversaries of tribal interests – state and local governments, federal and business interests in competition or opposition to tribes, and tribal members and others under the jurisdiction of tribes. I hope to see a multitude of articles about the inner workings of tribal governments and the realities of Indian country governance.\textsuperscript{83} I hope to see realism.

\textit{Miigwetch.}

\textsuperscript{81} 132 S. Ct. 2199 (2012).
\textsuperscript{82} See id. at 2212 (Sotomayor, J., dissenting) (“The Court’s holding not only creates perverse incentives for private litigants, but also exposes the Government’s ownership of land to costly and prolonged challenges.”); id. at 2218 (“[T]he majority’s rule will impose a substantial burden on the Government and leave an array of uncertainties. Moreover, it will open to suit lands that Congress and the Executive Branch thought the ‘national public interest’ demanded should remain immune from challenge. Congress did not intend either result.”).
TRIBAL SUPREME COURT PROJECT

TEN YEAR REPORT

OCTOBER TERM 2001 – OCTOBER TERM 2010
(OT01 – OT10)

Richard Guest

INTRODUCTION

In his seminal article, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color Blind Justice and Mainstream Values*, noted Indian law scholar David Getches provided an in-depth analysis of the U.S. Supreme Court’s re-writing of federal Indian law. In his analysis, Getches noted that Indian tribes were without an intellectual leader on the Court and were losing approximately 80% of their cases argued before the Court. In 2001, in response to another round of devastating losses, the Court had completed the October Term 2011 (OT2011) which is outside the Ten Year Report. However, this brief statistical overview of the Indian law decisions issued and the petitions filed during the OT2011 may provide some new perspectives to the Ten Year Report. In all, twenty-seven Indian law petitions were filed of which four petitions were granted certiorari: *Arctic Slope Native Association v. Sebelius* (11-83), *Match-E-Be-Nash-She-Wish Band of Pottawotomi Indians v. Patchak* (11-246), *Salazar v. Patchak* (11-247), and *Salazar v. Ramah Navajo Chapter* (11-551). However, the Court only issued two Indian law decisions, consolidating the petitions filed in the Patchak case and issuing a GVR (grant, vacate, and remand) in *Arctic Slope Native Association* for consideration in light of its decision in *Salazar v. Ramah Navajo Chapter* (in which tribal interests prevailed for the first time before the Roberts Court).

The case categories for Indian law petitions remained fairly constant: Civil Jurisdiction (5); Criminal Jurisdiction (4); Lands (4); Sovereign Immunity (4); Political Status (3); and Other (3). The largest groups of petitioners remain Tribes (9) and individual Indians (7), followed by Non-Indians (5) and the federal government (4). The largest group of respondents was State and Local Governments (8) followed by the Tribes (6) and the federal government (5). All of these numbers are relatively close to the averages in the Ten Year Report. The lower courts where the petitions originated varied from the data in the Ten Year Report: 30% of the petitions came from State courts; 22% from the Ninth Circuit; and 19% from the Tenth Circuit. Further, the breakdown of wins and losses at the lower court level remained fairly constant with the figures in the Ten Year Report. Tribal interests prevailed in State courts 57% of the time, evenly split in the Ninth and Tenth Circuits, and lost both cases in the D.C. Circuit.

The Tribal Supreme Court Project’s Ten Year Report would not have been possible without the able assistance of NARF’s wonderful law clerks and staff. In particular, I would like to thank Gregory Ablavsky (J.D. 2011, University of Pennsylvania Law School; Ph.D. Candidate, 2015, University of Pennsylvania) for all his hard work in creating the analytical and structural foundation for the Report. In addition, I would like to thank Ryan Ward (Cowlitz Indian Tribe; J.D. 2012, University of Washington School of Law); and Colby Duren (J.D. 2012, American University Washington College of Law) for all their work on updating and editing the final drafts of the Report. Finally, I would like to thank my colleagues Riyaz Kanji, Kanji & Katzen, PLLC, and John Dossett, General Counsel, National Congress of American Indians, who have helped steer the work of the Tribal Supreme Court Project since its inception.

tribal leaders met in Washington, D.C. and established the Tribal Supreme Court Project as part of the Tribal Sovereignty Protection Initiative.

The Tribal Supreme Court Project (“Project”) is a joint project staffed by the Native American Rights Fund (“NARF”) and the National Congress of American Indians (“NCAI”). The Project is based on the principle that a coordinated and structured approach to Supreme Court advocacy is necessary to protect tribal sovereignty—the ability of Indian tribes to function as sovereign governments—to make their own laws and be ruled by them. Early on, the Project recognized the U.S. Supreme Court as a highly specialized institution, with a unique set of procedures that includes complete discretion on whether it will hear a case or not, with a much keener focus on policy considerations than other federal courts. The Project established a large network of attorneys who specialize in practice before the Supreme Court along with attorneys and law professors who specialize in federal Indian law. The Project operates under the theory that if Indian tribes take a strong, consistent, coordinated approach before the Supreme Court, they will be able to reverse, or at least reduce, the on-going erosion of tribal sovereignty by Justices who appear to lack an understanding of the foundational principles underlying federal Indian law and who are unfamiliar with the practical challenges facing tribal governments.

One of the key tasks for the Tribal Supreme Court Project has been educating the Justices and other federal judges on key aspects of federal Indian law. In the summer of 2001, Justices O’Connor and Breyer took part in a historic visit to Indian country to observe tribal justice systems. Since that time, federal judges from the U.S. Courts of Appeals for the Ninth Circuit, Tenth Circuit and Eighth Circuit have attended the NCAI Conferences held in Sacramento, Denver and Rapid City, respectively. In August 2011, Chief Judge Riley was joined by Justice Alito during the Eighth Circuit Judicial Conference for a tour of the Pine Ridge Indian Reservation—a visit coordinated by NCAI and the South Dakota Tribes. And in September 2011, Justice Sotomayor visited the Jemez Pueblo, the Santa Domingo Pueblo, the Leadership Institute at the Santa Fe Indian School and the University of New Mexico. During her stay, she expressed her view that a Justice needs to focus on a few key priorities if they want to make a difference beyond their formal work on the Court. As pet projects, Justice Sotomayor was quoted as saying that she has prioritized education and American Indian law.

Another key task of the Project has been the development and coordination of the amicus brief strategy at various stages of litigation: (1) in each Indian law case heard on the merits by the Court; (2) in support of a discrete number of petitions for writ of certiorari filed by Indian tribes or by the United States on behalf of tribal interests; and (3) in support of tribal interests in a limited number of Indian law cases pending in the lower courts. Given the reversal strategy employed by the Court, the Project has often utilized the amicus strategy as an attempt to educate the Court on the wide-ranging negative policy implications and adverse practical impacts their broad rulings can have in Indian country. The Project has experienced some success in limiting the damage the
Court could do to tribal sovereignty in certain cases, such as *Plains Commerce Bank*, but has experienced little success in other cases, such as *City of Sherrill.*

Another key area where the Project has focused resources is the preparation of the brief in opposition. The Project has come to embrace the fact that perhaps the most important and effective brief filed with the Supreme Court is this specialized brief which explains to the Court why review of a lower court decision favorable to tribal interests is not worthy of review. The Project has worked with dozens of attorneys representing Indian tribes to prepare their briefs in opposition to successfully secure their lower court victories.

Now in existence for ten years, the Tribal Supreme Court Project can look back to review the degree to which its work has been effective. From OT01 through OT10, several developments are notable. First and foremost is the win-loss record for Indian tribes before the Court. Figure 1 of the Report is a table of the Indian Law Cases Where Certiorari Was Granted. Overall, the win-loss percentage has remained the same with the Tribes winning only about 25% of their cases. However, under the Rehnquist Court (OT01-OT04), Indian tribes increased their winning percentage to greater than 50%—winning 4, losing 3, and 2 draws in 9 Indian law cases heard on the merits. This winning percentage was a vast improvement from a deplorable winning percentage of 20% in the past. The work of the Tribal Supreme Court Project appeared to be paying major dividends. But in the past six Terms of the Roberts Court (OT05-OT10), Indian tribes have witnessed their winning percentage plummet to 0%—losing all 7 cases argued on the merits.

What happened? What changed? The Project did not alter its strong, consistent, coordinated approach begun before the Rehnquist Court. The Project continued to dedicate significant resources to improve the quality of tribal advocacy before the Roberts Court. The easy answer may be to simply attribute the losses to changes on the Court with the retirement of Justice Sandra Day O’Connor, the rise of John Roberts to be the new Chief Justice, and the addition of Justice Samuel Alito to replace Justice O’Connor. Although the loss of Justice O’Connor’s vote and her influence with other Justices should not be downplayed, there must be more to what is happening in Indian law cases before the Roberts Court.

A second development over the past thirty years may shed some light on our query. During the past six Terms of the Roberts Court, only seven petitions for writ of certiorari in Indian law cases were granted and argued on the merits (1.2/Term average), compared to nine petitions in the prior four Terms under the Rehnquist Court (2.25/Term average). In fact, the total number and average number of Indian law cases decided by the Supreme Court have been on the decline over the past 30 years. From OT81 to OT90, the Court decided 41 Indian law cases (4.1/Term average). From OT91 to OT00, the Court decided 28 Indian law cases (2.8./Term average). And from OT01 to OT10, the Court decided 16 Indian law cases (1.6. Term average). Thus, the number of

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petitions granted review and argued on the merits in Indian law cases has declined significantly. This trend follows, but is steeper than, the general decline in the Court’s overall plenary docket—from the Court deciding an average of 150 cases each Term before 1990, to deciding an average of 80 cases each Term more recently.

These and other important trends are identified within the Ten Year Report. Part I of the Report describes the methodology for gathering the data. Of the 259 petitions for writ of certiorari filed in Indian law cases before the Court, the Report breaks down and analyzes each case into four categories: (1) Petitioner and Respondent Type; (2) Question Presented or Subject Matter; (3) Cert Granted/Denied; and (4) Outcome for Tribal Interests. The Appendix to the Report contains a chart encompassing all 259 Indian law petitions broken down by category.

Part II of the Report looks at the 16 Indian law cases decided by the Court on the merits and examines the work of the Project during each Term. Apart from the win-loss record noted above, other facts emerge from a review of the data. From OT01-OT04, of the 9 Indian law cases decided by the Rehnquist Court, 5 cases involved tribal interests as respondents (won in court below), and 4 cases involved tribal interests as petitioners (lost in court below). However, from OT05-OT10, of the 7 Indian law cases decided by the Roberts Court, all 7 cases involved tribal interests as respondents. In other words, tribal interests had prevailed in the lower courts in all 7 cases only to be reversed by the Roberts Court. The Roberts Court has granted fewer Indian law cases, has not granted the petitions filed by Indian tribes or by the United States on behalf of an Indian tribe, and has granted review to reverse lower court decisions favorable to tribal interests. These are indeed disturbing trends.

Several other trends emerge when the data are analyzed. Figure 2 and Figure 4 of the Report summarize the Petitioner Types in Cases Heard by the Court and Case Categories When Certiorari Was Granted. First, the Court’s propensity to grant review to the federal government as petitioner usually involves a question of the nature and scope of the trust responsibility, while its propensity to grant review to state and local governments usually involves a lower court decision affirming a tribe’s right to be free from state regulatory authority (e.g. taxation) on its reservation. Second, the data suggest that the Court had little interest in reviewing cases involving tribal civil jurisdiction or tribal sovereign immunity, especially in cases brought by individual Indians or non-Indians. Plains Commerce Bank was the exception with a corporation as the petitioner. And third, although Indian and non-Indian individuals constituted over 50% of the petitions filed in Indian law cases, the Court did not grant a single one of their petitions regardless of the question presented.

Part III of the Report fully examines all 259 Indian law petitions for writ of certiorari filed before the U.S. Supreme Court from the OT01 through OT10. These data provide an opportunity for a broader analysis of what is happening in Indian law cases overall in the federal and state courts. Figure 5 of the Report illustrates the Categories of Certiorari Petitions by question presented and Figure 6 of the Report creates a table to view those Cases by Category and by Term. These data reveal that no one category
of Indian law dominated the question presented. But civil jurisdiction and tribal sovereign immunity—critical areas monitored by the Project from the beginning—are the leading categories with 15% and 14%, respectively, of the Indian law petitions filed, followed by lands (11%), taxation (10%) and Indian gaming (10%). Figure 6 shows a tendency for certain categories of cases to “spike” during a given Term, such as 11 petitions involving civil jurisdiction in OT02, the Term following adverse rulings by the Court regarding tribal jurisdiction over non-Indians, or the 7 petitions involving localized gaming disputes between states and tribes filed in OT03 and OT08.

The data regarding outcomes for tribal interests reveal that Indian tribes generally win as many cases in the lower courts as they lose. As Figure 9 of the Report Outcomes for Tribal Interests by Category shows, Indian tribes win more civil jurisdiction and sovereign immunity cases than they lose, but lose more taxation and trust responsibility cases than they win. And when the data are examined by petitioner and respondent type, it becomes clear that tribes win the former set of cases against non-Indian and Indian individuals and lose the latter set of cases against state and local governments and the federal government.

Finally, as Figure 13 and 14 of the Report illustrate, the vast majority of the petitions in Indian law cases are coming from the Ninth Circuit (28%), Tenth Circuit (14%) and the state courts (25%), where Indian tribes have a good track record of winning more cases than they lose. However, in the other Federal Circuits, including the D.C. Circuit and Federal Circuit, Tribes lose a disproportionate number of cases. This may be derived from the fact that the D.C. Circuit and Federal Circuit hear a disproportionate number of cases involving the federal government as an adversary, the limited types of questions presented in those cases (trust responsibility, lands, etc.), and/or a lack of familiarity with federal Indian law.

**Preliminary Conclusions and Suggestions for Further Study**

The Ten Year Report provides just a snapshot of the data relating to the 259 Indian law petitions filed with the U.S. Supreme Court. Tribal interests have met with some success in many areas in the lower federal and state courts, winning nearly 50% of their cases. But Indian tribes have failed to match the same level of success in the Supreme Court and continue to lose nearly 80% of their cases. And when an Indian tribe loses at the Supreme Court, all of Indian country loses.

The trends identified in the Ten Year Report should assist the Tribal Supreme Court Project in its work moving forward. The Project must continue its coordinated and structured approach to Supreme Court advocacy, in particular the preparation of briefs in opposition. The Project should begin to identify additional opportunities to participate in Indian law cases in the lower federal and state courts, and should develop relationships with more Supreme Court practitioners who may assist Indian tribes in the lower courts. Apparently, the best way to win an Indian law case is to keep the case, in particular, one involving the federal, state and local governments as an adversary, from ever going up to the Supreme Court.
The current composition of the Roberts Court presents its own unique challenge. In the 7 Indian law cases decided by the Roberts Court, tribal interests had prevailed in the lower courts, but generally lost by wide margins in the Supreme Court (9-0, 7-1, 8-1 and 7-2 decisions). The only exception is Plains Commerce Bank in which the tribal interests lost 5-4 in a majority decision written by the Chief Justice. In all seven losses, Chief Justice Roberts, along with Justices Scalia, Thomas and Alito, voted against tribal interests. In those seven losses, Justices Kennedy and Breyer only dissented one time, with Justice Stevens dissenting twice and Justice Ginsberg dissenting three times.

The steep decline in the number of Indian law cases being decided by the Roberts Court may be an area ripe for further research and analysis beyond the data supplied in this Report. Additional research on the Indian law jurisprudence of the individual Justices along with their voting patterns as a Court might also prove to be helpful. Such information may assist the Project in analyzing each Indian law case on the basis of how do we count votes to get to the magic number of “five.” This Report also treated all cases and petitions equally. However, the majority of petitions, particularly those involving individuals, stemmed from relatively weak cases, where the petitioners were unlikely to succeed. From the general constellation of certiorari petitions, therefore, more attention should be given to cases that presented substantial unresolved legal issues, particularly in the context of intergovernmental litigation. This might provide a more representative sample of how the majority of Indian law doctrine is being crafted.

I. METHODOLOGY

The 259 petitions examined here were drawn from the Supreme Court Bulletins of the National Indian Law Library (“NILL”), as well as from the briefs and documents available on the Tribal Supreme Court Project website (http://www.narf.org/sct/index.html). The petitions were classified based on the Term when the Court decided the case or denied certiorari, and not the year the petition was filed. In all, six factors were considered: (1) the petitioner type; (2) the respondent type; (3) case category; (4) whether certiorari was granted; (5) the outcome for tribal interests; and (6) the deciding court.

A. Petitioner and Respondent Type

The petitioner and respondent in each case were placed in one of six categories: (1) Indian Tribes; (2) State and Local Governments; (3) Federal Government; (4) Individual Indians; (5) Non-Indian Individuals; and (6) Corporations. Tribal corporations and other tribal entities were classified as Indian tribes. In instances where an individual’s Indian status itself was the legal issue, the outcome of the case determined the individual’s classification.

B. Case Category

Cases were classified into twelve categories based on the Indian law question presented in the case:

1. **Civil jurisdiction** (including both adjudicatory and regulatory jurisdiction)
2. **Criminal jurisdiction**
3. **Indian gaming**
4. **Lands**
5. **Political status** (including questions of tribal recognition, Indian hiring preference, and arguments over equal protection)
6. **Religious freedom**
7. **Sovereign immunity**
8. **Taxation**
9. **Treaties**
10. **Trust responsibility**
11. **Water rights**
12. **Other**

While many cases addressed multiple areas of Indian law, they were categorized based on the primary question presented on appeal which may not reflect the particular facts underlying the dispute or the procedural posture of the case. For example, many cases that arose over Indian gaming disputes hinged on legal issues implicating the doctrine of tribal sovereign immunity or tribal civil jurisdiction. And cases that arose under the Indian Civil Rights Act were generally classified either as civil jurisdiction or sovereign immunity cases, depending on the precise question presented.

C. Certiorari

Cases were classified as either certiorari granted, denied, or petition withdrawn. Instances where the Court granted certiorari, vacated, and remanded (“GVR”) for further proceedings consistent with a recent ruling were classified as instances where certiorari was granted, but not heard on the merits, and thus not included within the win-loss record before the Supreme Court.

D. Outcome for Tribal Interests

Each case was classified as either a “win,” or “loss” or “draw” for tribal interests based on the final determination, except when tribal interests were represented by both petitioner and respondent (as in litigation between tribes). Tribal interests were defined as the interests of the tribe, and not individual Indians. Instances where individual Indians unsuccessfully challenged tribal decisions, for instance, were classified as a “win” for tribal interests. Instances where the United States represented tribal interests were classified as a “win” for tribal interests.
II. **Indian Law Cases Where Certiorari Was Granted and the Work of the Tribal Supreme Court Project**

A. **An Analysis of Indian Law Cases Before the Supreme Court of the United States**

From OT01 through OT10, the U.S. Supreme Court granted certiorari in 21 out of 259 Indian law petitions, or in 8.1% of the petitions filed. This is higher than the average 4% for all paid petitions versus an average of less than ½ of 1% for *in forma pauperis* petitions filed by indigent parties (which make up the vast majority of petitions). Of the 21 cases granted review, the Court heard argument and issued an opinion deciding the outcome in 16 cases. The Court granted, vacated and remanded the petitions in the other five cases.

![Figure 1: Indian Law Cases Where Certiorari Was Granted, 2001-2010](image-url)

<table>
<thead>
<tr>
<th>Roberts Court</th>
<th>Case Name</th>
<th>Question Presented</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>OT 2010</td>
<td><em>United States v. Jicarilla Apache Nation</em></td>
<td>Trust Responsibility</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>United States v. Tohono O’odham</em></td>
<td>Trust Responsibility</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>Madison County v. Oneida Indian Nation</em></td>
<td>Sovereign Immunity</td>
<td>GVR</td>
</tr>
<tr>
<td></td>
<td><em>United States v. Eastern Shawnee Tribe of Oklahoma</em></td>
<td>Trust Responsibility</td>
<td>GVR</td>
</tr>
<tr>
<td>OT 2009</td>
<td>No Cert Grants</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OT 2008</td>
<td><em>United States v. Navajo Nation</em></td>
<td>Trust Responsibility</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>Hawaii v. Office of Hawaiian Affairs</em></td>
<td>Lands</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>Carcieri v. Salazar</em></td>
<td>Lands</td>
<td>Lost</td>
</tr>
<tr>
<td>OT 2007</td>
<td><em>Plains Commerce Bank v. Long Family</em></td>
<td>Civil Jurisdiction</td>
<td>Lost</td>
</tr>
<tr>
<td>OT 2006</td>
<td>No Cert Grants</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OT 2005</td>
<td><em>Wagnon v. Prairie Band of Potawattomi Indians (Fuel Tax)</em></td>
<td>Taxation</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>Wagnon v. Prairie Band of Potawattomi Indians (License plates)</em></td>
<td>Civil Jurisdiction</td>
<td>GVR</td>
</tr>
<tr>
<td></td>
<td><em>Lingle v. Arakaki</em></td>
<td>Political Status</td>
<td>GVR</td>
</tr>
<tr>
<td>Rehnquist Court</td>
<td>Case Name</td>
<td>Question Presented</td>
<td>Outcome</td>
</tr>
<tr>
<td>OT 2004</td>
<td><em>City of Sherrill v. Oneida Indian Nation of New York</em></td>
<td>Taxation</td>
<td>Lost</td>
</tr>
<tr>
<td></td>
<td><em>Cherokee Nation v. Leavitt</em></td>
<td>Other</td>
<td>Won</td>
</tr>
<tr>
<td></td>
<td><em>Leavitt v. Cherokee Nation</em></td>
<td>Other</td>
<td>Won</td>
</tr>
</tbody>
</table>
### OT 2003

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Issue</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. Lara</td>
<td>Criminal Jurisdiction</td>
<td>Won</td>
</tr>
<tr>
<td>South Florida Water Management District v. Miccosukee Tribe of Indians</td>
<td>Other</td>
<td>Draw</td>
</tr>
</tbody>
</table>

### OT 2002

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Inyo County v. Paiute-Shoshone Indians</td>
<td>Sovereign Immunity</td>
<td>Draw</td>
</tr>
<tr>
<td>United States v. Navajo Nation</td>
<td>Trust Responsibility</td>
<td>Lost</td>
</tr>
<tr>
<td>United States v. White Mountain Apache Tribe</td>
<td>Trust Responsibility</td>
<td>Won</td>
</tr>
</tbody>
</table>

### OT 2001

<table>
<thead>
<tr>
<th>Case Title</th>
<th>Issue</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chickasaw Nation v. United States</td>
<td>Taxation</td>
<td>Lost</td>
</tr>
<tr>
<td>United States v. Little Six, Inc.</td>
<td>Taxation</td>
<td>GVR</td>
</tr>
</tbody>
</table>

The total number and average number of Indian law cases granted and decided by the Court have declined dramatically over the past 30 years. From OT81 to OT90, the Court decided 41 Indian law cases (4.1/yr average). From OT91-OT00, the Court decided 28 Indian law cases (2.8/yr average). As noted above, between OT01 and OT10, the Court decided just 16 Indian law cases (1.6/yr average). This trend may be explained, in part, by the Court’s declining plenary docket overall. Prior to 1990, the Court decided about 150 cases each Term. That number declined to about 90 cases each Term between 1990 and 2000, and hit a low of 71 cases during October Term 2007. The decline in the Court’s plenary docket may be due to a “reversal strategy” being employed by the Court, a theory which posits that the Court may only be granting those cases it thinks it will reverse.

Such a reversal strategy may help explain, in part, the outcomes in relation to the Court’s Indian law docket over the past decade. Of the 16 Indian law cases heard by the Court, 13 lower court decisions were reversed with 11 cases being complete reversals and 2 cases being partial reversals (Inyo County and South Florida Water Mgmt Dist). In Chickasaw Nation v. United States, White Mountain Apache and Cherokee Nation v. Leavitt the Court affirmed the lower court decisions. However, the Tribe was the petitioner (not the respondent) in Chickasaw Nation, White Mountain Apache was a companion case to Navajo Nation I, and Cherokee Nation v. Leavitt was consolidated, argued and decided with Leavitt v. Cherokee Nation.

In general, the Supreme Court was hostile to tribal interests in its decisions. Of the 16 cases heard by the Court over the past ten Terms, tribal interests won four (25%), while their opponents won ten (62.5%), with two draws (12.5%). Further analysis of the cases suggests several possible structural reasons for this outcome. First, although individual Indians and non-Indians constitute over 50% of the total petitioners

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in Indian law cases (see Figure 10, *infra*), the Court did not grant review of any of their petitions. Instead, as Figure 2 highlights, the federal, state, and local governments were the petitioners in over 80% of the cases heard by the Court (13 of 16 cases) even though they were the petitioners in only 19% of the total cases (see Figure 10, *infra*). In the remaining three Indian law cases decided by the Court, a corporation was the petitioner in one (*Plains Commerce Bank*) and an Indian tribe was the petitioner in the other two (*Chickasaw Nation* and *Cherokee Nation v. Leavitt*).

**Figure 2: Petitioner Types in Cases Heard by the Court, 2001-2010**

- Federal Gov.: 44%
- State and Local Gov.: 37%
- Tribe: 13%
- Corporation: 6%

This propensity of the Court to grant petitions filed by federal state, and local governments has significantly impacted the development of federal Indian law to the detriment of Indian tribes. As Figure 3 makes clear, although Indian tribes were 33% of respondents in the 259 petitions filed between OT01 and OT10, tribes were respondents in 65% of the cases the Court agreed to hear. By contrast federal, state, and local governments were respondents in over 50% of the petitions filed during the same period, but were the respondents in only 25% of the cases heard by the Court. In short, the data confirm that the Court disproportionately granted certiorari in instances when tribal interests prevailed in the lower court against the federal government or state and local governments.
Figure 4 suggests another possible factor that disfavored tribal interests at the Supreme Court: the categories of cases in which review was granted. While the Court did hear a variety of Indian law cases, over 50% of the cases heard by the Court involved one of two issues: the nature and scope of the trust responsibility of the United States to Indian tribes; or taxation of activities occurring on Indian reservations. These two issues only constituted 18% of the total petitions filed with the Court but, as demonstrated in Figure 9, infra, these were precisely the categories of cases tribal interests were most likely to lose. In fact, Indian tribes lost every trust responsibility case by a wide margin (9-0, 7-1 and 6-3 decisions), except for United States v. White Mountain Apache in which the tribe narrowly prevailed in a 5-4 decision. And Indian tribes lost all three taxation cases by wide margins (8-1 and 7-2 decisions).

By contrast, on the issues of civil jurisdiction and sovereign immunity which constituted 29% of the total petitions filed—the categories where tribes have prevailed in the lower courts on a consistent basis—the Court granted review of two petitions challenging sovereign immunity, but did not decide the question presented in either Madison County v. Oneida Indian Nation or Inyo County v. Paiute-Shoshone Indians. The Court also granted two petitions involving challenges to tribal civil jurisdiction but only decided the question presented in Plains Commerce Bank v. Long Family.

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In general, therefore, the certiorari process hurt tribal interests. The Court tended to grant review in cases where Indian tribes had prevailed against federal, state and local governments, and often in categories which disfavored tribal interests. The poor track record of Indian tribes in the Court over the past ten years appears to reflect these systemic patterns in the process of granting certiorari and deciding outcomes in Indian law cases.

B. The Early Work of the Tribal Supreme Court Project (OT01 – OT02)

October Term 2001. Following the establishment of the Tribal Supreme Court Project in September 2001, resources were expended in the creation of a large network of Indian law attorneys, Indian law professors, tribal leaders and Supreme Court practitioners to assist in the coordinated and structured approach to Indian law advocacy before the Court. This network became known as the “Project Workgroup.” But before the Project Workgroup was organized to begin its substantive work, the only Indian law case of OT01, Chickasaw Nation v. United States, had already been fully briefed and was argued early in October 2001.\(^{10}\) Since no other Indian law cases were being argued during OT01, the Project organizers focused on the creation of a website, the development of operating procedures and the preparation of Indian law case summaries, the latter work being performed, in large measure, by the staff of the National Indian Law Library.

October Term 2002. As OT02 approached, the Project Workgroup hit its initial stride in response to the Court’s grant of review in United States v. Navajo Nation\(^ {11} \) and

\(^ {10} \) Chickasaw Nation v. United States, 534 U.S. 84 (2001).

United States v. White Mountain Apache Tribe. These two cases raised issues regarding whether the United States may be held liable in damages for mismanagement of the tribal trust resources. The Project Workgroup recognized that the decisions would likely affect the future ability of all Indian tribes to hold the United States accountable for their mismanagement of tribal trust property. Early correspondence indicated that “given the Court’s terrible record in Indian law cases, the fact that the Court has this opportunity to rule on the fundamental issue of the federal/tribal trust relationship is frightening and must be actively addressed.” The Project Workgroup prepared an amicus brief on behalf of NCAI in support of White Mountain Apache Tribe, the only amicus brief submitted in that case. Although NCAI also submitted an amicus brief in support of the Navajo Nation in its case, several individual Indian tribes also submitted separate amicus briefs in support. Thus, the Project was faced with the task of coordinating several tribal-side amicus briefs and learned an important lesson in Supreme Court advocacy regarding the Court disfavoring redundancy within and among amicus briefs, especially so-called “me too” briefs.

On December 2, 2002, the same day that the Court heard oral argument in White Mountain and Navajo Nation, the Court granted review in Inyo County v. Paiute-Shoshone Indians. In Inyo County, the Ninth Circuit held that a search warrant issued by a state court against an Indian tribe on tribal property violated the Tribe’s sovereign immunity, and that the execution of the search warrant by county officials violated the Fourth Amendment of the U.S. Constitution which is actionable under 42 U.S.C. § 1983. In this case, the Project was confronted with four amicus briefs filed in support of Inyo County seeking reversal, including an amicus brief of the State of California joined by nine other states and an amicus brief filed by the National Sheriffs Association. In response, the Project coordinated the preparation of three amicus briefs in support of the tribal position: (1) a remarkable amicus brief filed by the states of New Mexico, Arizona, Montana and Washington to rebut the characterization of Indian reservations as enclaves of lawlessness and to recast Indian tribes as effective partners in law enforcement; (2) the NCAI and National Indian Gaming Association (NIGA) amicus brief joined by seventeen individual tribes which provided the Court with information regarding cooperative law enforcements agreements as the appropriate mechanism for resolving jurisdictional disputes; and (3) the United South and Eastern Tribes (USET) amicus brief which focused exclusively on the doctrine of tribal sovereign immunity.

At the end of OT02, the Project had one win (White Mountain Apache), one loss (Navajo Nation) and a draw (Inyo County). This early success was encouraging, but the limited resources of the Project were spread pretty thin. Fundraising became a priority as the early work of the Tribal Supreme Court Project came to a close. The ongoing ability of NARF and NCAI to provide attorney time and resources to the Project,

13 Inyo County, California v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, 291 F.3d 549 (9th Cir. 2002), cert. granted, 537 U.S. 1043 (2002).
16 Inyo County, California v. Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, 537 U.S. 1043.
and the need to recruit and retain Supreme Court practitioners to assist the Project, were all subject to the amount of funding generated. Project staff wrote articles describing the work of the Project, made presentations to foundations, and developed brochures and other materials to solicit funds from individual Indian tribes.

C. The Expanding Work of the Tribal Supreme Court Project (OT03-OT04)

October Term 2003. As OT03 approached, the Project recognized the extraordinary value of the lower court case summaries provided by NILL in monitoring and identifying Indian law cases that have a real potential to reach the Supreme Court. Early identification offers an opportunity to provide assistance to Indian tribes or, in certain cases to the United States, on whether to file a petition seeking review. This early identification proved helpful in United States v. Lara when Project staff attorneys met with the U.S. Solicitor General to present the views of Indian country regarding whether the United States should file a petition for a writ of certiorari and the content of that petition.\(^{17}\) The Court granted review, reversed the decision of the Eighth Circuit, and affirmed the inherent authority of Indian tribes to prosecute non-member Indians for crimes committed on their reservations.

In Lara, the Project staff attorneys had prepared two amicus briefs and coordinated the preparation of two other amicus briefs: (1) the NCAI amicus brief which discussed the scope of congressional power in Indian affairs; (2) an amicus brief on behalf of eighteen individual Indian tribes which focused on the jurisdictional void created by the Court in Duro v. Reina\(^{18}\) which was addressed by Congress with an amendment to the Indian Civil Rights Act; (3) the State of Washington amicus brief joined by seven other states providing their views of the benefits of an Indian tribe exercising criminal jurisdiction over all Indians with the reservation; and (4) the State of Idaho amicus brief joined by five other states which focused on the double jeopardy issue. The Project viewed each amicus brief as an opportunity to support the United States position while providing the Court with a detailed presentation of the varied landscape of criminal jurisdiction issues in Indian country. The Lara case offered another unique opportunity for the Project. In preparation for oral argument in Lara, the Solicitor General invited attorneys from the Project Workgroup to participate in two separate moot court sessions to assist the United States in its presentation to the Court. Moot courts, including opportunities to conduct moot court arguments before the prestigious Georgetown Law Center Supreme Court Institute, became another key tool for the Project to utilize to improve tribal advocacy before the Court.

In OT04, the Court also granted review in South Florida Water Management District v. Miccosukee Tribe of Indians in which the Tribe had brought a citizen suit under the Clean Water Act contending that the District’s pumping facility is required to obtain a discharge permit under the National Pollutant Discharge Elimination System.\(^{19}\) The district court and Eleventh Circuit held in favor of the Tribe concluding that the

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canal and reservoir were two different bodies of water. Project staff attorneys filed an amicus brief on behalf of NCAI and the National Tribal Environmental Council to protect tribal water rights. The Supreme Court held that although the Clean Water Act applies to a transfer of polluted water from one body of water to another, it remanded the case to further develop the factual record on whether the canal and reservoir are two different bodies of water.

During this time, another important Indian law petition was being considered by the Court in City of Sherrill v. Oneida Indian Nation. The Court issued a “CVSG” (Call for the Views of the Solicitor General). This practice by the Court generally occurs when the views of the federal government are relevant to a case in which the United States is not a party. In this case, the Court issued a CVSG asking the United States for its view as to whether the Court should grant review of a decision by the Second Circuit which held that certain lands purchased in fee by the Oneidas within their historic reservation were not subject to taxation by the City of Sherrill. Although the United States recommended denial, the Court granted review in City of Sherrill at the end of OT03. The Court had just granted review and consolidated the petitions in Cherokee Nation v. Leavitt and Leavitt v. Cherokee Nation in which the Tenth Circuit and Federal Circuit, respectively, had reached conflicting results on the same question—whether the United States is liable for its failure to fully pay contract support costs under the Indian Self-Determination and Education Assistance Act. The OT04 would prove to be one of the busiest periods for the Project and its expanding workload.

October Term 2004. In City of Sherrill, the Project staff attorneys worked with the Solicitor General, attorneys for the Oneida Nation, attorneys for other Indian tribes in New York, and tribal attorneys from around the country to coordinate a tribal amicus brief strategy. In addition to the amicus brief filed by the United States, four tribal amicus briefs were filed in support of the Oneida Nation: (1) the NCAI amicus brief on the principles of federal Indian law regarding the definition of Indian country, the standards regarding reservation disestablishment, and the rules of property taxation in Indian country; (2) a New York Tribes’ amicus brief that addressed the Non-Intercourse Act and its application to Indian tribes within New York; (3) an USET amicus brief that addressed the issue of federal recognition and tribal continuity; and (4) a “Brandeis” brief which addressed the “flood-gate” argument by the City of Sherrill and informed the Court regarding numerous cooperative agreements between Indian tribes, states, and local governments regarding issues related to taxation, land use and other jurisdictional matters. Unfortunately, the Court reversed the Second Circuit in an 8-1 decision.

In the Cherokee Nation cases, the Project staff attorneys worked together with the attorneys representing Cherokee Nation, Shoshone Paiute and other Indian tribes in the preparation of three amicus briefs to ensure that the U.S. Supreme Court would rule that Indian tribes are entitled to enforce their contracts in federal court when federal agencies breach the Terms of those contracts. The resolution of such disputes by the

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U.S. Supreme Court had potentially far-reaching implications for Indian tribes administering programs pursuant to self-determination contracts or self-governance compacts. At that time, the United States had taken the position that since self-determination contracts are not government procurement contracts, Indian tribes are not entitled to the same protections afforded other government contractors. The Tribes prevailed in both cases, improving the overall win-loss record (OT01-OT04) to 4 wins, 3 losses, and two draws.

During OT04 the Project was asked to expand its substantive work in two new directions. First, in *South Dakota v. Cummings*, the State of South Dakota had filed a petition seeking review of decision by the South Dakota Supreme Court which had suppressed evidence seized by state law enforcement from a tribal member on the reservation. The state sought to expand the *Nevada v. Hicks* decision to vastly increase the jurisdiction of states to enter Indian reservations in connection with crimes committed off-reservation. The Project attorneys secured the pro bono assistance of a Supreme Court practitioner to work directly with the attorneys for the tribe and tribal member on the brief in opposition to the petition. The Project staff attorneys learned that a well-crafted brief in opposition is a potent weapon in demonstrating to the Court why the petition should be denied, thus securing the tribal victory in the court below. This experience paid immediate dividends in the denial of review in *South Dakota v. Cummings*, and continues to serve the Project well in the denial of review of a numerous petitions, in particular, those involving challenges to tribal criminal jurisdiction over non-member Indians, tribal civil jurisdiction over non-Indians, and tribal sovereign immunity.

Second, Project staff attorneys had been monitoring a case pending in the First Circuit in which the State of Rhode Island was challenging the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA). In *Carcieri v. Norton*, a group of ten state Attorney Generals, led by South Dakota and Connecticut, submitted an amicus brief making several broad arguments that, if successful, would adversely affect tribes throughout Indian country. For the first time, the Project determined that it would be beneficial to become directly involved in an Indian law case pending in the lower courts. With the pro bono assistance from two law firms, the Project attorneys coordinated the writing of two amicus briefs on behalf of NCAI and USET, as well as 40 individually-named Indian tribes. In addition, NCAI requested and was granted shared oral argument time with the United States. This direct involvement in important Indian law cases at the lower court level, especially those likely to reach the Supreme Court, has been utilized strategically but sparingly due to the limited resources of the Project.

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D. The Tribal Supreme Court Project and a Changing Supreme Court (OT05-OT10)

October Term 2005. As the Project looked ahead to OT05, two major personnel changes on the Court were underway. Justice Sandra Day O’Connor had announced her resignation prior to the death of Chief Justice Rehnquist. Project staff attorneys had reviewed the qualifications and experience of the Chief Justice’s eventual successor, Judge John G. Roberts, and had prepared a written report of their findings. The Project also began evaluating the impact created by the resignation of Justice Sandra Day O’Connor and was reviewing the qualifications of potential nominees to replace her on the Court. When Judge Samuel Alito was nominated by President Bush, Project staff attorneys reviewed his qualifications and experience and prepared another written report of their findings. Similar written reports were prepared for Judge Sonia Sotomayor as the nominee to replace Justice Souter in OT09, and for Solicitor General Elena Kagan as the nominee to replace Justice Stevens in OT10. The Rehnquist Court, which had the same nine Justices from OT94 to OT05, is now the Roberts Court with a young Chief Justice and three new, relatively young Justices. And as noted above, fewer and fewer Indian law cases are being heard and decided by the Roberts Court. Given the 0 for 7 win-loss record for tribal interests before the Roberts Court, this new development may not be all bad, but it certainly raises new challenges.

