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INDIAN SELF-DETERMINATION: THE FEDERAL GOVERNMENT, NEW MEXICO, AND TRIBES IN THE WAKE OF *CHEROMIAH*

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I. BACKGROUND

Legal fictions have long been important tools in evolving group expectations and protected rights within a political process.¹ The “sovereign equality of the states” to the federal government is a legal fiction.² So too is the designation of the American Indian Tribe as a “dependent domestic nation” endowed with inherent sovereignty, yet defeated by conquest.³ These two fictions have been important engines in developing settled expectations with respect to both sovereigns under the United States.⁴ But historically, state and tribal sovereigns have operated against one another in asserting and evolving their respective substantive law and rights.⁵ This opposition between States and Tribes was a product of Anglo American “conquest,” which culminated in the writing of the United States Constitution.⁶

The federal government mutually excluded the laws of States and Tribes from one another at its inception. Common law tradition codified in the absolute federal sovereign would apply more or less to the States, subject to the States’ consent. But the newly minted federal government proceeded to declare the legal status of Tribes as conquered separate political entities, dependent on and subject only to the plenary power of the United States by its power under Article I, Section 8, Clause 3, and Article VI, Clause 2 of the Constitution.⁷ In other words, conquered peoples

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1. See generally 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Stanley N. Katz ed., Oxford Press 1979) (1769).

2. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 5 (1996).

3. See *infra* Part III.A; *Cherokee Nation v. Georgia*, 30 U.S. 1, 3 (1831).

4. Compare *Slaughter-House Cases*, 83 U.S. 36 (1872) (grounding the origin of substantive rights incorporation to the states through the due process clause of the Fourteenth Amendment), with *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (grounding affirmation of Indian substantive rights incorporation to the Tribes through the Indian Civil Rights Act of 1968).

5. See *infra* Part III.A.

6. See *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *infra* Part III.A. *M’Intosh* states in the stipulated facts that “the [European] right of soil was previously obtained by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured.” *M’Intosh*, 21 U.S. at 545. The stipulated facts go on to state that by the commencement of the war between France and Britain of 1756,

the Western Confederacy of Indians...were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty...these Indians, after the treaty, became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property.

Id. at 547–48. The case goes on to stipulate that all Tribes about the colony of Virginia at this time were completely sovereign and not conquered in any way, but parties to Treaties. *Id.* at 548–50. Thus, the notion of conquest that this case relies on to invalidate Indian title is counterfactual.

7. See *Worcester v. Georgia*, 31 U.S. 515, 558–59 (1832), *abrogated on other grounds as recognized in Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001); see also *infra* Part III.A.

would be subject to the mercy of the conqueror. Congress alone determined the autonomy or political viability of the Indian Tribes.⁸ Congress chose to recognize “conquered tribes,” once great and preexisting Anglo invasion for centuries, not divested of inherent sovereignty.⁹

Today, judicial review might apply to either sovereign. The laws of the State are to concede to the laws of the United States when their subject matter is in conflict with the latter.¹⁰ And, in the aftermath of assimilation and reorganization efforts, the laws of the Indian nations remain subject to the traditional “special relationship” and “dependent domestic nation status” the federal government has assigned to Tribes.¹¹

Thus, the divergent paths of the States and Tribes to assertions and advancement of autonomy are either ratified or rejected by the federal sovereign, generally spoken, through the medium of the judiciary. In other words, the patriarchal authority and integrity of the federal government in large part is dependent upon the two sovereigns’ ability to supply developed precedent to the federal sovereign.¹² This parentage, however, should be reserved so that its “children” may grow, but learn from the federal courts.¹³ As a result, the judiciary should be equipped to deliver principled decisions.

II. INTRODUCTION

This Comment will focus on recent decisions and trends in Indian Law signaling that State and tribal governments have a vested interest in working as partners, crafting mutually inclusive relationships that in turn can better guide the federal sovereign toward democratic principles. As such, it will address two main areas.

First, Congress has understood that its trust responsibilities to the Tribes are best served by loosening restrictions and allowing Tribes to privately contract with States or other outside parties on their own terms.¹⁴ This allows Tribes to

8. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (holding that Congress was assumed to have acted in good faith on behalf of tribes even when it breached its fiduciary duties as trustee to fraudulently abrogate the terms of a treaty).

9. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); see also *infra* Part III.A.

10. See *Marbury v. Madison*, 5 U.S. 137 (1803) (standing for the now universally accepted proposition that it is the duty of the judiciary to interpret what the law is and overrule any state or federal law that is found in opposition to the laws of the United States or the supremacy of the federal constitution).

11. See U.S. CONST. art. VI, cl. 2; U.S. CONST. art. III, § 2, cl. 2; *Worcester*, 31 U.S. at 561 (standing for the proposition that no state law shall have any force on tribal land if the federal government has preempted it); see also *Cherokee Nation*, 30 U.S. 1; *infra* Part III.A.

12. But see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 203 (1978), *superseded in part by statute*, Pub. L. No. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), as recognized in *United States v. Lara*, 541 U.S. 193, 205–07 (2004) (announcing that the “unspoken assumption” rather than the previously applicable “clear and plain intention” canon of construction applied to abrogate Indian rights, allowing the Court to hold that tribal courts had no criminal jurisdiction over non-Indians for tribal code crimes). See also discussion *infra* Parts III.D, V.

13. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (recognizing that *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), laid to rest the notion that “congressional good faith” was based on a presumption that relations between the United States and tribes were a political matter not amenable to judicial review); see also discussion *infra* Part III.C–D.

14. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f (2000); see also discussion *infra* Part III.C.

substantially provide for their own health, welfare, and safety.¹⁵ The Congress has also learned by its failed policies of the past that self-determination is enhanced when Tribes provide for their own political integrity, adopting their own constitutions and creating strong tribal judiciaries.¹⁶

But, in the wake of the self-determination era, the federal courts have adopted neo-colonial tendencies instead.¹⁷ These tendencies abandon established Indian canons of construction, resulting in new doctrine that has turned the Marshall trilogy against tribal autonomy.¹⁸ The result is judicial encroachment upon tribal power authorized by Congress.¹⁹ Such judicial encroachment upon state legislatures is not new. But judicial encroachment on self-determination is apparently a recent invention.²⁰

This first section argues that modern federal Indian policy is fundamentally sound because it affords Indian nations access to federal republican norms on their own terms.²¹ Tribes have organized governments capable of providing for their own citizens' health, welfare, and safety, lessening the burden of the federal government's fiduciary duty to the Tribes.²² This should be mutually beneficial once federal courts realize rational basis review with respect to Indian law and thus

15. See, e.g., Indian Financing Act of 1974, 25 U.S.C. § 1451 (2000) (establishing low cost financing that will be reimbursable as Tribes exercise management and utilization of their own resources); see also discussion *infra* Part III.C.

16. See Indian Reorganization Act of 1934, 25 U.S.C. §§ 476–477 (2000); see also discussion *infra* Parts III.B–C.

17. See *Oliphant*, 435 U.S. at 212 (holding that “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians”); *Nevada v. Hicks*, 533 U.S. 353, 365 (2001) (holding that States have inherent jurisdiction on reservations); Gloria Valencia-Weber, *The Supreme Court Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 407 (2003) (discussing the modern Court’s construction of judicial plenary power as lacking constitutional origins by invading “Congress’ enumerated and exclusive power in relations with Indian tribes”); David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 270 (2001) (asserting that the decidedly state-centric Rehnquist Court has engaged in little historical analysis with respect to Indian cases, which has left the Indian Commerce clause—the clause the framers had designated to fulfill the exclusive political relationship between tribes and the United States for centuries past—in desuetude); see also discussion *infra* Part III.D.

18. See discussion *infra* Part III.A and note 33; see also discussion *infra* Part III.D. Compare *Montana v. United States*, 450 U.S. 544 (1981) (holding that Tribes have no civil jurisdiction over non-members within a reservation except where a non-member has entered into a contractual relationship with a tribe or an individual member or the actions of the non-member so threaten the health, welfare, and safety of the tribe that the Tribe’s political integrity is threatened if jurisdiction does not lie in tribal court), with *Worcester v. Georgia*, 31 U.S. 515, 553–54 (1832), *abrogated in part as recognized in Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001) (holding that tribes entered treaties with inherent sovereignty, not divested by Congress, to make their own rules and be governed by them); *Williams v. Lee*, 358 U.S. 217, 256 (1959).

19. See *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute*, Pub. L. No. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), *as recognized in United States v. Lara*, 541 U.S. 193, 205–07 (2004); see also discussion *infra* Part III.D.

20. Compare *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), with *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980) (criticizing but not overruling a decision that encroached on principles of Indian sovereignty from the same era as *Lochner*: *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). See also discussion *infra* Part III.D.

21. See generally Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970) [hereinafter Message to Congress]; see also discussion *infra* Part III.C.

22. See, e.g., Ronald N. Johnson, *Indian Casinos: Another Tragedy of the Commons*, in SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 214, 220–21 (2006) (noting that the Indian Gaming Regulatory Act of 1988 (IGRA) had resulted in 40 percent of participating U.S. Tribes’ annual gaming revenues equaling the combined annual gaming revenues of Nevada and New Jersey by 2003); see also discussion *infra* Part III.C.

mature to the level of Congress.²³ Therefore, tribal governments might be governed by their own laws and develop their own precedent, which is also a judicial decree of the Court.²⁴

Second, the States in conjunction with Tribes in their midst can play a key role in encouraging the federal judiciary toward principled decisions.²⁵ By temporarily avoiding the judiciary's hostility toward Indian self-determination, tribal and state forums can build consistent precedent. This precedent can inform a fledgling rational basis review with respect to tribal court decisions.²⁶ New Mexico is located in the heart of Indian country, and decisions originating here such as *Cheromiah v. United States*²⁷ suggest positive mechanisms to (1) protect and advance the adjudicative turf of both sovereigns by (2) staying out of federal court and certifying questions of law in either a tribal *or state forum*.²⁸ Simply put, *Cheromiah* tactics could also work and be put to better use by building comity between state and tribal fora. Consistent precedent created by Tribes and States in partnership is vital to local economic interests, which subsume the health and welfare concerns of both New Mexico and the Tribes.²⁹

This second section will argue that a cohesive body of law with respect to New Mexico Tribes and the State is achievable and desirable. The two sovereigns are already in significant economic and political partnerships and should want to maximize their investments in order to improve their joint infrastructure.³⁰ Procedural and other structural mechanisms such as arbitration and the amendment of tribal laws and contracts can go a long way toward creating trust, which is essential to this endeavor.³¹ A consistent, published tribal precedent forged by the States and the Tribes could educate the federal judiciary in matters already understood by Congress.