During the OT05, the Court only heard one Indian law case, *Wagnon v. Prairie Band Potawatomi Indians*, in which the State of Kansas sought to apply its motor fuel tax against the Tribe for on-reservation sales to non-Indian motorists. The machinery of the Project was put to work once again to coordinate and prepare four tribal amicus briefs: (1) the NCAI amicus brief which focused on the major tax principles in federal Indian law; (2) the National Intertribal Transportation Alliance amicus brief which discussed the importance of motor fuel taxes to Indian tribes due to the poor quality of road systems in Indian country and the disparity in funding between states and tribes for transportation infrastructure; (3) the National Intertribal Tax Alliance amicus brief which provided the Court with an overview of the numerous tax compacts entered into by tribes and states; and (4) the Kansas Tribes’ amicus brief which discusses the violation by Kansas of its Act for Admission and its abandonment of prior state-tribal tax agreements. In all, over 30 individual Indian tribes signed on to the tribal amicus briefs. The Supreme Court reversed the Tenth Circuit in a 7-2 decision holding in favor of the State of Kansas.

The Project continued to work with tribes on the preparation of their briefs in opposition in cases they had won in the courts below, and to evaluate whether to file petitions in the cases lost. The Project staff attorneys also continued to monitor several major Indian law cases pending in the lower courts, with one extremely important case requiring direct involvement. In a significant reversal of longstanding precedent, the National Labor Relations Board (NLRB) issued a ruling in *San Manuel Indian Bingo & Casino* that the National Labor Relations Act (NLRA)—the federal law regulating

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collective bargaining agreements between unions and employers in the private sector—would apply to tribally-owned businesses on Indian reservations.\(^{26}\) The San Manuel Band of Mission Indians filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit in October 2005, and the Project staff attorneys, in close coordination with the Tribe’s attorneys and attorneys throughout Indian country, prepared a tribal amicus brief which argued: (1) the NLRB’s new interpretation is inconsistent with the historical context of the NLRA and with established rules that safeguard tribal self-government; and (2) the Board’s new construction is unworkable and would, if accepted, abrogate tribal sovereignty. Following a disappointing outcome in the D.C. Circuit, the Project worked with the Tribe and its attorneys to recommend that, given the current composition of the Roberts Court, as well as the particular factual background and legal precedent of the case, the Tribe not file a petition seeking review by the Supreme Court.

**October Term 2006.** In OT06, for the first time in decades, the Court did not accept any Indian law cases for review. In all, 29 petitions for cert were filed in Indian law cases: 25 petitions were denied review; two petitions were dismissed under settlement agreements pursuant to Rule 46; and two petitions were carried over to the OT07. The Project staff attorneys worked with the attorneys in the two petitions dismissed under settlement agreements which were *Doe v. Kamehameha Schools*\(^ {27}\) and *Wright v. Coleville Enterprises.*\(^ {28}\) In certain cases, settlement and withdrawal of a petition is a good result when the question presented involves controversial subject matter before a very conservative Court. In coming to terms with this principle, Project staff attorneys began to collect data regarding the number and type of petitions being filed in Indian law cases which quickly led to tracking and summarizing cases based on subject matter. In OT06, most of the petitions in Indian law cases filed were grouped into one of five subject matter areas: tribal sovereign immunity (7 petitions); issues related to criminal jurisdiction (5 petitions); rights related to Indian lands (4 petitions); the trust responsibility of the United States (3 petitions); and issues related to taxing authority on-reservation (2 petitions). At the end of OT06, the First Circuit issued its opinion in *Carcieri v. Kempthorne* and upheld the Secretary’s authority to take land into trust on behalf of the Narragansett Indian Tribe—what would prove to be a short-lived victory for Indian country.\(^ {29}\)

In another development at the end of the OT06, the Agua Caliente Band of Cahuilla Indians announced that it had reached a settlement agreement with the California Fair Political Practices Commission (FPPC) wherein the Tribe agreed not to seek review of the California Supreme Court’s 4-to-3 decision in which the court held against tribal sovereign immunity “[i]n light of evolving United States Supreme Court precedent and the constitutionally significant importance of the state’s ability to provide a transparent election process with rules that apply equally to all parties who enter the

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\(^{26}\) San Manuel Indian Bingo and Casino v. N.L.R.B., 475 F.3d 1306 (D.C. Cir. 2007).

\(^{27}\) Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006), cert. denied, 550 U.S. 931 (2007).


\(^{29}\) Carcieri v. Kempthorne, 497 F.3d 15 (1st Cir. 2007).
electoral fray.” The Tribal Supreme Court Project had worked closely with the Tribe and its attorneys on these issues, including hosting a conference call to discuss the potential implications of a petition seeking review by the U.S. Supreme Court in this case.

October Term 2007. During OT07, the Court only granted review in one Indian law case: Plains Commerce Bank v. Long Family Land & Cattle Co. The Project staff attorneys had been asked to provide resources and amicus support for two Indian law-related cases, which had already been granted review early in the Term: Exxon Shipping Company v. Baker (punitive damages for oil spill harming Native fisheries) and Crawford v. Marion County Election Board (photo identification requirement for elections). Although contact was made with the law firm representing the Long family shortly after the petition was filed, the Project did not follow up to assist in the preparation of the brief in opposition. This omission was a difficult lesson. The Project staff attorneys did respond quickly to the cert grant and were able to secure the pro bono services of a veteran Supreme Court practitioner and the resources of the University of Texas Law School’s Supreme Court Clinic. The Native American Rights Fund joined the litigation team as co-counsel representing the Long family. The question presented by the petitioner, Plains Commerce Bank, was: “Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an ‘other means’ of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation.” In the tribal court proceedings, a unanimous jury had found in favor of the Long family on their breach of contract, bad faith and discrimination claims, and the general verdict was upheld by the Cheyenne River Sioux Tribal Court of Appeals. The federal district court and the Eighth Circuit upheld the tribal court’s jurisdiction.

On the merits, the Project Workgroup developed a tribal amicus brief strategy which included briefs submitted by the U.S. Solicitor’s General Office, the Cheyenne River Sioux Tribe, the National American Indian Court Judges Association, and others in support of tribal court jurisdiction. The bank was supported by several groups, including the State of Idaho (joined by eight other states: Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington, and Wisconsin), the American Bankers Association, the Association of American Railroads, and the Mountain States Legal Foundation. The Project worked closely with the attorneys representing the Long family and hosted a moot court oral argument at the University of Colorado School of Law. However, in another disappointing outcome, a sharply divided (5-4) Court took a significant step in diminishing the authority of Indian tribes over non-members conducting business on Indian reservations. One important footnote to the Plains Commerce Bank case is that Chief Justice Roberts chose to write the majority opinion

30 Memorandum from Tribal Supreme Court Project on Update of Recent Cases (July 30, 2007) (on file at Tribal Supreme Court Project).
34 Petition for Writ of Certiorari, Plains Commerce Bank, 552 U.S. 1087(No. 07-411).
himself and it was the first Indian law case since the addition of the Chief Justice and Justice Alito to the Court. Since then, they have both voted against tribal interests in every Indian law case to come before the Court.

October Term 2008. At the end of OT07, the Court granted review in Carcieri v. Norton following a decision by the en banc panel of the First Circuit which upheld the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe. Once again, the resources of the Project were maximized. The Tribal Supreme Court Project coordinated the preparation of four tribal amicus briefs in support of the United States: (1) the Narragansett Tribe amicus brief addressing issues arising under the Rhode Island Settlement Act; (2) the NCAI-Tribal amicus brief addressing issues arising under the IRA; (3) the Indian Law Professors’ amicus brief providing information to the Court regarding the concept of “federal recognition” and development of the federal acknowledgment process; and (4) the Historians’ amicus brief providing information to the Court regarding the history and development of federal policies leading up to the IRA. But writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer, and Alito, reversed the decision of the First Circuit with Justices Breyer, Ginsberg and Souter concurring in the judgment. The Court invoked the “plain meaning rule” and provided a strained, circular reading of a few sentences in the IRA to create different “classes” of Indian tribes. Given that the fundamental purpose of the IRA was to organize tribal governments and restore land bases for tribes that had been torn apart by prior federal policies, the Court’s Carcieri ruling stands as an affront to the most basic principles underlying the IRA. However, Justice Breyer’s concurrence, drawing directly from materials contained in the tribal amicus briefs, may well serve to limit the ultimate impact of the opinion, especially in relation to decisions being made at the administrative level.

During OT08, the Project also dedicated substantial resources in support of the petition in Navajo Nation v. U.S. Forest Service which sought review of a decision by an en banc panel of the U.S. Court of Appeals for the Ninth Circuit reversing a three-judge panel decision and holding that the U.S. Forest Service’s approval of a permit allowing the use of recycled sewage waste-water to manufacture snow for a ski resort on the San Francisco Peaks—a sacred-site for many American Indian Tribes—does not violate the Religious Freedom Restoration Act (“RFRA”). The Project was able to secure the pro bono services of the Stanford Law School Supreme Court Clinic to prepare the petition in collaboration with the attorneys who represented the tribes before the Ninth Circuit. The Project also assisted in the development of an amicus strategy in support of the petition.

However, the Court did not grant review in Navajo Nation v. U.S. Forest Service, but did grant review in two other Indian law cases in which the reversal of lower court decisions favorable to tribal interests were highly likely: United States v. Navajo Nation (Navajo II), part of the on-going litigation between the Navajo Nation, Peabody Coal and the United States (as trustee) which reached the Supreme Court in 2003; and State of

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35 Carcieri v. Norton, 423 F.3d 45 (1st Cir. 2005).
Hawaii v. Office of Hawaiian Affairs in which the Supreme Court of Hawaii held that the State of Hawaii should be enjoined from selling or transferring “ceded lands” held in trust until the claims of the Native Hawaiians to such lands have been resolved. Although reversal appeared likely, the Project staff attorneys worked closely with the attorneys representing the Navajo Nation to prepare four amicus briefs in support of the Navajo Nation. And in State of Hawaii v. Office of Hawaiian Affairs, the Project worked with the attorneys representing OHA, and prepared an amicus brief on behalf of NCAI in support of Native Hawaiian interests. Through the amicus strategy, the Project sought to limit the damage the Court might do to tribal interests in these cases—an emerging area of expertise. With little fanfare or surprise, the Court issued two unanimous decisions adverse to tribal interests.

October Term 2009. With the start of OT09, most of the attention and speculation was focused on the addition of Justice Sotomayor to the Court, as well as the possible retirement of Justice Stevens at the end of the Term. And for the second time in three years, the Court did not grant review in any Indian law cases during OT09. Nonetheless, the Project remained busy working on a few important Indian law cases at the cert stage, including Harjo v. Pro-Football, Inc. and Benally v. United States—both involving racial bias, stereotypes and discrimination against Indians—and Elliott v. White Mountain Apache involving tribal court jurisdiction over non-Indians and exhaustion of tribal court remedies. For example, in a very high-profile case, Harjo v. Pro-Football, Inc., the D.C. Circuit had held that the doctrine of laches (i.e. long delay in bringing lawsuit) precluded consideration of a petition seeking cancellation of the “Redskins” trademarks owned by Pro-Football, even though the Trademark Trial and Appeals Board found that the trademarks disparaged Native Americans. The Project coordinated four amicus briefs in support of the petition seeking review by the Supreme Court: (1) the NCAI-Tribal Amicus Brief which summarized the efforts of the Native American community over the past forty years to retire all Indian names and mascots; (2) the Social Justice/Religious Organizations Amicus Brief which focused on the social justice and public interests present in the case; (3) the Trademark Law Professors’ Brief which supported and enhanced the trademark law arguments put forward by petitioners; and (4) the Psychologists’ Amicus Brief which provided an overview of the empirical research of the harm caused by racial stereotyping. Although the Court denied review, the Project had used the amicus briefs as an opportunity to further educate the Court on the issues related to racial bias, stereotypes and racial discrimination against Indians—issues which will return to the Court in the future.

In addition to its work before the Supreme Court, the Project continued to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project became involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests.

40 Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009), cert. denied, 130 S. Ct. 624 (2009).
During OT09, the Project assisted in the preparation of amicus briefs in a number of cases, including: *Patchak v. Salazar* (pending before the D.C. Circuit challenging trust land acquisition based on *Carcieri* and the status of the Tribe in 1934); *Water Wheel Camp v. LaRance* (pending before the Ninth Circuit on questions involving the scope of tribal court jurisdiction over non-Indian lessees); *Osage Nation v. Irby* (request for en banc review by Tenth Circuit on question of disestablishment of Osage Reservation denied); and *Colorado v. Cash Advance* (pending before the Colorado Supreme Court on the question of the sovereign immunity of tribal enterprises doing business outside the reservation). The Project renewed its efforts to monitor a substantial number of Indian law cases pending in the lower courts, and to update the cases by subject matter area, including: Post-*Carcieri* Litigation; Criminal Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship. Hopefully, these continued efforts will help the Project identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court.

October Term 2010. The start of OT10 included the induction of Justice Kagan to replace the retired Justice Stevens. As the former U.S. Solicitor General, Justice Kagan was recused in the two Indian law cases decided by the Court during OT10: *United States v. Tohono O’odham Nation* and *United States v. Jicarilla Apache Nation*. At its opening conference, the Court considered eight petitions for writ of certiorari in Indian law cases, requesting the views of the Solicitor General in one Indian law case, *Thunderhorse v. Pierce* (state prison’s enforcement of its grooming rules, including the prohibition of long hair on men with no exception for Native American religious practitioners), and denying review of the other seven Indian law petitions. The denials of review preserved important victories in the lower courts in *Hoffman v. Sandia Resort & Casino* (tribal sovereign immunity) and *Hogan v. Kaltag Tribal Council* (recognition of tribal court judgments), cases in which the Project was able to work with the tribes and their attorneys on the briefs in opposition.

Early in the Term, the Court granted review in *Madison County v. Oneida Indian Nation of New York* in which the Second Circuit had held that the Oneida Indian Nation is immune from suit in foreclosure proceedings for non-payment of county taxes involving fee property owned by the Tribe. In a terse concurring opinion written by Judge Cabranes and joined by Judge Hall, two of the three judges on the Second Circuit panel agreed that they were bound by Supreme Court precedent upholding tribal sovereign immunity, but wrote that this decision “defies common sense” and “is so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*.” In all, five amicus briefs, including an amicus brief on behalf of the State of New York joined by seven other states, had been filed in support of the petition.

43 Thunderhorse v. Pierce, 364 F. App’x 141 (5th Cir. 2010), cert. denied, 131 S. Ct. 896 (2011).
44 Madison County, N.Y. v. Oneida Indian Nation of New York, 605 F.3d 149 (2nd Cir. 2010), 131 S. Ct. 704 (2011).
To avoid another disastrous Supreme Court decision in the wake of *City of Sherrill*, the Project staff attorneys worked closely with the Nation’s attorneys to determine whether a settlement could be reached or the case withdrawn. As a result of those discussions, a letter was filed informing the Court that the Nation had passed a tribal “Declaration of Irrevocable Waiver of Immunity” which waived “its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States.” The Oneida Indian Nation recognized the inherent danger of the Court’s review of the doctrine of tribal sovereign immunity under the particular facts in the case and informed the Court that it had taken this step “to clarify that, as contemplated by its prior posting of letters of credit covering taxes on all lands at issue in this case, it is prepared to make payment on all taxes that are lawfully due.” Evidently, the Court was persuaded that the declaration and waiver moots the primary question presented. The Court vacated the opinion and remanded *Madison County v. Oneida Indian Nation of New York* to the Second Circuit.

Unfortunately, the Court had granted review and reversed the favorable lower court rulings in *United States v. Tohono O’odham Nation*; and *United States v. Jicarilla Apache Nation*. Both cases involved procedural aspects of litigation involving alleged breaches of the trust relationship between Indian tribes and the United States. The Project assisted with the development of the amicus strategy, the preparation of amicus briefs, and moot court oral argument in the cases. The overall win-loss record (OT01-OT10) had plummeted under the Roberts Court (0 wins) to 4 wins, 10 losses and 2 draws.

However, during OT10, another notable development occurred. The Court invited the Solicitor General to file a brief expressing the views of the United States in *Osage Nation v. Irby*, one of a number of cases the Project had been tracking involving disestablishment of Indian reservations, and one in which the Project staff attorneys had prepared an amicus brief in support of the petition. This practice by the Court is known as a CVSG. It is not unusual for the Court to CVSG in an Indian law case on occasion—once every two or three years—particularly when the petitioner is a state or local government challenging an Indian tribe. Thus, it was not unusual for the Court to CVSG in the case late last Term when the State of Alaska challenged the authority of the Tribal Court over a tribal member-child placement proceeding (cert denied).

But the Court issued a CVSG in a total of four Indian law cases during OT10 alone. In addition to *Osage Nation v. Irby*, the Court issued a CVSG in *Brown (formerly Schwarzenegger) v. Rincon Band* (IGRA “revenue” sharing); *Miccosukee Tribe v. Kraus-Anderson* (enforcement of tribal court judgments); and *Thunderhorse v. Pierce* (Native American religious practices). In three of the four cases, Indian tribes and Indian interests have been on the top-side—the petitioners seeking review by the Court. Based in part on the recommendation of the United States, the Court denied review of all four petitions. Although it would be premature to draw any conclusions regarding these “requests” by the Court, these developments may be the result of the addition of Justice Sotomayor and Justice Kagan on the Court. Perhaps individual Justices are seeking a
better understanding of the issues being raised and the law being applied by the lower federal and state courts in Indian law cases.

What does all of this teach us? First and foremost, we have learned that the Roberts’ Court is not friendly to tribal interests. Although the Project maintained its consistent, coordinated approach before the Roberts’ Court, we lost all seven cases on the merits. Therefore, it is incumbent upon the Project and its supporters to re-examine the strategy, re-shift its approach and re-dedicate resources to meet the new challenges posed by the Court. One potential area ripe for consideration is the data from Part III. Indian Law Petitions and the Certiorari Process.
III. INDIAN LAW PETITIONS AND THE CERTIORARI PROCESS

A. Overall Results

1. Case Categories

As Figure 5 illustrates, no one category of Indian law dominated the question presented within the 259 petitions filed between OT01 and OT10. However, tribal jurisdiction—both criminal and civil jurisdiction—constituted an issue in nearly a quarter of the petitions (23%) coming before the Court. Challenges to the doctrine of tribal sovereign immunity were also abundant, the primary question presented in 36 of the 259 petitions, or nearly 14% of the time.

Figure 5: Categories of Certiorari Petitions, 2001-2010

<table>
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<tr>
<th>Category</th>
<th># of Cases</th>
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<td>Criminal Jurisdiction</td>
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</tr>
<tr>
<td>Treaties</td>
<td>8</td>
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<td>6</td>
</tr>
<tr>
<td>Total</td>
<td>259</td>
</tr>
</tbody>
</table>

Figure 6 breaks these numbers down and examines the categories of petitions filed year-by-year from OT01 to OT10. The numbers are generally too small to support any broad generalizations about the direction of Indian law. Still, there are some suggestive changes that point to possible trends. The spike in civil jurisdiction cases in 2001 and 2002—followed by a relative decline from over the rest of the period—might be the result of the Court’s 2001 decisions in Atkinson Trading Company v. Shirley and Nevada v. Hicks, particularly since many of the cases hinged on the validity of tribal court judgments. There was no
spike in civil jurisdiction cases following the Court’s 2007 decision in *Plains Commerce Bank v. Long Family*.

Figure 6 also reveals an increase in trust responsibility cases toward the middle and end of the period. This may be explained in part by two things: the first being the success in the lower courts in *Cobell*, which itself resulted in four separate petitions for certiorari, and the second being the drive by the United States to narrow the scope of the trust responsibility as evidenced in *Navajo Nation II* (OT08), *Jicarilla Apache* (OT10) and *Tohono O’odham* (OT10). The occasional spikes in Indian gaming cases, by contrast, seem to reflect local controversies that produced litigation. The OT03 petitions, for instance, included two cases resolving the legal status of pull-tab machines, and two cases stemming from Texas’ prohibition on Indian gaming. Three of the OT08 cases stemmed from a California dispute over gaming license arrangements.

**Figure 6: Cases Per Category By Term**

<table>
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<tr>
<th>Category</th>
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<th>2002</th>
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<th>2004</th>
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<td>259</td>
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</table>

**2. Outcome for Tribal Interests**

As Figure 7 illustrates, the results for tribal interests in the lower courts were split nearly evenly over the period: tribes and their interests lost slightly more cases than they won in the lower courts, and only a small percentage of cases pitted tribes against each other.
Figure 8 breaks down these results over time, but it does not provide any clear pattern. One notable development is that, in recent years, Indian tribes have fared worse than they did in the lower courts through the middle of the decade, when they won more cases. However, the numbers may be too small and the period examined too short to demonstrate an overwhelming trend.
Clearer trends are evident when the outcome for tribal interests in the lower courts is categorized by the question presented. As Figure 9 illustrates, tribal interests prevailed far more often in certain disputes, particularly those involving sovereign immunity, civil jurisdiction and criminal jurisdiction, and frequently lost in cases concerning taxation, lands, and trust responsibility. In part, this seems to reflect the state of doctrine. For example, during this period, the lower federal courts generally accepted tribal sovereign immunity as an absolute bar to suit, and declined to carve out any exceptions. This reflects, at least up to this point in time, a strong adherence to the Supreme Court’s 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*.

Although the doctrine on tribal civil jurisdiction remains less settled, the Court’s 1981 decision in *Montana v. United States* has emerged as the “pathmarking” case for lower federal courts to determine the scope of tribal authority over non-Indians. Surprisingly, many of the cases which challenged tribal civil jurisdiction involved suits by tribal members against the tribes themselves. These were disputes in which the federal and state courts largely refused to intervene. In the area of tribal criminal jurisdiction, the Court’s OT03 decision in *United States v. Lara* helped clarify doctrinal ambiguities for the lower courts in relation to the question of inherent tribal authority to prosecute non-member Indians for crimes committed on their reservations.

**Figure 9: Outcomes for Tribal Interests by Category**

<table>
<thead>
<tr>
<th>Category</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Won</td>
<td>8</td>
<td>15</td>
<td>15</td>
<td>17</td>
<td>13</td>
<td>15</td>
<td>3</td>
<td>14</td>
<td>9</td>
<td>9</td>
<td>109</td>
</tr>
<tr>
<td>Lost</td>
<td>10</td>
<td>15</td>
<td>8</td>
<td>12</td>
<td>11</td>
<td>11</td>
<td>8</td>
<td>17</td>
<td>13</td>
<td>17</td>
<td>105</td>
</tr>
<tr>
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<td>0</td>
<td>4</td>
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<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Total</td>
<td>20</td>
<td>31</td>
<td>24</td>
<td>29</td>
<td>28</td>
<td>27</td>
<td>12</td>
<td>31</td>
<td>26</td>
<td>31</td>
<td>259</td>
</tr>
</tbody>
</table>
Another factor probably played an even more significant role in determining outcome: the nature of tribes’ opponents. As can be seen in Figure 12, infra, the opponents of tribal interests in suits involving sovereign immunity and civil jurisdiction were often individuals—usually non-Indians in cases involving tribal sovereign immunity, a mixture of Indians and non-Indians in cases involving tribal civil jurisdiction. By contrast, in cases involving taxation, status of lands, and the nature of the trust responsibility, tribes and individual Indians almost invariably confronted the federal government and state governments as opponents—usually the state and local governments in taxation and lands cases, and almost invariably the federal government in trust cases. As discussed below, the data bears out what common sense would suggest: tribal interests were considerably less successful against government-opponents than against individual litigants. The sophistication and effectiveness of the tribe’s opponent, in other words, probably explains much of the variance in tribal wins and losses across the categories.

3. Party-Type

Based on the numbers, as one would expect, Indian tribes were the most common litigants in Indian law cases reviewed for certiorari (a party in 57% of the cases). They were followed by state and local governments (40%), individual Indians (36%), the federal government (32%), individual non-Indians (22%), and corporations (13%). However, these parties were not evenly divided between petitioner and respondent, nor were the proportions the same across all categories of cases.

Figure 10: Petitioner Type, Cert. Petitions, 2001-2010

Instead, as Figure 10 shows, individuals, both Indian (31%) and non-Indian (19%), were much more likely to be the petitioner in a case. Clearly, over the past ten Terms, individuals filed 50% of all petitions—a fact which may reflect a lack of success
in the lower courts in challenging tribal jurisdiction or sovereign immunity. In fact, of the 21 Indian law petitions granted by the Court, not one involved a petition filed by an Indian or non-Indian individual.

**Figure 11: Respondent Type, Cert. Petitions, 2001-2010**

Individuals, by contrast, were very rarely the respondents to a petition for writ of certiorari (8%). Instead, the federal government (27%) and state governments (26%) together constituted more than half of the respondents in Indian law cases. Tribes were slightly more likely to be a respondent (33%) than a petitioner (24%), although in many of these cases the lower appellate court simply reaffirmed the grant of sovereign immunity by the lower trial court. Corporations were petitioners (7%) and respondents (6%) in roughly equal proportion.
Figure 12 tracks the total number of each type of party in each case category, and demonstrates that parties were also unevenly spread among the various categories. Not surprisingly, tribes and non-Indians constituted the parties in the vast majority of sovereign immunity suits. Trust responsibility cases, by their nature, usually pitted the federal government against either tribes, or individual Indians. Taxation disputes primarily involved state and local governments contending with tribes, or, more frequently, individual Indians. Individual Indians were also the predominant litigants in cases concerning criminal jurisdiction, against either the state or federal government.

These data demonstrate that the type of litigant varied significantly between petitioners and respondents, and across case categories. Individual non-Indians and Indians were usually the petitioners, rarely the respondents, and often litigated issues of jurisdiction and sovereign immunity. By contrast, governments—state, local, and federal—usually prevailed in the lower court, and, while a significant party in many categories of dispute, played a particularly prominent role in questions of civil jurisdiction, Indian gaming, taxation, and trust responsibility. Part III.c, infra, will analyze the petitions by party-type more thoroughly.

B. Lower Courts

Of the 259 petitions for writ of certiorari filed in Indian law cases, 25% came from state court decisions. The other three-quarters came from the federal courts, which would be expected given the prevalence of federal question jurisdiction in Indian law disputes. Geography determined the prominence of certain circuits over others: 28% of the petitions came from the Ninth Circuit; 14% came from the Tenth Circuit; and 7% came from the Eighth Circuit. The Federal and D.C. Circuits together constituted 12% of petitions, many of which addressed trust responsibility or similar questions of tribal-federal relationship. By contrast, only one petition came from the Third Circuit (which
contains no federally recognized tribes) and none came from the Fourth Circuit (which contains two).

Figure 13: Indian Law Certiorari Petitions by Lower Court, 2001-2010

Based solely on petitions for writ of certiorari filed, Figure 14 demonstrates that tribal interests did not fare equally in all courts over the past ten years. In the Ninth Circuit, tribal interests were considerably more successful than in any other court, winning nearly twice as many cases than they lost (43 wins versus 22 losses). In the Tenth Circuit and in the State Courts, tribal interests won just slightly more than they lost. In the D.C., Circuit, the Federal Circuit and all other Circuits, tribal interests lost substantially more cases than they won. This probably does not reflect any intended bias on the part of the courts. Rather, the Ninth and Tenth Circuits are located within the heart of Indian country and hear substantially more Indian law cases involving a wider range of issues than the other courts. By contrast, the D.C. and Federal Circuits deal extensively with cases by tribes against the federal government on issues of trust responsibility and tribal recognition, in which tribes usually did not prevail.
C. Analysis by Party

1. Tribe as a Party

As noted above, Tribes were parties in 57% of cases: 24% as petitioners and 33% as respondent. Since the Court only granted certiorari in 21 of the 259 Indian law petitions, the outcome in the lower courts was usually the final decision in the case. Based solely on petitions for writ of certiorari filed, the results for tribal interests generally tracked the proportion between instances where the tribe was a petitioner (lost below) and when the tribe was a respondent (won below): Figure 15 shows that tribes won (48%) slightly more cases than they lost (43%) in the lower courts.
However, as illustrated in Figure 16, tribes did not prevail evenly against all types of opponents. Tribes tended to be successful against individuals, and less so when their opponents were the federal, state, and local governments.

By contrast, as Figure 17 highlights, when tribes were the petitioner, federal, state, and local governments constituted over two-thirds (67%) of respondents, reflecting tribes’ general lack of success below. Corporations also constituted a sizeable proportion of respondents (16%), as did litigation involving other tribes (10%).
Individuals, by contrast, rarely prevailed below against tribes; non-Indians made up only 5% of respondents, and Indians made up only 2%.

Figure 18 shows the case categories involved when the tribe was a party. Unsurprisingly, sovereign immunity constitutes the largest issue litigated, followed by civil jurisdiction, Indian gaming, and lands. Tribes were rarely parties in questions of criminal jurisdiction, since those cases usually involved disputes between individual Indians, the federal government, and state governments.
As Figure 19 demonstrates, Indian tribes were not equally successful in all categories of cases. It is illustrative to compare Figure 19 below, which shows the outcome for tribal interests by category in only cases where the tribe was a party, with Figure 9, supra, which shows the same information for all cases. As expected, tribes fared best in cases involving sovereign immunity and civil jurisdiction, and poorly in lands questions. They were more successful in taxation cases, however, than tribal interests generally, and less successful in cases involving Indian gaming.
Explanations for these differences are suggested by the examination of the general constellation of these cases. Most of the other taxation cases were brought by individual Indians, whose claims were often weaker and were, perhaps, less sophisticated litigants. By contrast, most of the Indian gaming cases without tribal parties consisted of non-Indians attempting to challenge state or federal law authorizing Indian casinos. Courts generally disfavored these suits and routinely sided with tribal interests in upholding state and federal power to allow tribal gaming. In other words, Indian tribes were generally more successful in court than individual litigants, but were less successful than state and federal government parties.

To summarize, tribes as parties faced a dual role. As respondents, they, like the federal government and state governments, often defended the status quo against individual Indians and non-Indians. In these cases, they were usually successful. However, as petitioners, tribes behaved more like individual litigants, attempting to modify state or federal policy concerning taxation, gaming, lands, or treaty rights. In this latter category, courts generally sided against tribal interests and found for federal, state, and local governments in these cases.

2. Federal Government as a Party

The federal government was a party in 32% of cases where Indian law petitions were filed: 27% as respondent and 5% as petitioner. It played, however, a dual role with respect to tribal interests. In nearly one-third of cases to which it was a party, the federal government litigated on behalf of tribal interests. But in over 60% of the cases, the
federal government was adverse to tribal interests. (The remaining cases represent disputes between tribes, and therefore no clear role can be assigned). To properly analyze the role of the federal government, therefore, it is necessary to separate these two types of cases.

Tribes generally did very well in the lower courts when the federal government litigated their interests. Of the Indian law cases decided by the lower courts, tribal interests prevailed in 21 out of 23 cases or 91% of the time. Figure 20 illustrates the petitioner-type in these cases. Individual Indians were the petitioners almost exclusively in criminal jurisdiction cases, as in United States v. Lara, when they challenged aspects of tribal sovereignty. Non-Indians and state and local governments, by contrast, challenged a variety of federal pro-tribal regulations, including hiring preferences, land-into-trust decisions, and authorizations of tribal gaming. The federal government was the petitioner in only two cases where it defended tribal interests: one, Lara, was decided favorably by the Supreme Court; the other, United States v. Pataki, pitted the federal government against New York over long-standing Indian land claims.

![Figure 20: Petitioner-Type When Pro-Tribal Federal Party was Respondent](image)

It is also interesting to note the variety of tribal interests represented by the federal government. As Figure 21 illustrates, lands and criminal jurisdiction were the largest categories, followed by civil jurisdiction and political status. The political status cases involved questions of federal recognition of tribal entities, voting rights, and Indian preference.
Tribal interests fared considerably worse when the federal government was the adverse party in the lower courts. Indian tribes only won 6 (11%) of these cases, and lost 45 (83%). As is evident in Figure 22, over a quarter of these cases (30%) involved the federal trust responsibility. A number of others addressed questions of political status, particularly tribal recognition, and religious freedom. The religious freedom cases generally involved individual Indians challenging federal laws that they alleged burdened their religious practice, such as the Bald and Golden Eagle Protection Act (challenged in three separate prosecutions).
The federal government was usually the respondent when adverse to tribal interests. Figure 23 breaks down the government’s opponents in such instances. Over half the petitioners were individual Indians, many of them challenging adverse decisions concerning trust responsibility, taxation, religious freedom, or political status; tribes made up over a third of petitioners, often in cases involving disputes over lands, recognition, trust responsibility, or contract support costs under government contracts.
When it acted adversely to tribal interests, the federal government was the petitioner in only ten cases. As Figure 24 illustrates, the vast majority of these cases were against tribes. These particular cases were especially likely to be granted certiorari by the Court. Of the eleven cases with a federal petitioner and tribal respondent, the Court agreed to hear eight (73%, well above the 8% average). Tribes prevailed in two of the eight cases in the highest court: *United States v. White Mountain Apache* (OT04) and *Leavitt v. Cherokee Nation* (OT02).
The data for the past ten years persuasively demonstrate that the federal government remains a formidable litigant, both for and against tribal interests. Not only did the federal government frequently prevail in the lower courts, but, in the instances when tribes managed to secure lower court victories, the federal government frequently obtained Supreme Court review. Of the six overall victories for tribal interests over an adverse federal party, three came through a Supreme Court decision.

3. **State and Local Governments as a Party**

State and local governments were also a major player in Indian law litigation during this period: they were parties in 40% of cases, 14% as petitioner, 26% as respondent. To a lesser extent than the federal government, they played a dual role in Indian law litigation. Occasionally, they appeared in court to defend tribal interests, as they did in 19% of the cases. These cases can be easily summarized. Most of them involved suits by non-Indians (although sometimes individual Indians or other local governments) challenging on equal protection grounds state policies that allegedly favored Indians. Indian gaming issues also contributed to many of the suits, as individuals challenged state decisions to enter into tribal-state gaming compacts. Tribal interests usually prevailed in these suits: of seventeen cases, the tribal interest prevailed in fifteen (88%).

More frequently, though, state and local governments were adverse to tribal interests (in 82% of the cases in which petitions were filed). As a general matter, tribal interests did not fare well against state and local governments, although they fared better than against the federal government. In the ten-year period, tribal interests prevailed in almost one-third (31%) of the cases, but lost in two of every three cases (66%).
As Figure 25 illustrates, disputes between state and local governments and tribal interests focused on certain key areas. Taxation and civil jurisdiction were the most common; Indian gaming and lands also figured prominently. Figure 26 demonstrates that, while Indian interests did poorly against states in all categories, they prevailed most often in questions of civil jurisdiction. In cases centered on taxation, gaming, and lands, tribes and their interests lost by a wide margin. In the case of lands, courts generally disfavored the revival of long-standing claims and barred them on the basis of laches, statutes of limitation, or *res judicata*. 

Figure 26: Outcome for Tribal Interests against Adverse State/Local Gov. Party by Category
As Figure 27 and Figure 28 illustrate, tribes and individual Indians were the most common opponents of state and local governments. The higher proportion of tribes and federal parties as respondents reflects their higher success rate in the lower court. States enjoyed considerable success as petitioners seeking review by the Supreme Court, although not to the same extent as the federal government. The Court granted certiorari in 35% of cases where a state and local government was the petitioner. In the five Indian law cases argued before the Court on the merits where state and local governments were adverse to tribal interests, the Court reversed rulings favorable to tribal interests and sided with the state and local government in three cases, with the other two resulting in a draw with no clear winner. By contrast, the Court did not grant review in a single case where a state or local government was the respondent. These trends helped produce the unfavorable results for tribes when litigating against state and local governments.
4. **Individual Indians as a Party**

Individual Indian litigants were a party in 36% of cases seeking review by the Supreme Court: 31% as petitioners, 5% as respondent. As Figure 29 illustrates, individual Indians played a complex role in Indian law litigation. Often, individual Indians went to court to vindicate general tribal interests: tribal immunity from taxation, Indians’ rights to religious freedom, the federal trust responsibility, or the validity of tribal court judgments. *(See Figure 31, infra).* The federal, state or local governments were consistently their opponents (73% of the time as respondent), although tribal governments were also their opponent in a number of cases (21% of the time as respondent). Individual Indians as petitioners had a poor track record: the Court declined to grant review in any of the 95 petitions they filed.

**Figure 29: Respondent-Type When Indian Was Petitioner**

Individual Indians infrequently prevailed in lower courts. When they did, as Figure 30 highlights, it was usually against the state and local government, or a corporation, but rarely against a tribe or the federal government. One of the petitions brought by a corporation against an individual Indian that was granted and decided adversely was *Plains Commerce Bank v. Long Family.* The other petition granted review involving an individual Indian as a respondent was *United States v. Lara,* where the Court vindicated tribal interests when it upheld the *Duro* fix and its affirmation of inherent tribal sovereignty.
As highlighted in Figure 31, the dominance of governmental parties in cases involving individual Indians is not surprising given the predominance of certain case categories. Cases centered on civil jurisdiction, criminal jurisdiction, and taxation made up well over half of the petitions involving individual Indians.

Figure 31: Cases with Individual Indian Party by Category

- Civil Jurisdiction: 21%
- Criminal Jurisdiction: 20%
- Taxation: 14%
- Sovereign Immunity: 4%
- Religious Freedom: 4%
- Political Status: 5%
- Other: 13%
- Lands: 7%
- Indian Gaming: 1%
- Trust Responsibility: 10%
- Treaties: 1%
5. Non-Indian Individuals

Individual non-Indians were parties in 22% of the petitions filed: 19% as petitioners, and only 3% as respondents. These figures demonstrate that, like individual Indians, non-Indians rarely prevailed in the lower courts. Unlike individual Indians, non-Indians were nearly always adverse to tribal interests: in only one case of 52 petitions filed could it be argued that a non-Indian litigant sought to defend tribal interests.

The low success rate of non-Indian individuals can be attributed, at least partly, to the categories of cases they brought. As Figure 32 illustrates, over a third of cases brought by non-Indians involved questions of tribal sovereign immunity, which tribes nearly invariably won. Civil jurisdiction, political status, and Indian gaming constituted over another third, in which non-Indians generally challenged federal and/or state grants of authority to tribes.

The data in Figure 33 tracking respondent-type reinforce these observations. In just over half the cases non-Indians filed against tribes; the bulk of these were sovereign immunity cases, with a handful of civil jurisdiction cases brought by non-Indian employees of casinos or non-Indians involved in child custody disputes. The other half of cases involved non-Indians challenging federal, state, and local regulations that protected tribal sovereignty or secured gaming rights. Non-Indians were unsuccessful petitioners: the Supreme Court did not grant review of any petition with a non-Indian petitioning party.
Non-Indians were respondents in only six cases: twice against individual Indian petitioners in disputes arising from personal relationships, twice against state and local governments, and twice against tribes in cases where the lower courts had abrogated tribal sovereign immunity.

6. Corporations

Corporations were the least frequent litigant in Indian law cases, appearing in only 13% of the petitions filed with the Court. It appears they met lower court success in a near equal measure—they were the petitioners in 7% of cases, and respondents in 6%. Corporations were generally adverse to tribal interests, except in certain rare instances involving disputes between corporations, or in couple cases where suits were brought against corporations to challenge tribal employment policies since a suit could not be brought against the tribes directly.

As Figure 34 illustrates, tribes and individual Indians were the frequent opponents of corporations. Corporations generally had more success against tribes than other litigants; they had very little success against the federal government, and roughly equal odds against individual Indians, other corporations, and state and local governments.
Figure 36 highlights the subject matters of these disputes. Suits against tribes over tribal sovereign immunity constituted the largest category: corporations met with more success in these areas than individuals because they frequently had contracts that (allegedly) waived tribal sovereign immunity. Many disputes involving corporations arose from gaming contracts, including cases that hinged on civil jurisdiction or sovereign immunity as well as those which implicated Indian gaming law directly.
The Supreme Court granted certiorari to the only petition filed by a corporation in *Plains Commerce Bank v. Long Family*. This lower (8%) success rate in securing review by the Court was consistent with the average for all cases, and reinforces the conclusion that corporations, like Indian tribes themselves, had a mixed record of success.
PRELIMINARY CONCLUSIONS AND SUGGESTIONS FOR FURTHER STUDY

This snapshot of data relating to recent Indian law petitions before the U.S. Supreme Court shows mixed results. Tribal interests have met with success in many areas. Tribes have largely prevailed against Indian and non-Indian individuals in asserting their sovereign immunity and civil jurisdiction. When they have sought to preserve policies that benefit Indians against outside challenges, the federal and state and local governments have also been very effective defenders of Indian interests. Tribes and their allies, however, have been much less successful when contending with federal, state and local governments. Courts have generally, although not invariably, denied their trust responsibility, taxation and lands claims against the federal and state governments.

The role of the Supreme Court in this process has generally harmed tribal interests. During this period, the Court largely refused to grant certiorari to petitioning tribes and individual Indians. It did, however, frequently grant certiorari to federal and state governments who sought to overturn lower court rulings that favored tribes. The result was that tribal interests lost in the Supreme Court at a higher proportion than they did in the general population of cases.

The preliminary conclusions of this study are necessarily limited by its narrow chronological sweep. One potential avenue for future study lies in expanding the time period examined. Ideally, this approach would consider not only Indian law decisions at the Supreme Court level, but also the decisions in the circuit courts and state high courts. This would make it easier to identify Indian law trends over time regarding the types of cases, outcome for tribal interests, and parties involved, and contrast high court developments with lower court outcomes.

This study also treated all cases and petitions equally. However, the majority of petitions, particularly those involving individuals, stemmed from relatively weak cases, where the petitioners were unlikely to succeed. From the general constellation of certiorari petitions, therefore, more attention should be given to cases that presented substantial unresolved legal issues, particularly in the context of intergovernmental litigation. This might provide a more representative sample of how the majority of Indian law doctrine is crafted.
“ININDIANS, IN A JURISDICTIONAL SENSE”: TRIBAL CITIZENSHIP AND OTHER FORMS OF NON-INDIAN CONSENT TO TRIBAL CRIMINAL JURISDICTION

Paul Spruhan*

In 1844, an exasperated Agency Superintendent reported to the Commissioner of Indian Affairs details of a troubling case. William Armstrong described the hanging of Jacob West, a white man of no Indian ancestry, at the order of a Cherokee court for participating in the murder of a Cherokee.1 West had been married to a Cherokee and had lived in the Cherokee Nation.2 Under Cherokee law in effect at the time, he qualified to be a naturalized citizen of the Nation.3 West unsuccessfully sought a writ of habeas corpus from the federal district court in Arkansas to release him from Cherokee custody.4 According to Armstrong, the court denied West's request because West had married into the Cherokee Nation and "had, for all legal purposes, become one of the tribe."5 Based on West's execution at the order of the tribal court, Armstrong asked,

are all other tribes to exercise the same jurisdiction? Are the Osage to be suffered to scalp any white man married among them, whenever, according to their peculiar customs, he may have incurred that penalty? . . . If an American, by marriage and residence among the Cherokees becomes for all legal purposes an Indian, it is difficult to conceive why the same consequences should not result from marrying and residing among any other tribe.6

Fast forward to 2011. The Court of Appeals of the Port Gamble S’Klallam Tribe faced a similar question, though under somewhat different facts: could a non-Indian be subject to the tribe’s criminal jurisdiction by simply signing a form indicating his consent?7 In Port Gamble S’Klallam v. Hjert, the non-Indian defendant consented to

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2 Sen. Doc. No. 1, supra, note 1, at 461.
4 Sen. Doc. No. 1, supra, note 1, at 461.
5 Id.
6 Id. at 461-62.
prosecution by the tribal court for alcohol offenses by signing such a form. Hjert had previously pled guilty before the tribal court to similar offenses and been sentenced to detention, fines, and probation. The form, apparently prepared by the tribal prosecutor, explicitly limited the scope of consent to prosecution in that case, and not a general consent to tribal authority. Despite his consent, and his apparent failure to seek dismissal of the prosecution, the tribal trial court dismissed the case on its own, ruling that the tribe had no jurisdiction. The tribal Court of Appeals affirmed the dismissal, holding that though non-Indians generally might be able to consent to tribal jurisdiction, the absence of an affirmative tribal statute authorizing such consent meant that the tribe currently lacked such jurisdiction. Further, the court ruled that the consent itself did not comport with the due process requirements of the Indian Civil Rights Act in the absence of evidence that it was “freely and expressly given, voluntary, intelligent and case specific.”

These different outcomes reflect not only differences in the two tribal nations’ laws at the time of the cases but also significant changes in the federal view of and influence on tribal criminal jurisdiction. Between 1844 and 2011 federal courts would claim to reduce tribal criminal jurisdiction over non-Indians to the point that standard descriptions of federal Indian law state that tribes lack any such jurisdiction, or, at least that such authority is restricted solely to contempt and exclusion from tribal lands. Indeed, a mere two years after Armstrong’s report on West’s execution, the United States Supreme Court decided United States v. Rogers, ruling that the United States had jurisdiction to prosecute a white man married into the Cherokee Nation. In Rogers, the Supreme Court concluded that a white man could not claim to be an “Indian” exempt from federal jurisdiction based on his status as a citizen of the Nation. According to the Court, Indian status was racial under federal criminal law, barring white men from being “Indians.” Though, as discussed below, the ruling did not forbid tribal jurisdiction over the same offense or the naturalization of non-Indians as tribal citizens, it nonetheless interfered with tribes’ citizenship determinations by stripping exclusive tribal jurisdiction. More significantly, the United States Supreme Court some one hundred and thirty five years after Rogers ruled in Oliphant v. Suquamish that tribes lacked criminal jurisdiction over non-Indians at all. Though this ruling did not explicitly

8 Hjert., slip op. at 1-2.  
9 Id. at 1.  
10 Id. at 2.  
11 Id.  
12 Id. at 15.  
13 Id. at 16.  
16 See Rogers, 45 U.S. at 572-73.  
17 Id. at 573.  
prohibit consent, the sweeping nature of the ruling created more doubt on its viability.  

The Cherokee Nation’s decision to execute West was not made with any consideration of federal views expressed in Oliphant, while such views greatly affected the S’Klallam’s decision to dismiss Hjert’s prosecution, as the Court of Appeals discussed in detail in its opinion.  

In the face of these developments that purport to restrict if not outright bar consent, the question still remains: Can tribes exert criminal jurisdiction over non-Indians who consent, by whatever means, to adhere to tribal laws? Has federal Indian law, and tribes’ reaction to it, changed the universe of tribal jurisdiction so significantly that non-Indians can truly never be subject to tribal criminal law? This article explores the concept of consent as a still viable theory of tribal criminal jurisdiction. I first examine some historical examples of non-Indian consent through adoption or naturalization under tribal law, and reactions to such consent by federal officials. I then discuss modern examples of tribal law theories of consent, primarily through recent statutory law and opinions of the Navajo Nation. Finally, I suggest different forms of consent tribes might consider, and their relative potential success in surviving federal scrutiny. Ultimately, I conclude that the grant of tribal citizenship to non-Indians has the greatest likelihood of establishing consent. However, I also conclude that non-Indians should consent to tribal criminal jurisdiction to foster true tribal sovereignty.

At the outset, it is important to define clearly what I mean by “consent.” I am not defining it to mean mere physical presence on tribal lands, as the United States Supreme Court in Oliphant and Duro v. Reina, discussed below, has clearly rejected that theory of consent. What I mean by “consent” is a voluntary acceptance, whether explicit or implicit, by a non-Indian of tribal criminal jurisdiction. This voluntary acceptance may be through the grant of citizenship by a tribe; marriage or other familial affiliation with a tribal member; or written acknowledgment of tribal authority generally or in a specific case, whether as a stated condition of living or working on tribal lands or not. In reality, on the ground in Indian Country, non-Indians quietly but routinely consent through compliance with tribal police on roads or in their homes on the reservation, through waivers of their federally-recognized right to file a writ of habeas corpus, or other jurisdictional challenge to tribal authority. These consents are done with little

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19 See Hjert, slip. op. at 9-10 (discussing whether Oliphant means that tribes lack subject matter or personal jurisdiction over non-Indians, and therefore whether non-Indians can ever consent); Christoper Chaney, The Effect of the United States Supreme Court’s Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction, 14 BYU J. PUB. L., 186 (2000) (discussing concern that Oliphant precludes jurisdiction based on general rule that subject matter jurisdiction cannot be created by consent).

20 See Hjert, slip op. at 4-13 (discussing federal limitations on tribal jurisdiction).

21 Oliphant v. Suquamish, 435 U.S. at 212 (stating flatly that “Indian tribes do not have inherent authority to try and punish non-Indians.”); Duro v. Reina, 495 U.S. 676, 696 (1990) (rejecting argument that defendant’s contacts with tribe justified tribal jurisdiction as merely a different articulation of argument that physical presence is enough to establish criminal jurisdiction). For further discussion of the federal theory of consent in Duro, see infra, notes 123-26.

22 Indeed, on some Indian reservations, tribal police are the only, or, at least, closest first responders to incidents involving non-Indians when 911 or other requests for assistance are made to law enforcement.
fanfare, and evade documentation through tribal or federal court decisions.\textsuperscript{23} What I am interested in here, however, are attempts under affirmative tribal law to establish consent as a means of tribal authority. How have tribes conceptualized consent, and how might they in the future, whether with federal review in mind or not? To answer this question, it is important to first consider how tribes have historically dealt with jurisdiction over non-Indians through consent.

**HISTORICAL EXAMPLES OF TRIBAL LAWS OF CONSENT THROUGH ADOPTION OR NATURALIZATION**

One simple way non-Indians historically consented to tribal authority was through adoption or naturalization as citizens of the tribal nation. Accounts of tribal societies include numerous references to non-Indians living among Indians, whether by marrying into the tribe or simply settling among them.\textsuperscript{24} Accounts of so-called “white Indians” described persons taken captive by tribes during times of conflict, who elected to remain with the tribe even after attempts to ransom or return them to white society.\textsuperscript{25} Some tribes engaged in elaborate adoption ceremonies for non-Indians and through such ceremonies some captives replaced family members killed in wars.\textsuperscript{26} Some of these non-Indians who married into tribal society lived their whole lives in it, and produced “mixed-blood” children.\textsuperscript{27} Other tribes, even into the late nineteenth century, adopted whites married into the tribe or otherwise residing among them, through approval by

\textsuperscript{23} The U.S. Supreme Court in *Duro v. Reina* believed this acquiescence to tribal jurisdiction may be why there were, in its view, few federal challenges to tribal court jurisdiction. See *Duro v. Reina*, 495 U.S. at 689.

\textsuperscript{24} See, e.g., Letter of Lewis Cass and Duncan McArthur to Acting Secretary of War George Graham, September 30, 1817, reprinted in 2 American State Papers, Indian Affairs 138, 139 (1834) (discussing non-Indians living among Wyandot who “have identified themselves in feelings, manners, and interest with the Indians.”); Letter of Thomas McKenney to Secretary of War James Barbour, September 2, 1825 reprinted in 2 American State Papers, at 651 (listing one hundred and forty seven white men and seventy three white women married into Cherokee Nation); Jedidiah Morse, Report to the Secretary of War on Indian Affairs, Appendix 37 (1822) (discussing white and black men married into Fond Du Lac tribe); James Axtell, *The White Indians of Colonial America*, 32 WILLIAM AND MARY QUARTERLY 55, 56 (1975) (reporting that “large numbers of Englishmen had chosen to become Indians—by running away from colonial society and joining Indian society, by not trying to escape after being captured, or by electing to remain with their Indian captors when treaties of peace periodically afforded them the opportunity to return home.”).

\textsuperscript{25} Letter of Lewis Cass, supra, note 24, at 139 (“Some have been taken prisoners in early life [and] have married Indian women[,]”); Axtell, supra, note 22, at 56-58; see generally, JOHN DEMOS, THE UNREDEEMED CAPTIVE (1994) (recounting story of Eunice Williams, daughter of a New England preacher taken captive by Kahnawake Mohawks who refused to return to English society).

\textsuperscript{26} See Axtell, supra, note 24 at 59, 67, 69-73; Demos, supra, note 25, at 81-82, 137, 163 (describing adoption of captives and assignment of captives to Mohawk clans).

\textsuperscript{27} See, e.g., Demos, supra, note 25, at 142, 186 (discussing white men and women captured at a young age who married and had children with Iroquois Indians); see generally S.C. GWYNNE, EMPIRE OF THE SUMMER MOON (2011) (discussing Cynthia Parker, a white woman captured by the Comanche at age nine who refused to leave the Comanche until forcibly returned, and her mixed-blood son, Quanah Parker, who waged war against white settlers).
tribal councils. Some tribes allowed them to vote or participate in negotiations on important tribal matters, including agreements to cede tribal lands.

Three of the five so-called “Civilized Tribes” had formal citizenship laws that authorized whites married to tribal citizens to become citizens of the Nation. Similar in content, each tribe’s law recognized the ability of whites to be naturalized or adopted. An early Cherokee statute passed in 1819, before removal of the Nation to the Indian Territory, required white men to get a license from the national clerk and to marry a Cherokee woman through a minister or “other authorized person” before they could be recognized as citizens of the Nation. In 1836, the Choctaw Nation similarly recognized the right of naturalization for a white man married to a Choctaw woman, and, like the Cherokee Nation, stated that if the white man parted from his wife “without just provocation,” he would forfeit his citizenship. Both later required such white men to swear allegiance to the tribe and to abide by its laws. Later statutes passed by both tribal nations, as well as the Chickasaw Nation, required certification by a certain number of citizens vouching for the white man’s character before naturalization could occur. In its 1855 constitution, the Chickasaw Nation recognized the authority of the legislature to adopt anyone except “a negro, or descendant of a negro,” though such adoption only granted the right “to settle and remain in the nation, and to be subject to its laws.” It further made intermarried men and women eligible for annuities as citizens, though they were barred from “any office of trust or profit in [the] Nation.”

The Cherokee, Creek, Choctaw and Seminole Nations recognized the right of blacks to citizenship under certain circumstances. Though intermarriage with blacks had been prohibited under Cherokee law in 1839, the Cherokee Nation in 1866 amended

28 See, e.g., Letter of Commissioner D.W. Browning to the Secretary of the Interior, June 7, 1895, reprinted in Transcript of Record, United States ex. rel. West v. Hitchcock, No. 194, 27, 31 (discussing Wichita tribal council decision to approve adoption of white men and white women as citizens); Letter of D.W. Browning to Jane Shirley, April 3, 1894, reprinted in Transcript of Record, supra, at 44-45 (discussing adoption of white man by Comanche, Wichita, and Caddo tribes); Letter of Acting Secretary M.L. Joslyn to Commissioner of Indian Affairs, December 13, 1884, reprinted in Transcript of Record, supra, at 39-40 (discussing adoption of whites by Quapaw tribe).
29 See, e.g., 2 American State Papers, supra, note 24, at 239 (1820 report of treaty commissioners of appointment of principal chiefs and “six white men and half-breeds” to Choctaw negotiation committee); Sen. Ex. Doc. No. 14, 52nd Cong., 1st Sess. 14-15 (1892) (listing at least one white man as “male adult member” of Wichita tribe empowered to vote on agreement).
30 Act of November 2, 1819, reprinted in 2 American States Papers, supra, note 24, at 283.
35 Constitution of the Chickasaw Nation, 1855, General Provisions, Section 9, reprinted in Constitution, Laws and Treaties of the Chickasaws, supra, note 34.
its constitution to recognize the right of former slaves and free blacks living within the Nation at the beginning of the Civil War, and their descendants, to citizenship in the Nation. Such amendment appears to be based on the Cherokee’s agreement in its 1866 treaty with the United States to recognize such “Freedmen” as entitled to “all the rights of native Cherokees.” The Seminoles similarly agreed in their 1866 treaty that certain “persons of African descent and blood,” and their descendants, as well as “such other of the same race” were allowed to live in the Nation and “enjoy all the rights of native citizens.” The Creeks similarly agreed to recognize blacks under an almost identical provision in their treaty. The treaty with the Choctaw and Chickasaws placed $300,000 paid by the United States for land cessions in trust until the tribes passed laws to accept the Freedmen and their descendants as citizens.

Importantly, those Nations reserved criminal authority over such naturalized citizens in their treaties with the United States. In the 1835 Treaty of New Echota, the Cherokees reserved to themselves the power to pass laws for the protection of “persons and property within their own country belonging to their people or such persons as have connected themselves with them.” In the Cherokee Nation’s 1866 treaty, the Nation reserved “exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation[].” As Freedmen were granted citizenship in the same treaty, such jurisdiction appears to have extended to them as well as intermarried whites. The Nation reiterated this authority in an 1891 agreement with the United States. In their collective 1866 treaty, the Choctaws and Chickasaws similarly reserved such right over intermarried white persons residing on tribal lands or who had been adopted by legislative action, stating that such a white person was

38 Treaty with the Cherokee Nation, July 19, 1866, Art. 9. In a recent opinion, the Cherokee Supreme Court concluded that the treaty provision did not grant citizenship, but only promised that the Freedmen “would be treated as equals to the citizens of the Cherokee Nation under the federal law as it existed at the time.” Cherokee Registrar v. Nash, No. SC-2011-02, slip op. at 8 (August 22, 2011).
39 Treaty with the Seminoles, March 21, 1866, Art. 2.
40 Treaty with the Creeks, June 14, 1866, Art. 2.
41 Treaty with the Choctaws and Chickasaws, April 28, 1866, Art. 3.
43 Treaty with the Cherokees, December 29, 1835, Art. 5 (emphasis added).
44 Treaty with the Cherokee Nation, supra, note 38, Art. 13.
45 The United States Supreme Court concluded as much in Alberty v. United States, which concerned the prosecution of a Cherokee Freedmen for the murder of an illegitimate child of a black female slave and a Choctaw man. See 162 U.S. 499, 500-01 (1896). The wife of the victim was a black “freed woman” made a citizen of the Cherokee Nation by the Treaty of 1866. Id. at 501. “Though the Court believed Alberty, the defendant, was a citizen of the Cherokee Nation and under its jurisdiction if the victim were also a citizen, it concluded Cherokee law precluded the victim from being a citizen, as marriage to a freedman did not confer citizenship on the spouse. See id. at 499, 501.
46 Agreement with the Cherokee Nation, December 19, 1891, Art. 2.
deemed to be a member of said nation, and . . . subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw.\textsuperscript{47}

The Seminoles similarly stated in their treaty that “the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.”\textsuperscript{48} The Creeks included an almost identical provision in their treaty, with the addition that all citizens were also entitled to equal protection under their law.\textsuperscript{49} Through these treaty provisions, tribal nations asserted their right to exert jurisdiction over non-Indians who became tribal citizens.

\textbf{HISTORICAL FEDERAL RECOGNITION OF NON-INDIAN TRIBAL CITIZENS}

How did federal courts and federal officials react to such assertions of the right to confer citizenship and prosecute based upon such citizenship? Read in isolation, the holding of \textit{U.S. v. Rogers}, that a white man married into a tribe could not be an “Indian” under federal criminal law, might be seen as the beginning of the complete racialization of Indian status, or at least the federal repudiation of non-Indian tribal citizenship. However, the Court made that ruling only in the context of the definition of “Indian” for federal criminal jurisdiction. The Court explicitly disclaimed any conclusion on whether a white man could nonetheless consent to tribal jurisdiction, stating that “he may by such adoption become entitled to certain privileges in the tribe, \textit{and make himself amenable to their laws and usages}.”\textsuperscript{50} While as a practical matter, extension of federal jurisdiction over crimes committed by naturalized tribal citizens might have divested a tribal nation’s prosecutorial authority, as the person might have been in federal custody before the tribe could assert its jurisdiction, \textit{Rogers} did not divest such jurisdiction as a matter of law.\textsuperscript{51}

Importantly, for the tribal nations with a treaty-recognized right to exclusive criminal jurisdiction over adopted or naturalized citizens, \textit{Rogers} became a legal nullity. The 1866 treaty with the Cherokee Nation authorized federal jurisdiction over crimes between two naturalized Cherokee citizens, and therefore effectively overturned \textit{Rogers}. The Choctaw and Chickasaw treaty’s recognition of authority was even

\textsuperscript{47} Treaty with the Choctaw and Chickasaw Nations, \textit{supra}, note 41, Art. 38.
\textsuperscript{48} Treaty with the Seminoles, \textit{supra}, note 37, Art. 2.
\textsuperscript{49} Treaty with the Creeks, \textit{supra}, note 38, Art. 2.
\textsuperscript{50} \textit{See} \textit{Rogers}, 45 U.S. at 573.
\textsuperscript{51} Indeed, Rogers himself was put into federal custody by Cherokee law enforcement, as there were no Cherokee jails to keep him, on the expectation he would then be returned for prosecution by the Cherokee Nation. \textit{See} Berger, \textit{supra}, note 1, at 1984. Instead, federal officials kept him, transferred him to Little Rock, Arkansas, and initiated federal prosecution. \textit{Id.} at 1985-88. In a curious twist, Rogers himself died while escaping from federal custody before his case even reached the Supreme Court. \textit{See} \textit{Id.} at 1999. The Court was then answering a theoretical question that would have had no practical effect on Rogers himself. \textit{See} \textit{Id.} at 1999-2003.
broader, as it reserved criminal jurisdiction to those nations seemingly regardless of the status of the victim.

Federal courts grappled with these treaty exceptions to Rogers, but ultimately upheld the tribes’ exclusive criminal jurisdiction. For example, “Hanging judge” Parker of the Circuit Court of Western Arkansas found ways around the treaty requirements in several cases.\footnote{Id. at 353.} In \textit{Ex Parte Kenyon} (1878), ironically the main case cited by the U.S. Supreme Court to bolster its decision in \textit{Oliphant},\footnote{\textit{Oliphant}, 435 U.S. at 199-200.} Judge Parker ruled the Cherokee Nation lacked jurisdiction over a white man who had been naturalized through marriage.\footnote{Id. at 355.} Kenyon, the white man, had stolen a horse, the horse of his deceased Cherokee wife in fact, and had been sentenced by the Nation to five years detention.\footnote{Id. at 353.} Parker granted a writ of habeas corpus, holding that the Nation generally lacked jurisdiction over a non-Indian.\footnote{Id. at 355.} Though Judge Parker acknowledged Kenyon was a citizen of the Nation under its exclusive jurisdiction granted by the treaty, Judge Parker reasoned that Kenyon’s Cherokee citizenship lapsed under Cherokee law when he left the Nation with the horse and his children.\footnote{Id.} In another case, Judge Parker evaded the Choctaw treaty by questioning the status of Choctaw wives in \textit{Ex Parte Reynolds} (1879). This case concerned a murder of one white citizen by another.\footnote{20 F. Cas. 582, 582-83 (C.C.W.D. Ark. 1879) (No. 11,719).} Judge Parker focused on paternal descent to find one of the wives was not truly Choctaw. Therefore, the case was not within the exclusive Choctaw jurisdiction under the treaty, because this finding meant one of the white men in the controversy was not actually a Choctaw citizen.\footnote{Id. at 585.}

Though Judge Parker’s decisions found ways around exclusive tribal jurisdiction, the United States Supreme Court later affirmed the tribes’ exclusive authority over such cases in several opinions. In \textit{No fire v. United States} (1897), the United States attempted to prosecute several Cherokees for the murder of a naturalized white Cherokee citizen.\footnote{See 164 U.S. 657, 658 (1897).} The circuit court had concluded that the evidence of the victim’s compliance with the requirements of Cherokee marriage laws, and therefore evidence of his citizenship, was insufficient.\footnote{Id.} The Supreme Court disagreed, and held that the victim had married a Cherokee woman in a manner consistent with the Cherokees’ requirements for white intermarriage discussed above, and by doing so the victim was

\begin{footnotes}
\item[52] The moniker “hanging judge” was quite appropriate, as between 1875 and 1896 his court hanged seventy-nine people, including many Indians. Berger, \textit{supra}, note 1, at 1998. Justice Rehnquist’s opinion in \textit{Oliphant} includes a lengthy digression in a footnote discussing Judge Parker and his knowledge of Indians in a notably positive light. See \textit{Oliphant}, 435 U.S. at 200 n. 10.
\item[53] \textit{Oliphant}, 435 U.S. at 199-200.
\item[54] 14 F. Cas. 353, 355 (1878) (No. 7,720).
\item[55] Id. at 353.
\item[56] Id. at 355.
\item[57] Id.
\item[58] 20 F. Cas. 582, 582-83 (C.C.W.D. Ark. 1879) (No. 11,719).
\item[59] Id. at 585. For a discussion of that case and its influence over the conception of Indian status in the late nineteenth century, see Paul Spruhan, \textit{A Legal History of Blood Quantum in Federal Indian law to 1935}, 51 S.D. L. Rev. 1, 22-23 (2006).
\item[60] See 164 U.S. 657, 658 (1897).
\item[61] Id.
\end{footnotes}
“to a certain extent allying himself with the Cherokee Nation.” The Court similarly held in *Ex Parte Mayfield* (1891) that a Cherokee citizen, whether a citizen by birth or adoption, could not be convicted of adultery in federal court because of the Cherokees' exclusive jurisdiction. The Supreme Court suggested crimes between Freedmen were also within the Cherokee Nation’s exclusive jurisdiction in *Alberty v. United States* (1896). The Court ultimately upheld federal jurisdiction over the Freedman defendant because the victim was the illegitimate son of a Choctaw man and a black slave, and according to the Court not an “Indian,” and the victim’s marriage to an adopted black woman did not grant him citizenship under Cherokee law. Further, in *Lucas v. United States*, the Court, following *Alberty*, concluded that the murder of a black Freedman in the Choctaw Nation by a Choctaw Indian would be under exclusive tribal jurisdiction.

According to the Court, the prosecution implied to the trial court that “there were negroes who were, and those who were not, *Indians, in a jurisdictional sense.*” The Court reversed the trial court on the issue of how the black victim’s citizenship in the Choctaw Nation was to be proven, rejecting the lower court’s presumption that a “negro” in the Nation was not a tribal citizen.

Not only did the federal courts weigh in on tribal citizenship, but federal officials also recognized adopted or naturalized white men as “Indians” when they abided by requirements of tribal approval of land cessions. Indeed, in the late nineteenth century, during the dismantling of tribal lands through allotment, negotiators for the United States openly sought out and recorded the signatures of intermarried men as fully empowered to act along with other tribal citizens in certain situations. For example, the agreement with the Sioux Nation to break up the Great Sioux Reservation in 1889 was signed by some ninety-four white men, who were described as “white man” or “squaw man” openly in the federal commissioners’ report to Congress. They were nonetheless listed as adult male members of the Nation empowered to approve the agreement. Justification for such treatment appears to have been based on a reference in the 1868 Treaty of Fort Laramie to persons “legally incorporated,” a provision which also appears in several treaties negotiated with the Navajo Nation and other tribes in the same year. The United States Supreme Court observed in *Red Bird v. United States* of

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62 Id. at 662.
63 See 141 U.S. 107, 114 (1891).
64 162 U.S. 499, 501-02.
65 See Id. at 501, 504-05.
67 Id. at 615.
68 See Id. at 616.
69 “Squaw man” was a term used in the nineteenth century to describe a non-Indian married to an Indian woman. www.merriamwebster.com/dictionary/squaw man (accessed April 5, 2012). While used pejoratively in some circumstances, it was also used sometimes, as here, as a neutral description. See Spruhan, supra, note 58, at 21.
71 See Id.
72 See Id. at 253 (identifying signatory as “White; incorporated into tribe in 1868”), 275-77, 279 (identifying several signatories as "squaw man since 1868"); *Treaty with the Sioux, April 29, 1868*, Art. 6. See also *Treaty with the Navajo, June 1, 1868*, Art. 5; *Treaty with the Crow, May 7, 1868*, Art. 6. Historian Harry
States, a case challenging the right of certain white men to Cherokee allotments, that the agreement to allot the Cherokee Nation would not have been approved without the participation of white naturalized citizens. Congress also recognized naturalized or adopted citizens of the Civilized Tribes as subject to the jurisdiction of their respective tribal nation, and as eligible for tribal property. Though Congress generally barred white men who married Indian women after August 9, 1888 from claiming an interest in tribal property, it nonetheless exempted such men who were “otherwise a member of any tribe of Indians.” In an 1890 act to organize the territory of Oklahoma, Congress recognized that “the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the Nation, by nativity or adoption, shall be the only parties.” Under the instructions of the Dawes Commission, a quasi-judicial tribunal created by Congress, whites and Freedmen who established their right to citizenship to the satisfaction of the Commission were allotted land from the collective property of their adopted tribe.

Further, when Congress decided to release whites and Freedmen from restrictions on their allotments earlier than other tribal citizens, it used the curious phrase “Indians who are not of Indian blood” to describe such citizens in the title of the legislation. However, Congress did preclude other non-Indians from claiming allotments through judicial action, by granting a cause of action against the United States to establish eligibility only to “persons who are in whole or in part of Indian blood.”

Anderson has referred to white men recognized under the Treaty of Fort Laramie as “68-ers.” See 203 U.S. 76, 93 (1906). Nonetheless, the Supreme Court held that white men married to Cherokees after 1875 were ineligible for allotments based on Cherokee law. Id. at 79, 95 (affirming ruling of Court of Claims).

See Senate Ex. Doc. 14, 52nd Cong., 2nd Sess., at 12, 14-15 (1892). For a further discussion of W.C. West and his unsuccessful suit against the secretary of the interior to compel the grant of an allotment, see infra, text accompanying notes 80-9299279-91.


Act of May 2, 1890, § 30, 26 Stat. 81 (emphasis added). This provision supported the U.S. Supreme Court’s decisions that the tribal nations had exclusive jurisdiction over crimes between tribal citizens, whether Indians by blood, naturalized or adopted. See, e.g., Alberty v. United States, 162 U.S. 499, 502 (1896) (discussing statute).

See H.R. Rep. 60-1454, at 2-4 (1908) (listing numbers of Indians by blood, intermarried whites, and freedmen granted allotments among the Five Civilized Tribes). The U.S. Supreme Court did deny some white claimants allotments in the Cherokee Nation by upholding restrictions on their citizenship under Cherokee law. See Red Bird, 203 U.S. at 95.

See Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204.

Though Congress recognized non-Indian citizenship in certain situations, the Supreme Court’s opinion in *United States ex rel. West v. Hitchcock*, which arose out of the 1891 agreement with the Wichita discussed above, suggests that the federal government can intrude on tribal decisions to adopt or naturalize non-Indians as tribal citizens. The Department of the Interior denied W.C. West, an intermarried white man and signatory to the agreement, an allotment, despite his claim that Wichita leaders adopted him as a tribal citizen. West filed a writ of mandamus against Secretary of the Interior Ethan Hitchcock, alleging that his adoption by the Wichita council required the secretary to issue him an allotment. Secretary Hitchcock responded by arguing, among other things, that he had the sole “power and authority to place an effective veto upon [West’s] adoption by the Wichita Indian Tribe.” Interestingly, the record in the case included correspondence showing that the Office of Indian Affairs had rejected such adoptions in other situations under a general departmental policy to disapprove such adoptions except for “exceptionally good reasons,” including a request of the Comanche Nation to adopt Mexican captives. In his brief, West pointed out the ironic position Interior was taking given his approved signature as an Indian on the agreement ceding tribal lands to the United States:

[s]o long as his services in negotiating the agreement were necessary and his influence with the *other Indians* was desirable, his title to tribal membership was clear enough and strong enough to satisfy the most jealous guardian of tribal rights to be found in the Indian Office. Only when the need for him was past and when he demanded his part of the consideration for the grant of these lands was it discovered by the Interior Department that it was the function of the Secretary and not of the tribe in council to determine who was and who was not of its membership.

Unmoved, the Supreme Court sided with the Department of the Interior. The Court, through an opinion authored by Justice Oliver Wendell Holmes, held that mandamus was inappropriate because the secretary indeed had the discretionary right to accept or deny whites as tribal citizens, regardless of the actions of tribal leaders under tribal law. The Court did not clearly identify the source of this right, but cited “long-established” Department of the Interior practice and a broad statutory provision

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80 205 U.S. 80 (1907).
81 *Id.* at 83.
82 *Id.* at 82-83.
83 *United States ex Rel. West v. Hitchcock*, No. 194, Records and Briefs of the United States Supreme Court, Brief on Behalf of Defendant in Error 32.
84 Letter of Secretary of Interior C.L. Bliss to Commissioner of Indian Affairs, February 7, 1898, reprinted in Transcript of Record, *supra* note 28, at 39.
86 See *supra*, text accompanying note 74.
87 *United States ex rel. West v. Hitchcock*, No. 194, *supra*, note 84, Brief for Plaintiff in Error 17 (emphasis added).
88 *Hitchcock*, 205 U.S. at 84.
generally empowering the secretary in Indian affairs.\textsuperscript{89} However the Court also stated later in the opinion that “someone must decide who the members are.”\textsuperscript{90} The Court did state, in response to West’s argument that the tribal nation should decide, that secretarial approval was indeed a good thing for the “rather helpless” Indians, as “the temptation to white men to go through an Indian marriage for the purpose of getting Indian rights is sufficiently plain.”\textsuperscript{91} Though decided in the context of the right to tribal property, the case suggests that the Department of the Interior generally has the authority to deny tribal adoptions and decline to recognize non-Indians’ consent through tribal citizenship.

The Bureau of Indian Affairs later asserted the same power to deny tribal adoption or naturalization through its power to approve tribal constitutions under the Indian Reorganization Act. In a general letter to BIA employees and tribal leaders in 1934, John Collier, then Commissioner of Indian Affairs, at least entertained the possibility that a non-Indian married into a tribe might be accepted as a tribal citizen.\textsuperscript{92} However, in Circular 3123, issued in 1935, Collier stated that the Bureau should only approve adoption provisions in proposed constitutions if

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\text{[t]he provisions for the adoption of non-members . . . require approval by the Secretary of the Interior for each applicant, unless such individual must be a person of Indian descent related by marriage or descent to the members of the tribe.}\textsuperscript{93}
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Collier therefore sought to continue the Department of the Interior’s oversight of non-Indian adoptions asserted and upheld in \textit{West} by requiring each one to be approved by the Secretary of the Interior. The Indian Reorganization Act itself defined “Indian” as, along with those of one-half Indian blood and descendants of Indians living on reservations, “all persons \textit{who are of Indian descent} who are members of any recognized Indian tribe now under federal jurisdiction.”\textsuperscript{94} Non-Indian tribal citizens, if any still existed at the time, therefore were excluded from the act under the three categories in the definition.

IRA-era tribal constitutions generally followed this formulation of tribal citizenship. Many contain general provisions acknowledging the possibility of adoption, and some

\textsuperscript{89}\textit{Id.}
\textsuperscript{90}\textit{Id.} at 85, 86.
\textsuperscript{91}\textit{Id.} at 85.
\textsuperscript{92} See Letter of John Collier to Superintendents, Tribal Councils and Individual Indians, January 20, 1934, at 6 (posing the question whether “all the residents of the reservation who are of Indian descent, or \textit{married to an Indian}, be admitted to citizenship or membership in the proposed community, or shall restrictions, depending on degree of blood or length of residence on the reservation, be provided?” (emphasis added)).
\textsuperscript{93} Circular 3123, Office of Indian Affairs (November 18, 1935), reprinted as Exhibit 1, Index 36, 2 Appendices to the Final Report, Task Force No. 9, Law Consolidation, Revision, and Codification, American Indian Policy Review Commission (1977).
\textsuperscript{94} Indian Reorganization Act, ch. 576, 48 Stat. 984, § 19.
contain a requirement for secretarial approval of such adoptions. However, whether at the choice of the tribal nation, or at the insistence of the Bureau of Indian Affairs, explicit naturalization or recognition of non-Indian tribal citizens essentially disappeared.

One anecdotal example of discussions between a tribal nation and the federal government on the issue involved two Pima-Maricopa tribal communities in Arizona. According to Felix Cohen, then an attorney working with Collier, the Pima-Maricopa communities at Gila River and Salt River had proposed a joint constitution that would have recognized “Caucasians” previously married into the community as members. According to Cohen, the same constitution would have barred future “[m]ixed marriages of any kind” on pain of a forfeit of membership by the member engaging in the marriage.

Cohen used this proposal in a memorandum on the drafting of tribal constitutions as an example of a constitution that “considers the complications arising out of intermarriage.” However, the final constitutions, approved by the Office of Indian Affairs in 1936, contained no such recognition of non-Indian spouses, but neither did they bar future mixed marriages. Instead, they simply barred adoptions completely.

CURRENT STATUS OF NON-INDIAN CONSENT

Fast forward to 2012. You would be hard pressed to find examples of consent through citizenship, adoption, or otherwise. The long history of non-Indian adoption and naturalization is mostly forgotten, with the exception of ongoing controversies within the five Oklahoma tribes concerning the status of Freedmen descendants. As discussed by Kirsty Gover, tribal constitutions since 1934 have increasingly applied explicit blood quantum or lineal descent from persons of Indian blood as requirements to define tribal citizenship. Even the tribal nations that previously naturalized or adopted intermarried whites and/or Freedmen, except for the Seminoles, have amended their citizenship laws through various methods to restrict citizenship to those able to document their descent from persons with Indian blood. Why such changes were made is controversial, and

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95 See KIRSTY GOVER, TRIBAL CONSTITUTIONALISM 133 (2010). In her empirical study of tribal constitutions, Gover states that 92 per cent of constitutions ratified before 1941 contain an express reference to tribal adoptions. Id. According to Gover, the proportion of constitutions referencing adoptions has since dropped to 74 per cent, explained as resulting from the omission of adoption provisions in new constitutions, and not because of amendments to older ones. Id.

96 See FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 15 (D. Wilkins, ed. 2006).

97 Id.

98 Id. at 14.


100 Id.

101 See infra, notes 103, 104, 105.

102 See Gover, supra, note 96, at 132.


The Cherokee Nation amended its constitution in 2007 by referendum approved by the Cherokee people to require Cherokee, Delaware, or Shawnee Indian blood, thereby intentionally excluding
beyond the scope of this article. Importantly, the BIA continues to suggest to tribes that adoption or naturalization should generally not occur, as, according to the Bureau “inclusion of non-Indians as members” is one of several provisions that “render proposed constitutions inappropriate.” Gover suggests that such attitude is consistent with the Bureau’s general view that blood quantum requirements ensure the political cohesion of a tribal nation. Whatever the reason, there are very few tribes that explicitly authorize adoption or naturalization of non-Indians as tribal citizens.

Some tribes do assert consent through other theories than adoption or naturalization. Indeed, as shown by the Hjert case discussed above, at least the Port Gamble S’Klallam tribe has recently attempted to prosecute a non-Indian through written consent. There may be other tribes that similarly accept consent in individual or general situations, including as a condition of living or working on tribal lands. Absent known affirmative statutory law on the practice, is hard to gauge how common such consent really is within tribal nations.

Citing Cherokee Freedmen and intermarried whites. See Cherokee Registrar v. Nash, No. SC-2011-02, slip op. at 4-5 (Cherokee Sup. Ct. August 22, 2011). The Cherokee Supreme Court recently upheld the referendum by concluding it lacked the jurisdiction to review it. See Id. at 7. Interestingly, as part of its ruling, the Cherokee Supreme Court stated that the Treaty of 1866 never granted citizenship to the Freedmen, but only “that the Freedmen would be treated as equals to the citizens of the Cherokee Nation under the federal law as it existed at the time.” Id. at 8.