III. MODERN FEDERAL INDIAN POLICY: DISCOVERING SELF-DETERMINATION

A. *The Initial Understanding*

In the beginning of the Union, Chief Justice John Marshall penned a series of cases known as "the Marshall trilogy," which determined the legal status of Tribes

23. See *supra* note 20.

24. See *Williams v. Lee*, 358 U.S. 217, 219–20 (1959); see also discussion *infra* Parts III.D, IV.B.

25. See *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999). There, the court propounded a certified question of law to a tribal court to determine how a wrongful death tort might proceed under tribal law in a Federal Tort Claims Act claim. *Id.* at 1309–10. Certified questions of law could easily be used as a mechanism to build precedent between state and tribal fora with respect to other issues. See also discussion *infra* Part IV.B.

26. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 (1980); see also discussion *infra* Parts IV.B, III.C.

27. 55 F. Supp. 2d 1295.

28. *Id.*; see also discussion *infra* Part IV.A.

29. See NMSA 1978, § 29-1-11(C)(8) (2006) (providing for deputization of tribal and pueblo officers to act as New Mexico police officers outside of Indian country); see also discussion *infra* Part IV.B.

30. See, e.g., NMSA, 1978 § 11-13-2 (2006) (providing for New Mexico's revenue sharing of tribal gaming pursuant to the IGRA); see also discussion *infra* Part IV.B.

31. See *C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (holding that a carefully constructed arbitration clause that was acceptable to the Tribe waived sovereign immunity without explicitly stating such waiver); see also discussion *infra* Part IV.B.

within the borders of the expanding United States.³² The trilogy designated “conquered tribes” no longer foreign nations per se, but redefined Tribes as “dependent domestic nations.”³³ Under this definition, the Tribes were separate political entities with no standing to bring a cause of action before the courts.³⁴ Indian dependency upon the federal government also meant that the United States retained conquered Indian lands in fee simple.³⁵ But aboriginal or “Indian title” was observed whereby Tribes had a mere possessory right to the use and occupancy of such lands subject to the will of Congress’s exclusive power to regulate commerce with the Indian Tribes.³⁶ In this manner, the doctrine of “discovery” would not allow Tribes to compete with the infant nation in foreign affairs.³⁷

Congress primarily exercised its powers in making treaties with the Tribes as the nation expanded westward.³⁸ The Court held that when entering treaties, Tribes had ceded lands to the federal government in exchange for the protection of their inherent sovereignty, which had not been divested, to make their own laws and be governed by them.³⁹ This essentially meant protection from encroachment from non-Indians and States upon land reserved for and governed by the Tribes.⁴⁰ In this regard, the Court held that state law had no force on Indian land because Congress’s plenary power had preempted it.⁴¹

Taken as a whole, the Marshall trilogy advanced the proposition that “a special relationship” was formed between the Tribes and the federal government.⁴² This relationship generated a distinct form of trust where the United States is trustee and the Tribes are the beneficiaries.⁴³ In this regard, the United States is under a fiduciary duty to act in good faith on behalf of the Tribes.⁴⁴

The trilogy, however, sublimated an explicit assumption that the trust relationship would be temporary.⁴⁵ In other words, the Court opined this relationship would one day be irrelevant when the Tribes assimilated into the dominant Anglo-

32. *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832), *abrogated in part as recognized in Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001).

33. *Cherokee Nation*, 30 U.S. at 17. This legal designation kept the dual scheme of federalism intact: Tribes were not States. *Id.*

34. *Id.* at 39.

35. *M’Intosh*, 21 U.S. at 584.

36. *Id.* at 587, 603.

37. *Id.* at 573 (discussing the doctrine of discovery that enabled European nations to rationalize complete ownership of aboriginal lands because these lands were discovered by Europeans. The European “discovery” of the continent subsequently, and by convention, enabled an assignment of a mere possessory right to aboriginal peoples.); *see also* discussion *infra* Part III.D, notes 135–144 and accompanying text.

38. *Worcester v. Georgia*, 31 U.S. 515, 549 (1832), *abrogated in part as recognized in Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001).

39. *Id.* at 553–54; *Williams v. Lee*, 358 U.S. 217, 218 (1959).

40. *Worcester*, 31 U.S. at 561–62.

41. *Id.* at 561; *see also McClanahan v. Ariz. Tax Comm’n*, 411 U.S. 164 (1973).

42. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (noting in dicta that “[Indians’] relation to the United States resembles that of a ward to his guardian”).

43. *See United States v. Mitchell*, 463 U.S. 206, 225 (1983).

44. *Id.*

45. *See Johnson v. M’Intosh*, 21 U.S. 543, 589–90 (1823); *Cherokee Nation*, 30 U.S. at 23; *Worcester*, 31 U.S. at 593; *Solem v. Bartlett*, 465 U.S. 463, 466 (1984); *see also American Indian Trust Fund Management Reform Act*, 25 C.F.R. § 1200.3(b) (2006).

American culture governed by dual federalism.⁴⁶ And surely the Tribes would want to do so, because the dominant culture was assumed superior.⁴⁷ This explicit assumption proved wrong because Western cultural values did not understand and could not defeat tribalism.⁴⁸ Past congressional attempts to defeat tribalism have been disastrous to all three sovereigns.⁴⁹

B. *The Failures of Assimilation*

The Dawes Act of 1887⁵⁰ ushered in the Allotment Era, a reform attempt to destroy tribalism and convert all Indians into farmers.⁵¹ Under this policy, individual members of federally recognized Tribes were forced to accept a parcel of land for farming.⁵² Remaining tribal land or “surplus lands” would be sold off to white settlers.⁵³ Significantly, the individually allotted Indian parcels were granted in fee simple to Indians, subject to the individuals proving “civilized” abilities to manage land.⁵⁴ As a result, not only the selling of surplus lands, but outright graft on the part of non-Indians, induced naive tribal members to sell allotments contributing to the loss of approximately ninety million acres of reservation lands held under trust.⁵⁵ This interpolation of trust doctrine by Congress was formally rationalized during the Allotment Era in *Lone Wolf v. Hitchcock*,⁵⁶ where the Court held that Indian treaty rights could be breached if Congress determined that such breach was in the interest of the Tribes.⁵⁷

The compelled assimilation under Allotment in the “interest” of the Tribes was a substantial breach of Congress’s fiduciary duty to the Tribes.⁵⁸ The Dawes Act, supporting a policy of accommodating land-hungry white settlers thinly veiled as an attempt to better the Tribes, resulted in extreme poverty on what remained of the reservations.⁵⁹ Parcels given to Indian individuals to farm were small and not suited

46. *M’Intosh*, 21 U.S. at 589–90.

47. *Id.*

48. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 63–68 (1987); see also discussion *infra* Part III.B.

49. See discussion *infra* Part III.B.

50. Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 334–358 (2000)).

51. *Id.*

52. Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 959 (1972).

53. *Id.*

54. *Id.*; see also LeAnn Larson LaFave, *South Dakota’s Forced Fee Indian Land Claims: Will Land Owners Be Liable for Government’s Wrongdoing?*, 30 S.D. L. REV. 59, 65–67 (1984). The article documents government “blue ribbon competency commissions” that were designed to achieve western literacy and familiarity with domestic practices with respect to Indians. *Id.* at 66. Confirmation of competency included legal change of Indian males’ names to generic Anglo names and a ceremony to memorialize competency in which the Indian male “shoots the last arrow.” *Id.* at 66 n.49.

55. See Comment, *supra* note 52, at 960; see also *Harjo v. Kleppe*, 420 F. Supp. 1110, 1132–33 (D.D.C. 1976) (documenting an outright federal government conspiracy during the Allotment Era that undermined the Creek government, recognized by treaty, in order for Oklahoma to achieve statehood).

56. 187 U.S. 553 (1903).

57. *Id.* at 566 (holding that Congress was assumed to have acted in good faith on behalf of these Tribes, rather than fraudulently, when it did not obtain the requisite three-fourths of adult male Kiowa, Comanche, and Apache signatures necessary to abrogate the terms of a treaty).

58. See discussion *infra* Part III.C.

59. See generally INST. FOR GOV’T RESEARCH, *STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION* (1928). The report detailed abysmal poverty with respect to individual Indians supposedly

for farming in the mostly arid lands of reservations,⁶⁰ and the United States' "one size fits all" approach to Tribes failed to understand the differing cultural values of separate political entities.⁶¹ On balance, tribalism survived Allotment and ironically left Congress with a greater fiduciary burden, which Congress presumably initially intended to lessen with respect to what remained of Tribes and their assets.⁶² Thus, Congress felt compelled to return to legitimate trust principles consistent with a guardianship.⁶³

The Indian Reorganization Act of 1934 (IRA)⁶⁴ rehabilitated trust doctrine by prohibiting the allotment of reservation land to any Indian, individually and in fee simple.⁶⁵ This effectively repealed the Dawes Act,⁶⁶ but the IRA vested authority in the Tribes themselves rather than local Indian agents.⁶⁷ For example, the IRA prohibits alienation of Indian land or assets to any interest other than the Tribe.⁶⁸ Furthermore, the Secretary of the Interior would now make loans to the Tribe rather than to individuals who had a hard time repaying the loans.⁶⁹ Some of these funds were to be used for educational purposes, earmarked to cover tuition and other expenses.⁷⁰ Thus, the IRA illustrates an example of tribalism surviving assimilation, but with a new twist: Tribes had greater control of their own destinies.⁷¹

Greater self-control of tribal destinies was accomplished under the IRA by democratic principles. For the first time, federal legislation did not compel all Tribes to come under an Act, giving Tribes a vote to adopt or reject the IRA.⁷² Most importantly, sections sixteen and seventeen of the Act allowed for the formation of Indian constitutions and issuance of charters for incorporation respectively.⁷³

During the two-year period within which Tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 Tribes (129,750 Indians) accepted the Act and 77 Tribes (86,365 Indians, including 45,000 Navajos) rejected it.... Within 12 years, 161 constitutions and 131 corporate charters had been adopted pursuant to the IRA.⁷⁴

benefited by Anglo agricultural practices grounded in fee simple ownership. *Id.* at 430–546. Significantly, the report recommended rehabilitating the tribes to provide their own social services rather than rely on the government that had always understaffed and under funded this effort. *Id.* at 8, 629–45.

60. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 142 (5th ed. 2005).

61. See WILKINSON, *supra* note 48, at 68, 77.

62. See Comment, *supra* note 52, at 959 (stating that one intended consequence of Allotment was to "relieve the Government of the need for further supervision of Indian affairs and life").

63. See discussion *infra* notes 64–76 and accompanying text.

64. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

65. *Id.*

66. *Id.* (stating that Indian lands would again be held communally in trust for Tribes by the federal government, rather than allotted individually to Indians with the subsequent right to sell these lands).

67. 25 U.S.C. § 463.

68. *Id.*

69. *Id.* § 470.

70. *Id.* § 471.

71. See WILKINSON, *supra* note 48, at 68.

72. 25 U.S.C. § 478.

73. *Id.* §§ 476–477; see, e.g., CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA CONSTITUTION AND BY-LAWS, available at http://thorpe.ou.edu/constitution/Chyn_aph.html#preamble.