The Seminole constitution defines citizenship eligibility as “all Seminole citizens whose names appear on the final rolls of the Seminole Nation of Oklahoma [from 1906] and their descendants,” and therefore does not exclude Freedmen. Constitution of the Seminoles, March 8, 1969, as amended, Art. 2. Further, the Seminole membership code indicates that “each Seminole Freedman enrolled member” is entitled to membership in a Freedman Band of the Nation. Seminole Code, Title 22, § 102(d). However, the Seminole Nation has barred Freedmen from certain tribal programs through requirements for a certificate of Indian blood or descendancy from a member of the Seminole Nation as it existed in Florida in 1828, fueling litigation and controversy. See, e.g., Davis v. United States, 343 F.3d 1282, 1285-88 (10th Cir. 2003) (describing dispute). The Seminole Nation did attempt to change its membership criteria through constitutional amendment to eliminate Freedmen citizenship, but the Bureau of Indian Affairs disapproved the amendment. See Seminole Nation v. Norton, 2001 WL 36228153 at * 17(D.D.C. 2001) (affirming BIA disapproval of Freedmen amendments).

For further discussion of these controversial citizenship issues within the Cherokee and other Oklahoma tribal nations, see, e.g., Circe Sturm, Blood Politics: Race, Culture and Identity in the Cherokee Nation of Oklahoma 168-200 (2002) (discussing Cherokee Freedmen), Kevin Noble Maillard, Redwashing History: Tribal Anachronisms in the Seminole Nation Cases, in The Indian Civil Rights Act at Forty 87 (2012) (discussing Freedmen controversy in Seminole Nation).


Gover, supra, note 96, at 127-28.

The Seminole Nation of Oklahoma’s constitution allows enrollment of Freedmen descendants and assignment to a Freedman Band of the Nation. See supra, note 103. However, such Freedmen may indeed have Indian ancestry, though the Dawes Commission may not have documented it when it went about classifying Indians by blood and Freedmen for the Seminole rolls. See Maillard, supra, note 105, at 97-98; Ariela Gross, What Blood Won’t Tell 155-160 (2008) (discussing subjective decisions of Dawes Commission in classifying individuals as Indians by blood or Freedmen for preparation of Dawes Rolls). Interestingly, Congress authorized only one Seminole roll, but the Dawes Commission itself separated out the rolls between Seminoles by blood and Freedmen. Gross, supra, at 153.

See text accompanying notes 7-13.
The Navajo Nation has affirmatively asserted a theory of consent for a certain class of non-Indians. The Navajo Nation Council amended its criminal code in 2000 to assert full criminal jurisdiction over all persons married to Navajos, called hadane in the Navajo language. At the same time, the Nation purported to be able to “civilly prosecute” other non-Indians. Apparently based on the Navajo Supreme Court opinion Means v. District Court of the Chinle Judicial District, the Council in 2000 stated that

[n]othing in this Section shall be deemed to preclude exercise of criminal jurisdiction over one by reason of assuming tribal relations with the Navajo people or being an “in law” or hadane or relative as defined by Navajo Common law, custom or tradition, submits himself or herself to the criminal jurisdiction of the Navajo Nation.

In Means, the Court applied Navajo common law to conclude that such “in-laws” consent to Navajo jurisdiction through the reciprocal obligations they owe the clan of their Navajo spouse. Interestingly, the Court justified such theory of consent through citations to Nofire and the other U.S. Supreme Court opinions discussed above, even though those opinions affirmed non-Indian consent recognized by the United States through treaty and statute. Though Means concerned a non-member Indian, the Council extended the theory of consent to non-Indian spouses. Importantly, the Navajo Nation Code prohibits adoption of non-Navajos, and does not otherwise recognize the naturalization of non-Indian hadane as citizens of the Nation. The Nation applies a one-quarter blood quantum requirement to be recognized as a Navajo citizen. The only explicit benefit for in-laws under the Navajo Code is that they receive second-tier employment preference below enrolled Navajos, but above other Indians not married to Navajos, under the Navajo Preference in Employment Act.

However, though the Navajo Criminal Code purports to extend the Nation’s criminal jurisdiction to non-Indians, in reality the Navajo Division of Public Safety, the

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109 See 17 N.N.C. § 204(C) (2005).
110 17 N.N.C. § 204(A) (2005).
111 7 Nav. R. 382 (1999).
112 17 N.N.C. § 204(C) (2005).
114 Means, 7 Nav. R. at 391-92.
115 See 1 N.N.C. § 702(A) (2005). Interestingly, this provision was intended to prevent non-Indian actors from claiming to have been adopted or made honorary members of the Nation while filming movies in the area during the 1930s. See Paul Spruhan, The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Citizenship in the Navajo Nation, 8 TRIBAL L. J. 1, 4 (2008).
116 1 N.N.C. § 701(C) (2005). For a discussion of this provision and its origins, see Spruhan, supra, note 115, at 3-10.
Office of the Prosecutor, and the Navajo Nation courts have not invoked such authority in an actual situation at the time of the writing of this article. Part of the reason for this is that the Nation’s police officers are cross-commissioned or otherwise authorized to enforce Arizona and New Mexico state law.\(^\text{118}\) They therefore can arrest non-Indians without having to invoke Navajo law and can transfer them to state authorities if consistent with the Nation’s extradition laws.\(^\text{119}\) Further, many of the Nation’s officers and criminal investigators have Special Law Enforcement Commissions from the Bureau of Indian Affairs.\(^\text{120}\) Such commissions allow the Nation’s officer and criminal investigators to make federal arrests, including of non-Indians, and transfer such offenders to federal custody for crimes under federal jurisdiction.\(^\text{121}\) Therefore, as a practical matter, the Nation’s law enforcement need not invoke Navajo law to arrest and seek prosecution of non-Indians, though Navajo law allows it. Whether declination of prosecution by the state or federal governments will trigger the desire to test its stated authority over non-Indian hadane remains to be seen.

**A Review of Possible Theories of Consent**

What ways might tribal nations think about asserting jurisdiction through consent? There are three examples discussed above: (1) recognizing citizenship in the nation through formal or informal adoption or naturalization, (2) imputing consent under tribal law by marrying a tribal citizen or otherwise becoming part of an Indian family or tribal society, and (3) accepting an invocation of consent in writing. Each of these three examples involves either complex questions or tribal law and policy.

All involve complex questions or tribal law and policy. Granting citizenship to non-Indians is the most controversial. Tribal citizenship for a given tribal nation may be so inherently a matter of family, clan, or “blood” that a tribe will not admit anyone not biologically descended from a tribal member or at least from a person with Indian ancestry. A tribe’s traditional law may preclude it, or the prevailing policy views of the tribe and its citizens may be against granting citizenship to non-Indians. However, tribal nations might seriously consider it, if not inconsistent with its own views of its identity and such identity’s relationship to political citizenship in the tribe.\(^\text{122}\)

\(^{118}\) See, e.g., A.R.S. 13-3874(A) (empowering tribal police to enforce Arizona laws if APOST certified); Cross-Commission Agreement between the Navajo Nation and the McKinley County Sheriff’s Office (December 8, 2007) (authorizing Navajo police to act as county sheriffs in McKinley County, New Mexico).

\(^{119}\) See 17 N.N.C. §§ 1951, et seq. (2005) (setting out requirements for extradition of Indians by state authorities). While restricted in the statute to Indians, it may be that a Navajo Nation court would require an extradition request from a state government even for a non-Indian in Navajo custody, particularly one married to a Navajo.

\(^{120}\) See 25 U.S.C. 2804(a) (authorizing tribal and other non-federal law enforcement to be commissioned as federal officers by the Bureau of Indian Affairs); 12 C.F.R. § 12.21(a) (discussing SLECs).

\(^{121}\) See 18 U.S.C. § 1152 (authorizing federal criminal jurisdiction over crimes by non-Indians against Indians).

It would appear that granting full citizenship, with the right to vote and otherwise politically and socially participate in tribal government, has the best chance of justifying tribal criminal jurisdiction through consent under federal law. Indeed, the reasoning of the recent United States Supreme Court opinions limiting tribal criminal jurisdiction, particularly in Duro v. Reina, suggests as much. In Duro, Justice Kennedy tied the inherent authority of tribal nations to Anglo-American theories of consent by the governed. Justice Kennedy concluded that a tribe lacked criminal jurisdiction even over citizens of other tribes, so-called “non-member Indians,” because they were not citizens of the prosecuting tribe and therefore can never “consent” to tribal government. Kennedy rejected the argument that a defendant’s contacts with the tribe or a tribal member justified the tribe’s assertion of jurisdiction, stating that such an argument was just another attempt at establishing jurisdiction through mere physical presence on tribal lands. Importantly, Kennedy explicitly reserved the question whether a nonmember could consent to tribal jurisdiction through some other method.

In Justice Kennedy’s formulation, the definition of tribal citizenship through familial or biological ties is the key stumbling block for tribal jurisdiction. The use of tribal or Indian blood quantum by definition bars naturalization of anyone not already in possession of the necessary ancestry. Fixing that is as easy as changing the citizenship criteria of the tribal nation. It is important, however, to add the caveat that the Department of the Interior might assert itself directly through disapproval of any necessary tribal constitutional changes to citizenship rules or by generally opining that such change is impermissible. Whether something as seemingly radical, at least from a modern perception of Indian identity, as citizenship for non-Indians is a plausible political and social possibility in any tribal nation is another question.

The Navajo Nation approach has the attractive quality of being based on tribal traditional law, but has the weakness of imputing consent by conduct. The Nation does not seek any affirmative acceptance of the responsibility of an in-law to Navajo law, but simply states that marriage to a Navajo subjects the non-Indian spouse to its jurisdiction. Marriage to a Navajo is indeed more than simple conduct, as it creates a legal relationship between the spouses. However, the Nation’s assertion of jurisdiction does not depend on creating a legal relationship under the laws of the Navajo Nation or on explicit consent to Navajo law as part of the marriage ceremony, as apparently anyone married to a Navajo under any state or tribal law subjects himself or herself to

123 See Duro, 495 U.S. at 693-94.
124 Id.
125 Id. at 695.
126 Id. at 698 (“We have no occasion in this case to address the effect of a formal acquiescence to tribal jurisdiction that might be made, for example, in return for a tribe’s agreement not to exercise its power to exclude an offender from tribal lands.
127 See supra, text accompanying notes 93-94, 106, 105.
128 See, e.g., Fletcher, supra, note 123, at 324-25 (discussing “zealous” defense of citizenship criteria by Grand Traverse Band of Ottawa and Chippewa Indians as example of potential resistance by tribes to expanding citizenship rules).
Navajo jurisdiction through the marriage itself. With no corollary right to vote or directly participate in the government of the Nation, such theory does not appear to alleviate the concerns expressed by Justice Kennedy.\textsuperscript{129} Whether the Nation or any other tribe should be concerned about conforming their views on jurisdiction to external expectations, particularly when supported by and consistent with tribal traditional law, is another question.

The Port Gamble S'Klallam approach, if authorized by the tribal nation’s own law, and if done carefully, has its strengths. Here, there is no imputation of consent; consent is clearly given. The use of a form clearly stating the non-Indian’s right to consent or not, and an explanation of the conditions under which the tribe will accept the consent, goes a long way in bolstering the perception that tribal nations adhere to notions of fairness familiar to outside federal courts. It may be that the Port Gamble S'Klallam Court of Appeals’ emphasis on a clear and intelligently given consent reflects the tribal justices’ expectations that non-Indians be given full due process rights as a matter of tribal concepts of fairness and justice. Regardless, such emphasis clearly assuages their stated concerns over compliance with the federal Indian Civil Rights Act and federal notions of due process and equal protection.\textsuperscript{130} Such requirements may then fulfill tribal law and, whether consciously or not, conform to federal requirements as well.

That approach appears stronger than generally purporting to subject a non-Indian to criminal jurisdiction as a condition of residence on tribal lands or employment by the tribe or one of its members.\textsuperscript{131} However, the explicit conditioning of residency on tribal lands or employment by a tribe or its enterprises at least involves some benefit in exchange for the consent, unlike the bare consent in Hjert,\textsuperscript{132} though not the right to political participation contemplated in Duro.\textsuperscript{133} Indeed, as a tribe has the power to exclude non-members from tribal lands,\textsuperscript{134} why can’t a tribe condition the privilege of living on such lands through consent to all tribal laws? Indeed, even under stringent United States Supreme Court case law such consent at the very least can establish some civil jurisdiction over non-Indians.\textsuperscript{135} However, the Court also has stated that the assertion of tribal civil jurisdiction must have a nexus to the non-Indian’s consent, and consent in one area does not result in general consent to all tribal jurisdiction.\textsuperscript{136} If such blanket consent is questionable in the civil context, it is even less likely allowable in the criminal context. However, as a practical matter, if the non-Indian breaches the agreement by filing a federal petition for habeas corpus to preclude prosecution, the

\begin{footnotesize}
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  \item[129] For a further discussion of this problem of imputed consent under the hadane theory, see Spruhan, supra, note 114.
  \item[131] See Id. Applying an immigration analogy, Professor Fletcher supports a requirement that non-members consent to full tribal jurisdiction as a condition of living in tribal housing or on tribal lands. See Fletcher, supra, note 122, at 326.
  \item[132] No. POR-CR-09/209-169.
  \item[133] 495 U.S. 676.
\end{itemize}
\end{footnotesize}
tribe can simply exclude him or her or terminate their employment, assuming such action is otherwise consistent with tribal law. For non-Indians with tribal member spouses and children, such consequences can be a compelling incentive for compliance. However, it is unclear whether any tribe actually enforces such consent,\textsuperscript{137} and such theory is therefore untested.

**CONCLUSION**

In the end, the great divide between tribes and the United States Supreme Court reflects quite different theories of consent. For the tribes discussed in this article, consent by non-Indians is almost exclusively based on conduct less than full political participation and citizenship. From mere physical presence to marriage to case-specific consent, tribes have conceptualized consent under their own laws and policies, and have not extended full political rights to non-Indians as a condition of the assumption of criminal authority. Whether tribes adjust their views to comply with the Court’s vision of consent by the governed, seemingly requiring full political participation, or transcend that vision to conform to their own unique views of government authority, is within the right of each tribe to decide. However, the consequences of those choices on tribal societies must be fully acknowledged and understood, as any attempt to assert criminal jurisdiction ultimately can subject the tribe to federal court review.

Regardless of the relative merits of these different theories of consent, there is a simpler way for a tribe to exercise its full sovereignty: a non-Indian can simply consent by not objecting to such jurisdiction. Barring sua sponte action by the tribal court, as happened in *Hjert*,\textsuperscript{138} the non-Indian defendant has all the power to consent he or she needs. He or she can simply decline to seek dismissal of the case on jurisdictional grounds or seek habeas review in federal court. Indeed, if non-Indians living and working within tribal nations truly believe the rhetoric of tribal sovereignty, they should practice it through consent. It may be difficult for anyone subjected involuntarily to a criminal justice system to forego an argument that could bar prosecution. However, for non-Indians caught up in day-to-day incidents within Indian Country, it is time to consider something larger: the continued vitality of tribal governments through the practical application of tribal sovereignty. For non-Indians married into the tribe, or who are employed by the tribal government or one of its members, or have permission to reside on tribal lands, compliance is a natural outgrowth of the privileges received. This also means, however, that a tribal government may have to adjust its views on who their constituents are, and to whom tribal services are provided.

\textsuperscript{137} The Pueblo of Isleta recently began requiring non-members, apparently not just non-Indians, to pass a background check before being allowed to reside within the Pueblo. See Ungelbah Daniel-Davila, Non-Tribal Residents of Isleta Pueblo Must Undergo Background Checks, Albuquerque Journal, February 29, 2012, [http://www.abqjournal.com/main/2012/02/29/abqnewsseeker/non-tribal-residents-of-isleta-pueblo-must-undergo-background-checks.html](http://www.abqjournal.com/main/2012/02/29/abqnewsseeker/non-tribal-residents-of-isleta-pueblo-must-undergo-background-checks.html). Though there is no apparent requirement to consent to tribal criminal laws, the Pueblo ordinance is one method of conditioning residency on adherence to tribal requirements.

\textsuperscript{138} No. POR-CR-09/209-169.
Put another way, non-Indian obedience to tribal law is active resistance to the ongoing federal reduction of tribal authority. Ultimately, even if the U.S. Supreme Court denies a tribal nation’s power to condition citizenship, residence, or employment by consent to criminal jurisdiction, a non-Indian still can empower tribal nations through on-the-ground compliance with tribal law. That can never be taken away.
OF WHALING, JUDICIAL FIATS, TREATIES AND INDIANS: THE MAKAH SAGA CONTINUES

Jeremy Stevens*

“Fiat lux et facta est lux.”¹

“So is this great and wide sea,
wherein are things creeping innumerable,
both small and great beasts.
There go the ships:
there is that Leviathan
whom thou hast made to play therein.”²

 “[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. Here, as in other parts of the world, the undermining of that faith begins with the glorification of ‘expert administrators’ whose power-drives are always accompanied by soft music about ‘the withering away of the state’ or the ultimate ‘liquidation’ of this or that bureau.”³

At the northwestern-most corner of the continental United States, on a 27,000 square acre reservation, reside the Makah.⁴ Currently the only group of the Nuu-chah-nulth people within the realm of the United States of America,⁵ the Makah once exerted dominion over a territory that consisted of all “that portion of the extreme northwest part of Washington Territory . . . between Flattery Rocks on the Pacific coast, fifteen miles south from Cape Flattery, and the Hoko [R]iver . . . eastward from the cape on the Strait of [Juan de] Fuca.”⁶ The Makah also claimed Tatoosh Island, and indeed still today retain Tatoosh Island and the cluster of land masses which the appellation has come to

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¹ Genesis 1:3, Latin Vulgate (translated into common parlance: “‘Let there be light.’ And there was light.”).
² Psalm 104: 25-6 (King James).
⁵ Other Nuu-chah-nulth tribal people live on Vancouver Island and along the central critic Columbia coast. See Ruth Kirk, TRADITION AND CHANGE ON THE NORTHWEST COAST: THE MAKAH, NUU-CHAH-NULTH, SOUTHERN KWAKIUTL, and NUXALK 8-9, University of Washington Press (1986).
represent. But the whole of the Makah ancestral lands “is of a mountainous character, and is the termination of the Olympic range, [covered with] an almost impenetrable forest.” The inhospitable climate—the winds, the rains, the rocky crags, the clay dirt and sandstone, and the occasional boulder of granite—is not suitable for cultivation. Owing to the terrain and the climate, the Makah engaged in very limited amounts of agriculture, cultivating potatoes “at a hill on Flattery rocks” and picking berries, naturally resident to the terrain. It is thus not difficult to understand that the Makah were primarily “a seafaring people who spent their lives either on the water or close to the shore;” sprinkled with the occasional tuber, nut, berry or sea fowl, most of the Makah “subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal.” But paramount to the Makah of all the fecund ocean’s largesse was the California Gray Whale. As the Makah themselves assert, whale hunting is the “symbolic heart” of their culture.

And the Makah have been hunting whales for 1,500 years. Makah religion in fact instructs that Thunderbird, a “flying wolflike god, delivered a whale to their shores to save them from starvation.” For at least 3,000 years since, the “gray whales have been sacred icons in the petroglyphs, jewelry, art, carvings, songs, and dances” of the Makah. Whaling has not only been a source of subsistence to the Makah as they have learned to survive—thrive, even, before westward expansion squeezed them onto their current reservation—atop their clump of clay, rock, and dirt—whaling has been “an expression of religious faith and community cohesion.”

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7 Id.
8 Id. at 2.
9 Id.
11 Id.
12 “The California gray is the kind usually taken by the Indians, the others being but rarely attacked.” SWAN, supra note 6, at 19.
14 See generally, SWAN, supra note 6, at 4.
15 Bradford, supra note 4, at 171.
16 Id. at 172.
17 Id. “The practice of the whalers is particularly revealing of the religious essence of Makah whaling: in order to become spiritually pure enough to enter the spirit world whey they could become ‘at one with the whale’ and deserving of the whale’s gift of itself to them, Makah whalers were required to undergo grueling physical training which included abstention from sex, self-infliction of floggings with stinging nettled, bathing in frigid ponds, lying naked on the beach covered in sand fleas, and swimming large rocks from one river bank to another.” Footnote 52. But the Makah were also ‘emphatic’ traders of whale blubber and oil to white traders, lumber mills and other tribes along the coast of the Pacific Northwest. Indeed, the trading of whale oil brought a notable degree of prosperity to the tribe. See SWAN, supra note 6, at 31-2. And modern scholars posit that as much as 84.6% of the Makah pre-contact diet could have been composed of whale meat and other whale derivatives. See Ann M. Renker, Ph.D, Whale Hunting and the Makah Tribe: A Needs Statement, April 2007, http://iwcoffice.org/cache/downloads/ds5fzaq2p14w88ocko00o4gcw/64-ASW%204.pdf (last visited Oct. 31, 2012).
reverence, this sense of cultural inter-dependence, more illustrated than in the Treaty of Neah Bay.\textsuperscript{18}

The Treaty of Neah Bay is the constitutionally binding source of federal plenary authority and dominion over the Makah Indians—the exercise of the Indian Commerce clause which grants the congressional right to dictate by legislative fiat the totality of Makah affairs. Effectuated in 1855, it is but one of the "eleven different treaties, each with several different tribes"\textsuperscript{19} produced by Governor Isaac Stevens.\textsuperscript{20}

Congress’ chosen method of opening up vast swaths of Pacific Northwest land for white westward expansion was through the negotiation of treaties, as an instrument of conquest.\textsuperscript{21} And to clear the way for white settlement onto Indian lands, to accommodate the increasing flow of American settlers pouring into the lowlands of Puget Sound and the river valleys north of the Columbia River, Governor Isaac Stevens was tasked with inducing the Indians of the area to move "voluntarily"\textsuperscript{22} onto reservations. Indeed, Governor Stevens was well-suited for the undertaking. He recognized in the Makah not much concern for their land (save for their village, burial sites, and other sundry locations), but recognized great concern for “their marine hunting and fishing rights.”\textsuperscript{23} The Governor therefore reassured the Makah that the United States government did not “intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits.”\textsuperscript{24} But Governor Stevens did not speak the Makah’s language, nor did the Makah representatives speak English. Instead, the Treaty of Neah Bay was negotiated in English and an interpreter translated English into “Chinook Jargon” which then a member of the Clallum Tribe translated into Makah: English into Chinook into Makah, and back.\textsuperscript{25} Nevertheless, Governor Stevens was sufficiently intuitive and well enough informed to recognize the primacy of the whale


\textsuperscript{20} Governor (US Army Colonel) Isaac Stevens was neither a benevolent nor a pusillanimous man. Born in Massachusetts in 1818 and a top of his class West Point graduate, having been a strong supporter of Franklin Pierce’s presidential candidacy, he was rewarded for his dedication with the position of Governor/Superintendent of Indian Affairs for the newly created Washington Territory. In this capacity and with the occasional use of intimidation and force, Governor Stevens orchestrated virtually all of the US-Indian treaties – Treaty of Medicine Creek, Treaty of Hellgate, Treaty of Neah Bay, Treaty of Point Elliott, Point No Point Treaty, Quinault Treaty – which laid the foundation of Indian displacement, loss of cultural identity, and Indian Tribal rights and reservation boundaries in the Pacific Northwest. Despite his hostility toward Natives (or perhaps as a consequence of it), Governor Stevens was popular enough to be elected delegate to the United States Congress in 1857 and 1858. But he resumed service in the United States Army when the civil war began in 1861, became a brigadier general on September 28, 1861, and was shot in the head while leading an infantry charge at the Battle of Chantilly, going on to meet his maker instantly on September 1, 1882.


\textsuperscript{22} See United States v. Washington, 520 F.2d at 682-83 (9th Cir. Wash. 1975) (aff’g United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).

\textsuperscript{23} Id.


in Makah culture; indeed, the man “promised United States assistance in securing a treaty-based right for the Makah to whale and promot[e] Makah whaling” because, in his own words, "[t]he Great Father knows what whalers you are." Much of the official record of the treaty negotiations thus deals with securing the right to whale; and as consideration for that treaty-reserved right, the Makah ceded 91% of their land—a full 300,000 square acres—and retained only a 27,000 square acre wind-swept, crag-ridden, “mountainous, forest-covered region, with no arable land except the low swamp and marsh.” The Makah were not interested in becoming tillers of soil or hunters of the elk, deer and bear which dwelt among them. Yes, the Makah grew their potatoes and gathered berries when the season was proper, but no culture can survive on tubers and berries alone; a people requires “animal food, and [the Makah] prefer[red] the products of the ocean to the farina of the land.” As a testament to the importance of the whale to every aspect of Makah culture and as an illustration of the extent to which the act of whaling was more important to the Makah than it was to any other tribe with which the Government negotiated a treaty, the Treaty of Neah Bay is the only United States-Indian treaty which secures for the Indians the express right to whale: the “right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States."

But in Anderson v. Evans, the Ninth Circuit abrogated that right, and did so through applying an eminently improper analytical framework of its own making. Part I of this article will chart the unhappy sequence of events leading up to the Anderson decision as the Makah sought—and continue to seek today—to re-establish their long-customary and treaty-reserved practice of whaling. Next, this article will consider the canons of United States-Indian treaty interpretation relevant to the Anderson court’s failings. Included in this proposition is identifying the source of federal power over Indians, identifying the source of state power over Indians, and identifying what are referred to as the state conservation necessity test and the federal weight and consideration test. As each appellation suggests, the former is used to assess the effects a state’s regulation imposes upon an Indian treaty-reserved right while the latter

27 Id.
28 SWAN, supra note 6, at 2.
29 Id.
30 But “[t]here is no indication that the Indians intended or understood the language ‘in common with all citizens of the Territory’ to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places . . .” United States v. State of Wash., 384 F. Supp. at 333.
32 371 F.3d 475, 501 (9th Cir. 2004) (amending 314 F.3d 1135 (9th Cir. 2002)).
is used to assess the effects a federal regulation imposes upon an Indian treaty-reserved right. This article will then address in Part III why the Anderson decision was incorrectly decided and in conclusion, this article will present the current state of the Makah’s efforts to resume their treaty-reserved right of “whaling or sealing at usual and accustomed grounds and stations” in exercise of their treaty right to do so.

I. THE MAKAH’S QUEST TO RE-ESTABLISH WHALING

Having been whalers for over 1,500 years, in the 1920s, as greatly “improved equipment increased the slaughter of [whales] to such a degree that world-wide attention began to focus on the possibility of hunting several species of whales to extinction,” the Makah voluntarily ceased their whaling activities. Recognizing the pressing need to roll back the near extirpation of several whale species, in 1937 several nations—among them the United States of America—signed the first International Whaling Agreement. Faced with the virtual extinction of the California Gray Whale nine years later in 1946, the United States signed the International Convention for the Regulation of Whaling (ICRW), established in order “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.” The ICRW then enacted a “schedule of whaling regulations” and created the International Whaling Commission (IWC) as its rule-making/enforcement arm. The IWC was to be “composed of one member from each signatory nation,” and the ICRW granted the IWC the power to amend the “schedule of whaling regulations” by “adopting regulations with respect to the conservation and utilization of whale resources,” this included—and remains to this day—setting quotas for the maximum number of whales that can lawfully be taken in any one whaling season. IWC then placed an outright ban on taking or killing gray whales, but allowed an aboriginal subsistence exception “when the meat and products of such are to be used exclusively for local consumption by the aborigines.” Congress for its part passed the Whaling Convention Act in 1949 “to implement domestically the International Convention for the

35 When Attila the Hun was ravaging the eastern boundaries of the Roman Empire, the Makah where whaling. Prior to contact with non-Indians in fact, the Makahs had been hunting “whale successfully for at least 1200 years without destroying the resources. Ceremonial, social and cultural proscriptions established a functional balance between the Makahs and the whale populations which swam in or through Makah waters.” Renker, supra note 17, at 12. See also SWAN, supra note 6.
39 Metcalf v. Daley, 214 F.3d 1135, 1138 (9th Cir. 2000).
42 See 62 Stat. at 1723. Note that this qualification the Metcalf court and others refer to as the “aboriginal subsistence exception.” See Metcalf v. Daley, 241 F.3d at 1138.
Regulation of Whaling." The Whaling Convention Act prohibits whaling in violation of ICRW, the IWC schedule of whaling regulations, or any whaling regulation adopted by the United States Secretary of Commerce. Furthermore, and most relevant for the purpose of this article, Congress has tasked the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) with the promulgation of regulations to implement the Whaling Convention Act.

Notwithstanding IWC, NOAA and NMFS efforts, unhappily, by 1970 the global gray whale population—that awesome but “gentle giant of the sea” had decreased to less than a meager 2,000 individual leviathans. The next significant development vis-à-vis the Makah, then, came that very year when Congress designated the California Gray Whale as an endangered species in compliance with the United States Endangered Species Conservation Act (ESA); two years later, in 1972, Congress enacted the Marine Mammal Protection Act (MMPA). Under the MMPA, the NOAA is responsible for the conservation of, among others, the California Gray Whale, that behemoth long instrumental to Makah cultural identity and preservation.

Happily, by June of 1994, the Eastern North Pacific (ENP) population of the California Gray Whale had “recovered to near its estimated original population size and [was] neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range.” This steady, stable population of approximately 20,000 California Gray Whales, leisurely roaming the seas was delisted under the ESA that same year, and the Makah decided to resume its hunting of those “who migrated through the Sanctuary.”

43 Id. See also 16 U.S.C.A. § 916 et seq. (1985).
48 See Jordan, Supra at A01.
49 Metcalf v. Daley, 214 F. 3d at 1138. Makah whaling has long targeted the California gray whale, which migrates between the North Pacific and the coast of Mexico. “During their yearly journey, the migratory whale population travels through the Olympic Coast National Marine Sanctuary (“Sanctuary”), which Congress established in 1993 in order to protect the marine environment in a pristine ocean and coastal area. A small sub-population of gray whales, commonly referred to as ‘summer residents,’ live in the Sanctuary throughout the entire year.” Id. For further profitable information about the California gray whale and its usefulness to the Makah, See Ann M. Render, Ph.D., Whale Hunting and the Makah Tribe: A Needs Statement, 5-23 (April 2007), http://iwcoffice.org/cache/downloads/ds5fzaq2p14w88ocko00o4gcw/64-ASW%204.pdf (last visited Oct. 31, 2012).
formal written agreement by which the “NOAA, through the United States Commissioner to the IWC, will make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe.” But in response to this agreement, in June of 1997, two organizations—Australians for Animals and the BEACH Marine Protection—submitted a letter to NOAA “alleging that the United States Government had violated National Environmental Policy Act (NEPA) by authorizing and promoting the Makah whaling proposal without preparing an” Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The NOAA responded by distributing an EA for public comment, in compliance with the National Environmental Policy Act, on August 22, 1997. A short time later, on October 13, 1997, NOAA and the Makah entered into a new written agreement which “required the Makah to confine hunting activities to the open waters of the Pacific Ocean.” After the signing of this new agreement, the NOAA issued a Finding of No Significant Impact (FONSI) four days later, on October 17, 1997.

One day later at the IWC’s annual meeting the United States on behalf of the Makah, and the Russian Confederation on behalf of a Siberian aboriginal group called the Chukotka, submitted a “joint proposal for a five-year block quota of 620 whales. The total quota of 620 assumed an average annual harvest of 120 whales by the Chukotka and an average annual harvest of four whales by the Makah.” Yet some delegates “expressed doubts about whether the Makah qualified for the quota under the ‘aboriginal subsistence’ exception, and therefore suggested “amending the joint proposal to allow the quota to be used only by aboriginal groups whose traditional subsistence and cultural needs have been recognized by the International Whaling Commission.” The United States rejected this amendment, arguing that the IWC had no “established mechanism for recognizing such needs.” The proposal submitted by the United States and the Russian Federation was thus amended to allow the block quota of 620 whales to be used only by aboriginal groups “whose traditional subsistence and cultural needs have been recognized.” This quota shortly thereafter was approved, and on April 6, 1998, NOAA issued a Federal Register Notice allocating a

51 Metcalf v. Daley 214 F. 3d at 1139.
52 Id. Under the National Environmental Policy Act, when a Federal agency develops a proposal to take an action, there are three levels of analysis that a federal agency must undertake to comply with the law. These three levels include: preparation of a Categorical Exclusion (CE); and if no CE applies, the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI); or when there has been no FONSI, the preparation and drafting of an Environmental Impact Statement (EIS).
53 Metcalf v. Daley, 214 F. 3d at 1139.
54 Id. (interior quotations omitted). The Metcalf court further provided, “Apparently, this provision was added to the Agreement in order to increase the probability that, although the whaling would occur in the Sanctuary, the Makah would hunt only migratory whales, rather than the Sanctuary’s ‘summer residents.'”
55 Id.
56 Metcalf v. Daley, 214 F. 3d at 1140 (emphasis added).
57 Id.
58 Id. (interior quotations omitted.) The Metcalf court presumes that these delegates, for their own reasons, “were attempting to amend the proposal in a manner that would allow the Chukotka to harvest gray whales, but would prohibit the Makah from doing so.” Id.
59 Id.
60 Id.
quota to the Makah for limited hunts in 1999. This allowed the Makah, in lawful exercise of its re-established expressly-reserved treaty right, to engage in whaling “pursuant to the IWC-approved quota and Whaling Convention Act regulations.”

Meanwhile, on the very day the 1997 Finding of No Significant Impact was released by the NOAA—October 17, 1997—Congressman Jack Metcalf, joined by Australians for Animals, BEACH Marine Protection and others, filed a complaint in the United States District Court for the District of Columbia alleging that the federal defendants—NOAA and NMFS—violated the National Environmental Policy Act, the Whaling Convention Act and the Administrative Procedures Act. Metcalf et al. chiefly contended that NOAA’s Environmental Assessment was a “deficient effort” organized simply to “justify the prior agreement allowing the Tribe to hunt whales.” After granting the Makah’s motion to intervene, the District Court transferred the case to the Western District of Washington. The district court for the Western District of Washington granted summary judgment for the Makah and their Federal allies. Thereafter, the Makah, having voluntarily suspended whaling operations in the 1920s, resumed whaling under full federal supervision in 1999. On May 17, 1999, the Makah

celebrated a pivotal moment in [their] long history. At 6:54 a.m., the Creator allowed a Makah crew to realize a collective dream that the Makah Nation had stored in its minds and hearts for seventy long years: they brought a whale home to the Tribe. This pivotal cultural event riveted the attention of the Makah community, and energized Makah Tribal members who believed in, and worked toward, the restoration of this significant cultural and subsistence practice.

1,200 Makah watched the hunt’s successful completion on live television; hundreds of off-reservation Makah traveled home to the land of their fathers, seeking only to be a part of this event; 1,400 Makahs gathered at Front Beach in Neah Bay to welcome the whale and the successful whalers; and as they undertook the process of preparing the food and resources for consumption and sharing at a later date, many “ate raw blubber right on the spot.”

63 See Metcalf v. Daley, 214 F.3d at 1140. See also Anderson v. Evans, 371 F.3d at 485.
64 Anderson v. Evans, 371 F.3d at 485.
65 Id.
66 See Metcalf v. Daley, 214 F.3d at 1140. See also Anderson v. Evans, 371 F.3d at 485.
67 Id.
68 Renker, supra note 17, at 15.
69 Id.
But neither the whale’s demise nor the Tribe’s jubilation brought “this prolonged dispute to an end,”\textsuperscript{70} for the United States Court of Appeals for the Ninth Circuit reversed the district court in \textit{Metcalf v. Daley}\textsuperscript{71}, concluding that NOAA violated NEPA because agencies must engage the NEPA process before any irreversible and irretrievable commitment of resources. Therefore, before NOAA can issue the Tribe a permit or waiver under the MMPA, which would be an irreversible commitment of resources, NOAA must complete the NEPA process. Otherwise, NOAA may have granted permits for takings of marine mammals without first fully considering the effects of that federal action through NEPA.\textsuperscript{72}

The \textit{Metcalf} court accordingly ordered that a new EA must be drafted “under circumstances that ensure an objective evaluation free of the previous taint.”\textsuperscript{73} In compliance with the court’s directive, NOAA then rescinded its agreement with the Makah and began the EA process anew.\textsuperscript{74} Unfortunately their next effort would prove no more successful, but would be far more discouraging than its predecessor had.

\section{II. Cannons of United States Indian Treaty Interpretation United States}

The Federal government was granted its power to govern when by act of ratification in 1790 the Constitution was finally approved by each of the original thirteen colonies.\textsuperscript{75} Because each of the thirteen colonies granted the Federal government only those powers explicitly stated in the Constitution and reserved unto themselves a great multitude of powers, the states derive their authority over Indian affairs from a different paradigm than whence originate the Federal government’s powers over Indian tribes.\textsuperscript{76}

\subsection*{A. Source of Federal Power Over Indian Tribes}

The source of federal authority over Indian tribes derives from the United States Constitution, through the Treaty Clause and the Indian Commerce Clause.\textsuperscript{76} Nearly two hundred years ago, in fact, the Supreme Court stated that the “Constitution . . . confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our
intercourse with Indians.”

Supreme Court decisions involving Indian affairs have therefore referenced *jus gentium*—the law of nations—to explain and justify the relationship between the Federal government and Indian tribes. Consequently, the field of Indian law has its roots in international law. And just as the Treaty Clause grants the President power to enter into binding agreements with extra-territorial nations subject to ratification by the Senate, the Treaty clause also grants the President power to enter into binding agreements with Indian tribes subject to Senate approval, and “has been a principal foundation for federal power over Indian affairs.”

Consider then that Indian tribes once were vast, indomitable governmental forces exerting their dominion over miles and miles of inhospitable and rugged terrain even as throngs of young Americans and recent immigrants rushed westward to hack a life out of the wilderness the Indians regarded as their own. Consider this and it is easy to ascertain just how the Supreme Court could state that treaties with these Indian tribes were not grants of property or sovereignty from the United States to Indian tribes, but conversely, treaties with these Indian tribes were acts of cession, acts of surrendering those long-held property rights—the dominion and governance over millions of acres of tribal hunting, grazing and wintering grounds—by the Indians to the United States, subject to a reservation of rights not explicitly relinquished.

The United States Supreme Court first attempted to formulate its views of Indian tribes and their legal and historical relation to the land in *Johnson v. McIntosh*. In *Johnson* the Court held that the discovery of lands in the new world gave the discovering Europeans a sovereign title, good against all other Europeans and the “sole right of acquiring the soil from the natives.” Thus, Indians only retained the right of occupancy which only the sovereign could extinguish, either by “purchase or by

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78 See Cherokee Nation v. Georgia, 30 U.S. 1, 53 (1831); Johnson v. McIntosh, 21 U.S. 543, 71-84 (1823) (regarding rights of ‘discovering nations’).
79 See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 5.01 (2005 ed.).
80 Id.
81 See United States v. Winans, 198 U.S. 371, 381 (1905). See also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2005 ed.).
82 Johnson v. McIntosh, 21 U.S. at 543. But 13 years earlier in 1810 the Court hinted that Indians did not hold title to their lands sufficient to validate a transfer for those lands to non-natives in Fletcher v. Peck, 10 U.S. 87 (1810) (stating that the “reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony.” Id. at 142). In 1795, members of the Georgia legislature had been bribed to convey 35 million acres of land to private companies at a price of 1.5 cents an acre. In 1796, the Georgia legislature rescinded the grant of land, but by then much of the property already had been conveyed to unsuspecting investors. In an opinion authored by Chief Justice Marshall the Court held that it was unconstitutional for Georgia to rescind its grant of land. The Court indicated that the legislative power is limited by both “the general principles of our political institutions,” 10 U.S. at 139, and “the words of the Constitution.” Id. Because title had been conveyed to innocent owners, the law rescinding the grant was deemed to unconstitutionally interfere with vested rights. Because the Indians lacked any proper claim to the land, their conveyance of the land was invalid.
83 Johnson v. McIntosh, 21 U.S. at 573.
conquest." The “sovereign” in this case was not a king but the United States government. The result of Johnson v. McIntosh, then, was that the Federal government was to recognize a legal right of Indians in their lands, good against all third parties but existing at the mere sufferance of the federal government: this right to occupancy is referred to as “aboriginal title” or simply “Indian title.” Additionally, the proposition that the Federal government possesses plenary authority over Indian tribes by virtue of having discovered them is referred to as the Doctrine of Discovery.