74. Comment, *supra* note 52, at 972 (footnotes omitted).

Thus, the Tribes could organize for their common welfare under section sixteen and regulate their own business practices under section seventeen.⁷⁵ Finally, IRA funds were “used to reacquire” some allotted land to improve Tribes’ ability to manage land.⁷⁶ But the legacy of Allotment created a “patch-work” of jurisdictional nightmares because non-Indian fee land was now within Indian reservations, which were once again considered inherently sovereign.⁷⁷

Non-Indian fee land within Indian country is inimical to inherent sovereignty because it erodes political integrity. Thus, the germ of *Lone Wolf* that encouraged the assimilationist assumptions of the Marshall trilogy could not entirely be overruled.⁷⁸ On the contrary, *Lone Wolf* perpetuated a line of cases hostile to inherent sovereignty.⁷⁹ With no judicial review checking unprincipled decisions, impatient reformist attempts on the part of Congress could and did surface quickly to wreak havoc, despite the inchoate accomplishments of the IRA legislation.⁸⁰

Post-World War II, Congress again became agitated to achieve assimilation as soon as possible under Republican President Eisenhower, himself fearful of the “danger[s] of big government.”⁸¹ As Eisenhower warned, “those who would stay free must stand eternal watch against excessive concentration of power in government.”⁸² As historian Angie Debo countered, “World War II had its effect: with the expanding agriculture, envious eyes were again fixed on the Indians’ land at the same time that the national attention was focused elsewhere.”⁸³ Thus, the pretext of trust doctrine would again be used to accelerate assimilation as freedom from federal control was considered to be in the best interest of Indians individually.⁸⁴

In this period, freedom from federal control manifested itself as House Concurrent Resolution 108,⁸⁵ otherwise known as the Termination Act. This Act was introduced in June of 1953 and endorsed by the Senate without debate as declared Indian policy.⁸⁶ The Act was designed to “free” Indians of the burdens of federal oversight so that they could “assume their full responsibilities as American

75. 25 U.S.C. §§ 476–477; see also discussion *infra* Part IV.B (discussing the enormous influx of capital through Indian casinos operated and managed by Tribes).

76. Comment, *supra* note 52, at 976.

77. See discussion *infra* Part III.D.

78. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), *abrogation recognized in* *Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), *distinguished by* *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979).

79. Compare *Lone Wolf*, 187 U.S. at 556 (holding that treaties with Tribes may be abrogated), *United States v. Kagama*, 118 U.S. 375, 379 (1886) (asserting that there are only two sovereigns: the United States and the “states of the Union”), and *United States v. McBratney*, 104 U.S. 621, 624 (1881) (recognizing Colorado’s jurisdiction over crimes committed on the Ute reservation “by a white man upon a white man” by operation of equal footing doctrine), *with* *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (holding that Indian Tribes retain the power to make law because this power existed prior to the U.S. Constitution), *Ex Parte Crow Dog*, 109 U.S. 556, 570–72 (1883) (holding that Indians retain criminal jurisdiction on Indian lands with respect to crimes between members), and *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (holding that state law can have no force on Indian land), *abrogated in part as recognized in* *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001).

80. See discussion *infra* notes 81–93 and accompanying text.

81. See Gary Orfield, *A Study of the Termination Policy* (1966), reprinted in GETCHES ET AL., *supra* note 60, at 200.

82. *Id.* at 200–01.

83. ANGIE DEBO, *HISTORY OF THE INDIANS OF THE UNITED STATES* 301 (1970).

84. See discussion *supra* notes 58–61 and accompanying text.

85. H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953).

86. Orfield, *supra* note 81, at 201.

citizens.”⁸⁷ The Act was overwhelmingly opposed by most of the Tribes, but some groups within several Tribes favored termination, largely to be able to mortgage or sell their land without government interference.⁸⁸

A few days after the adoption of the policy, Congress passed Public Law 280⁸⁹ giving specific States power to extend their civil and criminal law over Indian reservations.⁹⁰ Public Law 280, if adopted by a State, did not require tribal consent until 1968 when President Johnson signed a bill mandating consent.⁹¹ Thus, tribal sovereignty effectively ended because States imposed legislative and judicial authority. Along with the termination of tribal sovereignty, federal assistance to Tribes decreased.⁹² Public Law 280 States, however, were precluded from taxing Indian reservations or trust lands in order to finance their new jurisdictional obligations.⁹³

Decreased federal funding exacted heavy financial burdens on Public Law 280 States. Accordingly, States began to have second thoughts in adopting Public Law 280 because protecting the health, welfare, and safety of newly incorporated reservations proved expensive.⁹⁴ For example, the terminated Menominee Tribe’s corporation subsidy would now be funded by its sawmill operation in an effort to shore up Wisconsin’s tax deficits because the cost of the Tribe’s services exceeded the State resources.⁹⁵ The burden was too great for the Menominee and Wisconsin, compelling Congress to authorize \$800,000.00 annually for four years in tax assistance.⁹⁶

Additionally, the federal government could not fully relieve itself of its treaty obligations, which were construed by the courts to be exempt from termination. Thus, the courts decided a series of cases that awarded partial guardianship for protection of Tribes’ traditional hunting and fishing rights.⁹⁷ Thus, the unintended consequence of the Termination Era was the survival of tribalism over assimilation, in spite of Tribes having no control over their own destinies.⁹⁸

87. *Id.*

88. *Id.* at 202–03.

89. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000)).

90. 18 U.S.C. § 1162(a) and 28 U.S.C. § 1360(a) authorized mandatory jurisdiction over Tribes within Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin without tribal consent. *See also* DEBO, *supra* note 83, at 352–53.

91. DEBO, *supra* note 83, at 353.

92. *Id.* at 351, 376.

93. *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (holding that “the legislative history of Pub. L. 280 and the application of canons of construction applicable to congressional statutes claimed to terminate Indian immunities” foreclosed a grant of the power to tax Indian lands with respect to the States).

94. *See* CAROLE GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280*, at 11–12 (1997) (explaining that Public Law 280 is essentially a federally unfunded mandate and that this fact, ironically, led to more “lawlessness,” which the Act was designed to remedy, because state police and other state agencies could not afford to extend services previously performed under federal agencies and aid).

95. DEBO, *supra* note 83, at 310.

96. *Id.*

97. *See, e.g., Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985).

98. *See* WILKINSON, *supra* note 48, at 75–78.

Even more ironic, the goal of termination also had the unintended consequence of accelerating tribal autonomy.⁹⁹ The National Congress of American Indians (NCAI), organized in the mid-1940s, alerted individual Tribes designated for termination to successfully avoid it in some instances and at least mitigate disastrous consequences in others.¹⁰⁰ In 1961, the NCAI held its largest gathering in decades where over seventy Tribes rejected the Termination Act and asserted their right to make and be governed by their own laws.¹⁰¹ The policy of termination would be abandoned in the 1960s and repealed by Republican President Nixon in 1970.¹⁰²

In conclusion, tribalism again survived “one size fits all” assimilation.¹⁰³ Congress had learned through infliction of great poverty during the Allotment Era that Tribes were separate cultural entities with differing cultural values. The IRA provided Tribes mechanisms for legitimate inherent sovereignty to address and develop this reality on their own terms under the protection of the trust doctrine. In hindsight, the Termination Act would only accelerate tribal impulses recently recognized by the IRA. And coercion, instead of consent, only increased the trust burden of the United States because dependent domestic nations were previously not nurtured to manage their own affairs. The States, presented with the opportunity during the Termination era to govern Tribes, mostly declined because the financial burden was considered too great. Tribes, on the other hand, had organized and were equal to the task.

C. Indian Self-Determination: 1970 to Present

President Nixon asked Congress to repeal the Termination Act in his Message to Congress July 8, 1970.¹⁰⁴ In this message, Nixon explicitly endorsed self-determination, stating a new national policy goal:

to strengthen the Indian's sense of autonomy without threatening his sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntarily from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support.¹⁰⁵

Nixon went on to state that federal programs had never been consistent with the promise of self-determination because,

as to whether a Federal program will be turned over to Indian administration, it is the Federal authorities and not the Indian people who finally make that decision.

This situation should be reversed. In my judgment it should be up to the Indian Tribe to determine whether it is willing and able to assume administrative

99. See DEBO, *supra* note 83, at 375.

100. See *id.* at 371.

101. See STEPHEN CORNELL, *THE RETURN OF THE NATIVE* (1988), reprinted in GETCHES ET AL., *supra* note 60, at 218.

102. See *infra* Part III.C.

103. See WILKINSON, *supra* note 48, at 53–86.

104. Message to Congress, *supra* note 21.

105. *Id.* at 566–67.

responsibility for a service program which is presently administered by a Federal agency.¹⁰⁶

Commentators have criticized the Nixon address and its shift in federal policy because Nixon's administrative actions contradicted his rhetoric.¹⁰⁷ Under the banner of self-determination, powerful corporate interests could directly control Indian governments formed to do business with the federal government.¹⁰⁸ As Roxanne Dunbar Ortiz notes, "this strategy parallels neocolonialist strategy in Third World countries."¹⁰⁹

A further neo-colonialist strategy of substituting parallel movements for those perceived as less threatening to federal government interests in an effort to pacify civil discontent is provocative. The American Indian Movement (AIM), a political separatist group of limited membership, was alleged to be publicly promoted by the Nixon administration to divert attention away from domestic anti-war opposition deemed a greater threat to the prosecution of the Vietnam War.¹¹⁰ In other words, "substitution" was hoped to dilute wider and growing opposition to a sagging war effort.¹¹¹

AIM was patterned after the Black Panthers, a militant anti-war black liberation movement perceived by the federal government as a grave threat to domestic and international interests. Federal agents thought the Panthers were gathering wide membership and substantial publicity. Leading members of the Panthers were assassinated in the late 1960s, allegedly by the FBI.¹¹²

Attempts to use parallel movements to pacify civil discontent can also have unintended consequences. As Ortiz concludes, "The effects of such policies are usually effective in defusing explosive situations, but in the long term, often actually broaden movements. Such strategy sometimes backfires, also. The environmental movement has itself become an explosive and widespread one."¹¹³ Likewise, self-determination has broadened tribal autonomy, and Congress seems to have also taken President Nixon at his word.¹¹⁴

For over half a century, Congress's power over Indian affairs has been exercised on behalf of furthering tribal sovereignty and economic self-sufficiency, and this

106. *Id.* at 567.

107. See Roxanne Dunbar Ortiz, *Foreword* to JACK FORBES, NATIVE AMERICANS AND NIXON 9 (1981); DEBO, *supra* note 83, at 337 ("At the same time Nixon designated Governor Hickel as his choice for [S]ecretary of the Interior. Throughout American history from the admission of Kentucky to the Union in 1792 to that of Oklahoma in 1907, appointing the governor of any frontier State to a position supervising Native rights would have been equivalent to appointing a wolf as the guardian of the sheepfold.")

108. Ortiz, *supra* note 107, at 11.

109. *Id.* at 19.

110. *Id.* at 9-11.

111. *Id.*

112. MIA: History: USA: The Black Panther Party, http://www.ucc.ie/acad/socstud/tmp_store/mia_2/Library/history/usa/workers/black-panthers/ (last visited Sept. 5, 2008). For the counter proposition that "[n]o one, inside or outside the [AIM] movement, has so far been able to destroy the will and strength of AIM's solidarity," see Laura Waterman Wittstock & Elaine J. Salinas, *A Brief History of the American Indian Movement*, <http://www.aimovement.org/ggc/history.html> (last visited May 21, 2008).

113. ORTIZ, *supra* note 107, at 11.

114. See *infra* note 116.

has been greatly accelerated post-Nixon.¹¹⁵ Most importantly, “Indians have learned how to lobby.... No Indian legislation has been passed over Indian opposition since the ICRA of 1968.”¹¹⁶

The modern U.S. Supreme Court initially validated the Marshall line of cases with respect to self-determination and even extended judicial review to rehabilitate Indian trust doctrine. In *Morton v. Mancari*¹¹⁷ Justice Blackmun affirmed the Court’s commitment to IRA Indian hiring preferences within the Bureau of Indian Affairs (BIA). Rejecting the non-Indian respondent’s Equal Protection claim, Blackmun noted, “If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”¹¹⁸ Regarding judicial review, Justice Blackmun in *United States v. Sioux Nation of Indians*¹¹⁹ held *Lone Wolf* in disrepute, noting,

[I]t seems that the Court’s conclusive presumption of congressional good faith was based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amendable to judicial review. That view, of course, has long since been discredited in takings cases, and was expressly laid to rest in *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).¹²⁰

The Court held that the political question of Tribes comprising an independent bar to judicial review did not apply.¹²¹ Thus, the Court applied a heightened standard of review to congressional action regarding the following facts of the case.¹²²

Sioux Nation involved the restoration of treaty rights in accordance with principled notions of common law trust doctrine.¹²³ There, the Sioux Tribe was awarded just compensation for an unconstitutional taking of the Black Hills in

115. See Daniel M. Rosenfelt, *Toward a More Coherent Policy for Funding Indian Education*, 40 LAW & CONTEMP. PROBS. 190, 202 (1976); see also Indian Financing Act of 1974, 25 U.S.C. §§ 1451, 1461–1469 (2000) (establishing a revolving loan fund and extending low-cost reimbursable financing as tribes exercise management and utilization of their own resources); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a–n (2000) (consolidating the authority of the Secretary of the Interior to contract with Indian organizations and when declining to contract, provide objections in writing to tribal organizations to provide Tribes assistance in either overcoming the stated objections or provide a hearing for the tribal organization to appeal). The Act also provides increased funding for reservation school districts and amends Public Law 815 “to place Indian schools in the highest priority category together with military bases and natural disasters.” Rosenfelt, *supra*, at 202; Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1903, 1911–1923 (2000) (enabling Tribes and tribal parents to determine proper custody with respect to Indian children adopted by non-members); Tribal Self Governance Amendments of 2000, 25 U.S.C. § 458aaa (2000) (allowing tribes to completely take over Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) contracts if previously demonstrating successful management of these contracts); The Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. §§ 4301–4307 (2000); Indian Gaming Regulatory Act of 1987 (IGRA), 25 U.S.C. §§ 2701–2721 (2000).

116. WILKINSON, *supra* note 48, at 82–83.

117. 417 U.S. 535 (1974).

118. *Id.* at 552; see also GETCHES ET AL., *supra* note 60, at 232 (“Today about 90 percent of the 10,746 employees in the BIA are Indians. Most of the high level Indian policy positions within the Interior Department and the BIA are now held by Indians.”).

119. 448 U.S. 371 (1980).

120. *Id.* at 413.

121. *Id.*

122. *Id.* at 415–16.

123. *Id.* at 416–17.

violation of the 1868 Fort Laramie Treaty.¹²⁴ The Court did not question Congress's plenary power, but found "this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in... a guardianship and to pertinent constitutional restrictions."¹²⁵ Thus, *Sioux Nation* stands for the proposition that congressional action regarding Indian law, although plenary, is not immune to heightened review when it violates the Constitution or trust doctrine principles.¹²⁶ Otherwise, Congress is afforded deference in Indian affairs.¹²⁷

Tribal courts and administrative organizations vested with the authority to make law and regulate affairs within their borders are a manifestation of Congress's plenary power, consistent with trust doctrine.¹²⁸ Yet tribal court proceedings and administrative decisions are routinely denied rational basis review before the Court.¹²⁹ This lack of deference happens most often when a non-member subject to regulation on tribal land claims the tribal court has no jurisdiction.¹³⁰ Because self-determination is relatively new as enforced policy, tribal precedent showing efficient and fair dealings with non-members is lacking.¹³¹ Therefore, the modern Court, inconsistent

124. *Id.* at 424.

125. *Id.* at 415 (citing *United States v. Creek Nation*, 295 U.S. 103, 109–10 (1935)). In other words, Congress's presumption of "good faith" in meeting its trust responsibilities is not enough where facts indicate otherwise, and judicial review will follow.

126. *Id.* at 416–17 ("The 'good faith effort' and 'transmutation of property' concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians."). Simply stated, the federal government must choose whether it is exercising its power of eminent domain, in which case it must pay fair compensation, or whether it is managing the beneficiary's corpus, in which case it must adequately attempt to provide property of equivalent value to the beneficiary.

127. *See supra* Part III.A–B.

128. Numerous federal statutes such as the Tribal Self Governance Act of 1994, 25 U.S.C. § 458aa–hh (2000), have developed tribal autonomy recognized again as essential under the IRA of 1934 to fulfill the federal trust obligation. The IRA was the first attempt of Congress to rectify breach of its trust obligation to Tribes that was clearly abrogated by the Allotment Era. *See also* discussion *supra* Part III.C.

129. The standard of review with respect to non-members appealing tribal jurisdiction is *de novo* because challenge of tribal jurisdiction is itself a federal question of law. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985). But where Indian rights are implicated and the relief sought is abrogation of these rights, the broadest possible scope is to be favored in resolving ambiguities in favor of Indians with respect to treaties, statutes, and contracts. *Rice v. Rehner*, 463 U.S. 713, 732–33 (1983). *But see* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), *superseded in part by statute*, Pub. L. No. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), *as recognized in* *United States v. Lara*, 541 U.S. 193, 205–07 (2004) (denying tribal court jurisdiction to prosecute non-Indian non-members in Indian country with respect to misdemeanor criminal violations of tribal codes); *Montana v. United States*, 450 U.S. 544 (1981) (denying tribal agencies the power to regulate non-Indian non-members within reservation land); *Duro v. Reina*, 495 U.S. 676 (1990), *superseded by statute*, Pub. L. No. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), *as recognized in* *United States v. Lara*, 541 U.S. 193, 205–07 (2004) (extending *Oliphant* to deny tribal court jurisdiction of Indian non-members in Indian country with respect to misdemeanor criminal violations of tribal codes); *see also* discussion *infra* Part III.D.

130. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *see also* discussion *infra* Part III.D.

131. *But see* The Judicial Branch of the Navajo Nation, <http://www.navajocourts.org/> (last visited May 24, 2008) (showing developed court systems and procedures); The Harvard Project on American Indian Economic

with the spirit of *Morton v. Mancari* and *Sioux Nation*, could instead develop a tendency to encroach upon tribal governments by proscribing their powers.¹³² The Court has readily been able to encroach upon tribal governments by citation to *Kagama*,¹³³ in particular, which does not recognize tribal sovereigns.¹³⁴

D. "Lochnerizing" Self-Determination

*Oliphant v. Suquamish Indian Tribe*¹³⁵ begins the disconnect between congressional policy and modern Supreme Court jurisprudence. As commentators Johnson and Martinis note, "Congress had learned, primarily through trial and error, that the right of Indian tribes to self-determination must be protected. Rehnquist has yet to acknowledge this congressional discovery."¹³⁶

In *Oliphant*, Justice Rehnquist held that tribal courts have no criminal jurisdiction over non-Indians, even for tribal code crimes.¹³⁷ Justice Rehnquist announced a new test based on "unspoken assumption" or "commonly shared presumption" to determine that Congress implied that Tribes did not retain criminal jurisdiction over non-Indians rather than utilize the "clear and plain intention" canon of construction previously applicable to abrogation of Indian rights.¹³⁸ Thus, "Justices can engage in a mystical game of reading the mind of Congress...to justify any change in legal doctrine the Court chooses to make."¹³⁹ But as Johnson and Martinis note, "Congress passed many laws dealing with Indians. Congress did not rely on the courts to discern its 'unspoken assumption' when interpreting laws. Congressional silence really means what it is commonly supposed to mean—absolutely nothing."¹⁴⁰

Negative implication by way of congressional and judicial silence allows the Court to abuse its discretion regarding tribal jurisdiction. Johnson and Martinis suggest that the dependent domestic status of Tribes in *Cherokee* related to proscribing the Tribes' sovereign status only in an international context. In this way, Tribes could not compete with the United States in the arena of foreign policy.¹⁴¹ *Oliphant*, however, explicitly rejects this proposition and holds that Congress also implicitly proscribes Tribes' sovereign status internally.¹⁴² But the Marshall Court did not intend dependency in an internal context because Congress can act by

Development, http://www.ksg.harvard.edu/hpaid/hn/hn_1999_law.htm (last visited May 24, 2008) (discussing the Navajo court system's preference for statutory and written common law as well as describing extensive regulated procedures and opportunities for alternative dispute resolution); see also discussion *infra* Parts III.D, IV.B.

132. See discussion *infra* Part III.D.

133. 118 U.S. 375 (1886); accord *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978); *Nevada v. Hicks*, 533 U.S. 353, 363–64 (2001).

134. *Kagama*, 118 U.S. at 379.

135. 435 U.S. 191 (1978).

136. Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND. L. REV. 1, 7 (1995).

137. *Oliphant*, 435 U.S. at 212.

138. *Id.* at 203, 206, 208 n.17; see also Johnson & Martinis, *supra* note 136, at 12; see also *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (holding that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith").

139. Johnson & Martinis, *supra* note 136, at 12.

140. *Id.*

141. *Id.* at 14.

142. *Oliphant*, 435 U.S. at 204.

passing legislation protecting the interests of the dominant state.¹⁴³ “[A]pplying [dependent domestic nation] status in this context gives the Court unprincipled discretion to decide the extent of tribal court jurisdiction.”¹⁴⁴

Unprincipled discretion in the context of Indian law decisions relies on rejecting the initial understanding of Tribes as enunciated by the Marshall court. It is revealing that *Oliphant*, a modern case, cites *Kagama*¹⁴⁵ for the proposition that there are only two sovereigns in the United States: the federal government and the States.¹⁴⁶ Such jurisprudence confirms the continuing *Lone Wolf* line of case law that is hostile to the initial understanding of Indian nations that existed previous to Anglo invasion: separate political entities endowed with inherent sovereignty.¹⁴⁷ Such jurisprudence standing as good Indian law confirms that judicial review per *Sioux Tribe* is merely in an infant stage.¹⁴⁸

Revision of tribal inherent sovereignty by way of *Oliphant* enabled further judicial encroachment in *Montana v. United States*.¹⁴⁹ There, Justice Stewart wrote, “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.”¹⁵⁰ *Montana* proscribed the power of a Tribe to regulate hunting and fishing with respect to non-Indians living on non-Indian fee land within its reservation.¹⁵¹ The Court held that regulation of non-Indians by tribal law is possible only where (1) the non-Indian is in a consensual commercial relationship with the Tribe or (2) the regulation is necessary to protect “the political integrity, the economic security, or the health or welfare of the tribe.”¹⁵² The Court has construed both *Montana* exceptions very narrowly.¹⁵³

The Court attempted to retreat from the judicial encroachment explicit in *Oliphant* and furthered in *Montana* when it announced its tribal court exhaustion rule in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*.¹⁵⁴ There,

143. See Johnson & Martinis, *supra* note 136, at 14.

144. *Id.*

145. 118 U.S. 375 (1886).