Eight years later, the Supreme Court further defined the Federal relationship to Indian tribes in Cherokee Nation v. Georgia\(^85\) when it held that Indian tribes are domestic dependent nations: Indians were acknowledged to possess an unquestionable right to the lands they occupy, “yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly . . . be denominated domestic dependent nations.”\(^86\) Therefore, Indian tribes are not foreign states or states within the meaning of Article III of the Constitution. Instead, an Indian tribe is to be regarded as a dependent nation, with “a distinct political society separated from others, capable of managing its own affairs and governing itself.”\(^87\) Indeed, Chief Justice Marshall’s characterization of Indian tribes as “domestic dependent nations” laid the groundwork for future protection of tribal sovereignty by Marshall and his immediate successors. But the characterization also created an opportunity for much later Courts to discover limits to tribal sovereignty inherent in the domestic dependent status of tribes.

Yet before later Courts would discover limits to Indian tribal sovereignty, the Marshall Court further circumscribed the nature of Indian tribal sovereignty: State governments could be excluded from exerting dominion over Indian affairs due to the actual words of the United States Constitution,\(^88\) the Articles of Confederation, and in Worcester v. Georgia.\(^89\) In Worcester, Chief Justice Marshall developed the idea that Indian tribes are nations whose independence had been limited in only two essentials—their right to convey land and their ability to deal with foreign powers. Reinforcing the tribal right of self-government and the exclusive federal right to govern relations between the tribe and outsiders, the Supreme Court ruled that Georgia laws which sought to influence on-reservation behavior were nullities because they conflicted with federal dominion over Indian affairs. Indeed, state laws seeking to influence on-reservation behavior are “repugnant”\(^90\) to the Constitution—and this not due to the essential character or nature of Indian tribes, but due to the primacy and plenary authority of Congress to dictate by legislative fiat the sum of tribal affairs. The trilogy of Justice Marshall’s opinions thus stands for the propositions relevant to this article that (1) state law by virtue of its essential character does not apply within treaty-reserved

\(^{84}\) Id. at 587.
\(^{85}\) Cherokee Nation v. Georgia, 30 U.S. at 1.
\(^{86}\) Id. at 17.
\(^{87}\) Id. at 30.
\(^{88}\) U.S. Const. art. I, § 8, cl. 3.
\(^{90}\) Id. at 540.
Indian land; (2) tribes are distinct political entities; (3) a trust doctrine exists whereby the Federal government is charged with protecting tribal sovereignty from state incursion; and (4) it is the Federal government’s power, by virtue of Congress, that serves to block the application of state laws, not the tribe’s status as a distinct political subdivision.

Yet attendant to the power to enter into a treaty is the power to abrogate that selfsame treaty, and the Supreme Court has applied this axiom to treaties with Indian tribes. Indeed, because Indian tribes are “domestic dependent nations” their “incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.” Because the tribes have surrendered rights to the Federal government, Congress’ constitutionally-granted power over Indian affairs is “plenary and exclusive.”

By virtue of categorical ratification, then, “the People” have imbued the Constitution with legal effect, thus granting the Federal government authority to enter into binding treaties with foreign nations. Expressly, the Constitution elevates those treaties to the perch of the “supreme Law of the land.” And by virtue of the Marshall Court’s decisions declaring them so, and due to their inability to mount any realistic sense of militaristic resistance, Indian tribes in effect are “domestic dependent nations,” owing their existence to and depending upon the largesse and protection of the Federal government. Consequently, the Federal government has the power to expand or contract or abrogate any treaty stipulation Congress so desires. This is so because the Constitution and Supreme Court precedents say it is so, and because Indian tribes have no armies.

**B. Source of State Power Over Indian Tribes**

Whereas the Federal government’s power to regulate Indian tribes and their treaty rights extends from the Federal government’s constitutionally-enumerated authority to regulate “Commerce with . . . the Indian tribes” and from Congress’ plenary power over treaties, a state by “virtue of its police power has the initial authority to regulate the taking of fish and game.” Indeed, the Supreme Court has stated that it “see[s] no reason why the rights of the Indians may not also be regulated by an appropriate exercise of the police power of the State.” As a direct product of a

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91 See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); see also United States v. Dion, 476 U.S. 734 (1986).
92 Cherokee Nation v. Georgia, 30 U.S. at 1.
95 U.S. Const. art. I, § 8, cl. 3.
96 See McClanahan v. State Tax Comm’n of Arizona, 411 U.S. 164, 172 n.7 (1973) (stating “The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulation commerce with Indian tribes and for treaty making.” (citing U.S. Const. art I, § 8, cl. 3; id. art. II, § 2, cl. 2 (additional citations omitted.))
97 United States v. State of Wash., 520 F.2d at 684. See also Geer v. Connecticut, 161 U.S. 519, 540 (1896), “By virtue of its police power, the state has authority to regulate the taking of fish and game.”
state’s police power, a state’s regulatory authority thus does not extend—unless congressionally-mandated—to federal lands, such as to federal lands held in trust for Indian tribes, or to United States waters. Since the Federal government possesses plenary power to enter into Indian treaties and to abrogate rights expressly retained by treaties, and since the state derives its powers over Indian tribes either through non-constitutionally enumerated power to police or through an explicit act of Congress, it is easy to understand the appropriateness of two different analytical frameworks through which to assess a regulation’s effect on rights explicitly protected by United States-Indian treaties. These two frameworks are referred to as the State conservation necessity test, and the federal weight and consideration test.

C. Canons of Treaty Interpretation

Interpretation of United States-Indian treaties begins and ends with the Supreme Court’s maxim: “the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.” In consideration of the cultural differences between Indian tribes, the United States government and its representatives, then, and out of deference to the federal role as trustee of lands and resources for Indian tribes, the Supreme Court has fashioned rules of treaty construction sympathetic to Indians. First, United States-Indian treaty provisions are to be liberally construed in favor of the Indians in order to accomplish the protective purpose under which the Federal government entered into the treaties with the Indian tribes. And although United States-Indian treaty negotiations were between the Federal government and the Indian tribe, the treaties nonetheless “reserved rights . . . to every individual Indian, as though named therein . . . and the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.” Finally, treaties were “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.” The extent of that grant will be construed as understood by the Indians at that time, taking

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99 See Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976) (holding that a state does not have regulatory authority over Indian activity on tribal land absent specific Congressional authority).


102 In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.” Jones v. Meehan, 175 U.S. 1, 10-11 (1899) (citing Worcester v. State of Georgia., 31 U.S. at 515).


105 Id.
into consideration the Indians’ lack of literacy and lack of familiarity with the United States legal system, and the limited understanding of the jargon in which negotiations were conducted.\(^{106}\) Ambiguities extant in United States-Indian treaties, then, are to be construed liberally in favor of the Indian tribes and in all cases, “the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.”\(^{107}\) But what exactly does this mean—when, if at all, can a state or the Federal government entirely abrogate a United States-Indian treaty, or merely enact a statute that infringes upon a treaty-reserved right such as the right to hunt and fish, or the right to whale?

**D. The State Conservation Necessity Test**

The Supremacy Clause of the United States Constitution “ensures that [Federal] laws regulating Indian affairs and treaties with tribes supersede conflicting state laws or state constitutional provisions.”\(^{108}\) Yet the Supreme Court has also held that by virtue of its police power, the state and its political subdivisions can regulate the off-reservation exercise of treaty-reserved hunting and fishing rights; but a state can only do so if it first demonstrates that the “specific regulation is reasonable and necessary for conservation.”\(^{109}\) Additionally, the regulating state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians and the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.\(^{110}\) This is the state conservation necessity test: states do have the authority to qualify treaty-guaranteed rights, provided first that the regulation is “necessary” for the “conservation” of the affected species and only if the goals of the regulation cannot be attained by restricting only citizens other than treaty Indians, and in no way may the regulation discriminate against treaty Indians.\(^{111}\)

As early as 1942, the Supreme Court suggested the possibility of a state regulating off-reservation Indian fishing and hunting activity, despite United States-Indian treaties explicitly preserving these same rights. In *Tulee v. Washington*,\(^{112}\) a Yakima Indian was arrested for catching salmon off reservation without a license, in violation of Washington State law.\(^{113}\) The fishing right the Yakima had been exercising was explicitly reserved in the 1854 Treaty of Medicine Creek: \(^{114}\) the “right of taking fish,
at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory.”

The Supreme Court held that the Treaty of Medicine Creek did not permit the state from charging the Yakima a license “fee of the kind in question here.” The Court found that the state’s regulatory purpose could be accomplished otherwise, [and] that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and . . . fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the “usual and accustomed places” cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.

The Court’s choice of language, “[t]he license fees prescribed are regulatory as well as revenue producing . . . [b]ut it is clear that their regulatory purpose could be accomplished otherwise,” suggests two things: (1) it may be possible for a state to regulate Indian treaty-reserved fishing rights, but (2) only if no other regulatory measure (e.g. one that does not infringe upon a treaty-reserved right) can accomplish the “regulatory purpose” at issue. In response to this ruling, the State of Washington ceased charging the Yakima Indians a license fee. But on grounds that regulating off-reservation exercise of treaty-reserved fishing rights was “indispensable” to the state’s “regulatory purpose,” the State of Washington continued to regulate the act.

Indian resistance to the regulations increased until the State of Washington sued the Puyallup and Nisqually Tribes and several of the Tribes’ members to enjoin further fishing inconsistent with state law, even when the fishing was ostensibly reserved by Treaty.

The resulting lawsuit, Puyallup Tribe v. Department of Game (“Puyallup I”), concerned a Washington State regulation effectively banning off-reservation net fishing of steelhead trout and salmon by everyone, Indian and non-Indian alike. As stated, the United States-Puyallup Treaty guaranteed the Puyallup the right to fish at their “usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” The Supreme Court went on to hold for the first time in explicit terms that a state can lawfully regulate treaty rights of Indian tribes, finding that the tribes’ use of the nets at issue to capture salmon and steelhead trout was illegal under the Washington law.


115 Treaty with the Nisqualli, Puyallup, etc., 184., 10 Stat. 1132, art. 3.
117 Id. at 685.
118 Puyallup Tribe v. Dep’t of Game of Wash., 391 U.S. at 392.
120 See Puyallup Tribe v. Dep’t of Game, 391 U.S. at 395.
121 The Puyallup and Nisqually tribes are both signatories to the Treaty of Medicine Creek. The Treaty of Medicine Creek, like the Treaty of Neah Bay, was negotiated by Governor Isaac Stevens.
122 Puyallup Tribe v. Dep’t of Game, 391 U.S. at 392.
The treaty right is in terms of the right to fish “at all usual and accustomed places.” We assume that fishing by nets was customary at the time of the Treaty . . . [b]ut the manner in which the fishing may be done and its purpose . . . are not mentioned in the Treaty. We would have quite a different case if the Treaty had reserved the right to fish at the “usual and accustomed places” in the “usual and accustomed” manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather it is one “in common with all citizens of the Territory.” Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State . . . [T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.  

In 1972, Federal Indian Law scholar Professor Ralph W. Johnson accordingly predicted a “continuing series of clashes between the Indians and the state, each seeking to carve out the broadest possible claim in this legal thicket” on grounds that the newly-coined conservation necessity test was “notoriously vague.” As it turns out, his prediction was not entirely inaccurate.

On remand from the United States Supreme Court, the Washington Supreme Court found that Puyallup I’s ban against net fishing was necessary for species conservation and thus held lawful the State’s ban on all Indian net fishing. After hook-and-line sport fishing, there were only sufficient numbers of steelhead left to propagate the species. The tribe disputed this assertion and their claim became Puyallup II. The United States Supreme Court then went on with relative ease to conclude that the ostensible state-granted priority for hook-and-line sport fishing, though facially neutral, discriminated against the Indians because nearly all Indian fishing was carried out by net, in the now prohibited fashion. “There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is

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123 Id. at 398 (quoting Treaty of Medicine Creek, art. 3, 10 Stat. at 1133). Yet because the question of the whether the prohibition on the use of the nets at issue were a “reasonable and necessary” conservation measure had not been addressed by the Washington State courts, the case was remanded and the lower State courts were told that “any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase ‘in common with.'” Id. at 403.

124 Professor Johnson was also the founder of the Native American Law Center at the University of Washington Law School. See http://www.celp.org/water/celpjohnson/Rachael_Paschal_Osborn.html for a brief biography of the good Professor Johnson. (last visited Oct. 31, 2012).


126 Id.


allowed.” Nevertheless, the Court reasoned, “the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.” The Court thus propagated the principle that the non-discrimination aspect of the state conservation necessity test guarantees treaty fishermen not just the opportunity to fish on the same terms as other citizens, but a share of the harvestable fish.

Whereas Puyallup I and II dealt with Indians’ rights to treaty-reserved fishing off-reservation, in 1977 the United States Supreme Court confronted the issue of a state’s ability to lawfully regulate Indians’ on-reservation exercise of their treaty-reserved fishing rights. The United States Supreme Court held that indeed a state, subject to the state conservation necessity test, could also regulate on-reservation exercise, by Indians, of treaty-protected fishing rights.

Though it would be decidedly unwise, if Puyallup treaty fishermen were allowed untrammeled on-reservation fishing rights, they could interdict completely the migrating fish run and “pursue the last living steelhead until it enters their nets.” In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of non-Indian citizens of Washington recognized in the Treaty of Medicine Creek. In practical effect, therefore, the petitioner is reasserting the right to exclusive control of the steelhead run that was unequivocally rejected in both Puyallup I and Puyallup II. At this state of this protracted litigation, we are unwilling to re-examine those unanimous decisions or to render their holdings virtually meaningless.

In theory, then, a state is able to lawfully regulate the exercise—on and off reservation—of Indian treaty rights. Yet in practice, the United States Supreme Court requires an exacting standard. In order to lawfully regulate the exercise of Indian treaty rights, in each instance the state must demonstrate that (1) the regulation is necessary for the conservation of the concerned species; (2) no other regulation is sufficient to effect the intended species conservation than the regulation at issue; and (3) any regulation meeting this necessity test must not have the practical effect, even though the regulation may be facially neutral, of denying Indian fishermen the ability to fish. Indeed, applying the canons of treaty interpretation to the in-common-with language of United States-Indian treaties demands that the Indians possess a right to the harvest of no less than one half of the harvestable total take of the species at issue. But what about federal regulation of Indian treaty rights? Are the standards as exacting? In light of Congress’ plenary power over Indian tribes, is the same conservation necessity test appropriate?

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129 Id. at 49.
130 Id.
132 Dep’t of Game v. Puyallup Tribe, 414 U.S. 44.
E. The Federal Weight and Consideration Test

The United States Supreme Court stated in 1903 that “Congress may abrogate treaties and tribal sovereignty when circumstances arise which . . . not only justify the government in disregarding the stipulations of [a] treaty, but may demand, in the interests of the country and of the Indians themselves, that it should do so.” In considering the effect of congressional regulation on an Indian treaty right, the general presumption militates against treaty abrogation. The United States Supreme Court offered guidance for this general proposition in Menominee Tribe of Indians v. United States. An 1854 treaty set aside territory for the Menominee and reserved hunting and fishing rights on the reservation lands. One hundred years later, Congress passed the Menominee Termination Act to take effect in 1964 whereby

all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.

This effectively removed the United States-Menominee trust relationship and ceased to recognize, at least legally, the Menominee as a bona fide Indian tribe. Yet the Termination Act did not mention the Menominee’s treaty-reserved right of hunting and fishing. The State of Wisconsin, seeking to charge the Menominee state hunting and fishing license fees, argued that the Termination Act was a per se extinguishment of their fishing and hunting rights. A majority of the Warren Court disagreed and “decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians, [finding] it difficult to believe that Congress without explicit statement would subject the United States to a claim of compensation by destroying property rights conferred by treaty.” Thus, treaty-reserved hunting and fishing rights are not extinguished absent congressional intent to do so. But despite Menominee’s requirement of clear intent to abrogate a treaty-reserved right, in United

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133 Lone Wolf v. Hitchcock, 187 U.S. at 566.
135 Treaty of Wolf River, May 12, 1854, U.S.-Menominee, 10 Stats. p. 1064, ART. 2. (Stating lands “to be held as Indian lands are held.”)
136 Termination of Indian tribes was the general policy of the United States from the mid-1940s to the mid-1960s. The idea was that Indians would be better served if they assimilated into mainstream American society. Intending to grant Indians all the rights and privileges of proper American citizenship and thus removing all the rights and privileges granted to Indians, Congress purposed to terminate the special trustee relationship between Indian tribes and the Federal Government. As a result of this termination, the Menominee were to become subject to the state and federal taxes and laws from which their special trust relationship had theretofore exempted them. See U.S. House of Representatives Resolution 108, 83rd Congress, 1953.
138 Justices Black and Stewart dissenting (Justice Marshall not involved).
139 Menominee, 391 U.S. at 412-13 (emphasis added).
States v. Dion140 the United States Supreme Court rejected a per se rule requiring explicit congressional language to do so, in favor of a federal weight and consideration test.

Generally, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress.141 Determining just when these treaty rights become clearly relinquished was the Court’s task in Dion. When the state of South Dakota convicted Mr. Dion, a Yankton Sioux, for killing four bald eagles on reservation land in violation of the Eagle Protection Act142 (EPA) and the ESA, Mr. Dion asserted as his defense his treaty-reserved right of taking eagles for non-commercial purposes. The court found this argument of little avail and held that the EPA and the ESA reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to a permit, was inconsistent with the need to preserve those species and that both laws abrogated the treaty right to unrestricted hunting.

[W]here the evidence of congressional intent to abrogate is sufficiently compelling, the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.143

In establishing the federal weight and consideration test, the Court noted that in implementing the EPA,

Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a

141 FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 18 (2005 ed.). See generally Menominee Tribe v. United States, 391 U.S. 404. But this is not to say that Indian tribes may not license non-Indians to hunt on their tribal lands.
142 The Eagle Protection Act expressly made it a federal offense to hunt bald or golden eagles anywhere within the United States unless provided a permit by the Secretary of the Interior. 16 U.S.C. § 668.
143 United States v. Dion, 476 U.S. at 739-40 (1986) (interior quotations omitted). It is interesting to note that such a simple set of facts with such a simple, forthright holding from the Court has codified entirely that realm of Federal Indian Law which deals with the abrogation of Indian treaty rights by Federal statute. Indeed, given the simplicity of the High Court’s directive, it is difficult to ascertain just how the United States Court of Appeals for the Ninth Circuit could have failed to see the correctness of applying the Federal weight and consideration test vis-à-vis the Makah’s treaty-reserved whaling right, but instead applied the State Conservation and Necessity Test. One can very easily conclude that the Ninth Circuit’s conflation of the two tests was not an accidental error but a willful and deliberate act of disregarding Supreme Court precedent in favor of its own line of reasoning. Why the court would do such a thing is of course open to speculation; but such speculation is beyond the scope of this article.
specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.\footnote{144}

After \textit{Dion}, in order for a congressional statute to abrogate a treaty-reserved right, Congress must only consider the regulated action weighed against the action reserved in the treaty, and then choose to infringe upon the treaty-reserved right.

Further cementing the correctness of the federal weight and consideration test, the United States Supreme Court has applied the \textit{Dion} analysis to two subsequent cases, \textit{South Dakota v. Bourland},\footnote{145} and \textit{Minnesota v. Mille Lacs Band of Chippewa Indians}.\footnote{146} \textit{Bourland} held that Congress abrogated the Cheyenne River Sioux Tribe’s treaty-reserved right to “absolute and undisturbed use and occupation”\footnote{147} of former tribal trust lands when Congress acquired the trust lands for a dam and flood control project. Congress explicitly reserved tribal rights to hunt and fish \textit{around} the reservoir “subject to the regulations governing the corresponding use by other citizens of the US”\footnote{148} and this limited reservation of rights could not be supported, except by presuming c intent to abrogate the Tribe’s treaty-reserved right of hunting and fishing on and off reservation lands. Holding conversely that treaty-reserved\footnote{149} rights to hunt and fish were not abrogated by a subsequent c act,\footnote{150} the Court in \textit{Mille Lacs} explicitly held there was no “clear evidence”\footnote{151} that Congress intended to abrogate the treaty-reserved “privilege of hunting, fishing and gathering.”\footnote{152} In both cases, the federal weight and consideration test, promulgated in \textit{Dion}, was upheld and used to determine each case’s outcome.

\textit{Bourland} and \textit{Mille Lacs} were each decided after \textit{Puyallup I} and \textit{II} yet neither \textit{Bourland} nor \textit{Mille Lacs} follows –or even mentions– the state conservation necessity test. In neither \textit{Dion, Bourland, nor Mille Lacs} did the Court say it was overruling any decision which developed or supported the state conservation necessity test. Nor does \textit{Dion} cite any Supreme Court decision–nor any Ninth Circuit decision, in any relevantly meaningful capacity\footnote{153}– that either supports or develops the state conservation necessity test. This illustrates further the Court’s clear intention to promulgate two distinct tests to determine the constitutionality of federal regulations which interfere with

\footnote{144} United States v. Dion, 476 U.S. at 43-44.  
\footnote{146} Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).  
\footnote{147} S. Dakota v. Bourland, 508 U.S. at 683.  
\footnote{148} Id. at 690 (citing Cheyenne River Act of Sep. 3, 1954, 68 Stat. 1191, 1193 (1954)).  
\footnote{149} Under the Treaty of St. Peters of 1837, 7 Stat. 536, the Ojibwa (Chippewa) Nations ceded a vast tract of lands stretching from what now is north-central Wisconsin to east-central Minnesota. Article 5 of the treaty states, in relevant portion, “The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States.”  
\footnote{150} The Enabling Act, whereby Minnesota was admitted to the Union.  
\footnote{151} Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. at 203.  
\footnote{152} Treaty of St. Peters, U.S.-Chippewa, art. 5., July 29, 1837  
\footnote{153} United States v. Dion, 476 U.S. at 739, does cite Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 690 (U.S. 1979), only to provide the following: “Absent explicitly statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .”}
treaty-reserved rights on the one hand, and state regulations which interfere with treaty-reserved rights on the other: the weight and consideration test applicable to the former, the conservation necessity test applicable to the latter.154

III. ANDERSON v. EVANS AND WHY IT VIOLATES FEDERAL INDIAN LAW

Anderson arose in the wake of the NMFS and the NOAA response to Metcalf. Complying with that court’s directive, in January of 2001 NMFS and NOAA published another Draft Environmental Assessment. The whale quota in this Draft, and in the Makah Management Plan which accompanied it, targeted migrating whales. This meant that whaling would be allowed only in the “open waters of the Pacific Ocean which are outside the Tatoosh-Bonilla Line,”155 thus targeting migratory whales. But the Makah revised their management plan; the amended plan, in contrast to the Tribe’s earlier management plan, did “not contain any general geographic limitations on the whale hunt.”156 This amendment was not incorporated into the Draft Environmental Assessment and there had thus “been no opportunity for public comment on the important”157 change. Additionally, none of the scientific studies relied upon in the Draft EA evaluated the impact of the revised management plan.158 Nevertheless, the NOAA and the NMFS issued a FONSI, thereby obviating the need to proceed, under NEPA, with an EIS.159 The next “step in the administrative saga took place when NOAA and the NMFS issued a Federal Register notice on December 13, 2001 announcing a quota”160 of five gray whales in 2001 and 2002, and in approval of the Makah management plan.161

It should come as no surprise, then, that citizens and animal welfare groups filed another complaint in January 2002, alleging violations of both the National Environmental Policy Act and the Marine Mammal Protection Act. Once again, the Makah Tribe intervened as a defendant, and once again, on the district court level, summary judgment was granted to the defendants, whereupon the plaintiffs, once again, appealed.162 The saga took its most relevant and unhappy turn when the Ninth Circuit considered the plaintiffs’ appeal from the district court’s summary judgment, and reversed the lower court. The court held in Anderson v. Evans that the government’s failure to prepare an EIS violated NEPA and the MMPA’s take moratorium and permitting process was binding upon the Tribe’s exercise of its treaty-reserved right to hunt whales. On November 26, 2003163 and June 7, 2004,164 the Ninth Circuit Court of

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155 Anderson v. Evans, 371 F.3d at 485.
156 Id.
157 Id. at 486.
158 Id.
159 Id. at 485-86.
160 Id. at 486.
162 Anderson v. Evans., 371 F.3d at 486.
163 Anderson v. Evans, 350 F. 3d 815 (9th Cir. 2003).
164 Anderson v. Evans, 371 F.3d 475 (9th Cir. 2004).
Appeals denied en banc rehearings and issued amended opinions which clarified the (faulty) legal reasoning of its decision, but did not alter the conclusion.

Having held that the Marine Mammal Protection Act proscribes the Makah Tribe’s treaty-reserved whaling rights, the Anderson Court stated that they were not overruling the Treaty of Neah Bay’s explicitly-reserved right to whale; this however is in essence the practical impact of the decision. In reaching its conclusion, the Court used the state conservation necessity test which the United States Supreme Court in Puyallup I, II and US v. Washington used to assess the constitutionality of state laws which infringe upon Indian treaty rights, while the MMPA is a federal law. Regardless of the United States Supreme Court’s clear intention to promulgate two distinct tests to assess a federal or a state statute’s constitutionality when the statute infringes upon a treaty-reserved right, it is this latter test, this state conservation necessity test, which the Ninth Circuit followed in applying the MMPA in Anderson v. Evans.

The satisfaction of the state conservation necessity test was instrumental in the Ninth Circuit’s ruling against a Tulalip Indian who shot and killed a bald eagle on the Tulalip reservation in United States v. Fryberg. In Fryberg, the Ninth Circuit faced in 1980 the same issue the Supreme Court would address in 1986 in Dion: whether the Eagle Protection Act modified or abrogated Indian treaty-reserved rights. In deciding the matter, the Ninth Circuit took its cue from the Puyallup cases, applying the state conservation necessity test, this time to a federal statute, which the United States Supreme Court in Puyallup I and Puyallup II etched into judicial granite. Yet each Puyallup case involved state conservation laws, not federal statutes. Further illustrative of the fact that the United States Supreme Court in Dion was developing a distinct test to be used for determining the relevance of federal statutes to treaty-reserved rights, is the incontrovertible fact that not once—not in the text, not in a footnote—in its Dion opinion did the United States Supreme Court six years later mention either Fryberg or any of the Puyallup cases. Indeed, there was no need to mention either because neither was relevant. Instead, there was to be a distinction between manner of determining the relevance of a state’s conservation statute to treaty-reserved tribal rights and determining the relevance of a federal statute to treaty-reserved tribal rights because the provenance of federal authority over Indian tribes differs from the provenance of federal authority over Indian tribes.

The Ninth Circuit was careful to note in Anderson, however, that they were not deciding whether or not the MMPA actually abrogated the Makah treaty-reserved right to whale, holding only that satisfaction of the state conservation necessity test bound the Makah to MMPA regulations. But hearkening to the distinction between regulation and abrogation as a way to avoid the larger abrogation analysis is intellectual sophistry which skirts the issue of whether Congress intended a federal statute to even apply to—and in this way to limit—an Indian treaty-reserved right. Applying the state conservation necessity test to determine the effects of a state statute violates a sacrosanct tenant in

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165 United States v. Horwitz, 622 F.2d 1010 (9th Cir. 1980).
166 See Anderson v. Evans, 371 F.3d at 480 (concluding “that the MMPA applies to the Tribe’s proposed whale hunt.”).
the field of Federal Indian Law and a Supreme Court admonition: congressional intent to modify or abrogate Indian treaty-rights "is not to be lightly imputed." Have ing used the state conservation and necessity test to bind the Makah to the MMPA, the Ninth Circuit has subjected the Makah's treaty-reserved right to whale to the academics and the "expert administrators' whose power-drives" may very well "reflect the rise and fall in our democratic faith." Having used the state conservation and necessity test to bind the Makah to the MMPA, the Ninth Circuit has subjected the Makah's treaty-reserved right to whale to the academics and the "expert administrators' whose power-drives" may very well "reflect the rise and fall in our democratic faith.

IV. THE CURRENT STATE OF THE MAKAH’S EFFORTS

How, then, have the Makah responded? In Ms. Emily Brand’s words:

After two rejected en banc rehearing requests, the Tribe had to decide whether to appeal Anderson to the United States Supreme Court or follow the Ninth Circuit's direction. The Makah chose to forgo appeal and follow Anderson. The possibility of the Supreme Court affirming the decision and creating groundbreaking precedent against treaty rights for all tribes was too big of a risk.

And so in September of 2003, having worked closely with federal agencies “on marine mammal issues for over fifteen years, the Makah Tribe formally instituted a Marine Mammal Management Program” of its own. The Tribe intended to monitor marine mammal populations, particularly the Eastern North Pacific stock of gray whales, within its usual and accustomed whaling areas and to develop regulations “regarding marine mammals that might be stranded in Makah territory or be caught as incidental bycatch in the Tribe’s fisheries.” Paramount among the program’s motives was to “reduce incidental mortality of marine mammals . . . and look at ways to reduce harm to gear.” The program scheduled and oversaw “marksmanship training” for hopeful whaling crews and for the next three years would participate in survey operations, charged with identifying gray whales by visual observations and aerial photographs. In 2004, the Makah Program began to participate in the IWC Scientific Committee meetings—sending its marine biologist to participate in the meetings as a United States delegate—and this collaboration “continued in 2005 and 2006.” In 2004, the Makah marine biologist was invited to join a “research project that documented and monitored contaminants in marine mammals collected” in the Makah’s usual and accustomed whaling grounds. Having become of its own accord entirely satisfied that resuming its

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167 See Menominee Tribe of Indians v. United States, 391 U.S. at 412.
170 Id. supra note 17, at 17.
171 Id.
172 Id.
173 Id. (interior citations omitted).
174 Id. at 18.
175 Id.
176 Id.
177 Id.
treaty-reserved whaling practice yet again would pose absolutely no deleterious effects on the global California Gray Whale population, on February 14, 2005, the Makah sent NOAA Fisheries a request for a limited waiver of the MMPA take moratorium, including the issuance of regulations and any necessary permits. The application submitted explicitly explained the Makah’s request, the applicable law, the international California Gray Whale populations, and the impact Makah whaling may have on the California Gray Whale population.178 In response, NOAA published a notice of availability of the waiver request on March 3, 2005179 and the process began anew for the third time. On August 25, 2005, NOAA Fisheries published a Notice of Intent to conduct public scoping meetings and to prepare the EIS required under NEPA, the MMPA and Anderson, related to the Makah Tribe’s request to resume its treaty-reserved practice of whaling.180 Initially, NOAA proposed that its updated draft EIS would be ready for public comment in December of 2006 and that the final draft EIS would be complete “in August or September” 181 of 2007; the comment period would then begin and a final document, and a final decision, would “follow eight to ten months later, in the summer of 2008.”182 But not until nearly three years later, on May 9, 2008, did NOAA Fisheries announce the release of a draft EIS, and the comment period began.183 And even now, more than four years after the comment period began, NOAA has still failed to make a final determination.

Of particular importance to NOAA’s consideration of the Tribe’s request is information on the genetic structure of the Eastern Northern Pacific Stock of Gray Whales. Three “Technical Memorandums”184 currently under consideration implicitly argue that the 2008 Draft EIS is insufficient for failing to address the possibility that the

181 Renker, supra note 17, at 20.
182 Id.
Eastern North Pacific stock\textsuperscript{185} of the California Gray Whale is sufficiently isolated from the rest of the global population to merit a new Draft EIS. The majority of California Gray whales migrate north to “summer feeding grounds in the Bering, Chukchi, and Beaufort Seas [while] a small number of individuals [of about 200] spend the summer feeding in the waters ranging from northern California to southeast Alaska.”\textsuperscript{186} The scientific/academic community commonly regards the former constituency as the northern feeding group and the latter as the southern feeding group. A California Gray whale learns from its mother “site fidelity to different feeding grounds.”\textsuperscript{187} Because California Gray whale calves have through the ages learned from their mothers what and where a feeding ground is, one memorandum contends that “knowledge of specific feeding areas is only present within certain matrilines. Therefore, if whales are extirpated from a specific feeding ground, they will not be ‘replaced’ (or the area will not be repopulated) by others.”\textsuperscript{188} The memorandum also demonstrates that there are very slight mitochondrial differences extant between the northern and southern feeding groups and argues that these differences predate whaling.\textsuperscript{189} Accordingly, because with the extirpation of the 200 whales which the authors presume comprise the southern feeding group, the strain of whales possessing that slight mitochondrial distinction will not re-populate. The authors themselves concede that there is some degree of migration between the northern and southern feeding groups, but assert that “although reliable estimates of migration rates could not be obtained here, the data clearly show that rate of migration is low enough for the two groups to represent independent demographic entities.”\textsuperscript{190} The authors then conclude that the southern feeding group consequently “qualifies as a separate management unit, and requires separate management considerations.”\textsuperscript{191} While the Memorandum does not state exactly what these considerations should compel, all they can compel is another EIS.

Taking the authors’ contentions to be true, the authors still fail to address the near extirpation of the species and the geographic size of the southern feeding group’s southern feeding grounds. Consider the following: if the southern feeding group is a distinct “management unit,” as the authors contend, and if once extirpated cannot repopulate, then the near extinction of the entire global population of California Gray Whales failed to eliminate that small southern feeding group. But somehow the Makah’s hunting of four whales per year—not necessarily killing four whales per year—when the northern feeding group is also passing through the Makah’s usual and accustomed whaling areas bound for their winter feeding grounds is a sufficiently grave threat to the population of a presumed amount of 200 whales, is enough to merit an entirely new Draft EIS. Further, by the author’s own admission, the southern feeding grounds of the

\textsuperscript{185} “There is widespread agreement that at least two populations of gray whales in the North Pacific exist, a western North Pacific population (also called the Korean population) and an eastern North Pacific (ENP) population (sometimes called the California population).” CALAMBOakis, supra note 184, at 13.

\textsuperscript{186} FRASIER, supra note 184, at 2.

\textsuperscript{187} Id. at 15.

\textsuperscript{188} Id.

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 15-16.

\textsuperscript{191} Id. at 16.
southern feeding group extends from “northern California to southeast Alaska.” But the Makah’s usual and accustomed whaling areas is an area that does not extend south of the Olympic Peninsula.

Still more maddening is that to combat this kind of scientific speculation and murkiness, courts past have fashioned the Canons of Treaty Construction and developed from them the federal weight and consideration test. The recent “Technical Memorandums,” are stultifying the current NOAA process. The potential result of yet another Draft EIS demonstrates just a handful of consequences attending three judges’ decision to bind the Makah’s treaty-reserved right to whale to the rubric of the conservation necessity test, in defiance of Supreme Court precedent.

But the Ninth Circuit for its part seems to have corrected itself and embarked upon a path destined to either proscribe the applicability of Anderson’s use of the conservation necessity test only to assessing the relationship between “state regulations and treaties with ‘in common’ rights,” or ridding itself altogether of the Makah’s tragic, crushing millstone. Addressing a pre-trial motion in a case involving whether or not the Migratory Bird Treaty Act abrogated hunting rights reserved by the Yakama Treaty, on August 13, 2009, federal judge Edward F. Shea of the Eastern District of Washington addressed squarely the Anderson court’s errors. “[A] court analyzing the impact of federal legislation on treaty rights must determine whether Congress clearly and plainly intended to modify or abrogate an Indian treaty right.” Judge Shea then addressed the series of cases – Puyallup I and II and Fryberg – which develop and chart the application of the conservation necessity test to state statutes that would infringe upon Indian treaty-reserved rights. Judge Shea then described the weight and consideration test implemented by Dion, noting that “while Congress has the authority to abrogate an Indian treaty right, a state does not.” Although “the Ninth Circuit [in Anderson] was analyzing a federal [statute], not a state statute or regulation, the Ninth Circuit failed to use congressional treaty abrogation analysis. This failure conflicts with . . . basic principles of Indian treaty analysis.” Judge Shea noted that the Anderson court, despite its intellectual prestidigitations, did recognize that Dion did not discuss the conservation necessity test but the Anderson court erroneously concluded “that the conservation necessity test . . . has not been undermined by later cases and is supported by the Supreme Court authorities.” This “conclusion,” Judge Shea asserted, “was reached without analysis and is wrong. The Supreme Court cases alluded to [in Anderson] involved state regulations and treaties with ‘in common’ rights. When the Supreme Court has explicitly used congressional treaty abrogation analysis to

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192 Frasier, supra note 184, at 2.  
193 See generally Swan, supra note 6.  
196 Id. at 3.  
197 Id. at 8.  
198 Id. at 9 (emphasis in original).  
199 Anderson, 371 F. 3d at 498, n. 22.
interpret federal statutes, the same analysis should be used when interpreting the same federal statutes and treaty rights."

Judge Shea is not alone in this belief. Writing for the District Court from the District of Nevada and similarly called upon to address the extent to which the Migratory Bird Treaty Act may have abrogated Indian treaty-reserved rights, Magistrate Judge Lawrence R. Leavitt similarly criticized the Anderson fiat. "In assessing whether Congress implicitly abrogated a treaty right, what is essential, is clear and convincing evidence that Congress considered the conflict between its intended action on the one hand and Indian treaty rights on the other. [After undergoing this analysis, if Congress subsequently] chose to resolve the conflict by abrogating the treaty . . . the proper approach," continued Magistrate Leavitt, "would be clear but for the Ninth Circuit’s 1980 decision in United States v. Fryberg and the application of Fryberg’s analysis [– the conservation necessity test –] in Anderson v. Evans." Magistrate Leavitt then went on to repeat that in developing its conservation necessity test, the Ninth Circuit based its “doctrine on various Supreme Court cases, all of which involve state conservation statutes or regulations, and not congressional treaty abrogation power.” In recognizing that the Dion Court used the weight and consideration test to determine the applicability of a congressional enactment to a treaty-reserved right, Magistrate Leavitt was similarly careful to note that in Dion the Supreme Court “employed an abrogation analysis in reaching its holding, without once referring to Fryberg or the state-based conservation necessity analysis [from the Ninth Circuit]. Nevertheless, eight years after Dion, the Ninth Circuit in Anderson v. Evans applied the conservation necessity doctrine to a federal statute without recognizing or engaging in an abrogation analysis.” As categorically as Judge Shea had, Magistrate Leavitt then concluded that the “Ninth Circuit’s decision in Anderson cannot be reconciled with the Supreme Court’s decision in Dion.” The Anderson Court’s conclusion that its own conservation necessity test ought to be applied in determining the applicability of congressional enactments to Indian treaty-reserved rights “was reached without analysis.”