146. *Oliphant*, 435 U.S. at 211.

147. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1214 (2001) (discussing that when the modern court in the era of self-determination is faced with an individual issue concerning tribal sovereignty, the court draws on more than the “Marshall trilogy and recent pronouncements by the President and Congress about the inherent sovereignty of tribes. Rather, they draw on the whole messy, conflicted and conflicting doctrinal and legislative history.”); see also discussion *supra* Part III.A.

148. See discussion *supra* Part III.C, notes 119–127 and accompanying text.

149. 450 U.S. 544 (1981).

150. *Id.* at 564 (emphasis added).

151. *Id.* at 566–67.

152. *Id.* at 565–66.

153. *Id.* at 566 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Fisher v. Dist. Court*, 424 U.S. 382 (1976)). The cases cited suggest that inherent tribal sovereignty means limited power to tax and regulate internal family relations respectively. *Accord Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Nevada v. Hicks*, 533 U.S. 353 (2001).

154. 471 U.S. 845 (1985). *But see Hicks*, 533 U.S. at 364–65 (holding that “the States inherent jurisdiction on reservations” precludes a tribal member from bringing a tort action in tribal court against a state official in his or her individual capacity for alleged damages occurring on tribal land). The opinion relies substantially on *Kagama* for its authority. *Id.* at 363–64.

the Court limited its holding in *Oliphant* to preempt tribal jurisdiction only with respect to imposing criminal penalties on non-Indians.¹⁵⁵ Where civil jurisdiction regarding a non-Indian presumptively lies in the tribal courts, a tribal court has a right to determine its jurisdiction with respect to the litigation.¹⁵⁶

National Farmers properly recognized Congress's commitment to self-determination, concluding that a non-Indian party challenging a Tribe's jurisdiction undercuts this policy.¹⁵⁷ The rule requires exhaustion of tribal remedies, including tribal appellate review where available.¹⁵⁸ Such exhaustion should only be foreclosed where jurisdiction is clearly lacking or exhaustion is intended only to harass or is futile.¹⁵⁹ But the rule was remade as "prudential" rather than jurisdictional in *Strate v. A-1 Contractors* on the grounds that challenge of tribal jurisdiction is itself a federal question.¹⁶⁰

In conclusion, competing strands of Indian case law have historically operated to inform diametrically opposed congressional Indian policies.¹⁶¹ Both *Montana* and *National Farmers* illustrate the remnants of unstable legislative resolve and competing strands of Indian law today, barely subject to judicial review, perpetuating a mostly incoherent jurisprudence.¹⁶² This Comment submits that the Court has not matured to the level of the Congress with respect to Indian self-determination and, as such, is reliving the sins of *Lochner v. New York*.¹⁶³

In *Lochner*, the Court rejected a state law that set a maximum cap on the number of hours each week that a professional baker could work.¹⁶⁴ The Court rejected the notion that the statute had any reasonable relationship to safety.¹⁶⁵ Instead, the Court ruled that a restriction on hours that a baker could work was a violation of the liberty of the individual employer or employee to contract, which is protected by the Fourteenth Amendment.¹⁶⁶

Lochner and its progeny, decided at the height of laissez-faire capitalism, enabled the Court to strike down socially progressive legislation that States proffered in an attempt to exercise legitimate use of their police power to protect their citizens.¹⁶⁷ Decades later, *Lochner* was eventually overruled by *Williamson v. Lee Optical of Oklahoma*.¹⁶⁸ There, the Court retreated from judicial encroachment, adopting rational basis review in an effort to defer to state legislatures.¹⁶⁹ As Justice Douglas

155. *Nat'l Farmers*, 471 U.S. at 854, 855.

156. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19–20 (1987) (affirming *National Farmers* exhaustion rule in diversity cases).

157. *Nat'l Farmers*, 471 U.S. at 856.

158. *Id.*

159. *Id.* at 857 n.21.

160. 520 U.S. 438, 450 (1997).

161. See discussion *supra* Part III.A–B.

162. See generally Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

163. 198 U.S. 45 (1905).

164. *Id.* at 65.

165. *Id.* at 62–63.

166. *Id.* at 64.

167. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 376–84 (16th ed. 2007) (discussing the rise and fall of the *Lochner* era).

168. 348 U.S. 483 (1955).

169. *Id.* at 487–88.

noted in *Lee Optical*, “The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”¹⁷⁰ Thus, *Lee Optical* suggests that the *Lochner* Court’s elevation of a constitutional principle, freedom of contract, to the exclusion of other valid considerations is an essential flaw of *Lochner*.¹⁷¹

Like the justices in *Lochner*,¹⁷² Justice Rehnquist in *Oliphant*¹⁷³ elevated the United States’ “great solicitude that its citizens be protected...from unwarranted intrusions on their personal liberty” above the legitimate police powers of the Tribe.¹⁷⁴ This dicta was penned despite the fact that the Indian Civil Rights Act of 1968¹⁷⁵ incorporated most of the guarantees of the Bill of Rights to apply to “any” person subject to the jurisdiction of the tribal courts.¹⁷⁶ Furthermore, the Court could find no explicit preemption of Tribes’ inherent power to regulate conduct even among non-members with respect to minor crimes that occurred on reservation lands.¹⁷⁷ Finally, Justice Rehnquist conceded the fact that any attempt to abrogate Indian rights must be explicitly indicated by Congress.¹⁷⁸ Thus, it was necessary for the Court to presume that the legislative history of Congress implied this result.¹⁷⁹ The Court chose, *sua sponte*, withdrawal of *any* criminal jurisdiction afforded Tribes regarding a non-member on reservation land.¹⁸⁰

Like *Lochner*, *Oliphant* and its progeny continue to frustrate the development of tribal court power because the modern Court has not yet extended rational basis review to tribal legislatures. For example, in *Duro v. Reina*,¹⁸¹ the Court extended *Oliphant* to preclude a Tribe from criminally prosecuting a non-member Indian.¹⁸² Amici on behalf of Tribes showed that historical ties and substantial inter-tribal marriage among Tribes, as a consequence of past federal Indian policy, are common.¹⁸³ Amici further argued that as a practical matter inherent sovereignty would mean little if regulation of a non-member Indian was denied.¹⁸⁴ Congress superseded the Court’s ruling by passing subsequent legislation one year after *Duro*

170. *Id.* at 488.

171. See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

172. 198 U.S. 45 (1905).

173. 435 U.S. 191 (1978).

174. See *id.* at 210.

175. 25 U.S.C. §§ 1301–1303 (2000).

176. *Id.* §§ 1302, 1303.

177. See *Oliphant*, 435 U.S. at 208 n.17.

178. *Id.* (acknowledging the canon of construction that requires ambiguities in treaty and statutory law to be resolved in favor of Indians).

179. See *id.* at 197, 203, 206.

180. *Id.* at 204.

181. 495 U.S. 676 (1990), *superseded by statute*, Pub. L. No. 101-511 § 8077(b) (1990) (codified as amended at 25 U.S.C. § 1301(2) (2000)), *as recognized in* United States v. Lara, 541 U.S. 193, 205–07 (2004).

182. *Id.* at 679.

183. See Brief for Rosebud Sioux Tribe et al. as Amici Curiae Supporting Respondents, *Duro*, 495 U.S. 676 (No. 88-6546), 1989 WL 1126953.

184. *Id.*

that recognized the power of a Tribe to assert criminal jurisdiction over all Indians within its reservation.¹⁸⁵

Duro might suggest that Congress does not want tribal courts to assert jurisdiction over non-Indians, because Congress could have just as easily acted to correct earlier rulings such as *Oliphant* and *Montana*.¹⁸⁶ Notwithstanding political realities on the ground, this assumption proves too much. Congress had always sought to assimilate the Tribes into dual federalism and relax its trust relationship with Tribes.¹⁸⁷ But policies of compelled assimilation have been failures that have necessitated the continuing need for trust doctrine.¹⁸⁸ Self-determination is consistent with trust doctrine because it affords real mechanisms for inherent sovereignty.¹⁸⁹ But at the same time, self-determination presents Congress with the best opportunity to relax its trust responsibility because healthy tribal governments should be able to independently provide for tribal needs over time.¹⁹⁰

It stands to reason that healthy tribal governments will also benefit States precisely because Tribes have not been incorporated under the protection of the States in a dual federalism model.¹⁹¹ But centuries of historic animosity between States and Tribes will take time to overcome. It will be overcome when non-Indians and the courts are educated about the organic and cultural differences between States and Tribes.

Duro is essentially an affirmation of this education in process because Congress passed legislation that superseded it within a year after the decision.¹⁹² Thus, self-determination as a fledgling policy was vindicated and enforced by Congress. Therefore, the erroneous presumption of silence in *Oliphant* should not extend to *Duro* just because Congress superseded it by statute. *Oliphant* and *Montana* stand as good law because self-determination is newly established policy that will take time to become reality.

Returning to the Marshall Court, in *Marbury v. Madison*,¹⁹³ Chief Justice John Marshall confirmed judicial review, stating, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."¹⁹⁴ But unlike the spirit of judicial restraint found in *Lee Optical*,¹⁹⁵ the modern Court seems to exercise its inherent power to strike down tribal laws because such laws are "out of harmony" with a discredited school of thought as determined by Congress: forced assimilation into a two-sovereign system.¹⁹⁶ Thus, judicial

185. 25 U.S.C. § 1301(4) (2000).

186. See Frickey, *supra* note 162, at 1770–75.

187. See discussion *supra* Part III.A–B.

188. See *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); see also discussion, *supra* Part III.B.

189. See discussion *supra* Parts III.B–C.

190. See discussion *supra* Part III.C; *infra* Part IV.B.

191. Ronald N. Johnson, *Indian Casinos: Another Tragedy of the Commons*, in SELF-DETERMINATION, *supra* note 22, at 214, 218–20.

192. See 25 U.S.C. § 1301(4) (2000); see discussion *infra* Part IV.A–B.

193. 5 U.S. (1 Cranch) 137 (1803).

194. *Id.* at 177.

195. 348 U.S. 483 (1955).

196. Getches, *supra* note 17, at 274–76 (discussing the fact that since 1992, the Court has only twice cited

encroachment will continue to “Lochnerize” tribal courts empowered by the will of Congress, and this undermines the integrity of the Court.¹⁹⁷

Tribal self-determination is fundamentally sound and necessary to a democratic nation that includes among its citizens the Indian peoples.¹⁹⁸ But “new” and born in a time of neo-colonialism, self-determination will be “Lochnerized” for some time to come until the Court realizes the errors of its ways.

IV. NEW MEXICO AND *CHEROMIAH*

A. *Cheromiah and Its Teachings*

Because the judiciary has not matured to the level of the Congress regarding the necessity of tribal self-determination, it is generally to the benefit of States and Tribes in economic relationships to stay out of the federal courts. As Philip Frickey remarked, the Court imposes a “one size fits all” solution where “Congress has the capacity to operate on a local basis, attempting to find ways to work with individual Indian Tribes, and with the States and counties that include their reservations, to reach practical, functional resolutions of problems...without any federal involvement at all.”¹⁹⁹ If federal litigation is eminent, however, *Cheromiah*²⁰⁰ teaches ways to bend the court toward tribal autonomy, which is important to New Mexico.

Cheromiah is an example of preserving a courtroom opinion in favor of tribal law, ultimately settled out of federal court during interlocutory appeal.²⁰¹ Michael Cheromiah was an enrolled member of Laguna Pueblo and sought medical attention for chest and respiratory pains at a federally operated Indian Health Service (IHS) clinic located within Acoma tribal lands.²⁰² Despite repeated visits to the clinic over a period of a week, Michael Cheromiah was continually dismissed and accused of “faking it” and being “a wimp.”²⁰³ Michael Cheromiah eventually fell into a state of paralysis due to shock, and on his final visit to the clinic was air lifted to an Albuquerque hospital.²⁰⁴ There, he died that same day of cardiac arrest due to a hole in his heart caused by a misdiagnosed and untreated bacterial infection.²⁰⁵ Had he been correctly diagnosed, Michael Cheromiah would have survived due to his

the Marshall trilogy for support in its majority opinions, ignored “nearly all of its approximately eighty modern era decisions,” and instead has opted to create new case law that posits aberrant special rules concerning non-Indians).

Indian law has always been based on the assumption that separate societies could exist exempt from the American melting pot, preserving customs, values, and governance of the vestiges of traditional tribal territory....

[R]eliance on Congress to decide clearly the bounds of Indian sovereignty—the Court’s primary approach until the mid-1980s—has nearly disappeared.

Id. at 276; see also discussion *supra* Part III.B.

197. See discussion *supra* Part III.D.

198. 8 U.S.C. § 1401(b) (2000).

199. Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 10 (2002).

200. 55 F. Supp. 2d 1295 (D.N.M. 1999).

201. *Id.*

202. *Id.* at 1297.

203. Interview with Randi McGinn, Senior Partner, McGinn, Carpenter, Montoya, and Love, P.A., in Albuquerque, NM (Oct. 8, 2006).

204. *Id.*

205. *Cheromiah*, 55 F. Supp. 2d at 1297.

generally good health and young age.²⁰⁶ Michael Cheromiah was twenty years old.²⁰⁷ His father and mother, enrolled members of the Laguna and Acoma tribes, respectively, brought the wrongful death action on behalf of their son under the Federal Tort Claims Act (FTCA), claiming that tribal law should govern the action.²⁰⁸

The court stated in its opinion that it did not have evidence of title regarding the status of the land on which the malpractice occurred in order to determine tribal jurisdiction.²⁰⁹ To be safe, the court applied a *Montana* analysis.²¹⁰ It found that a consensual contract to provide medical services was formed between a non-Indian party (IHS) and the Acoma Tribe and thus met the first *Montana* exception.²¹¹ The court found that the second *Montana* exception was also met where practically the only western medical care for most of the Tribe was provided for by the IHS clinic.²¹² If IHS were allowed to continue its malpractice with impunity, the court reasoned that the political integrity of Acoma Pueblo was threatened because its very survival would continue to be at stake.²¹³ Thus, the district court found “that if the United States were a private person, it could be sued in Acoma Tribal Court for the alleged negligence of its agents” and that “the Acoma Tribe is the relevant political entity who controls the jurisdiction in which the alleged tort occurred.”²¹⁴

The *Cheromiah* court applied a plain meaning construction to the FTCA statutory language “law of the place” where the act of omission occurred to determine that Acoma tribal law controlled this medical malpractice/wrongful death action.²¹⁵ Judge Vazquez issued an interlocutory appeal and ordered the parties to submit trial briefs outlining the application of Acoma tribal law.²¹⁶ Before briefs were due and the trial commenced, the federal government settled the case for \$675,000, \$75,000 in excess of the New Mexico Medical Malpractice damages cap.²¹⁷ Randi McGinn, attorney for the plaintiff, stated that settlement was strategic on her part in order to guarantee that a written opinion applying tribal customary law to a tort action would not be disturbed on appeal.²¹⁸ The federal government, for its part, presumably settled without appealing because it did not want to risk setting a precedent or expend court costs and time equaling or exceeding the amount of settlement.²¹⁹

206. McGinn Interview, *supra* note 203.

207. *Cheromiah*, 55 F. Supp. 2d at 1297.

208. *Id.*

209. *Id.* at 1304.

210. *Id.* at 1304–05. Judge Vazquez referred to the fact that the court was provided no evidence of title as “unfortunate.” *Id.* In other words, she implicated sloppy lawyering and proceeded to undertake a *Montana* analysis for counsel to determine tribal civil jurisdiction. See also discussion *supra* Part III.D, notes 151–153 and accompanying text.

211. *Cheromiah*, 55 F. Supp. 2d at 1304.

212. *Id.* at 1305.

213. See *id.*

214. *Id.*

215. See *id.* at 1306–07.

216. *Id.* at 1310.

217. Scott Sandlin, *Tribal Law Used in Negligence Suit Against the U.S.*, ALBUQUERQUE J., Aug. 9, 1999, at A1.

218. McGinn Interview, *supra* note 203.

219. *Id.*

Cheromiah exposes an alleged conflict with New Mexico state law, which in turn reveals the animus tribal members might expect if they litigate in a federal forum and wish to apply tribal law.²²⁰ After determining that the United States could be sued, the United States mounted a defense relying on a recent decision preceding *Cheromiah* in the federal district court, *Louis v. United States*.²²¹ *Louis* essentially had the same facts as *Cheromiah*, but the court ruled in favor of applying state law under the FTCA.²²²

In *Louis*, the judge did not consider the possibility of applying tribal law as “the law of the place” where the act or omission occurred, because such precedent was not presented by tribal advocates.²²³ Thus, the court did not foreclose the possibility that an FTCA action applying tribal law could be legitimate.²²⁴ It has long been established that *lex loci delicti* (law of the place of the injury) is where the tort occurs, and that tort actions are judged by local community standards.²²⁵ Thus, in *Cheromiah*, it was easier to distinguish *Louis* because precedent that applied the law of *political entities* to a tort action was briefed for the court.²²⁶ In *Cheromiah*, Judge Vazquez noted, “the fact that [applying tribal law] has never been done, standing alone, does not mean that it is not what the law requires.”²²⁷

In *Cheromiah*, the court quoted *Louis*, where it was argued that applying tribal law would “subject the United States to varying and often unpredictable degrees of liability depending on the reservation that was the site of the occurrence.”²²⁸ The *Cheromiah* court, however, noted that the United States already had varying degrees of liability with respect to Tribes by hundreds of treaties that were still in force.²²⁹ Further, the court did not want to speculate how much of a “varying degree of liability” the FTCA allowed, since it clearly intended to allow varying liability by exposing the United States to suit with respect to applying various States’ laws.²³⁰

Finally, the United States attempted to plead a conflict of law when it argued that the plaintiff’s wrongful death action was dependent on the New Mexico wrongful death statute because such action was not recognized at common law.²³¹ Briefly

220. See *Cheromiah*, 55 F. Supp. 2d at 1308.

221. 54 F. Supp. 2d 1207 (D.N.M. 1999). New Mexico attorney Randi McGinn also represented the plaintiff in this action. *Id.* at 1208.

222. *Id.* at 1210. In *Louis*, plaintiff, an enrolled member of the Acoma pueblo, alleged negligent pre-natal medical care at an IHS hospital that ultimately led to the death of her newborn daughter. *Id.* at 1208.

223. *Id.* at 1210 (noting cases that applied state law regarding actions arising on tribal land).

224. *Id.* at 1210 n.5 (citing *Montana*, the court noted that it must determine the ownership status of the land where the tort occurred for purposes of determining tribal jurisdiction, but that it was not presented with any factual elements in this regard).

225. See *Richards v. United States*, 369 U.S. 1, 11–12 (1962).

226. See *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305–08 (D.N.M. 1999). The court noted:

In Puerto Rico, the law of Puerto Rico is applied, *Soto v. United States*, 11 F.3d 15, 16 (1st Cir. 1993), *Borrego v. United States*, 790 F.2d 5, 6 (1st Cir. 1986); In Guam, the law of Guam is applied, *Taber v. Maine*, 67 F.3d 1029, 1033 (2nd Cir. 1995). . . . None of these entities are states. Yet, they are the “political entities” in whose jurisdiction the alleged tort occurred. Thus, theirs is “the law of the place” that controls the FTCA action.

Id. at 1302.

227. *Id.* at 1306.

228. *Id.* at 1307.

229. *Id.*

230. *Id.*

231. See *id.* at 1308.

stated, a conflict of law occurs “whenever two or more *states* have a connection to a case and an issue arises as to which their respective laws differ, a choice of law must be made.”²³² In other words, the United States intended to dismiss plaintiff’s suit for failure to state a claim under New Mexico law, but the *Cheromiah* court recognized that this reasoning was irrelevant to Acoma law, owing to the Tribe’s independent status as a separate political entity.²³³

LaFromboise v. Leavitt,²³⁴ another FTCA case that came after *Cheromiah*, ruled against application of tribal law.²³⁵ *LaFromboise* is remarkable because it cites *Cheromiah* to dismiss its “singular” statutory interpretation of the FTCA, yet it does not mention case law therein that applied the law of political entities to FTCA actions.²³⁶ Thus, *LaFromboise* shows entrenchment of the incorrect notion that there are only state and federal sovereigns in the United States and, by logical extension, only state or federal law could control an FTCA claim.²³⁷

Cheromiah is intriguing because it shows the United States arguing (1) an alleged conflict of law with respect to the nature of Tribes and the New Mexico wrongful death statute and (2) the erroneous preclusion of tribal laws by state laws at large with respect to the intent of its own FTCA statute. Thus, *Cheromiah* exposes animus that is directed toward Tribes and their governments within the federal judiciary, even though the case is almost singular in its “victory.”²³⁸ *Cheromiah* also reveals the federal courts playing on the fears that non-Indian members entertain regarding the “capricious and arbitrary” nature of tribal courts.²³⁹

If *Cheromiah* were appealed, there is a substantial likelihood that “outsider fears” would have reversed this decision, which is not in the best interest of New Mexico. Reversal would have incorrectly applied state law in compliance with *Louis* and *LaFromboise* because the Acoma Pueblo was the relevant political entity that controlled the jurisdiction in which the alleged tort occurred. As the case stands now, it suggests possible methods for future litigators to diminish neo-colonial impulses of the modern judiciary.²⁴⁰

Cheromiah delivers a rich opinion that serves as a metaphor for New Mexico and the Tribes within its midst: *Cheromiah* is the dead man that talks. In plain language, this case settled before trial and showed that it is possible to move the modern

232. DAVID D. SIEGEL & PATRICK J. BORCHERS, CONFLICTS IN A NUTSHELL § 5, at 5 (3d ed. 2005) (emphasis added).

233. See *Cheromiah*, 55 F. Supp. 2d at 1308.

234. 439 F.3d 792 (8th Cir. 2006). The facts of this case are essentially the same as those of *Cheromiah* in that a parent tribal member brings an FTCA claim against the federal government on behalf of her child for alleged malpractice occurring at an IHS facility on tribal land. *Id.* at 792–93.