The Anderson court clearly conflated the state conservation necessity test with the federal weight and consideration test in holding the Makah’s exercise of their treaty-reserved right to whale bound by the MMPA. But the great tragic irony of the matter is that in defense of four whales per year of the estimated 20,000 global beasts, three circuit judges have embarked upon a course which further erodes tribal sovereignty and cultural identity when the absence of whaling presents devastating consequences on Makah health and their collective psyche. Particularly illustrative of the ridiculousness

200 Order, supra note 195 at 11.
202 Id. at 5-6 (emphasis in original).
203 Id. at 6 (emphasis in original).
204 Id. at 7.
205 Id. at 8.
206 Id.
207 See Renker, supra note 17, at 19 ("[W]hen the Tribe was whaling, young people were involved with ceremonies and remained clean and sober instead of turning to drugs and alcohol. Current data from Neah Bay High School verifies that, in the absence of active whale hunting and its related preparations,
of this fact and the decided, intuitive injustice of it all is the quota of 120 whales per year granted by the IWC—the recognized global expert administrative body on the California Gray Whale—to the Russian Confederation on behalf of the Chukotka while three circuit judges sitting on a domestic American court have prohibited the Makah from hunting four whales per year in exercise of its treaty-reserved right to do so. Compounding the maddening injustice is that in doing this, these circuit judges have chosen to ignore United States Supreme Court precedent in favor of applying the test the Ninth Circuit itself developed, even when the United States Supreme Court has held that the Ninth Circuit’s test is to be applied in determining the effect state statutes—not federal statutes—have on Indian treaty-reserved rights. As Indian Law scholar Felix S. Cohen presciently penned 60 years ago, stifling the exercise of much of what it means to be Makah “reflects the rise and fall in our democratic faith” as the Ninth Circuit brings the Makah under the heel of “expert administrators whose power-drives are always accompanied by soft music about the withering away of the state or the ultimate liquidation of this or that bureau.”

Whereas once the Makah were warriors, mastering the storms and calms and collecting for their kin the giants of the deep, now the Makah have only their bit of earth, the rain, and a whisper, a hope and a dream of re-establishing that practice once abandoned out of respect for the leviathan itself—this as the Ninth Circuit chooses to apply the wrong rubric in order to protect 20 California Gray whales over the course of five years, even as the Makah’s northern neighbors are free to take 120 California Gray Whales in a single 365-day period. The decided, pernicious danger of the Ninth Circuit’s application of its conjured legal precedent in order to subject the Makah to the administrative leviathan is that in choosing to protect four living leviathans per year, even more of what yet remains of tribal sovereignty and cultural distinction is taken from the Makah. While the effects of this loss of cultural identity continue in earnest to affect the Makah, the reason for its taking is entirely illusory.

one in five male high school students is currently using drugs and or alcohol. ... 71.0% of the [recent survey's] respondents view the whale hunt as a means to maintain a healthy lifestyle for youth, as well as increase pride in being a Makah. In addition, [Makah Whaling Commission] members share the opinion that the ceremonies which must occur before a hunt, and the clean/sober lifestyle that hunters and their families must have, are a critical part of the Makah Tribe's spiritual profile. The moratorium on active hunting places Makah families at risk because important ceremonial practices cannot take place. These ceremonies have evolved over millennia, and shall not take place unless hunters are preparing for an actual hunt. Without an active hunt, [Makah Whaling Commission] members fear that an important part of the ceremonial life that was restored during the active hunting period in the late 1990s will remain in jeopardy... it is hard for Makah people to live under the stress of a concerted effort to derail a religious activity and an important aspect of tribal identity whose end product also provides a subsistence benefit.

209 Id. (internal quotations omitted).
SOVEREIGNTY, SAFETY, AND SECURITY: TRIBAL GOVERNMENTS UNDER THE STAFFORD AND HOMELAND SECURITY ACTS*  

Heidi K. Adams**

I. INTRODUCTION

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act), which provides federal guidance and support for disaster relief efforts, American Indian tribal governments lack the ability to directly request a presidential declaration of a major disaster in Indian country.1 Tribes governing reservation land must instead formally request their state governors to ask the President for federal assistance. The Homeland Security Act of 2002 (Homeland Act), which supplies funds and program assistance to state and local governments in order to prevent and respond to terrorist attacks, creates an effect similar to the Stafford Act with respect to Indian tribes. Both the Stafford Act and the Homeland Act list tribes under their constituencies, but only under the definition of “local governments.”2 As such, both of these acts, one targeting general catastrophes and the other aimed at preventing and responding to human-made disasters, force tribal governments to place themselves at the mercy of their state executives. This not only creates administrative roadblocks in

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1 “Indian country” as referred to in this piece is a combination of both the accepted legal definition under 18 U.S.C. § 1151, which includes Indian reservations, dependent Indian communities, and Indian allotments, and Indian lands not covered under this legal definition, particularly with regard to Alaska Native villages. See generally Alaska v. Native Village of Venetie Tribal Government et al., 522 U.S. 520 (1998) (as a result of the holding in this case and the provisions of the Alaska Native Claims Settlement Act of 1971, many Alaska Native villages no longer qualify as “dependent Indian communities,” thereby preventing most land held by Alaska Natives in that state from being considered part of “Indian country” for purposes of jurisdiction). “American Indians” and “Natives” as referred to in this article are used interchangeably as all-inclusive terms for the sake of brevity, and should be considered to reference members of any Indian or Alaska Native tribe, band, nation, pueblo, village, or indigenous community.

situations where timely response is essential, but also infringes upon tribal sovereignty and signifies a breach of the federal government’s duty to adequately provide for tribes.³

In an attempt to address these concerns, the US House of Representatives is currently reviewing a bill proposing amendments to the Stafford Act. The amendments would provide tribes with the option of directly communicating emergency requests to the President and federal agencies, thereby addressing the needs of Native communities while reinforcing tribal sovereignty.⁴ Congress should therefore amend the Stafford Act as proposed, supporting the creation of a more robust emergency management system that treats Indian tribes equally compared to state and local governments.

Congress should also change the Homeland Act to mirror the amended version of the Stafford Act. Unfortunately, the Homeland Act has received less attention during the legislative proposal to amend the Stafford Act. This could be due to several factors: first, the Homeland Act is relatively young and untested within Indian country. Second, environmental threats and disparities in environmental justice seem more prevalent in this time of climate change and increasingly extreme weather patterns. Third, media coverage on the issue of climate change has risen, and along with it, increased awareness of environmental justice issues. Compared to the emergence of environmental justice awareness, the threat of foreign and domestic terrorism to tribes seems miniscule. Still, tribes and their allies should advocate for amending the Homeland Act now, in order to capitalize on the momentum of Congress’s current attention to redrafting the language problems within the Stafford Act. Most importantly, strengthening the position of Indian tribes within the paradigm of homeland security now could prove to be pragmatic in the long-term, rather than waiting until real, significant terror threats occur.

Even if these changes are made, a potential caveat lies in the broad diversity between American Indian tribes. In some cases, smaller tribes with weaker resource bases may be reluctant to alter the current scheme, as states often bear the brunt of implementing and paying for disaster preparations and relief. Thus, it may be most prudent for Congress to amend the Stafford and Homeland Acts in a way that would provide dynamic flexibility between individual tribal governments. Specifically, these


⁴ Id.
amendments and subsequent programs would be stronger if crafted to echo the policies of current federal environmental legislation, such as the Clean Water Act (CWA), the Clean Air Act (CAA), and the Safe Drinking Water Act (SDWA). These statutes allow tribes to determine internally if they want to apply for “Treatment in the Same Manner as a State” (TAS)\(^5\) status and formulate their own tribal environmental regulation entities, or if they wish to function entirely under the appropriate federal agency. In either case, states are precluded in these pieces of legislation and administrative procedures from participating in—or interfering with—tribal affairs. Thus, tribes would be afforded wide latitude in determining how to exercise their inherent sovereignty.

This article analyzes the current effects of the Stafford and Homeland Acts’ provisions with regard to Indian country, including difficulties faced by tribes and social justice implications for indigenous groups. The examination of applicable federal Indian law and policy will follow, along with a discussion of the importance of tribal sovereignty and the ways in which the current legislation violates these principles. Finally, this article will conclude with a review of the 2011 proposed amendments to the Stafford Act, as well as an outline of recommendations for Congress and tribal advocates to borrow tenets from environmental regulation and weave these into disaster prevention and recovery laws.

II. TRIBAL GOVERNMENTS UNDER THE STAFFORD AND HOMELAND ACTS

Under the Stafford and Homeland Acts, states are the primary beneficiaries. The acts authorize the President to grant funds to states for disaster preparation and relief, rather than funding efforts to “local governments.”\(^6\) The Stafford Act defines “local government” as including “an Indian tribe or authorized tribal organization, or Alaska Native village or organization.”\(^7\) The Homeland Act also lists “an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation” under its definition of “local government.”\(^8\) Thus, tribal lands are subordinate to states within the structure of these statutes.

This is particularly harmful to tribes in light of the complex nature of Indian land holdings. Indeed, jurisdiction and property ownership in Indian country are often described in legal scholarship as intricate “patchwork” or as creating a “checkerboard.”

\(^5\) Treatment in the Same Manner as a State, U.S. Environmental Protection Agency (June 25, 2012), http://www.epa.gov/2012/06/tp/laws/tas.htm/American-Indian-Office-Tribal-Portal (last visited Nov. 16, 2012).
\(^7\) 42 U.S.C. § 5122(7)(B).
Some land may be held in fee by tribal member individuals, or by the tribal government. Or, some parcels may be held in trust by the federal government for tribal or individual tribal member use. Numerous pieces of reservation land are leased to nontribal entities by the tribes or the federal government. To complicate the situation further, many land tracts in Indian country have multiple tribal member owners who hold restricted trust land in undivided shares—a product of decades of estate and probate practices that have continually fractionated Indian property allotments with each generation.9 Some of these allotments never passed to Indian descendants, as non-Indians settled on reservation lands that were “opened” by the federal government. This “checkerboard pattern . . . renders management and regulation of those lands and the peoples on them cumbersome at best.”10 Thus, in disaster law, adding the state as another player in this scheme complicates the framework from every angle, from pre-disaster planning and preparation to emergency response and recovery.

The Stafford Act provides program funds for “Pre-disaster Hazard Mitigation” that are awarded as a result of recommendations to the President from state governors.11 Each year by an October 1 deadline, state governors are required to identify and recommend at least five local governments (including tribal governments) to receive this type of funding.12 But state executives often have limited contact with tribes and tribal governments. While statistics are not available to show how many tribes as “local governments” are nominated by their respective state governors for federal pre-disaster hazard mitigation help, it seems likely that tribes are underrepresented within this scheme because the qualifications for such funding include proving cost-effectiveness and need, which can be difficult to show when compared to more populous or urban regions within a state. Thus, tribes face difficult barriers in garnering federal assistance through their states’ recommendations.13

Nevertheless, for certain types of funding, states may be forced into lending assistance to tribal governments. The Stafford Act requires that in order to be eligible for “an increased Federal share for hazard mitigation measures . . . a State, local, or tribal government shall develop . . . a mitigation plan that outlines processes for identifying natural hazards, risks, and vulnerabilities of the area under the jurisdiction of the government.”14 This section specifically names tribes as if they are separate and distinct from local governments, requiring that “[e]ach mitigation plan developed by a local or

10 Id. at 127.
12 Id.
13 See infra Part V.
tribal government shall (1) describe actions to mitigate hazards, risks, and vulnerabilities identified under the plan; and (2) establish a strategy to implement those actions.”

States have a similar requirement to identify risks and vulnerabilities, but also to “support development of local mitigation plans” and “provide for technical assistance to local and tribal governments for mitigation planning.” For Native communities, the explicit reference to tribal governments is a definite improvement over a strict definition of tribes as “local governments.” But while the Act expressly forces states to offer technical support for tribal programs, this system ultimately contravenes federal Indian policy and the spirit of tribal sovereignty.

The requirement of state governments to support mitigation planning efforts by tribal governments may be helpful to tribes, but presents an anomaly within the framework of federal Indian law. The separation of tribal and local governments under this section of the Stafford Act underscores the inclusion of tribes in the competition for state program assistance and federal funds along with cities, towns, and counties. Thus, tribes should have state support equal to that of other local governments when creating hazard mitigation plans. However, this still places tribal governments at the mercy of their state executives, a concept that violates basic federal Indian law principles.

Similarly to pre-disaster hazard mitigation funding procedures, when disasters do occur, tribes must again seek assistance from the President through their state executive. But while the Stafford Act clearly states, “[a]ll requests for a declaration by the President that an emergency exists shall be made by the Governor of the affected State,” an exception may exist. Indeed, the President may act and declare a disaster without gubernatorial request “when he determines that an emergency exists for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority.” While tribes are not specifically mentioned in this section, the relationship between the federal government and Indian tribes should fall under this category. Thus, it is possible that the President has the ability to declare a major disaster in Indian country notwithstanding a request from a state governor. This possibility has never been exercised before 2010, begging the question of whether tribes are aware that they may

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15 Id. at § 5165(b).
16 Id. at § 5165(c).
17 Federal Indian law prescribes a duty of the federal government to care for and act as fiduciary to tribes on multiple levels. This relationship is discussed infra Part V.
18 42 U.S.C. § 5191(a).
19 Id. at § 5191(b).
appeal to the federal government for disaster relief under this procedural exception.\textsuperscript{20} Further, since this exception has been rarely and only recently exercised, it is unknown when and how tribes would qualify for this direct assistance.

\textbf{III. ENVIRONMENTAL AND DISASTER JUSTICE: VULNERABILITIES IN NATIVE COMMUNITIES}

Native communities are one of the most disadvantaged groups in the United States. Widespread poverty and lack of services are common throughout Indian country, leading to vulnerability on many levels.\textsuperscript{21} For example, tribes and their indigenous traditions may be particularly vulnerable to damage caused by environmental change, as “[t]ribal cultural practices and religious beliefs are rooted in the Earth and woven into the web of life. Tribal members use wildlife and plants and other natural resources in ways that are different from other ethnic groups that exist within the American society.”\textsuperscript{22} This dependence and closeness with the environment is true even today; while some tribes in urban areas or with wealth sources (e.g., minerals, gaming) have been able to modernize their lands and lifestyles, “traditional cultural and religious beliefs and practices are still important components of the identities of contemporary Indian people.”\textsuperscript{23} Indeed, when Native lands are threatened by disaster, tribal members may lose access to food sources and important cultural sites, and further suffer emotional trauma from the disaster itself.\textsuperscript{24}

Because a healthful environment is so central to the continuance of indigenous lifeways, environmental changes are often more likely to adversely affect tribes than other communities. Even gradual changes in climate, rather than unexpected and immediate disaster, can harm tribal groups. For instance, temperatures in the arctic

\textsuperscript{20} The Havasupai Tribe, traditionally residing around the Grand Canyon in Arizona, received direct FEMA funding to assist with recovery from floods that devastated the area in October 2010. This marks the first time that a Native tribe has received funds directly from FEMA exclusively for tribal use. Lee Allison, \textit{Havasupai Tribe and FEMA sign disaster agreement today}, ARIZ. GEOLOGY: BLOG OF THE STATE GEOLOGIST OF ARIZ. (Jan. 27, 2011, 8:13 a.m.), http://arizonageology.blogspot.com/2011/01/havasu-tribe-and-fema-sign-disaster.html (last visited Nov. 16, 2012).


\textsuperscript{23} \textit{Id.}

\textsuperscript{24} The Ute Indian Tribe suffered from major flooding and landslides in June 2011, and reported that “[c]ultural sites are . . . expected to be damaged by flood waters and road closures will prevent access to traditional hunting, gathering and ceremonial sites.” Ranae Bangerter & Geoff Liesik, \textit{Tribe declares flooding emergency}, VERNAL EXPRESS, June 8, 2011, http://www.vernal.com/stories/Tribe-declares-flooding-emergency-1548086 (last visited Nov. 16, 2012).
have increased more than in most areas of the globe, melting sea ice and glaciers, thawing permafrost, and altering forest and tundra ecosystems. Aside from issues affecting wildlife, which arctic peoples depend upon for subsistence, the physical makeup of the changing arctic and subarctic is directly endangering indigenous communities. In particular, the increasing arctic temperatures have caused the sea ice to form later in the year than usual, and when the ice does form, it is smaller in area and thinner than normal. The ice then attaches to the coast later in the season, breaks up earlier, and melts earlier. The melting sea ice prevents the buildup of natural protection of the shoreline from harsh storm surges.

This devastating change has created insurmountable challenges for Native villages in the arctic and subarctic regions. For example, the absence of the sea ice buffer has allowed an onslaught of waves against the western coast of Alaska, causing massive erosion and flooding. In one year, over one hundred fifty feet of beach at the Native village of Kivalina disappeared into the sea, forcing villagers to line their encroaching shores, in vain, with sandbags. Likewise, the village of Shishmaref, located on an island above the Bering Strait, lost thirty feet of land in the span of two hours during a storm. Shishmaref lies only a few feet above sea level, and now deals with overnight erosion and flooding.

As another example, the village of Newtok, Alaska, directly west of Bethel, has similar problems with flooding and erosion. Newtok was constructed atop permafrost, which has melted and shifted with the changes in northern climate. Buildings have sunk into the ground, their foundations crumbling and mixing with leaking sewage. Shishmaref, Newtok, Kivalina, and others desperately seeking to move their communities to safer, higher ground have appealed to Congress to help them relocate.

26 Id. The climate change situation in Alaska is also different from “the Lower 48” in terms of the relationships between governmental entities and tribes, because the legal status of Alaska Natives is unique. Only one reservation exists in Alaska, despite the state’s massive size. The remaining Native tribes and villages were divided into twelve regional areas and incorporated into Native-owned corporations. Thus, “tribal members” in the Lower 48 are akin to Alaska’s “Native shareholders.” Furthermore, Alaska Natives—through village and regional corporations—hold most of their lands in fee simple, rather than occupying lands held in trust for Native use by the federal government as in the Lower 48. See Alaska Native Claims Settlement Act, 43 U.S.C. §1601–1633.
30 Id.
inland. Congress has failed to aid the villages, however. In 2008, the Senate did not pass legislation that would have allowed appropriation of funds to relocate Alaska coastal villages. Since then, the situation has become more dire with each season, compelling Alaska Natives to seek federal assistance through the Stafford Act and the Federal Emergency Management Agency (FEMA), rather than new legislation directly addressing the concerns of the villages.31

FEMA, which is tasked with coordinating the federal government’s responsibilities under the Stafford Act, has several disaster mitigation and recovery programs that could be applicable to the climate changes threatening Alaska Native villages.32 In order to qualify for most FEMA disaster mitigation grants, communities must submit mitigation plans for FEMA’s approval.33 Most Alaska Native villages have not done so; but for those that have, the villages face the problem of meeting FEMA’s cost-effectiveness standards. Indeed, “[w]ith low populations and high construction costs in rural Alaska [because of the difficult terrain and high cost of transportation] village relocation projects have low benefit-to-cost ratios.”34 However, Alaska state officials have begun to assist Native villages with creating mitigation plans, specifically with the goal of obtaining grant funding from FEMA.35 While this will undoubtedly aid threatened Alaska Native groups in qualifying for disaster mitigation programs, the cost-benefit analysis required by FEMA remains a significant hurdle because of the relatively low populations and high cost of transporting and working in rural Alaska. Moreover, FEMA generally provides grants on a statewide basis, rather than in local areas.36 Given the size of Alaska and the isolation of some Native villages, federal aid under this framework is unlikely.

31 Arnold, supra note 27. In 2012, Congress enacted the Quileute Indian Tribe Tsunami and Flood Protection Act to assist the Quileute Tribe (located on the Olympic Peninsula in western Washington) with moving several tribal buildings to higher ground. The act has given the tribe 785 acres of trust land carved out of Olympic National Park, which will allow the Quileute to move the tribal school, elder center, and other buildings out of the immediate tsunami zone and floodplain. Pub. L. No. 112-97, 126 Stat. 257 (2012). The legislation is likely a result of concerns for the vulnerable coastal lowlands following the 2011 earthquake and tsunami in Japan. See Richard Walker, Quileute Is Moving to Higher Ground, INDIAN COUNTRY TODAY MEDIA NETWORK, Feb. 28, 2012, http://indiancountrytodaymedianetwork.com/2012/02/28/quileute-is-moving-to-higher-ground-100321 (last visited Nov. 16, 2012).


33 See 42 U.S.C. § 5133(c).

34 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 32, at 22–23.

35 Id. at 34.

36 Id. at 23, n.19.
In addition, FEMA mitigation and recovery programs under the Stafford Act are only applicable in areas that have been declared federal disasters. This poses a problem for Alaska Native groups because “many of the villages are facing gradual erosion problems and have not received a declared disaster designation, [so] they do not qualify for these programs.” Since the Stafford Act requires the governor of an endangered state to request that the President declare a major disaster before FEMA funding can be triggered, Alaska Native villages are thus dependent upon the governor of Alaska to request federal assistance. Considering the remote isolation of many villages and the fact that some are not incorporated as official towns, many villages are unable to request either funding from the state or convince the governor that federal funds are necessary. Where villages are able to gather state and/or federal assistance in creating disaster mitigation plans, most are only able to mitigate their losses by relocating to a safer area, which requires long-term planning and support. In most cases, long-term state and federal aid for villages have proved grossly insufficient.

Of course, Alaska Native villages are not the only indigenous communities threatened by climate change and other disasters. In the summer of 2011 alone, numerous Indian reservations on the Great Plains faced serious flooding issues. The Uintah and Ouray Reservation in northeast Utah depleted its own financial sources from the Ute Tribe Emergency Management Department, as well as funds it had been given from the state, in order to purchase sandbags for flooding. The Blackfeet Indian Reservation in northwestern Montana suffered from flooding problems for several months after an unusually harsh winter caused rivers and culverts to overflow from melting snow on the Rocky Mountains. In eastern Montana, the Crow Indian Reservation saw flooding from record rainfall, damaging hundreds of homes and revealing that many of the homes should have been condemned long before the

37 Id. at 23.
38 “After [the village of Allakaket] was flooded in 1994 and almost completely destroyed . . . homes were moved out of the floodplain . . . but many homes and infrastructure components were rebuilt or replaced in or near the floodplain. In August 1995, FEMA and the Alaska Division of Emergency Services provided a comprehensive plan to the people of Allakaket to use as guidance for completing the relocation process over a 20-year period. Subsequently, without a lead federal or state entity for providing relocation assistance and lacking the internal capacity and resources to sustain the relocation process, Allakaket has made minimal progress over the last 14 years.” Id. at 41.
39 It is likely that the Ute Tribe is able to support its own Emergency Management Department because the reservation is the second largest in the United States, and generates revenue through its oil and gas drilling, as well as its water company that serves the three counties. Bangerter & Liesik, supra note 24.
40 I observed this firsthand during the summer of 2011 while I lived and worked on the Blackfeet Reservation. Several of my clients and friends were forced to live with their family members in already grossly inadequate housing units and used FEMA trailers because the tribal government was unable to secure emergency housing.
floodwaters destroyed them.\textsuperscript{41} Many of these tribal members faced the prospect of completely rebuilding or relocating rather than repairing their homes, causing considerable hardship for some families. Additionally, the flooding in Montana was statewide, triggering the governor to request and receive a presidential disaster declaration.\textsuperscript{42} This secured some federal funding for tribes, but home ownership in Indian country is often complex and not easily discernable.\textsuperscript{43} This presents an issue on reservation lands because “[h]omes that are [tribally owned] are eligible for the FEMA repair funds, but residents who own their homes are responsible for their own recovery and repairs. For those homeowners, flood insurance would be key—but many don’t have it.”\textsuperscript{44} Therefore, FEMA funding through gubernatorial request is ineffective in these situations because no stopgap exists to cover uninsured or underinsured tribal homeowners on federal trust land.

These examples of current disaster-related problems on tribal lands represent the power disparity between tribal governments and states in obtaining assistance for mitigation and recovery programs. Not only do American Indian and Alaska Native communities face disaster on the same level as other communities, but their access to funds and services from the federal government is hindered by the complex nature of land ownership and jurisdiction in Indian country. As well, issues arise due to general vulnerabilities in tribal infrastructure and lack of socioeconomic strength, coupled with the stringent requirements for requesting federal disaster aid. These barriers signify a gross discrepancy between disaster law and federal Indian law, and also indicate an alarming failure on the part of the federal government to support tribal sovereignty.

IV. HOMELAND SECURITY: LACK OF PROTECTION FOR FIRST AMERICANS

Similar to the deficiencies in natural disaster law and procedure, the Homeland Act falls short of addressing tribal-specific concerns. Border patrol in particular can be a challenge to tribal governments, with 260 of the 7,400 miles of US international boundaries lying on tribal lands.\textsuperscript{45} Critics have pointed to the potential for illegal border


\textsuperscript{42} Id.

\textsuperscript{43} Many of my Blackfeet clients did not know if they owned their land parcels or the structures on them, or if the tribe or the federal government owned them and “leased” them (usually for free) or held them in trust for the use of tribal members.

\textsuperscript{44} Crow Reservation, supra note 41.

crossings onto tribal lands where tribal law enforcement is severely limited. Tribes that do not abut international borders are also at risk, as their lands could be targeted by domestic terrorists or other terror entities that have already successfully infiltrated US borders.

Potential terrorism targets are easily found within reservation boundaries, such as underground high-pressure interstate gas lines, manufacturing facilities catering to the US Department of Defense, important freight train routes, nuclear power plants and waste storage sites, hydroelectric dams, and even missile launch facilities. In all of these places, as soon as tribes exhaust their own resources for addressing terrorist threats, state governments will likely control funding for preventing and immediately responding to a terrorist attack. Indeed, the Homeland Act “ignores congressional plenary power over the tribes, . . . [as states] are responsible for distributing the funding from the Department of Homeland Security. . . . Just as a county, city, or town would be subject to state control and supervision, so would a tribe.” Subjecting tribes to state control and supervision thus presents a flagrant violation of the tenets of federal Indian law and tribal rights to self-governance, and ultimately leaves tribes vulnerable to terrorist attack without adequate protections.

V. BALANCING INTERESTS: GOVERNMENT EFFICIENCY AND TRIBAL SOVEREIGNTY

Modern federal Indian law rests upon three cases from the early 1800s, often referred to as the “Marshall trilogy.” In Johnson v. M’Intosh, Cherokee Nation v. State of Georgia, and Worcester v. State of Georgia, Chief Justice John Marshall laid foundational principles for the relationship between the federal government and Indian tribes. In Cherokee Nation, Marshall wrote that Indian tribes were neither state entities, nor foreign powers. Instead, they were “domestic dependent nations,” where the relationship between a tribe and the federal government is equal to that of “a ward

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46 For instance, the Blackfeet Reservation consists of 1.5 million acres of land, including approximately sixty miles along the Canadian border. The Reservation is internally patrolled by four to five on-duty tribal police officers at any given time. Interview with Nathan St. Goddard, Tribal Attorney, Blackfeet Nation (Oct. 11, 2012).
47 Butts, supra note 45, at 385–86.
48 Id. at 389.
49 21 U.S. 543 (1823).
50 30 U.S. 1 (1831).
51 31 U.S. 515 (1832).
52 This article does not focus in detail on these three foundational cases, nor on the following 180 years of Indian law jurisprudence. My summation of these principles is an oversimplification of the vast complexities of federal Indian law. For more in-depth discussion, see Matthew L.M. Fletcher, The Iron Cold of the Marshall Trilogy, 82 N.D. L. REV. 627 (2006).
This relationship, or “trust doctrine,” has been interpreted as a fiduciary duty on the part of the federal government, with Congress ultimately responsible for the trusteeship on behalf of Indian tribes. As such, in exchange for lands and resources ceded by tribes to the federal government, the United States is responsible for protecting and preserving the borders of Indian country. A large part of this includes keeping tribes safe from state encroachment by preventing states from interfering with tribal affairs. But through a century and a half of harmful Indian policies, “that relationship with the United States became tainted, and corrupted by the betrayal of Andrew Jackson’s Executive Branch and by Congress, just as the relationship between all the other Indian tribes and the United States became tainted and corrupted by betrayal.” Thus, the original holdings from the Marshall Court have been twisted, confused, and eroded into modern common law that makes defining today’s theoretical and de facto trust relationship nearly impossible.

Additionally, as a result of the civil rights movement in the 1960s, the federal government initiated a general policy towards Indian self-determination, empowering Congress to enact several laws aimed at strengthening tribal autonomy. Both the trust doctrine and the self-determination policy highlight that there is a strong—albeit often dysfunctional—relationship between Indian tribes and the federal government. This relationship, with a few exceptions left over from darker periods of federal Indian law, precludes states from intruding upon tribal communities. The Stafford and Homeland Acts clearly sidestep these principles by forcing tribes to route their disaster needs through their respective state executives. As such, not only do these laws fail in keeping consistent with federal Indian policy, but they also impede tribal abilities to exercise sovereignty.

53 Cherokee Nation, 30 U.S. 1, 2 (1831).
54 Id. at 17–18.
55 Id.
56 Fletcher, supra note 52, at 661.
58 For instance, the federal government as trustee is responsible for representing tribes in certain legal actions, even when an agency of the federal government is on the other side of such a lawsuit. See, Ann C. Juliano, Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes, 37 GA. L. REV. 1307 (2003) (“The Department of Justice takes a very Darth Vader-like position in its representation of Native American tribes. . . . When the Department of Justice seeks to resolve a conflict between a tribe and an agency, the conflict is not between two Executive agencies; rather, it is between trustee and beneficiary.”)
59 For example, Public Law 83-280 (PL-280), which was enacted in 1953, transferred jurisdiction in Indian country from the federal government to some states. PL-280 did not require consent of Indian tribes, and tribes were not consulted. 18 U.S.C. § 1162; 28 U.S.C. § 1360.
In an effort to clarify federal Indian policy, President Clinton issued Executive Order (EO) 13,175 in late 2000 entitled, “Consultation and Coordination with Indian Tribal Governments.” In his order, the President outlined three fundamental principles to guide governmental agencies in formulating policies that impact Indian country. First, the order delineates the Marshall trilogy concepts of federal Indian law—that the US government holds a special and unique legal relationship with tribes, where tribes are “domestic dependent nations” under the protection of the United States as trustee. Second, the President recognized that “[a]s domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory,” and that the working relationship between tribes and the federal government is on a “government-to-government basis.” Third, the EO states unequivocally that “[t]he United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.” Again, the Stafford and Homeland Acts are crafted in such a way to prevent this government-to-government communication between the United States and tribes. Thus, these disaster laws do not conform to this important presidential reiteration of the federal duty to protect and support tribal sovereignty.

Federal agencies following the three guidelines set forth in EO 13,175 are thus instructed to respect tribal self-governance, and to create and implement policies according to the trust relationship. In general, agencies must “grant Indian tribal governments the maximum administrative discretion possible,” as well as defer to tribes wherever possible when establishing agency standards and goals. Despite the strong language commanding maximum participation and deference to Indian tribal governments, federal governmental agencies may struggle with ambiguities strewn throughout the EO. For instance, defining the boundaries of where it is “possible” to allow for maximum tribal discretion could cause glitches where agencies are forced to balance the goals of preserving tribal sovereignty with resource allocation and expertise. Particularly where agencies are not equipped with culturally competent agency-tribal liaisons, following the EO could require overcoming significant communication obstacles between agencies and tribes.

One way to defeat this obstacle is to prescribe specific programmatic functions within agencies, where an employee trained in tribal relations is designated for the position of ensuring support for tribal objectives, while also advocating internally for

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60 Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); see also Cherokee Nation, 30 U.S. 1 (1831) (jurisdictional holding, wherein Chief Justice John Marshall ruled that the relationship between Indian tribes and the federal government is that of a “ward to its guardian”).


62 Id. at § 2(b).

63 Id. at § 2(c).

64 Id. at § 3(b).
agencies to meaningfully consider and consult with tribes when promulgating policies and regulations.\footnote{FEMA’s 2010 tribal policy statement promises that the agency will “[c]onsider the designation of full-time tribal liaisons in appropriate FEMA regional offices and explore the possibility of assigning attorneys within the FEMA Office of Chief Counsel (OCC) who are trained and experienced in Federal Indian Law.” FEMA, FEMA TRIBAL POLICY 4 (June 29, 2010), available at \url{http://www.fema.gov/pdf/government/tribal/fema_tribal_policy.pdf} (last visited Nov. 16, 2012).} Furthermore, this could aid in increasing general agency knowledge and effectiveness, especially in the field of environmental regulation and response to natural disasters where tribes are more acquainted with their local ecosystems than outsiders.\footnote{This is often referred to as “indigenous knowledge” or “traditional ecological knowledge,” defined as “the culturally and spiritually based way in which indigenous peoples relate to their ecosystems,” where environmental knowledge collected over the span of generations can aid scientists and policymakers in determining and understanding environmental impact and change. See generally Winona LaDuke, \textit{Traditional Ecological Knowledge and Environmental Futures}, 5 COLO. J. INT’L ENVT’L L. \\& POL’Y 127 (1994); Erika M. Zimmerman, \textit{Valuing Traditional Ecological Knowledge: Incorporating the Experiences of Indigenous People into Global Climate Change Policies}, 13 N.Y.U. ENVT’L. L.J. 803 (2005); Rebecca Tsosie, \textit{Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge}, 21 VT. L. REV. 225 (1996).}

In addressing the shortcomings of self-determination policies, federal agencies have begun taking steps to work cooperatively with tribal governments. In late 2009, President Obama attempted to address ambiguities in EO 13,175 by issuing a memorandum instructing agencies to complete “a detailed plan of actions [each] agency will take to implement the policies and directives of Executive Order 13,175” within ninety days.\footnote{Memorandum on Tribal Consultation for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) [hereinafter 2009 Memorandum].} The President explained that his administration is “committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.”\footnote{Id.} Agencies were further directed to consult with tribal officials in creating their plans, and to continually report on their progress to the President.\footnote{Id.}

Following President Obama’s memorandum, FEMA in 2010 released a document outlining its tribal policy. According to FEMA, in doing so it had “engaged all Federally-recognized [sic] Tribes to gather suggested revisions to FEMA’s existing Tribal Policy,” integrating feedback and ideas from these meetings in order to “enhance FEMA’s relationship with the Nation’s American Indian and Alaska Native Tribal communities to support preparing for, recovering from, mitigating, and responding to all natural and manmade hazards and disasters.”\footnote{FEMA TRIBAL POLICY, supra note 65, at 1.} Importantly, FEMA’s resulting policy states:

FEMA acknowledges the inherent sovereignty of American Indian and Alaska Native Tribal governments, the trust responsibility of the federal government, and the nation-to-
nation relationship between the US Government and American Indian and Alaska Native Tribal governments as established by specific statutes, treaties, court decisions, executive orders, regulations, and policies. FEMA further acknowledges the precedents of the Constitution, the President of the United States, and the US Congress as the foundation of this policy’s content. 71

However, FEMA’s policy also states that while it will follow the spirit of the policy’s content—presumably stemming from EO 13,175 and the 2009 Presidential Memorandum—the policy will have to operate within the confines of existing law and will remain consistent with current authority. 72 But current authority points to the Stafford and Homeland Acts, which lump tribes within the definition of “local governments.” Therefore, without amending these two pieces of legislation, FEMA’s Tribal Policy contradicts the procedural requirements of federal disaster law and ultimately has little real effect upon practices of engaging tribes on a government-to-government basis. While new policy from the executive branch requires “regular and meaningful consultation and collaboration with tribal officials,”73 doing so could effectively mean operating outside the construction of the Stafford and Homeland Acts.

VI. PROPOSED LEGISLATION: ATTEMPTS TO ELEVATE TRIBAL STATUS

Congressman Nick J. Rahall from Wyoming introduced a bill in the House of Representatives on May 24, 2011, proposing significant amendments to the Stafford Act with regard to American Indian tribes. 74 In addition to minor changes to the language of the original Stafford Act, HR 1953 states under “Indian Tribal Government Requests” that “[t]he Chief Executive of an affected Indian tribal government may submit a request for declaration by the President that a major disaster exists.”75 This simple provision is key in addressing the barriers for tribal government in directly requesting and receiving federal assistance. Additionally, the use of the word “may” in this amendment would presumably allow tribes the option to continue routing requests through state executives. This supports both tribal sovereignty—allowing tribes to autonomously make decisions about whether to approach the federal government directly or to continue within the Stafford Act’s historical scheme—and also indicates congressional understanding of the wide variances between tribes and their respective resources and interests.

71 Id. at 2.
72 Id. at 2, 4.
73 2009 Memorandum, supra note 67.
74 Capriccioso, supra note 3.
Next, HR 1953 would amend the Stafford Act to designate tribes as separate government entities. The bill specifies that when a tribal chief executive requests a declaration of disaster from the President in order to qualify for federal assistance, “references to ‘State’ and ‘Governor’ in . . . this Act shall mean ‘Indian tribal government’ and the ‘Chief Executive’ of an affected Indian tribal government, respectively.” The same language is repeated for emergency declarations in addition to major disaster declarations. Furthermore, “Indian tribal government is defined” as “the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List,” and that “[t]he term ‘Chief Executive’ means the person who is recognized by the Secretary of the Interior as the chief elected administrative officer of an Indian tribal government.” The proposed amendment clearly attempts to be as inclusive with tribes as possible. Importantly, it also allows tribes the choice to opt out, thereby supporting sovereignty principles in multiple ways. It potentially strengthens the tribal-federal relationship as well by providing tribal governments with an avenue for directly communicating their needs with the federal government—an ability that should be protected on all levels of federal procedure in order to comply with foundations of Indian law, EO 13,175, and President Obama’s 2009 Memorandum.

While the proposed amendment to the Stafford Act is a vital step for protecting tribal self-government and strengthening the tribal-federal relationship, this change may fall short of addressing increasing needs in Indian country. For instance, coastal villages in Alaska facing climate change emergencies still would not qualify under FEMA cost-benefit requirements and continue to face an uphill battle securing funds through the traditional meaning of a “disaster.” Furthermore, the proposed amendment does not necessarily provide additional scaffolding to support tribes in creating functional and professional emergency management departments, so significant economic barriers remain for smaller and poorer tribes.

In 2009, Congressman Frank Pallone, Jr. of New Jersey introduced HR 1697, which is intended to “ensure the coordination and integration of Indian tribes in the National Homeland Security strategy and to establish an Office of Tribal Government Homeland Security within the Department of Homeland Security.” The bill appears to have died before reaching the Senate, but acknowledged in its findings that “[d]espite the government-to-government relationship between Indian tribes and the United States, the Unites States has failed to include and consult with Indian tribes with regard

76 Internal quotation marks added. Id.
77 Id.
to homeland security prevention, protection, and response activities planning.\textsuperscript{79} The bill would have provided for full participation of tribal governments within national security strategies, as well as given tribes shares of funding to prevent and respond to terror threats. The proposal outlined several goals for enhancing coordination of Indian tribes with the Department of Homeland Security (DHS), including meeting the federal government’s trust responsibility to American Indians.\textsuperscript{80} If Congress had enacted this piece of legislation, it would have elevated tribes to equal status as states and local governments in dealing with terrorist threats. The failure to create a tribal government department within DHS thus leaves tribes on the periphery of national security policies, and limits the government-to-government relationship between tribes and the federal government.

The death of HR 1697 is particularly disappointing considering the potential shortcomings of HR 1953. The former would have made an extraordinary leap for American Indian rights and sovereignty, providing tribes and DHS with a comprehensive system that would have compelled the federal government to cooperate as equals with tribal entities and to fund them accordingly. In contrast, HR 1953 would signify a step in a healthy direction for tribal sovereignty, adding tribal governments in the Stafford Act as separate from local and state governments. But HR 1953 does not acknowledge basic and unique challenges in Indian country that must be addressed in order to make disaster preparation, mitigation, and response systems fully effective.