235. *Id.* at 796.

236. *Id.* at 794.

237. See *id.* at 796.

238. See *Cheromiah*, 55 F. Supp. 2d at 1305. The court noted, “taking into consideration the limited scope of the second *Montana* exception...the court finds that this is one of the unique situations...[where] the second *Montana* exception applies as well.” *Id.*

239. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (noting concern that the Indian Civil Rights Act is not identical to the Bill of Rights; tribal judges may not be independent structurally as determined by tribal governments; tribal mixture of state, federal, and unwritten law may be “unusually difficult for an outsider to sort out”; and risk of “substantial disuniformity” exists when tribes interpret state and federal law); see also discussion *supra* Part III.C–D and text accompanying notes 172–175.

240. See also discussion *supra* Part III.D.

federal judiciary again toward principled decisions.²⁴¹ But at the same time, *LaFromboise* confirms the wisdom of *Cheromiah* tribal advocates avoiding the judiciary's current hostility toward self-determination by not going to trial in a federal forum.²⁴² Therefore, the case implies that Tribes and States are better served to develop tribal precedent in either state or tribal forums for the time being.

B. *New Mexico and Tribes in Partnership: Pitfalls*

Cheromiah is a hollow victory because the case did not apply Acoma tribal law to the merits and set a precedent, which should be possible in a federal district court.²⁴³ *Cheromiah* teaches, and commentators agree, that an essential problem of promoting stability and economic growth on reservations is the lack of accessible tribal precedent necessary to establish integrity in a tribal judiciary.²⁴⁴ Therefore, New Mexico and the Tribes should develop consistent, accessible tribal law precedent, because they are already in significant economic and political partnerships.²⁴⁵

Such partnership between States and Tribes is possible without abrogating the federal trust responsibility. The Indian Gaming Regulatory Act of 1988 (IGRA)²⁴⁶ shows the three sovereigns in pure agreement. Under this Act, the federal legislature lessens the trust yoke, thereby increasing capital on trust lands by allowing Tribes to contract with States. Next, States guarantee Tribes "substantial exclusivity" in class III gaming, in return getting a percentage of annual wins. For example, New Mexico law provides that the Tribe is not obligated to share 16 percent of its annual net wins with New Mexico if the State allows any expansion of non-tribal Class III gaming.²⁴⁷ As a result, the Tribes are infused with billions of dollars in revenue.²⁴⁸

To date, eleven New Mexico Tribes participate in the IGRA.²⁴⁹ From the Act's inception in 1988 to 2003, approximately forty percent of Tribes across the United States have realized annual revenues growing from 188 million dollars to 16.8 billion dollars respectively.²⁵⁰ This 2003 figure equals the annual revenues of both

241. See discussion *supra* Part IV.A.

242. See discussion *supra* Part IV.A.

243. See *United States v. Tsosie*, 849 F. Supp. 768 (D.N.M. 1994). There, the judge remanded a tribal land dispute between tribal members to tribal court sua sponte under *National Farmers* abstention doctrine. *Id.* at 775. But both parties, advanced in age and weary of the twenty-five-year litigation, wanted the case to proceed in federal district court. *Id.* at 771. The respondent had attached an affidavit from a former tribal chief justice outlining pertinent tribal law. *Id.* at 774–75.

244. David D. Haddock & Robert J. Miller, *Sovereignty Can Be a Liability: How Tribes Can Mitigate the Sovereign's Paradox*, in SELF-DETERMINATION, *supra* note 22, at 210–11; Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 233 (1994). The *Oklahoma Bar Journal* frequently publishes tribal court decisions and other Indian law cases that affect that State and the Tribes within it. See, e.g., http://www.okbar.org/obj/articles_06/feb_06.htm (last visited Sept. 27, 2007).

245. Many Tribes maintain websites where tribal law precedent can be accessed. An online Indian law reporter can be found at <http://www.versuslaw.com/> (last visited Nov. 28, 2007).

246. 25 U.S.C. §§ 2701–2721 (2000).

247. NMSA 1978, § 11-13-2(4)(B) (1997).

248. Ronald N. Johnson, *Indian Casinos: Another Tragedy of the Commons*, in SELF-DETERMINATION, *supra* note 22, at 214, 218–20.

249. Indian Gaming, <http://www.indiangaming.com/associations/> (last visited Feb. 27, 2007).

250. Johnson, *supra* note 248, at 221.

Nevada and New Jersey Class III gaming (slot machine and table games) combined.²⁵¹

Significant political agreements between New Mexico and Tribes within the State are also evolving. New Mexico has statutorily provided for deputation of tribal and pueblo police to act as New Mexico police officers in either “hot pursuit” or the routine citation of traffic violations outside of Indian country.²⁵² In addition, New Mexico and Tribes are now sharing Driving While Intoxicated (DWI) data-base information on offenses between the two jurisdictions.²⁵³ Such cooperation between traditional police powers of both sovereigns protects all citizens, with the added benefit of conserving government resources. New Mexico-tribal agreements represent two of many substantial inter-governmental agreements between States and Tribes nationally.²⁵⁴ One commentator has described these agreements as a “movement of sweeping importance.”²⁵⁵

State-tribal agreements essentially affirm the old adage “time is money.” It stands to reason that New Mexico and the Tribes should not want to waste time and money when disputes that arise with respect to gaming compacts or other contracts would likely result in such waste in a federal forum.

*Tamiami Partners, Limited v. Miccosukee Tribe of Indians*²⁵⁶ is an example of such waste when Indian contracts are allowed to be interpreted in federal court. Tamiami Partners Limited (TPL) invested 6.5 million dollars in 1990 to buy land for the Miccosukee Tribe to construct a bingo hall.²⁵⁷ Disputes arose and the Tribe filed a suit in tribal court.²⁵⁸ TPL immediately filed a federal lawsuit to enforce the agreement’s arbitration clause and to enjoin the Tribe from taking control of the operation.²⁵⁹ The trial court determined that the Tribe waived its sovereign immunity by agreeing to an arbitration clause, but stayed proceedings until TPL exhausted its tribal court remedies.²⁶⁰

The Tribe appealed to the Eleventh Circuit and won a judgment that the federal district court had no subject matter jurisdiction.²⁶¹ After TPL filed a new complaint, the district court determined that it did have subject matter jurisdiction, but sovereign immunity barred TPL’s claim against the Tribe and its agencies, except individual defendants.²⁶² After all parties appealed, the court upheld its jurisdiction, defeated TPL’s breach of contract claim (finding that waiver of immunity applied

251. *Id.*

252. NMSA 1978, § 29-1-11(C)(8) (2005).

253. Governor Richardson’s Policy Initiatives: DWI, Office of New Mexico Governor Bill Richardson, <http://www.governor.state.nm.us/priorities-dwi.php?nm=4> (last visited Aug. 15, 2008).

254. WILKINSON, *supra* note 48, at 109 & n.156 (listing extensive inter-governmental agreements between Tribes and States across the United States).

255. *Id.*

256. 63 F.3d 1030 (11th Cir. 1995).

257. *Id.* at 1038.

258. *Id.* at 1039–40.

259. *Id.* at 1040.

260. *Id.* at 1040–41.

261. *Id.* at 1043.

262. *Id.* at 1045.

only to suits regarding arbitration), and upheld TPL's claim against individual tribal members.²⁶³

But years later and still in litigation, the Eleventh Circuit found TPL's second amended complaint was "a thinly-disguised attempt...to obtain specific performance of the Tribe's obligations" by suing individual defendants.²⁶⁴ Because the suit was construed to be against the Tribe, sovereign immunity protected the individuals.²⁶⁵ The court remanded the case again for trial on the arbitration issues, where the reach of tribal immunity rather than fact is still being litigated.²⁶⁶

Tamiami Partners illustrates the cost to both Tribes and States when the federal judiciary grapples with understanding its own tribal exhaustion doctrine and tends to read tribal sovereign immunity very narrowly. Tribal court exhaustion, required in the State of New Mexico,²⁶⁷ is seen as costless by the courts but not by investors.²⁶⁸ As commentators suggest, "it may be fair that disputes concerning matters on a reservation require non-members to litigate against members in tribal courts. But a Tribe cannot deposit 'fair' in the bank."²⁶⁹ This proposition creates a dilemma, because non-Indian investors see the application of tribal law as unpredictable and generally do not want to litigate in tribal court.²⁷⁰ Tribes, on the other hand, have historically been faced with animus and bias when litigating in a state forum, and generally prefer to litigate in tribal court.²⁷¹

Commentators have suggested that solutions to the dilemma of mistrust between outsiders and Tribes might be found in Tribes stipulating to carefully crafted waivers of sovereign immunity in contracts they execute with outsiders.²⁷² "The tribe would not be compelled to waive any immunity, but it could dependably do so whenever waivers were to its advantage."²⁷³ States and the federal government can adopt general class-wide waivers to attract investors unknown to them in advance, but the Tribes must follow an individualized process subject to BIA approval for waivers that affect trust property.²⁷⁴ This means that an investor that bears the cost of contract negotiations with a Tribe might have plans frustrated after the fact by the BIA if a Tribe does not waive immunity—even if the Tribe *wants* the project.²⁷⁵

In the alternative, *C&L Enterprises v. Citizen Band Potawatomi Indian Tribe*²⁷⁶ indicates that a carefully constructed arbitration clause can waive sovereign immunity without mentioning it. There, the Court agreed unanimously that waiver

263. *Id.* at 1051.

264. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225 (11th Cir. 1999).

265. *Id.* at 1226.

266. Haddock & Miller, *supra* note 244, at 206.

267. *See Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997).

268. *See Haddock & Miller, supra* note 244, at 203.

269. *Id.* at 204.

270. *See Valencia-Weber, supra* note 244, at 245.

271. *Id.* at 233.

272. Haddock & Miller, *supra* note 244, at 208; Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1691 (2006).

273. *See Haddock & Miller, supra* note 244, at 208.

274. *Id.* at 205.