\section*{VII. Treating Tribes in the Same Manner as States in Disaster Law}

Treating tribal governments in the same way as states would address many of these issues in both the Stafford and Homeland Acts. In fact, current regulations in environmental law provide a glimpse of how this proposed framework could successfully function. Under the CAA, CWA, and SDWA, tribes may be granted treatment as state (TAS) status in order to allow tribal governments to exercise regulatory and civil jurisdiction over tribal lands. The purpose of bestowing tribal TAS status is “to recognize and promote the right of tribal governments to protect the health and welfare of their members,” thereby reinforcing tribal sovereignty and strengthening the tribal-federal

\textsuperscript{79} Id.
\textsuperscript{80} The bill also purported to provide funds for the Indian Health Service and the Bureau of Indian Affairs in order to “respond to the homeland security needs of American Indians and Alaska Natives, without jeopardizing the non-security missions of the Indian Health Service and the Bureau of Indian Affairs.” Id. Particularly with respect to IHS, budget constraints and underfunding are a chronic issue in Indian country. If a human-made disaster were to occur within Indian country, IHS would likely be grossly incapable of an appropriate emergency medical response.
relationship by preventing outside encroachment upon tribal regulatory rights.\(^{81}\) Even if the Stafford Act is amended through HR 1953 and Congress follows suit with a parallel amendment to the Homeland Act, these provisions may be more beneficial to tribes if additional procedures are inserted to echo those within the CAA, CWA, and SDWA.

In order to qualify for TAS status under these environmental statutes, tribes must achieve the approval of the Environmental Protection Agency (EPA), through the following conditions:

1. The tribe must be federally recognized and must be “exercising governmental authority over a Federal Indian reservation.”
2. The tribe must have “a governing body carrying out substantial governmental duties and powers.”
3. The functions exercised by the Indian tribe must pertain “to the management and protection of water resources which are . . . held by the Indian tribe . . . [or] held by the United States in trust for Indians . . . [or] held by a member of the Indian Tribe if such property interest is subject to a trust restriction or alienation, or otherwise within the borders of the Indian reservation.”
4. The Indian tribe must be “reasonably” capable, in the “Administrator’s judgment, of carrying out the functions.”\(^{82}\)

Once these baseline requirements are met, qualifying tribes must submit a statement detailing the nature of the land and resources to be regulated by the tribe, as well as a description of the management capabilities of the tribal administration. This description should also contain a comprehensive plan for gaining the expertise and tools needed for effective regulation, including a strategy for gaining the necessary funds for resource management.\(^{83}\)

Tribal governments would be more likely to achieve a clearer understanding of best practices for disaster prevention, mitigation, and recovery programs with the implementation of these TAS status procedures. Tribes would be able to gain easier access to a higher level of support from federal agencies during the planning process, as this would elevate tribal status to a point where the EPA or FEMA would serve as supporting agencies, rather than as the primary administering agencies. Most importantly, TAS status under the Stafford and Homeland Acts would provide tribes the option to internally prioritize safety and security issues, thereby providing tribal


\(^{82}\) Marren Sanders, *Clean Water in Indian Country: The Risks (and Rewards) of Being Treated in the Same Manner as a State*, 36 WM. MITCHELL L. REV. 533, 538 (2010) (outlining 40 C.F.R. § 131.8(a)(1)–(4) and 40 C.F.R. § 131.3(l)).

\(^{83}\) Id. at 538–39.
governments discretion in exercising their inherent sovereignty in protecting their lands and people.

However, TAS status also has its shortcomings. It mirrors paternalistic policies with strict application requirements, thereby forcing theoretically sovereign nations to apply for power they should already possess. In addition, some Indian reservations contain considerable populations of nontribal members who may resent being subject to tribal jurisdiction. For instance, in the 1990s the EPA granted TAS status under the CWA to the Confederated Salish and Kootenai Tribes in order to regulate pollutant discharges on the Flathead Indian Reservation in Montana.84 The Flathead Reservation holds within its boundaries several nontribal facilities owned in fee simple by state, county, and municipality entities, in addition to a high population of nonmembers.85 Several nontribal groups challenged the EPA’s TAS designation, questioning the tribes’ jurisdictional ability to control and regulate activities of nontribal entities within the external boundaries of the reservation.86 While the court ultimately upheld the TAS grant, the tribes faced much resistance and tension as a result of the EPA’s delegation of authority.87

Finally, the TAS status framework cannot alleviate the challenges faced by poorer and smaller tribes. Tribes without strong revenue sources would have difficulty demonstrating to the administering agency that they could fund their own regulations for disaster planning and response, especially if tribes want to lead planning efforts for national security risks in addition to environmental disasters. Each area of disaster law would require a different set of tools and expertise, thereby requiring more tribal time and money to put these systems in place. Additionally, tribes with smaller population and/or land bases would likely struggle to justify the use of limited resources for disaster regulation. As such, a faithful application of the TAS status regime would probably not function seamlessly in every tribal environmental or security management project. Instead, the optimum approach for tribes could be a framework that combines TAS regulations and the amended Stafford and Homeland Acts.

VIII. Conclusion

The best option for tribes could be a hybrid of current and amended disaster laws combined with the TAS status system in environmental law. Identifying and then blending the best practices from both realms may be an ambitious task, as it would first

85 Id. at 1139–40.
86 Id. at 1140.
87 Sanders, supra note 82, at 544.
require selecting the provisions that are most beneficial to tribal entities. Even through careful selection and merging of these provisions, the resulting system would not necessarily address the funding issue, which is often an underlying roadblock for programs in Indian country. But it may still be worthwhile—the hybrid model could compel the EPA, FEMA, DHS, Customs and Border Protection, and Congress to meet tribal governments at an equal level to address the threats and interests of those in Indian country. It would also create a dynamic system, wherein tribes that do have the capability to implement their own disaster regulations would be able to do so with direct federal support. At the same time, tribes that do not have the resources or choose not to create their own programs could still rely on the federal government and retain their sovereignty instead of appealing to states for assistance. Finally, a hybrid model would also benefit the federal government by easing administrative burdens while satisfying federal aims of supporting tribal self-governance.

Regardless of whether this hybrid strategy is employed in the future for tribes within the disaster law realm, the Stafford and Homeland Acts must be amended to remove tribal governments and lands from the legal definitions of “local government.” The current statutes have proven too dangerous for the well-being of tribal lands and peoples, as the laws force tribal governments to beg their state executives for assistance that may never be granted, or may be granted in grossly inadequate form. Thus, when disasters do strike in Indian country, tribal members often suffer needlessly due to this basic lack of services and access. Amending the Stafford and Homeland Acts would not only begin the process of addressing these dramatic shortcomings, but would also comply with federal law regarding the US government’s obligations to American Indian tribes and, perhaps most importantly, would give greater deference to inherent tribal rights for sovereignty and self-determination. Without serious, fundamental changes to these laws now, along with continual reassessment and restructuring in the future shaping of disaster law, American Indians remain subject to grave social injustices in times of great need.
DEFINING THE CONTOURS OF THE INFRINGEMENT TEST IN CASES INVOLVING THE STATE TAXATION OF NON-INDIANS A HALF-CENTURY AFTER WILLIAMS V. LEE

Nathan Quigley

I. INTRODUCTION

In 2004, the accounting firm for Atlantic City Coin, a slot machine distributor and lessor, made a small administrative error. The accounting firm mistakenly filed a personal property tax declaration with Ledyard, Connecticut for slot machines leased to the Mashantucket Pequot Tribe. The Tribe leased the slot machines for use in its palatial and lucrative Foxwoods Resort Casino, located on the Tribe’s reservation and within the borders of Ledyard. Once Ledyard received the tax declaration, it predictably assessed its property tax against Atlantic City Coin. This small administrative error ignited a large legal battle over Ledyard’s attempt to impose taxes on personal property owned by non-Indians on the Mashantucket Pequot Reservation.

In response to Ledyard’s taxing efforts, the Tribe sought declaratory and injunctive relief from the application of the tax in the United States District Court for the District of Connecticut. In September 2011, after years of litigation, both the Tribe and Ledyard filed cross motions for summary judgment. In the Tribe’s motion, it argued that Ledyard was barred from imposing its personal property tax on the slot machines located on the reservation for three independent reasons. First, the Tribe argued that the tax was preempted by federal statute. Second, the Tribe argued that federal and tribal interests preempted the state tax under the Bracker interest-balancing test. Finally, the Tribe argued that the tax unlawfully infringed on its ability to “make [its] own

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1 J.D. Seattle University School of Law, 2012; B.A., Colby College, 2005. Special thanks to Professor Eric Eberhard, Bree Blackhorse, and Shay Story for their encouragement and advice on this paper.
5 Id. at 17–18.
8 Id. at 20. Specifically, the Tribe argued that the tax was preempted by the IGRA, S. Rep. No. 100-446, at 5 (1988), and the Indian Trader statutes, 25 U.S.C. §§ 261-264.
9 Id. at 28.
laws and be ruled by them."\textsuperscript{10} The United States Supreme Court enunciated this basis for limiting state regulation on Indian reservations in the 1959 case of \textit{Williams v. Lee}.\textsuperscript{11} This principle has become known as the infringement test, and it protects the inherent right of Indian tribes to be self-governing.\textsuperscript{12} While the infringement test remains a central principle of Federal Indian law, the United States Supreme Court’s subsequent jurisprudence does not make clear to what extent \textit{Williams v. Lee} still stands as a barrier to state taxation of non-Indians in Indian Country.

In \textit{White Mountain Apache Tribe v. Bracker},\textsuperscript{13} the Supreme Court stated that the infringement test is an “independent” barrier to state taxation.\textsuperscript{14} However, Indian law scholars note that the infringement test is “seldom decisive in the tax context.”\textsuperscript{15} For example, Ninth Circuit Judge William C. Canby, Jr. explains that:

Although nearly all [recent cases involving state taxation of non-Indians] depend largely or entirely upon preemption analysis, the rule of \textit{Williams v. Lee}—that the states may not interfere with the right of reservation Indians to make their own laws and be governed by them—has been held to be an \textit{additional, independent limitation on the states’ power to tax}. So stated, the rule would doubtless curb any attempt of the states to tax the sovereign functions of the tribes. Where the tax is upon nonmembers, however, the absolute prohibition of \textit{Williams v. Lee} tends to recede into the background while the courts engage in the balancing of interests called for by the preemption approach that they prefer. When that process results in the preemption of the state tax, the rule of \textit{Williams v. Lee} is sometimes then invoked as additional support for the result.\textsuperscript{16}

It is difficult to understand why the infringement test is called an “independent barrier” to a state’s authority to tax non-Indians on the reservation when the courts continually decide cases by focusing on preemption with “at most a passing reference to infringement.”\textsuperscript{17} Stated another way, how can the infringement test be an independent limitation if it consistently “recede[s] into the background” while courts focus on preemption?\textsuperscript{18}

\textsuperscript{10} \textit{Id.} at 37–38 (citing \textit{Williams v. Lee}, 358 U.S. 217, 220 (1959)).
\textsuperscript{12} \textsc{Stephen L. Pevar}, \textsc{The Rights of Indians and Tribes} 133 (3d ed. 2002).
\textsuperscript{14} \textit{Id.} at 142 ([C]ongressional authority and the ‘semi-independent position’ of Indian tribes has given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. Second, it may lawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’”) (citations omitted).
\textsuperscript{15} Erik M. Jensen, \textsc{Taxation and Doing Business in Indian Country}, 60 \textsc{Me. L. Rev.} 1, 61 (2008).
\textsuperscript{16} \textsc{William C. Canby, Jr.}, \textsc{American Indian Law in a Nutshell} 304–305 (5th ed. 2009) (internal citations omitted) (emphasis added).
\textsuperscript{17} Jensen, \textit{supra} note 15, at 61.
\textsuperscript{18} Canby, \textit{supra} note 16, at 304.
Acknowledging this incongruity, the Tenth Circuit recently questioned the continuing validity of the infringement test. In *Muscogee (Creek) Nation v. Pruitt*, the court said that “some have questioned the continued applicability of the infringement barrier . . . Based on the Supreme Court’s repeated mention of the infringement prong, we conclude it is still a necessary part of our analysis.” The Tenth Circuit is correct that this area of the law is in need of clarification.

This paper will review the Supreme Court’s cases involving state taxation of non-Indians in Indian Country to define the current contours of the infringement test. Specifically, this paper argues that since *Williams v. Lee* was decided in 1959, the Supreme Court has substantially weakened the power of the infringement test to stand as a barrier to state taxation of non-Indians in Indian Country. To that end, this paper proceeds in four parts. Part II introduces *Williams v. Lee* and then analyzes four Supreme Court cases that have discussed the infringement test: *McClanahan v. State Tax Commission of Arizona*, *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, *Washington v. Confederated Tribes of the Colville Indian Reservation*, and *White Mountain Apache Tribe v. Bracker*. Next, because the infringement test “derived from notions of tribal sovereignty,” Part III discusses *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*, two cases that drastically changed the limits of tribal sovereignty. Based on the analysis of these cases, Part IV argues that the Supreme Court has substantially weakened the power of the infringement test to shield non-Indians in Indian Country from state taxation. Finally, Part V discusses how the court in *Mashantucket Pequot Tribe v. Town of Ledyard* addressed the Tribe’s infringement test argument and offers a brief conclusion.

II. THE COURT’S ENUNCIATION AND SUBSEQUENT DISCUSSION OF THE INFRINGEMENT TEST

A. *Williams v. Lee* (1959)

The Court enunciated the principle that has become known as the infringement test in the landmark case, *Williams v. Lee*. *Williams* involved a non-Indian who owned a general store on the Navajo Reservation and sold goods on credit to a tribal member. Seeking to collect the debt, the storeowner sued the tribal member in Arizona State court, even though a Navajo tribal court was available to hear the case.
The storeowner won the case, and the Supreme Court of Arizona affirmed the judgment. On appeal, the United States Supreme Court considered whether the Arizona courts had jurisdiction to hear the controversy. The Court held that the Arizona courts could not exercise jurisdiction over the dispute because to do so "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 

In *Williams*, Justice Black cites to *Worcester v. Georgia*, calling Chief Justice Marshall’s 1832 opinion “courageous and eloquent.” The Court in *Worcester* established the principle that the tribes have inherent sovereignty because they are “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.” The Court used this principle to invalidate Georgia’s attempts to extend its laws to the Cherokee Reservation. Chief Justice Marshall said that the Cherokee nation is a “distinct community, occupying its own territory in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.”

Many Indian law scholars view *Williams* as faithful to *Worcester*. For example, Professor David H. Getches argues that the *Williams* Court “vindicated tribal sovereignty in a modern context” and “confirmed the modern Court’s adherence to foundation[al] principles [of Federal Indian law].” However, *Williams* can also be read as a departure from *Worcester*.

In *Worcester*, the Court held that, absent an act of Congress or a treaty, state action on Indian reservations was presumptively invalid because of the inherent powers of the tribes. In contrast, in *Williams*, the Court said that “[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” This frames state action as presumptively valid; the holding of *Williams* allows

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32 Id.
33 Id.
34 *Id.* at 223.
36 *Williams*, 358 U.S. at 219.
37 *Worcester v. Georgia* 31 U.S. at 559. The *Worcester* Court went on to say these original natural rights of Indian tribes are subject to a “single exception” that “excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.” *Id.* In addition, the Court had previously said that tribes had lost the power to freely alienate their lands. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 569 (1823).
39 *Id.*
42 *See Worcester v. Georgia* 31 U.S. at 540.
43 *Williams v. Lee*, 358 U.S. at 220.
state action on the reservation unless it infringes on the right of reservation Indians to make their own laws and be ruled by them.\textsuperscript{44} Thus, \textit{Williams} can be viewed as a departure from the principle of expansive inherent tribal sovereignty that could only be modified by Congress. Moreover, it illustrated the Court’s willingness to allow state authority on reservations.

Regardless of how faithful the decision in \textit{Williams} was to \textit{Worcester}, \textit{Williams} established a test that assessed the permissibility of state jurisdiction or regulation in Indian Country. The test required courts to consider whether the challenged state action “infringed on the right of reservation Indians to make their own laws and be ruled by them.”\textsuperscript{45}

\textbf{B. McClanahan v. State Tax Commission of Arizona (1973)}

In \textit{McClanahan}, the Court again considered an attempt by Arizona to impose a tax on the Navajo Reservation.\textsuperscript{46} This time, Arizona sought to tax the earnings of an Indian who resided on the reservation and whose income derived entirely from reservation activities.\textsuperscript{47} In 1967, $16.20 was withheld from Ms. Rosalind McClanahan’s wages to cover her state income tax liability.\textsuperscript{48} At the close of the tax year, Ms. McClanahan filed a protest against the collection of the taxes and filed a claim for a refund of the entire amount.\textsuperscript{49} When the Arizona Department of Revenue failed to respond to her claim, Ms. McClanahan sued in the Arizona courts on behalf of herself and other tribal members.\textsuperscript{50} The court held that the taxation was permissible.\textsuperscript{51}

On appeal to the United States Supreme Court, Arizona argued that a tax on the income of individual Indians was permissible under \textit{Williams}.\textsuperscript{52} The Court rejected this argument, and said that “[i]t must be remembered that the cases applying the \textit{Williams} test have dealt principally with situations involving non-Indians... The problem posed in this case is completely different.”\textsuperscript{53} Accordingly, the Court reasoned that the infringement test was only intended to apply to attempted exercises of state jurisdiction over non-Indians in Indian Country.\textsuperscript{54}

To evaluate state attempts to tax Indians in Indian Country, the Court adopted the preemption analysis as the applicable analytic framework:

\textsuperscript{44} See id.
\textsuperscript{45} Id.
\textsuperscript{46} McClanahan v. State Tax Commission of Arizona, 411 U.S. at 165.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 166.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 165.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 179. Professor Jensen points out that this statement is both inaccurate and counterintuitive. Jensen, supra note 15, at 62 n.365.
\textsuperscript{54} See McClanahan v. State Tax Commission of Arizona 411 U.S. at 179.
[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.

In adopting this framework, the Court in *McClanahan* stated that preemption “define[s] the limits of state power.” This portrays state taxation as presumptively valid until it conflicts with a federal statute or treaty. Thus, similarly to the *Williams* Court, the Court in *McClanahan* showed a willingness to allow state regulation on the reservation. Moreover, in the analysis endorsed by *McClanahan*, tribal sovereignty merely “provides a backdrop” for the reading of federal statutes and treaties and has little force of its own.

Even though the Court in *McClanahan* said that *Williams* did not apply because the appellant was an Indian, the Court’s commentary on *Williams* is important to later decisions. The Court stated that:

The cases applying the *Williams* test have dealt principally with situations involving non-Indians. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdiction. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

While this statement accurately described the Court’s decision in *Williams*, in a subsequent decision, the Court cited to this section of *McClanahan* to further increase the states’ power vis-à-vis the tribes in cases applying the infringement test.

**C. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation (1976)**

In *Moe*, the Court considered Montana’s imposition of a cigarette tax on sales by on-reservation smoke shops operated by tribal members of the Confederated Salish and Kootenai Tribes. The State tax applied to both Indian and non-Indian customers, and the State required the tribal retailers to collect the tax. The District Court of Montana upheld the State’s jurisdiction to tax the on-reservation sales of cigarettes to

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55 Id. at 172.
56 Id.
57 Id.
58 Id. at 179.
59 *See infra* Part II.D (discussing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)).
60 Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. at 466–67.
61 Id. at 467.
non-Indians and the requirement that the retailers collect this tax.\textsuperscript{62} However, the district court struck down the tax as applied to tribal members.\textsuperscript{63}

In a unanimous decision authored by Justice Rehnquist, the Court affirmed the lower court, focusing almost entirely on the collection requirement.\textsuperscript{64} The Court simply assumed that the tax was valid as applied to non-Indians.\textsuperscript{65} With respect to the collection requirement, the Court said that the State could require the tribal seller to collect the tax imposed on non-Indians because it was “a minimal burden designed to avoid the likelihood that in its absence non-Indian purchasers from the tribal sellers will avoid payment of a concededly lawful tax.”\textsuperscript{66} The Court called the collection requirement a “minimal burden” and said that “[w]e see nothing in this burden which frustrates tribal self-government [in violation of \textit{Williams}] or runs afoul of any congressional enactments dealing with the affairs of Indians.”\textsuperscript{67} The Court characterized this as a burden on tribal members rather than as a burden on the tribal government.

In the wake of \textit{Moe}, there was support for the proposition that a state can require tribal members to collect state taxes without infringing on a tribe’s right to self-governance. Moreover, the \textit{Moe} Court concluded that a state could cross a reservation boundary to impose a tax on non-Indians. This result played an important role in establishing Justice Rehnquist’s theory of implied divestiture. According to this theory, Indian tribes have impliedly lost certain sovereign powers, such as jurisdiction over non-Indians, due to their incorporation into the United States.\textsuperscript{68} This theory is crucial to understanding the result in this case. The Court was able to conclude that Montana’s tax did not frustrate tribal self-governance because, under the theory of implied divestiture, tribal self-governance was implicated when the State taxed tribal members, but not when the State taxed non-members.\textsuperscript{69}

\textbf{D. Washington v. Confederated Tribes of the Colville Indian Reservation (1980)}

In \textit{Colville}, the Court considered Washington’s attempt to tax the cigarette sales of several tribes.\textsuperscript{70} In contrast to the tribes in \textit{Moe}, the tribes challenging the state tax in \textit{Colville} had imposed their own taxing regimes on cigarette sales.\textsuperscript{71}

The \textit{Colville} Court concluded that the tribes’ tax regimes did not preclude Washington from also levying a tax on the on-reservation sale of cigarettes to non-

\textsuperscript{62} Id.
\textsuperscript{63} Id. at 468.
\textsuperscript{64} See id. at 481–483.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 483.
\textsuperscript{67} Id.
\textsuperscript{68} See infra Part III; see also Mark Trahant, \textit{High Court Could Use an Indian Voice}, \textsc{Seattle Post-Intelligencer}, July 9, 2005, \textit{available at} \url{http://www.seattlepi.com/local/opinion/article/High-court-could-use-an-Indian-voice-1177919.php} (last visited Nov. 10, 2012).
\textsuperscript{69} See infra Part IV.
\textsuperscript{70} Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 at 139.
\textsuperscript{71} Id. at 138.
members.\textsuperscript{72} The Court said that “[w]e do not believe that the principles of Federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.”\textsuperscript{73} First, the Court said that the federal statutes do not preempt the Washington sales and cigarette tax.\textsuperscript{74} In addition, the Court said that under \textit{Williams}, the State did “not infringe on the right of reservation Indians to 'make their own laws and be ruled by them' merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving.”\textsuperscript{75}

The Court’s next sentence is perhaps the most troubling because it incorrectly interpreted the Court’s commentary in \textit{McClanahan} discussing \textit{Williams}.\textsuperscript{76} It cited \textit{McClanahan} for the following proposition: “The principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interests of the Tribes and Federal Government, on the one hand, \textit{and those [interests] of the State}, on the other.”\textsuperscript{77} This statement foreshadowed what would become the \textit{Bracker} interest-balancing test and infused a consideration of the state’s interest into the Court’s infringement analysis.

However, it is a stretch to find support for this proposition in \textit{McClanahan}. The closest support for the Court’s statement comes from the following portion of \textit{McClanahan}: “The \textit{Williams} test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.”\textsuperscript{78} But instead of considering the state interest involved, this statement says that state jurisdiction would be tolerated only if there was no infringement on tribal self-government. Considering the state’s interest as part of the infringement analysis, as the Court did in \textit{Colville}, is very different than permitting state action unless it infringes on the right of tribal self-government, as the \textit{Williams} test prescribes. For example, under \textit{Williams}, even a very strong state interest would not permit state regulation if it infringed on tribal self-government.\textsuperscript{79} However, the Court in \textit{Colville} posed state interest as a factor in determining when taxation is permissible. \textit{Colville} continued the trend of reducing the importance of tribal sovereignty while increasing the significance of the states’ interest in the Court’s infringement analysis. As Justice Rehnquist noted in his concurrence in \textit{Colville}, “[a]t issue here is not only Indian sovereignty, but also necessarily state sovereignty as well.”\textsuperscript{80}

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\textsuperscript{72} Id. at 155.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 156.
\textsuperscript{76} See supra Part II.B.
\textsuperscript{77} Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 156 (emphasis added).
\textsuperscript{78} McClanahan v. State Tax Commission of Arizona, 411 U.S. at 179.
\textsuperscript{79} Ball, supra note 41, at 401 (citing CANBY, supra note 16, at 243–244).
\textsuperscript{80} Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 181 (Rehnquist, J., dissenting).
\end{flushleft}

Seventeen days after the Court decided Colville, the Court issued its decision in Bracker.\(^{81}\) Bracker involved Arizona’s attempts to impose its motor carrier license tax and motor fuel excise tax on the non-Indian contractors of a tribal timber business operated by the White Mountain Apache Tribe.\(^{82}\) The United States Supreme Court held that federal law, specifically the federal government’s comprehensive regulation of the harvesting of Indian timber, preempted the state taxes at issue.\(^{83}\)

Most courts called upon to analyze the permissibility of the state taxation of non-Indians cite to Bracker for the general rules regarding taxation in Indian Country.\(^{84}\) In Bracker, the Court stated that infringement and preemption are independent barriers to state regulatory authority on the reservation:

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. This congressional power and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation by tribal members.\(^{85}\)

Next, the Court explained how these barriers are related:

[The two barriers] are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important “backdrop,” against which vague or ambiguous federal enactments must always be measured.\(^{86}\)


\(^{83}\) Id. at 138.

\(^{84}\) See e.g., Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).

\(^{85}\) Bracker, 448 U.S. at 142–143 (emphasis added).

\(^{86}\) Id. at 143 (emphasis added). This statement is problematic because it describes the role of tribal self-governance as being similar in both the infringement analysis and the preemption analysis. However, the role of tribal sovereignty is considerably different in the two analyses. In the preemption analysis, Indian sovereignty provides a “backdrop” against which the applicable treaties and federal statutes must be read. In contrast, in the infringement analysis, tribal sovereignty is the focus of the analysis. This quote from Bracker does not modify the infringement analysis, but it does result in considerable confusion. Courts often do not properly appreciate the different role of tribal sovereignty in the two analyses. See, e.g., Cotton Petroleum, 490 U.S. at 204.
Although *Bracker* acknowledged that Indian self-government is ultimately subject to the broad power of Congress, as discussed in Part III, the *Bracker* decision has also been limited by the Supreme Court’s position that the tribes have implicitly lost certain powers.

### III. The Court’s Imposition of New Limitations on Tribes Over-Sovereignty

The infringement test was “derived from notions of tribal sovereignty.” As a result, a discussion of the contours of the infringement test is not complete without a discussion of two cases that drastically changed the limits of tribal sovereignty: *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*. These cases severely circumscribed tribal sovereignty, rendering it unrecognizable from the robust sovereignty defined by Chief Justice Marshall, where tribes retained all sovereign powers except the ability to freely alienate their land and have relations with foreign powers.

#### A. *Oliphant v. Suquamish Indian Tribe* (1978)

In *Oliphant*, the Court considered the scope of tribal criminal jurisdiction over non-Indians. The defendant in this infamous case was Mark David Oliphant, a non-Indian permanent resident of the Port Madison Reservation of the Suquamish Indian Tribe. At the Suquamish Tribe’s annual Chief Seattle Days celebration, Oliphant drunkenly assaulted a tribal police officer. Oliphant was arrested, and the Suquamish Tribe prepared to prosecute him in tribal court. Oliphant applied for a writ of habeas corpus in federal district court, challenging the Tribe’s criminal jurisdiction over him because he was not an Indian. Subsequently, Oliphant’s application was denied by the district court, and the Ninth Circuit affirmed the district court’s ruling. Both the district court and the Ninth Circuit concluded that preserving law and order within tribal lands was an indispensable attribute of inherent tribal sovereignty. Specifically, the Ninth Circuit said that “though conquered and dependent, [Indian tribes] retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress.” As a result, the Ninth Circuit said, “criminal jurisdiction over anyone committing an offense on the reservation is a ‘sine qua non’ of such powers.”

The Supreme Court reversed the decision, while at the same time inverting the limits of tribal sovereignty as defined by Chief Justice Marshall in *Worcester*. Even

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88 *See supra* note 36.
89 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 194.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at 195.
95 *Id.* at 196 (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).
96 *Id.*
though Congress had passed no law restricting a tribe’s criminal powers over non-
Indians, the Court in Oliphant concluded that this power was implicitly lost. After citing to
snippets of case law to support his result, Justice Rehnquist stated that the “retained
powers [of Indian tribes] are not such that they are limited only by specific restrictions in
treaties or congressional enactments.”97 Moreover, he stated, “Indian tribes are
prohibited from exercising both those powers of autonomous states that are expressly
terminated by Congress and those powers inconsistent with their status [as domestic
dependent nations].”98 These statements are irreconcilable with the Marshall trilogy.
Nevertheless, Rehnquist concluded that the Suquamish Tribe, and all other tribes
across the country, lacked criminal jurisdiction over non-members.99

**B. Montana v. United States (1981)**

In Montana, the Court extended the basic rule of Oliphant to civil cases. The
Court stated that the “exercise of tribal power beyond what is necessary to protect tribal
self-government or to control internal relations is inconsistent with the dependent status
of the tribes, and so cannot survive without express congressional delegation.”100 The
Court also stated that the “inherent sovereign powers of an Indian tribe do not extend to
the activities of nonmembers of the tribe.”101

In Worcester the Court said that tribes had power over both Indians and non-
Indians on the reservation, unless Congress took that power away. Here, the Court said
that tribes only have power over non-members if Congress explicitly grants this power
to the tribes. Under the formulation in Montana, a state’s attempt to exercise regulatory
authority over non-Indians does not infringe on the right of tribal self-governance unless
it falls under one of the two narrow Montana exceptions.102

**IV. The Current Contours of the Infringement Test**

Based on the analysis of the cases discussed in Parts II and III, this Part argues
that since Williams v. Lee was decided in 1959, the Supreme Court has substantially
weakened the power of the infringement test to stand as a barrier to state taxation of
non-Indians in Indian Country.

First, the Court has weakened the holding of Williams by concluding that state
tax collection requirements placed on individual tribal members and state regulation that

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97 *Id.* at 208.
98 *Id.* (citations omitted).
99 *Id.*
100 Montana v. United States, 450 U.S. at 564.
101 *Id.* at 565. In *Montana*, the Court carved out two exceptions to this rule. First, the Court said that a tribe
may regulate the “activities of non members who enter consensual relationships with the tribe or its
members, through commercial dealings, contracts, leases, or other arrangements”. *Id.* Second, a tribe
may “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.” *Id.* at 565-566.
102 *Id.* at 565.
indirectly affects tribal governments do not violate the infringement test. In *Williams*, the Court established a test that would invalidate state action that “infringed on the right of reservation Indians to make their own laws and be ruled by them.” In that case, the act of the Arizona courts exercising jurisdiction over the case of an individual tribal member violated the infringement test because it “undermined the authority of the tribal courts.” The *Williams* opinion recognized that state action aimed at individual tribal members could infringe on the authority of the tribal government. However, in finding that the infringement test did not bar the State’s collection requirement, the Court in *Moe* focused on the fact that Montana’s collection requirement fell on the “Indian proprietor” as opposed to the tribal government. Because the requirement fell on individual tribal members, the Court concluded that the state action did not “frustrate tribal self-government.” Yet, with this result, the Court undercut the authority of the tribal government: the tribal government did not pass the law that required tribal retailers to collect the state tax, and the laws of Montana ruled tribal sellers rather than the laws of their tribe. As a result, in *Moe* the Court takes the position that only state action directed at tribal governments, as opposed to individual tribal members, would be invalidated under the infringement test.

In addition, the Court in *Colville* upheld Washington’s imposition of a tax on tribal cigarette sales even though it had indirect effects on the tribal governments and their attempts to raise revenue. As the dissent noted, the tribes had imposed their own tax on cigarette sales in the hopes of “raising governmental revenues, establishing commercial enterprises, and escap[ing] from a century of oppression and paternalism.” Nevertheless, the majority concluded that the infringement test did not bar Washington from imposing its tax on sales to non-Indians. The Court reasoned that the imposition of the state tax would only indirectly reduce the revenues of the tribal government by putting the tribal retailers, who would be required to collect both state and tribal taxes, at a competitive disadvantage compared to off-reservation retailers. Although economic reality would not permit the tribes to continue to impose their tax on cigarette sales, the Court concluded that this did not infringe on the right of tribal self-governance. Thus, *Moe* and *Colville* illustrate the Court’s willingness to tolerate state regulation or taxation as long as it does not infringe directly on a tribal government.

Second, the Court has weakened the holding of *Williams* by introducing a consideration of the state’s interest into the infringement test. As introduced in *Williams*,

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103 *Williams v. Lee*, 358 U.S. at 220.
104 *Id.* at 223.
106 *Id.*
108 Justice Thomas would make an even stronger argument. It appears that he believes that the Court’s decisions in *Moe* and *Colville* have effectively invalidated the infringement test as an independent barrier to state taxation. See *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 36 n.2. (1999). *Blaze* also appears to argue that Arizona’s tax infringes on the Tribes’ right to make their own decisions and be governed by them and that this is sufficient, by itself, to preclude application of Arizona’s tax. (“Our decisions upholding state taxes in a variety of on-reservation settings squarely foreclose that argument.”).
109 *Id.*
the infringement test did not consider the state’s interest in determining whether state authority was permissible; even a very strong state interest would not be permitted if state regulation infringed on tribal self-government.  

However, in Colville, the Court inserted the state’s interest into the infringement analysis. The Court said that “[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interests of the Tribes and Federal Government, on the one hand, and those of the State, on the other.”

This permitted the Court to conclude that the tribes do not have as significant an interest in protecting their ability to raise revenues for essential governmental programs because the value of the cigarettes was not being generated by on-reservation activities. If the Court were not considering the state’s interest, the fact that the tribes were marketing an exemption to state taxation, thus reducing state revenue, would be irrelevant to the infringement analysis. Instead, the Court would have only considered the tribe’s lost revenue. Although the consideration of the state’s interest might be a case-specific holding because of the Court’s distaste for individuals who were “flout[ing]” their legal obligation to pay state tax, the Court infused a consideration of state interest into an analysis that originally only considered the rights of tribes as limited by Congress.

Finally, the Court has weakened the holding of Williams by severely circumscribing tribal sovereignty. The infringement test “derives[s] from notions of tribal sovereignty,” and the permissibility of state action under this test changes when the limits of tribal sovereignty are modified. The current limits of tribal sovereignty are nearly unrecognizable from those defined by Chief Justice Marshall in Worcester, where state action in Indian Country was presumptively invalid. First, in Williams and McClanahan, the Court adopted the view that state taxation or regulation was presumptively valid on the reservation; the Court would only strike it down if it infringed on tribal self-government or if it was preempted. Next, the Court embraced the theory of implied divestiture in Oliphant and Montana to drastically circumscribe tribal sovereignty. These cases concluded that tribes could only exert authority over non-Indians when Congress explicitly granted such authority. By changing the limits of tribal sovereignty so that the tribes could not exert their authority over most non-Indians, the Court ensured less state action would be struck down under the infringement test. Under the definition of tribal sovereignty after Oliphant and Montana, a state’s imposition of taxes or regulation on non-Indians does not infringe on tribal self-government because the tribes have been divested of their authority over non-Indians.

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110 See supra note 78.
111 Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. at 156. The Court cites McClanahan for this definition of the principle of tribal self-government; however, to it is a stretch to find support definition in McClanahan. See supra Part II.D.
113 Jensen, supra note 15, at 61.
V. Conclusion

As a result of the weakened state of the infringement test, it is misleading to continue to refer to the test as an independent barrier to state taxation of non-Indians in Indian Country. The Supreme Court’s opinions have restricted the ability of the infringement test to invalidate state action to instances in which state action directly encroaches on tribal governments. Perhaps Justice Rehnquist, who was instrumental in limiting tribal sovereignty during his tenure on the Court, explained the continuing importance of the infringement test best. In his dissenting opinion in Ramah, Justice Rehnquist said that the infringement test precludes state law only “in those rare instances in which the State attempts to interfere with the residual sovereignty of a tribe to govern its members.”

In Mashantucket Tribe of Indians v. Town of Ledyard, the case described at the beginning of this paper, the Tribe argued that the Town’s tax was preempted by statute, was preempted by the Bracker interest-balancing test, and impermissibly infringed on the Tribe’s right of self-government. In the opinion, the court did not respond to the Tribe’s infringement argument, but did strike down Ledyard’s taxation, finding that it was preempted by statute and under the Bracker interest-balancing test. It is impossible to know whether the court in Mashantucket felt that it did not need to address the Tribe’s infringement argument because it had already provided two bases for striking down the tax or because it felt that the infringement test did not stand as a barrier to the tax.

Regardless of why the court in Mashantucket did not address the Tribe’s infringement argument, the Supreme Court should consider thoughtfully describing the current contours of the infringement test. The Tenth Circuit in Muscogee was correct when it said that the Supreme Court “repeated[ly] mention[s]” Williams v. Lee; however, the Court rarely engages in any analysis of the cases that would illustrate the infringement test’s continuing relevance. Tribal litigants, like the Mashantucket Pequot Tribe, deserve to know whether they should continue spending precious space in their briefs on an infringement argument when challenging state taxation and regulation on their reservations.

117 Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159, 1171 n.5 (10th Cir. 2012).
THE JAY TREATY FREE PASSAGE RIGHT IN THEORY AND PRACTICE

Caitlin C.M. Smith*

INTRODUCTION

In 1794, the United States became a party to the Jay Treaty.¹ The treaty is formally titled Treaty of Amity, Commerce and Navigation, between His Britannick Majesty; and the United States of America, by their President, with the Advice and Consent of their Senate, but it was negotiated by then-Chief Justice John Jay, and the treaty is generally called Jay’s Treaty, or simply the Jay Treaty, after him.² Most of the treaty is no longer in force,³ but one key provision remains important. The United States and Great Britain recognized that groups of Native Americans⁴ were separated by what would become the U.S.—Canada border, and Article 3 of the Jay Treaty established that Native peoples would be able to move freely across the border:

It is agreed that it shall at all Times be free to His Majesty’s Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and re-pass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America.⁵

There is some debate about whether this right still exists as a treaty right per se, or whether it was abrogated by the war of 1812 and now exists only as a statutory right.⁶ That question is interesting and complicated, but it does not affect the right of

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¹ Caitlin C.M. Smith is a 2012 graduate of Columbia Law School. The author would like to thank David Armstrong and Douglas B.L. Endreson for their ideas and encouragement with this project. This article won first place in the 11th annual National NALSA Writing Competition, hosted by Lewis & Clark Law School.
³ "Only articles 9 and 10 appear to remain in force between the United States and the United Kingdom. Article 3, so far as it relates to the right of Indians to pass across the border, appears to remain in force between the United States and Canada." Treaties in Force 2010, supra note 1, at 291.
⁴ In this paper, “Indian” and “Native American” are used interchangeably to apply to American Indians, First Nations people, Native Alaskans, and other indigenous North American persons.
⁶ See generally Marcia Yablon-Zug, Gone but not Forgotten: The Strange Afterlife of the Jay Treaty’s Indian Free Passage Right, 33 QUEEN’S L.J. 565 (2008) (arguing that treaty was abrogated and now exists solely through statute); Dan Lewerenz, Historical Context and the Survival of the Jay Treaty Free Passage Right: A Response to Marcia Yablon-Zug, 27 ARIZ. J. INT’L & COMP. L. 193 (2010) (arguing that the right was restored after the War of 1812 by the Treaty of Ghent).
Canadian-born Indians to pass across the United States border today.\(^7\) That right is enshrined in the Immigration and Nationality Act. In the midst of the thousands of complicated chapters and subchapters that make up the United States’ immigration laws, one simple sentence stands out: “Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.”\(^8\) The Jay Treaty free passage right remains, in theory at least, as an exception to the requirements that the United States Customs and Immigration Service otherwise requires from people who would choose to immigrate to the United States.\(^9\)

Anyone who has dealt with the federal government will immediately suspect that a Canadian-born Indian cannot simply walk up to the border, wave at the border patrol, and skip across. Normally, a Canadian citizen who hopes to immigrate to the United States must deal with a laundry list of agencies (and an alphabet soup of agency names).\(^10\) Most prospective immigrants cannot even petition on their own to move to the United States; instead, a family member or prospective employer within the United States would have to sponsor the person.\(^11\) The sponsoring family member or employer would petition for a visa from the United States Citizenship and Immigration Services (USCIS), which is a division of the Department of Homeland Security (DHS). If the prospective immigrant was moving to the United States to work, her visa might require labor certification, which is issued by the Department of Labor. The immigrant would have to receive health screening from the Public Health Service (a division of the Department of Health and Human Services) to ensure that she was free from communicable diseases. Once the visa was approved, the Canadian immigrant would wait, possibly for months or years, until the Department of State issued the visa. At that point, she would cross the border, where she would be checked by officers from Customs and Border Protection (CBP), a division of DHS. In order to work in the United States, she would also have to visit an office of the Social Security Administration (SSA) in order to get a social security number.

\(^7\) The same is not true for United States–born Native Americans who wish to enter Canada, who must prove that the right is “an unextinguished aboriginal right under section 35(1) of the 1982 Constitution.” Cohen’s Handbook of Federal Indian Law § 5.02(2)(f) (2009).


\(^9\) A Jay Treaty immigrant to the United States is not only not subject to the usual restrictions on immigration; he is also not removable for violations of United States law. See MacDonald v. United States, No. 11-cv-1088 – IEG (BLM) (S.D. Cal. Dec. 23, 2011) (order granting defendants’ motion to dismiss), at 1 (“As a Canadian-born American Indian, MacDonald is exempt from restrictions imposed on aliens by the United States’ immigration laws and is not subject to removal.”).


\(^11\) Id. at 298.
With that in mind, this paper set out to explore how exactly the Jay Treaty free passage right works in practice. I was curious about how willingly these government agencies waive their usual procedures and requirements for beneficiaries of the Jay Treaty free passage right. I was also curious about how accessible information about the free passage right would be. Even in agencies that have formal rules accommodating beneficiaries of the free passage right, those rules are of little benefit when people cannot find out about them. Without accessible, user-friendly information, people cannot know about their rights and therefore are ill-equipped to take advantage of them. This becomes especially true when the government agents responsible for administering programs do not know about these rights.

**DESK-CLERK LAW**

This type of law, in which researchers examine the law as reported by public employees, is sometimes called “desk-clerk law”—a term coined by Elizabeth Emens in an illuminating article about the law surrounding marital name changes. In this article, Emens wrote,

Desk-clerk law is what the person at the desk tells you the law is. In the realm of marital names, the government functionaries who answer questions and direct choosing behavior around marital names seem frequently to give incorrect or normatively driven responses that discourage unconventional choices. In this informal way, desk clerks effectively make the rules for many citizens. Desk-clerk law is important to government-citizen interactions in the realm of marital names and beyond.

In her research on name changes, Emens and her research assistant called and emailed county clerks’ offices and Departments of Motor Vehicles around the country, asking them what name-change options were available to couples who married in that county. Their survey revealed that “federal, state, and local government clerks gave inaccurate, incomplete, contradictory, or normative responses to specific questions about legal options.” Several clerks gave information that conflicted with state law or with official agency policy, while other clerks offered unsolicited advice about the value of keeping or changing a name.

Questions about immigration law and Indian law are probably less likely to elicit personal advice than questions about marital law, but a Jay Treaty migrant, like a newlywed couple, is dependent on the knowledge and discretion of government

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12 Throughout the paper, such persons are referred to variously as “beneficiaries,” “migrants,” and “immigrants.” No distinction is meant by these different terms.
14 _Id._ at 765.
15 _Id._ at 811, n.175.
16 _Id._ at 824.
17 _Id._
employees. Many Jay Treaty migrants will not have lawyers, and one of the benefits of the Jay Treaty free passage right is its simplicity. The value of the right is diminished if the rights-bearer must obtain formal legal help in order to exercise it. Therefore, without formal legal assistance, a Jay Treaty migrant must depend on legal information available in pamphlets, on websites, and from government employees.

The free passage right is also an area ripe for the proliferation of misinformation. Immigration law generally is spread across so many agencies that no single government agency or employee will be likely to know every aspect of the process of coming to the United States. (The same is true for Indian law.) Therefore, a potential Jay Treaty migrant who is confused about her rights may have to consult several sources in order to find her answer. This compounds the possibility that one of the sources she encounters will give her bad information—and if two sources contradict each other, she will have no way of knowing which one to trust.

Furthermore, as in Emens’s study, many of the government agents involved in the process of exercising Jay Treaty rights will wield significant power over the people who seek their services. As Emens noted with concern, “[D]esk clerks have been granted no [formal] discretionary authority. Nonetheless, they become the face of the government, the source of information as well as the immediate authority encountered by most citizens, and thus can exert tremendous influence.”18 Several of the key players in a Jay Treaty migrant’s journey will have formal discretion. For example, a CBP officer at the border has virtually unreviewable authority to turn away someone attempting to enter the country.19 If the CBP officer decides that a person cannot enter the United States, then regardless of the state of formal law, that person effectively cannot enter.

Additionally, the stakes for a Jay Treaty migrant are very high. He is in the United States with minimal documentation—no visa, possibly no green card, maybe even no passport—and therefore runs the risk of being misidentified as an “illegal immigrant.” Even a government employee who lacks formal discretion can choose whether or not to alert Immigration and Customs Enforcement (ICE) to the migrant’s presence, thereby potentially thrusting the migrant into removal proceedings.20 This danger is exacerbated when states themselves play a role in enforcing immigration laws. A law like Arizona’s Senate Bill 107021 could create enormous difficulties for a Jay Treaty migrant, who

18 Id. at 827.
19 See Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (“As to [foreigners], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.”); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 543–44 (1950) (“The action of the executive officer . . . is final and conclusive. . . . [I]t is not within the province of any court . . . to review the determination of the political branch of the Government to exclude a given alien.”); Landon v. Plasencia, 459 U.S. 21 (1982) (a United States permanent resident who traveled to Mexico could, upon returning, be detained at the border and subjected to an exclusion hearing).
20 Of course, removal is not a concern if the ICE officers understand the Jay Treaty free passage right. Their knowledge and judgment could make the difference between a non-issue and a bureaucratic nightmare, potentially involving the immigration courts and even incarceration.
would have to explain to state law enforcement officers that while he had no documents, he was in fact authorized to be in the country—that in this case, “undocumented” was not synonymous with “illegal.” A Jay Treaty migrant caught in a traffic stop might find himself in jail if he failed to persuade state officers that a little-discussed eighteenth-century treaty gave him the right to enter the country.

**METHODODOLOGY**

I conducted research for this paper in three waves. As a preliminary matter, I researched laws and regulations involving the Jay Treaty free passage right to see what the formal rules were about the free passage right. Second, I did extensive internet research about rights and benefits available to Jay Treaty immigrants. For this, I used a combination of simple internet searches, information available on government websites, and some electronic pamphlets from legal services organizations that work with American Indians. During this wave, I was trying to accomplish two goals: first, since the laws and regulations about the right were frustratingly vague, I was hoping to learn more about the substantive rights and benefits available to Jay Treaty migrants, and second, I was trying to learn how easily accessible this information was on the internet.

For the next phase, I called government agencies. Using publicly available phone numbers, I called the national phone lines for the Bureau of Indian Affairs, United States Customs and Immigration Services, and the Social Security Administration. I also called Social Security offices and Women, Infants, and Children (WIC) agencies in states along the United States–Canada border. Finally, I called CBP offices at several ports of entry along the border. On each call, I asked the people I spoke with about the free passage right and about their agencies’ policies toward people who exercised the right.

**Wave I: Federal Laws and Regulations**

Federal laws and regulations contain minimal information about how the Jay Treaty free passage right functions as a practical matter. In addition to the single provision of the United States Code codifying the free passage right, there are a handful of regulations in the Code of Federal Regulations that reference the free passage right. These establish that

- the free passage right applies only to persons “possessing 50 per centum or more of the blood of the American Indian race” and does not extend to their spouses and children or to adopted Indians;\(^2^3\)

- persons admitted pursuant to the free passage right “shall be regarded as having been lawfully admitted for permanent residence” if they have “maintained residence in the United States” since they entered;\(^2^4\)

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\(^{23}\) 8 C.F.R. § 289.1 (2010).

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• “[t]he lawful admission for permanent residence of an American Indian born in Canada shall be recorded on Form I–181”,

• persons admitted under the free passage right are eligible for food stamps, and

• American Indians born in Canada who meet the blood quantum requirement are not required to obtain immigrant visas.

These provisions raise as many questions as they answer. What types of identification must Jay Treaty migrants produce in order to benefit from the right? In particular, how does a person prove that she “possess[es] 50 per centum or more of the blood of the American Indian race”? If Jay Treaty migrants are “regarded as having been lawfully admitted for permanent residence,” are they eligible for ordinary legal permanent resident status (i.e. green cards)? If so, may they remain in the United States without obtaining a green card? What public benefits are Jay Treaty migrants eligible for when they arrive in the United States? Few of these questions are answered by the regulations.

Wave II: Information Available on Websites

Many of the questions above are answered on the websites of various government agencies. For example, the website of Customs and Border Patrol gives some useful information about the identification required to cross the border. Since the advent of the Western Hemisphere Travel Initiative (WHTI) in 2009, crossing the United States–Canada border has, in general, required either a passport or an “enhanced driver’s license.” However, this restriction apparently does not apply to members of Native tribes or bands in the United States and Canada. The CBP site announces that although the United States government and United States tribes continue to work on developing enhanced tribal IDs, “Until further notice, Native American United States and Canadian citizens may continue to present their current tribal documents, including the current Indian and Northern Affairs Canada (INAC) card, as proof of identity and citizenship.” This ostensibly means that a Canadian Indian can show her INAC card at the border and be granted admission into the United States.

24 8 C.F.R. § 289.2 (2010). This regulation also grandfathers in persons of less than 50% American Indian descent who entered prior to 1952.
25 8 C.F.R. § 289.3 (2010). See also MacDonald, No. 11-cv-1088 – IEG (BLM) at 2 (“MacDonald’s Form I-181, which documents his status as a lawful permanent resident, indicates that he is admitted for permanent residence as a ‘Canadian Born American Indian.’”).
27 22 C.F.R. § 42.1(f) (2010).
A visit to the USCIS website clarifies another issue: Jay Treaty immigrants are eligible for green cards.30 The site explains that to get a green card, a Jay Treaty immigrant must request a creation of record by going to his local USCIS office with

- two passport-style photos,
- a copy of government-issued photo identification (which government is not specified),
- a copy of his "long form Canadian birth certificate," and
- “[d]ocumentation to establish membership, past or present, in each Band or tribe for yourself and every lineal ancestor (parents and grandparents) through whom you have derived the required percentage of American Indian blood.”31

This final documentation is supposed to come either from the tribal government or from Indian and Northern Affairs Canada (INAC), a Canadian government agency. If the immigrant does not have this documentation, USCIS will accept an “Original Letter of Ancestry” issued by INAC, or else documentation from the United States or Canadian governments (although it is not clear what form this would take).32

Assuming that the immigrant has all of these documents, he can then receive a green card, which confers two important advantages. First, while Jay Treaty status does not extend to an immigrant’s spouse or children,33 ordinary legal permanent resident status does. Once an immigrant has his green card, he can petition for visas for his spouse and children to join him in the United States.34 Second, green cards are the standard way of conferring status as a legal permanent resident in the United States.

Tribe of Idaho, have created enhanced tribal cards. Id. Canada is in the process of rolling out a new WHTI-compliant card called the Secure Certificate of Indian Status, which will apparently replace the old INAC cards over time. Indian & Northern Affairs Canada, Frequently Asked Questions—Secure Certificate of Indian Status, http://www.ainc-inac.gc.ca/br/is/scs/faq-eng.asp (last visited Oct. 31, 2012).

30 U.S. Citizenship and Immigration Services, Green Card for an American Indian Born in Canada, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=82a83a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=82a83a4107083210VgnVCM100000082ca60aRCRD (last visited Oct. 31, 2012).
31 Id. Paul Spruhan has pointed out that since Indian status in Canada is not defined by blood quantum, the United States has inserted a requirement for Canadian Indian status that the Canadian government does not recognize or enforce. Spruhan, supra note 8, at 317. This is why the INAC card, while permitted for identification at the border, is not considered proof of eligibility for the free passage right. Instead, the United States requires documentation from the Indian band—but not all Canadian Indians are members of bands, since “status and band membership are separate concepts” in Canada. Id. at 318.
32 Green Card for an American Born in Canada, supra note 29.
33 8 C.F.R. § 289.1 (2010).
Employers, government agencies, and universities know how to deal with ordinary legal permanent resident status. A Jay Treaty immigrant might well have an easier time in the United States if he can say, simply, “I’m a permanent resident,” and produce his green card, instead of having to explain his status under the free passage right.\(^{35}\)

However, it is not at all clear from the USCIS website what the options are for a Jay Treaty migrant who does not apply for a green card. The website seems to leave room for a category of people who exercise the free passage right but never go through the process of obtaining a green card. The site says, bluntly, “American Indians born in Canada (with at least 50% American Indian blood) cannot be denied admission to the United States,” but adds that “a record of admission for permanent residence will be created if an American Indian born in Canada wishes to reside permanently in the United States” (emphasis added).\(^{36}\) This statement seems to recognize that exercising the free passage right is distinct from choosing to live permanently in the United States. Furthermore, the site says that a Canadian-born person of 50% or more American Indian blood “may be eligible to receive a green card (permanent residence)” (emphasis added), when it has just said that the same category of people cannot be denied admission to the United States.\(^{37}\)

Put together, the CBP and USCIS websites suggest that there are two ways to exercise the free passage right. The first way would be to enter the United States, request a creation of record, and become a legal permanent resident. The second way would be to enter the United States, but choose not to apply formally for legal permanent resident status, at least not immediately. The first way would require dramatically more identification than the second. Even if the United States began requiring Canada’s new WHTI-compliant Secure Certificate of Indian Status cards, a person could obtain a USCIS card without having a long-form birth certificate or documentation that every one of her lineal ancestors was Indian (both of which would be required to become a legal permanent resident).\(^{38}\) Therefore, a Jay Treaty migrant could meet Customs and Border Protection’s requirements to enter the country, but still not have the degree of documentation required to obtain a green card from USCIS. There must be a status for Jay Treaty entrants without green cards—but the USCIS website gives no indication of what that status looks like.

According to the websites of other federal agencies, Jay Treaty immigrants are eligible for a variety of social programs and public benefits, often to a greater extent than ordinary immigrants. In general, anyone petitioning for a visa to bring a family

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\(^{35}\) David Armstrong, a lawyer with Wisconsin Judicare, told me that “practically it is much easier to get by if you do have a green card.” E-mail from David Armstrong, Staff Attorney, Indian Law Office, Wisconsin Judicare (Apr. 15, 2011, 6:20 p.m. CDT) (on file with author).

\(^{36}\) U.S. Citizenship and Immigration Services, Green Card for an American Indian Born in Canada, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=82a83a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=82a83a4107083210VgnVCM100000082ca60aRCRD (last visited Oct. 31, 2012).

\(^{37}\) Id.

member to the United States must complete a legally enforceable “affidavit of support,” in which she promises to support the person so that the new immigrant will not become a public charge. In addition to that restriction, many public benefits that are available to United States citizens are unavailable to legal permanent residents until the resident has worked for 40 quarters (essentially 10 years).

However, Jay Treaty immigrants are exempt from many of these bars. For example, a manual available on the website of the United States Department of Agriculture says that “American Indians born in Canada living in the United States under section 289 of the INA” (that is, Jay Treaty immigrants) “are eligible for food stamps on the same basis as citizens,” without any additional requirements. This is consistent with federal regulations. Neither the manual nor the regulation mentions the possibility that a Jay Treaty immigrant might also have a green card. It is not clear whether the food stamp program assumes that a Jay Treaty migrant necessarily will have a green card, assumes that a Jay Treaty migrant necessarily will not have a green card, or is not in close enough communication with USCIS even to realize that this is a concern.

The Social Security website similarly confirms that Jay Treaty immigrants are eligible for some benefits. The Social Security Administration posts its Program Operations Manual online, and this manual contains provisions on determining eligibility for Social Security cards for American Indians born in Canada. The Social Security website indicates very strongly that Jay Treaty migrants can stay in the United States (and, indeed, interact with the Social Security Administration) without obtaining green cards or any other immigration paperwork:

Certain Canadian born Indians who establish “one-half American Indian blood” are considered LAPR [legally admitted for permanent residence] and may freely cross borders and live and work in the U.S. without DHS documentation. DHS will provide documentation, if the individual requests it. SSA may also make a determination of LAPR status for SSA purposes, based on receipt of evidence of at least 50 per cent American Indian blood and evidence of birth in Canada [emphasis added].

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42 “No person is eligible to participate in the Program unless that person is . . . An American Indian born in Canada who possesses at least 50 per centum of blood of the American Indian race to whom the provisions of section 289 of the Immigration and Nationality Act . . . apply.” 7 C.F.R. § 273.4(a)(3)(i) (2010).
For the purposes of the Social Security Administration, at least, a Jay Treaty immigrant may be lawfully admitted for permanent residence without ever receiving a document showing that USCIS has declared the immigrant a legal permanent resident. If the immigrant does not produce a green card, the Social Security Administration requires “[s]atisfactory evidence of birth in Canada” and a “document that indicates the percentage of American Indian blood in the form of a: birth certificate issued by the Canadian reservation, or a letter, card or other record issued by the tribe.” These are slightly different from the requirements to obtain a green card: here, a long-form birth certificate is not specifically required, and the documents required to prove blood quantum are described in less detail. This lack of detail might create more discretion for individual Social Security employees in terms of what they will and will not accept.

The Social Security Administration warns its officers not to accept the “Certificate of Indian Status card (‘Band’ card) issued by the Canadian Department of Indian Affairs,” which seems to mean the INAC cards that Customs and Border Patrol specifically authorized for use as identification at the border. Therefore, it seems that a Jay Treaty beneficiary might have sufficient identification to cross the border, but not enough to receive public benefits or authorization to work (in the form of a Social Security card) once he arrived in the United States. This might well be deliberate on the part of the United States government. Canadians in general can come to the United States as tourists with very few restrictions. Similarly, a Canadian-born Native American with an INAC card is essentially coming to the United States on a tourist visa. If he wants to stay in the United States permanently, or if he wants to work in the United States, he must produce evidence of his blood quantum. To receive the full benefits of the free passage right, he must show that he falls within the parameters of § 289.

It is worth noting that no single government agency provides a comprehensive list of the requirements and benefits associated with the free passage right. Ferreting out the information available on the various government sites requires a considerable investment of time even for people who are experienced with electronic searches and have some familiarity with the federal agencies involved. The information above would be extremely difficult to find for someone who lacked experience with technology, had limited literacy in English, or did not know the names and functions of federal agencies in the United States. Many people, therefore, would have difficulty finding even this information—particularly individuals who did not live in the United States and were unfamiliar with the various agencies in the federal government.

Wave III: Information Available by Telephone

Note, though, that the Social Security Administration will also accept USCIS’s determination of legal permanent resident status. This section of the Program Operations Manual instructs agents to accept a Form I-551, which is the formal term for a green card. Id.

Id.

Id.


See supra note 30.
For many people who have difficulty with internet searches, the most readily available means of getting this kind of information will be by telephone. In order to gauge the quality of information available by telephone, I compiled lists of phone numbers and started calling government agencies. I had no special access or assistance, and the phone numbers I called were pulled off the internet from sources of varying reliability: some were official agency telephone numbers, others were pulled from semi-official-looking websites, and still others were numbers that came up when I ran Google searches with terms like “Social Security Idaho.”

Ultimately, I called WIC agencies and Social Security offices in every state bordering Canada, border crossings in four states, and national phone numbers for USCIS, the Bureau of Indian Affairs, and the Social Security Administration. On every phone call, I began with a scripted opening that varied slightly depending on which agency I was calling. For example, when I called social security offices, I began by saying the following:

“Hi, I have a slightly unusual question about eligibility for a social security card. My friend told me that if you’re a Native American born in Canada, you can come to the United States without a visa or green card and stay here, and you would be eligible for a social security card. Is that true?”

When I called a WIC office, I said the same thing but substituted “WIC benefits” for “a social security card.” When asked, I told the people I was speaking with that I was a student researching this area of immigration and Indian law; most people were happy to help me with my research.

When I called border checkpoints and immigration agencies, I initially began by asking whether a Native American born in Canada actually could come to the United States without a visa or green card, then asked about benefits if the person confirmed that that was possible. However, one CBP officer told me that he was not authorized to speak with researchers and that he did not want to get in trouble by being quoted in a paper. After that conversation, I began conversations with CBP officers by explaining that I was a student conducting a research project. No other officer expressed concerns about answering my questions.

The information I obtained from these phone calls was a mixed bag. Many people I spoke with were not familiar with the free passage right, although some of them looked up relevant rules or asked colleagues and then passed on their findings to me. A few operators were extremely well-informed; others gave me serious misinformation. The results of the full phone survey are summarized below.  

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49 I have excluded his responses from my data. For obvious reasons, I have not cited the date or location of this call.

50 See Appendix for an explanation of how the categories were defined.
Surprisingly poor information was available from the federal help lines. As soon as the agent at the Bureau of Indian Affairs heard my question, he told me to call the Department of Homeland Security because “that’s their issue, their jurisdiction.” He also told me that if an operator at any other department referred me to the BIA, I should ask to speak to the person’s manager. The BIA agent was technically right that this was not his area, since the BIA plays no role in administering the free passage right, either in terms of handling border crossings or in distributing benefits to Jay Treaty immigrants. However, a person who had recently arrived in the United States could be forgiven for thinking that the “Bureau of Indian Affairs” might be able to help them understand a right that is specific to American Indians, and it is more than a little surprising that the BIA was so completely disconnected from this area of Indian law. The BIA agent’s eagerness to hand me off to another agency was additionally problematic because of the misinformation I received from the agency that he recommended.

The USCIS agent I spoke to was friendly and helpful, and he was able to share a lot of information about how a Jay Treaty immigrant could become a legal permanent resident (and ultimately a citizen). However, he also told me that a person who comes to the United States by means of the free passage right must apply to become a legal permanent resident in order to stay in the United States long-term. He explained that if a Jay Treaty immigrant did not become a legal permanent resident, “[there would be] a stipulation, like you must leave within so many days, and so forth. Just like the border

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51 I did not include my conversation with a very helpful agent at the E-Verify hotline (run by USCIS) because I had no opportunity to assess her knowledge of the free passage right—I wound up explaining everything I already knew in order to frame my questions about E-Verify.
52 Telephone conversation with representative at Bureau of Indian Affairs (Apr. 20, 2011).
53 Id.
54 Telephone conversation with representative at U.S. Customs and Immigration Servs. (Apr. 15, 2011).
crossing cards—some of the border crossing cards are good for 72 hours, so they have to return back after the expiration of the card.”55 This is not only a contradiction of information contained on the Social Security Administration website,56 it also suggests that if a Jay Treaty immigrant did not apply for legal permanent resident status, she would have to leave the United States in a matter of hours or days. In fact, Canadian citizens coming to the United States as tourists can stay for up to 90 days,57 so even if the person in question had no additional rights under the Jay Treaty, she would not be required to leave in 72 hours.

The agent at the national Social Security Administration line was even less prepared. She had never heard of the free passage right,56 which makes some sense given that the Social Security Administration does not handle immigration matters directly. However, when I asked her if someone who came to the United States in this way might be able to get a Social Security card, she told me that the person “would need to have residency paperwork.”59 When I asked her what that residency paperwork would have to be, she told me she was not sure, but it would be something from “Immigration.”60 This is in stark contrast to the Social Security operations manual, which says, “Certain Canadian born Indians . . . may freely cross borders and live and work in the U.S. without DHS documentation.”61 This agent did not look up any agency rules or refer me to any other source of information. Her oversights were particularly egregious because she was at the official nationwide Social Security hotline, to which websites and voice recordings directed me throughout the project.

The local Social Security offices provided information of varying quality. Just over half of the offices (10 out of 19) gave me significant misinformation, and only 7 of 19 offices gave me complete, accurate information about the identification that a person would have to produce to obtain a Social Security Card.62 At different offices, agents told me that I would need a passport to get a Social Security card,63 that I would need “lawful presence and a work permit,”64 that I would need to provide immigration documents,65 and that I would need to provide a tribal ID as well as “of course,  

55 Id.
59 Id.
60 Id.
62 My baseline for accuracy was the information contained in the POMS operating manual.
63 Telephone conversation with agent in Soc. Sec. Offices in Billings, Mont. and Butte, Mont. (both April 25, 2011).
64 Telephone conversation with agent in Soc. Sec. Office in Burlington, Vt. (April 22, 2011). This is technically true—applicants for Social Security cards must be lawfully present and authorized to work—but the phrasing and context suggested that applicants would need some sort of documentation affirming their lawful presence or work authorization.
One agent answered the phone, cheerfully said, “I’m going to have to put you on hold while I double-check on that,” and then left me on hold for more than 15 minutes. (I hung up.) Agents at other offices insisted that the determination of eligibility is made on a case-by-case basis, so they could not describe the document requirements to me in the abstract.

It is important to recognize that these phone calls did not test whether agents could recognize appropriate documentation when it was presented to them. Some of the agents who answered my questions incompletely or incorrectly might nevertheless have been able to process a Jay Treaty immigrant’s actual application for a Social Security card. In some of the calls, it was clear that we were having trouble communicating, and it is possible that a face-to-face meeting would have ameliorated the problem. Some people I spoke to seemed to misunderstand my questions. One agent kept saying “Bureau of Indian Affairs” when (I think) she meant Indian and Northern Affairs Canada. Another agent, who seemed to have some familiarity with the free passage right, nevertheless told me that the documentation required for Social Security “can’t be a tribal card—it has to be an official Canadian document,” which is almost exactly the opposite of the Social Security Administration’s policy. It is possible that she would have recognized correct documentation when she saw it. But if a Jay Treaty immigrant took her advice, he might wind up leaving his (required) tribal records at home and bringing his INAC card (which the SSA will not accept) to the Social Security office.

I should also recognize here the terrific information that many offices did provide. One agent called me back twice in order to correct earlier misinformation. An agent in a border office gave me the most complete information I received from anyone in the entire project. Finally, one agent gave me excellent advice for dealing with any government situation: “I would bring every piece of [identification] that you have.”

The WIC offices stand out in the data for providing very little misinformation and providing a lot of useful information. This is partially due to a policy that is (at least officially) shared by WIC offices in every state I contacted: proof of citizenship or legal

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68 Telephone conversations with agents in Soc. Sec. Offices in Pocatello, Idaho (Apr. 22, 2011); Butte, Mont. (Apr. 25, 2011); and Bismarck, N.D. (Apr. 26, 2011) (the agent in Bismarck told me that the United States had different treaties with different tribes). Other agents were deliberately vague about the requirements for specific documents, probably out of concern for security, but these few offices failed to provide general information that was publicly available on the Social Security Administration’s website.
72 Telephone conversations with agent in Soc. Sec. Office in West Bend, Wis. (Apr. 25, 2011).
residence is not required in order to obtain WIC benefits.75 Several WIC offices emphasized that applicants would need to prove state residency (using a lease agreement, utility bill, or something similar), but all agreed that applicants did not need to provide proof of legal admission to the United States. 76 This policy is easy to remember, communicate, and implement. Representatives in Social Security offices and officers at border checkpoints (see infra) got confused about exactly what documentation their agencies required, but this rarely happened to the WIC representatives I spoke to.77

The Customs and Border Protection officers at the border (or, as CBP calls them, “Ports of Entry”) had mostly at least heard of the free passage right: three out of four officers knew that there were special immigration rules for some Canadian-born Native Americans.78 None of the officers gave rules for entry that were more restrictive than the rules on the CBP website, but two were less restrictive. One officer told me that since all Canadians can enter the United States without a visa, Canadian-born Native Americans could enter with only a tribal ID, but also insisted that there was nothing else special about their status.79 Another recognized that Native Americans born in Canada could become permanent residents, but never mentioned that they would have to show a birth certificate and prove blood quantum (despite my questions).80

THE RAMIFICATIONS OF POOR INFORMATION

At first blush, it might not seem to matter that some federal officials are giving out misinformation to potential Jay Treaty immigrants; if anything, the last officer I mentioned would seem to make their lives easier. However, even if he fails to ask for the required documentation, applicants for legal permanent resident status will still need to provide it in order for USCIS to issue a green card. This officer’s misinformation might make Jay Treaty immigrants have to apply twice—or worse, it might encourage them to enter the United States with less documentation than they needed. Multiple agents I spoke with encouraged would-be migrants to stop at border offices to make sure that their documents were adequate before they traveled any further. This advice is unhelpful if the border offices are evaluating documents incorrectly. Furthermore, CBP

76 As the representative in my local WIC office said: “We don’t ask for no type of papers.” Conversation with agent in New York City WIC office (April 25, 2011).
77 The exception was the Idaho Care Line, which told me that people “usually have to show proof of citizenship to apply for those services.” Telephone conversation with agent on Idaho Care Line (Apr. 22, 2011). The WIC numbers that I found mostly sent me to state WIC headquarters and hotlines, so I was hearing the official policies rather than hearing how local WIC offices implemented those policies. Nevertheless, given my mixed results with the official national hotlines, I still find the results of the WIC survey encouraging.
79 Telephone conversation with Customs & Border Prot. officer at Lewiston Bridge, N.Y. (Apr. 21, 2011).
80 Telephone conversation with Customs & Border Prot. officer in Baudette, Minn. (Apr. 26, 2011).
officers who do not know the details of how to create a record of admission for permanent residence may wind up filling out the wrong forms at the border.

Even though Jay Treaty immigrants are allowed stay in the United States indefinitely without obtaining green cards, incorrect immigration paperwork can have major consequences. When I began work on this project, one issue I was alerted to was a concern that the E-Verify system for employers might incorrectly “flag” Jay Treaty immigrants.\(^\text{81}\) According to USCIS, the E-Verify system is “an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.”\(^\text{82}\) Essentially, employers enter their employees’ identifying information into E-Verify, and E-Verify determines if the Social Security numbers that the employees provided were validly issued to them. The idea is to screen for individuals who are not authorized to work and are using fraudulent Social Security cards. Since Jay Treaty immigrants with proper identification are entitled to legitimate Social Security cards, I was unsure about why E-Verify would not work adequately for them.

I called the E-Verify hotline to get some information about problems that might occur with Jay Treaty immigrants’ information.\(^\text{83}\) Initially, the E-Verify agent suggested that Jay Treaty immigrants might be receiving “restricted” Social Security cards. According to the agent, some Social Security cards do not authorize their bearers to work in the United States.\(^\text{84}\) However, she also said that these restricted Social Security cards have their restrictions printed on them, so anyone with a restricted card would know it.\(^\text{85}\) Furthermore, the identification that a Jay Treaty immigrant would need to show in order to receive a Social Security card would also probably be sufficient to authorize him to work.\(^\text{86}\)

A more convincing explanation for why E-Verify might erroneously flag Jay Treaty immigrants has to do with how E-Verify works. The agent explained that E-Verify takes the information that an employee provides in an I–9 form (the employee’s name, address, Social Security number, date of birth, and supporting documentation) and

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\(^\text{81}\) Thanks to David Armstrong for bringing this to my attention.


\(^\text{83}\) In order to ask my question, I had to explain the existence of the Jay Treaty free passage right and some of its benefits, such as the right to a Social Security card. Therefore, I did not include the E-Verify agent in the data explained above.

\(^\text{84}\) Conversation with E-Verify agent, April 26, 2011. She explained that restricted Social Security cards may either say “valid for work only with DHS authorization,” in which case the bearer may work if he presents independent evidence that he is authorized to work, or say “not valid for work authorization,” in which case the bearer would have to obtain a new card before being able to work.


matches it against records kept by the Social Security Administration and the Department of Homeland Security. If the Jay Treaty immigrant has a valid Social Security card, then the SSA records should not be a problem. However, if he never applied to be a permanent resident, then there will be no DHS record of his admission as a legal permanent resident, and that disparity might cause E-Verify to flag the record as problematic.

A negative result from E-Verify can cause an employee to lose his job or even cause an encounter with Immigration and Customs Enforcement. If missing DHS documentation really does trigger problems with E-Verify, then problems with E-Verify are a risk for any Jay Treaty immigrant who does not formally become a legal permanent resident. It would not matter if the person deliberately chose not to become a legal permanent resident, lacked required documentation (such as the long-form birth certificate), or was admitted by a CBP officer who did not realize that he needed to create a record. Any of these circumstances could cause a Jay Treaty immigrant not to have DHS paperwork, which in turn could lead to problems with E-Verify. This makes it extremely important that CBP officers know how to properly record the entry of Jay Treaty immigrants.

CONCLUSION AND RECOMMENDATIONS

On some level, we should not be surprised that government agents do not know the details of the Jay Treaty free passage right. The free passage right is a complicated set of policies that affects relatively few people; most agents will rarely encounter circumstances that involve the Jay Treaty. However, for the people who do enter the United States using the free passage right, it is of the utmost importance that agents know how to handle their cases, or at least where to look for more information.

One feasible means of addressing this problem would be to create a single government website listing all of the rules and benefits available under the free passage right. A single page with a checklist of required documents would make it easy for Jay Treaty immigrants to find out how to take advantage of their entitlements under United States law. Furthermore, government agencies could refer their agents to this site in

87 Telephone conversation with E-Verify agent (Apr. 26, 2011).
88 A Jay Treaty immigrant who has not become a permanent resident also will not have an Alien Number or Admission Number, as required by the I-9. See I-9, supra note 85, at 1, available at http://www.uscis.gov/files/form/i-9.pdf (last visited Oct. 31, 2012).
89 The Code of Federal Regulations says that a creation of record requires a form I-181. 8 C.F.R. § 289.3 (2010). This was confirmed by one CBP officer from Pembina, N.D. Telephone conversation (Apr. 26, 2011). However, other officers said that they would use a form I-872 or a form I-551. Conversations with Customs & Border Prot. officers in Pittsburg Station, N.H. (Apr. 21, 2011) and Baudette, Minn. (Apr. 26, 2011). It is not clear which of these three forms would suffice to create an adequate DHS record for E-Verify.
90 My survey was limited to states along the Canadian border, where these cases would tend to be, if anything, more common than in the rest of the country. As one agent said to me, "We’re a border office . . . so [the free passage right is] something that we have to be familiar with. I mean, if you went down to Georgia or something they’re not going to know this rule!" Telephone conversation with agent in Sec. Soc. Office in Bemidji, Minn. (Apr. 26, 2011).
order to find comprehensive, easily digestible information that they could then share with migrants.

Some legal services organizations have taken steps to make this information publicly available. Before it closed, the American Indian Law Alliance published a pamphlet called *Border Crossing Rights Between the United States and Canada for Aboriginal People*, which provided clear and accurate information to potential Jay Treaty immigrants. (Unfortunately, the AILA website is no longer maintained, and the pamphlet has been removed from its official site.91) Legal Services of North Dakota also provides information about the free passage right on its website.92 These sites provide a useful model of the content a government page might contain.

However, it is important for the United States government to provide this information itself, rather than relying solely on legal services organizations. People seeking reliable information about government policies deserve the certainty that comes from obtaining information from the official source. This would also allow the federal government to update the site whenever the substantive rules changed.

There remains the possibility that the murkiness surrounding the free passage right is deliberate, or at least not unwelcome as far as the federal government is concerned. The trend in immigration law has been to tighten the borders, rather than to make travel and immigration easier.93 The lack of information about how to exercise the free passage right might serve to discourage would-be immigrants from taking advantage of their right to live freely within the United States. However, obscuring the contours of a right is not an acceptable way for the United States to make its policy. The Jay Treaty free passage right exists, and the bearers of that right should at least be able to find out how to exercise it.

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91 The text of the pamphlet appears to have been copied to several websites, so the information remains on the internet, albeit from less reliable sources. See, e.g., danielnpaul.com, JAY TREATY: 1794, [http://www.danielnpaul.com/AmericanBritishJayTreaty-1794.html](http://www.danielnpaul.com/AmericanBritishJayTreaty-1794.html) (last visited Oct. 31, 2012).
## Appendix: Metrics

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<th>Border crossing Points (n=4)</th>
<th>Federal information lines 94 (n=3)</th>
<th>Social Security Offices (n=19)</th>
<th>WIC Offices and hotlines (n=12)</th>
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</tr>
<tr>
<td>Looked up information or asked someone for help?</td>
<td>0%</td>
<td>0%</td>
<td>42%</td>
<td>8%</td>
</tr>
<tr>
<td>Gave adequate correct information?</td>
<td>25%</td>
<td>33%</td>
<td>37%</td>
<td>92%</td>
</tr>
<tr>
<td>Gave misinformation?</td>
<td>50%</td>
<td>67%</td>
<td>53%</td>
<td>8%</td>
</tr>
</tbody>
</table>

The questions in the table above were scored as follows:

1) “Knew of Jay Treaty right?”
   This question was scored generously. If the person with whom I was speaking made any sign that she had heard of a special right for Canadian-born Native Americans, she got credit for knowing about the Jay Treaty. My logic here was that if the operator had at least heard of the Jay Treaty right, she would be less likely to dismiss questions from a Jay Treaty immigrant and would be more likely to know where to look to find out more information.

2) “Referred me to a website, agency, or person?”
   Many agents who had no useful information about the free passage right still directed me to their agency websites, which I knew from independent research contained helpful information. A person who had not previously done internet research might be helped by a reference to, for example, http://www.socialsecurity.gov/. On the other hand, the government agency websites to which I was directed were huge, sprawling, and likely to intimidate inexperienced researchers.

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94 I did not include my conversation with a very helpful agent at the E-Verify hotline (run by USCIS) because I had no opportunity to assess her knowledge of the free passage right—I wound up explaining everything I already knew in order to frame my questions about E-Verify.
References to specific people and agencies were more helpful. A few agents gave me very specific referrals, sometimes giving me a specific person’s phone number or a direct line to another office.

3) “Looked up information or asked someone for help?”
Some agents who did not know the answers to my questions nevertheless made efforts to help (sometimes successfully, sometimes not). This is important not just on the theory of “A for Effort,” but because an agent who takes the effort to find out information is more likely to uncover formal policies as recorded in manuals and on agency websites.

4) “Gave adequate, correct information?”
In order to pass this category, an agent had to correctly describe the documents that a Jay Treaty immigrant would need to show in order to cross the border, receive a Social Security card, or obtain whatever benefit we were discussing.
I checked the answers by reference to agency policy as listed on websites. Therefore, if an agent at a Social Security office told me that a Jay Treaty immigrant could receive a Social Security card by showing a tribal I.D. card, I did not count that as adequate, correct information, because the Social Security website says that you need a document proving your Native American heritage and a birth certificate. (Even if that particular agent would have issued a Social Security card based on less identification, the agent is still giving the caller inadequate information to get a Social Security card from any other agent.)
One of the reasons WIC offices did so well in this category is that none of the WIC agencies I called required proof of citizenship or legal immigration status to obtain benefits. “We don’t need to see immigration documents” is an easy policy to remember and communicate.

5) “Gave misinformation?”
This category is not simply the opposite of the “adequate, correct information” category above, and in fact the two were not mutually exclusive. (For example, one agent at USCIS accurately described how a Jay Treaty immigrant could acquire legal permanent resident status, but then told me that Jay Treaty immigrants must become legal permanent residents in order to stay in the country long-term.) I put calls in this category when the agent affirmatively stated something that was not only wrong, but would also have significant consequences for a Jay Treaty immigrant (or would-be immigrant) who believed the agent.

In general, I excluded from my sample any phone calls where I could not reach a human being or where the agent with whom I spoke asked not to be included. I also excluded a call to the USCIS E-Verify hotline because the call gave me no useful opportunity to assess the agent’s knowledge of the free passage right.