275. *Id.*

276. 532 U.S. 411 (2001).

was indicated by two provisions.²⁷⁷ The first provision adopted a national trade organization's arbitration rules and allowed for final judgment by an arbitrator.²⁷⁸ The second provision included a choice of law clause that read, "The contract shall be governed by the law of the place where the Project is located."²⁷⁹ Therefore, *C&L Enterprises* indicates that a carefully tailored arbitration clause, "with teeth" acceptable to Tribes, could be an efficient resource rather than fodder for the federal courts to destructively examine its exhaustion and immunity doctrines.²⁸⁰

An association of like-minded Tribes could also pre-designate an arbitrator with specific options regarding waivers of immunity.²⁸¹ A member Tribe that rejects the arbitrator's decision could be evicted from the group's charter, which in this instance could designate the tribal court as a proper forum to pay a judgment to the aggrieved investor from the offending Tribe's assets held in the jurisdictions.²⁸² Furthermore, it has been suggested that Tribes might alter generic IRA constitutions to include a provision similar to United States Constitution Article I, Section 10, where governments are prohibited from interfering with contracts.²⁸³ As commentators Haddock and Miller note, "A far-sighted sovereign has an incentive to form a reputation that shows that investors within its realm will not find the returns from their investments confiscated or destroyed as a result of the sovereign's opportunism or capriciousness."²⁸⁴

This section has indicated that States and Tribes in significant partnerships should work together to increase their gains rather than deplete their resources.²⁸⁵ Historic distrust, however, between Tribes and outsiders typically throws jurisdictional disputes into the federal courts.²⁸⁶ *Cheromiah*²⁸⁷ shows that modern federal courts are certainly capable of delivering principled decisions if the courts will apply the law according to geographically based determinations of jurisdiction.²⁸⁸ But *Cheromiah* also teaches that in the wake of *Oliphant*²⁸⁹ and its progeny, favorable decisions regarding self-determination in a federal forum are not likely for the time being.²⁹⁰

This section also shows that incoherence generated by *Oliphant* often leads to costly delay with respect to tribal disputes between members and non-members in the federal courts.²⁹¹ This happens when the judiciary tries to make sense of its jurisprudence with respect to self-determination.²⁹² Therefore, Tribes and private parties have been in the best position to maintain efficiency in their dealings by

277. *Id.* at 423.

278. *Id.* at 415.

279. *Id.*

280. See discussion *supra* Part IV.B.

281. See Haddock & Miller, *supra* note 244, at 208–09.

282. *Id.* at 209.

283. *Id.* at 207; U.S. CONST. art. I, § 10.

284. Haddock & Miller, *supra* note 244, at 207.

285. See discussion *supra* notes 246–255 and accompanying text.

286. See discussion *supra* notes 267–271 and accompanying text.

287. 54 F. Supp. 2d 1207 (D.N.M. 1999).

288. See discussion *supra* Part IV.A.

289. 435 U.S. 191 (1978).

290. See generally discussion *supra* Part IV.A.

291. See generally discussion *supra* Part IV.B.

292. See *supra* notes 256–266 and accompanying text.

partial waiver of tribal sovereign immunity, which allows for final judgment by arbitration.²⁹³ But this vision does not mean that tribal governments and courts should be the mirror image of state or federal courts.²⁹⁴ Instead, this vision should inform tribal and state courts to find similar mechanisms such as insurance and escrow accounts that build trust between state and tribal partners. In the wake of *Cheromiah*, many of these mechanisms are either explicit or implied.²⁹⁵

C. New Mexico and Cheromiah: Solutions

Cheromiah indicates that certifying questions of law is an available and excellent strategy to develop trust between state and tribal courts. As illustrated by *Cheromiah*, it has been noted that certifying tribal law questions is not “impossible” when such questions received in a state court are not too complex, involving tribal tort or commercial transactions.²⁹⁶ But of course, certification is more efficient in allowing Tribes to answer difficult tribal law questions rather than allowing States to struggle with these questions alone, and possibly memorialize tribal law incorrectly.²⁹⁷

In the alternative, Tribes have applied choice of law principles in their codes, allowing the application of state law for some actions.²⁹⁸ Likewise, a state court can take judicial notice of tribal law when the issue is complex.²⁹⁹ These procedural mechanisms not only begin to develop an accessible record of tribal precedent, but can also protect cultural aspects of Tribes that are highly individualized by nature.³⁰⁰

Cheromiah reminds tribal advocates that applying the law of political entities is possible and is an excellent strategy to develop trust between state and tribal forums. Since Tribes are separate political entities, forum non conveniens could be applied in state court to enable Tribes to have “a first crack” regarding a difficult question of law where there is a tribal forum.³⁰¹ Cultural unfamiliarity and practical problems of access to proof, obtaining witnesses, and geographical isolation from a state court are typical reasons a judge might dismiss a case in favor of a more appropriate foreign forum.³⁰² These factors will often be present in the Indian law context.³⁰³ Therefore, procedural mechanisms already exist to enable tribal and state courts to get on with the business of developing precedent.

293. See *supra* notes 276–281 and accompanying text.

294. See Valencia-Weber, *supra* note 244, at 244–45.

295. See discussion *infra* Part IV.C.

296. See Florey, *supra* note 272, at 1692.

297. *Id.* at 1695.

298. *Id.* at 1694; see also, e.g., ORDINANCE PRESCRIBING A CODE OF LAW AND ORDER FOR THE PUEBLO DE ACOMA INDIAN RESERVATION § 4(C) (1971) (stating that any matters not covered by Acoma or federal law will be decided in accordance with the laws of New Mexico).

299. Florey, *supra* note 272, at 1692.

300. See Valencia-Weber, *supra* note 244, at 259–61.

301. See Florey, *supra* note 272, at 1693.

302. *Id.*; see also Indian Child Welfare Act, 25 U.S.C. § 1911(b) (2000) (“In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.”) (emphasis on the original).

303. Florey, *supra* note 272, at 1693.

These mechanisms are efficient, and presumed de minimus in their costs, unlike the costs of delay visited upon litigants in the current federal courts.³⁰⁴ Likewise, these procedural mechanisms should diminish systemic hostility between state and tribal parties once a mutually respectful body of precedent develops.³⁰⁵ Such precedent is needed for the federal courts to realize that self-determination is not a mutually exclusive endeavor.³⁰⁶

The lens of *Cheromiah* teaches that application of tribal law could be documented in state court through creatively applying canons of construction,³⁰⁷ certifying questions of law, and strategic settlement (if tribal litigators are fortunate enough to survive a *Montana* analysis).³⁰⁸ As Professor Valencia-Weber has noted, tribal law is legitimized in federal and state court decisions that record and affirm tribal law.³⁰⁹ Such publication of tribal law by state and tribal courts can help allay fears of outsiders that tribal law is idiosyncratic.³¹⁰ The fact that publication of Acoma law was not realized in federal court out of fear that an appeal would reverse *Cheromiah* implies that tribal and state courts must undertake this important endeavor for New Mexico.

The rise of tribal economic affluence through gaming and other contracts with outsiders enabled by self-determination legislation demands a strong tribal judiciary.³¹¹ The State must seek knowledge from this judiciary to “get it right” and help forge the necessary tribal law precedent that will enable the two sovereigns to realize the greater economic health and welfare of their respective citizens. Both sovereigns can bend a little toward each other through procedural and arbitration mechanisms identified. Over time, Tribes and States similarly situated across the nation might develop a generally consistent, mutually respectful, and efficient body of law and procedure that will inform the federal judiciary and blunt its current neo-colonial tendencies.

V. CONCLUSION

Indian law alternatively protects and forsakes tribal autonomy.³¹² Yet the courts, *Kagama* notwithstanding, do not seriously doubt that there continue to be preexisting sovereigns to the United States and its Constitution: Native American Tribes.³¹³

It is understandable that Native Americans would not trust a partnership with States, especially after the not so distant Allotment and Termination eras.³¹⁴ But it has been Congress and the judiciary that have sold out the interests of tribal

304. See discussion *supra* Part IV.B.

305. See discussion *supra* Part IV.B.

306. See discussion *supra* Part IV.B.

307. The court synchronized a plain meaning canon of construction of the FTCA language “law of the place” with the Indian canon of construction where ambiguities in federal law should favor Tribes if Indian rights might be abrogated. *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1308 (D.N.M. 1999).

308. See discussion *supra* text accompanying notes 217–219.

309. Valencia-Weber, *supra* note 244, at 249.

310. *Id.*

311. See *id.* at 232.

312. See discussion *supra* Part I.

313. See discussion *supra* Part I.

314. See discussion *supra* Part III.B.

autonomy, not the States.³¹⁵ True, greed for land by territorial expansion informed the federal sovereign to forsake Tribes, but manifest destiny is over.³¹⁶

This Comment indicates that the modern era of self-determination has traction.³¹⁷ Also, modern economic and political realities compel the States to develop a bona fide partnership with Tribes in their midst.³¹⁸

Legal fictions with respect to the sovereign equality of the States and the inherent sovereignty of dependent domestic nations have been realized.³¹⁹ The exclusivity of these two sovereigns is positive in the sense that it has tended to protect cultural differences between Tribes and States. On the other hand, exclusivity has had negative consequences in that previous attempts to force assimilation of Tribes within the dominant scheme of dual federalism have been disastrous.³²⁰

United States federalism certainly allows for a heterogeneous population.³²¹ A homogeneous population is not warranted or valuable in the context of a tribal culture situated within a State. Here, cultural diversity should be celebrated and understood to be to the benefit of all sovereigns in the United States. Apparently, Congress has learned this.³²²

Congress has learned that the assimilationist assumptions subsumed in the Marshall trilogy are best served, if at all, by the will of the Native American Tribes.³²³ The federal judiciary will eventually catch on that self-determination is here to stay. But for now, it is up to the States and the Tribes to document this news for the Court to read.

315. See discussion *supra* Part III.

316. See discussion *supra* Part III.B.

317. See discussion *supra* Part III.C.

318. "Patchwork" or intermingled state and tribal jurisdiction as a result of the Allotment Era demands some collaboration not only for mutually beneficial economic development, but also to protect the health and safety of both sovereigns. See *supra* note 254 and accompanying text.

319. See discussion *supra* Part III.

320. See discussion *supra* Part III.

321. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (stating that the "Framers split the atom of sovereignty....The resulting Constitution...establish[ed] two orders of government, each with its own set of mutual rights and obligations to the people who sustain it and are governed by it.").

322. *But see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 177 (1989) (holding that States could impose oil and gas severance taxes on non-Indian companies extracting oil and gas in Indian country, leaving the companies subject to taxation by the Tribe and the State); see also Krakoff, *supra* note 147, at 1209 ("While *Cotton Petroleum* ostensibly allows concurrent taxing authority by the State and tribe, as a practical matter it allows state taxes to preempt tribal ones. Tribes rarely will succeed at convincing businesses to stay on their reservations if they are subjected to triple taxation. Thus, the Court's decisions concerning the imposition of state taxes in Indian Country have left tribes with uncertainties concerning their attempts at revenue collection."); discussion *supra* Part III.

323. See discussion *supra* Part III.B-C.