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Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival

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SAWNAWGEZEWOG: "THE INDIAN PROBLEM" AND THE LOST ART OF SURVIVAL

Matthew L.M. Fletcher**

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*After such knowledge, what forgiveness? Think now
History has many cunning passages, contrived corridors
And issues, deceives with whispering ambitions,
Guides us by vanities.¹*

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* "They are in difficulty." ANDREW J. BLACKBIRD, HISTORY OF THE OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN 126 (1887) (reprinted by Little Traverse Regional Historical Society, Inc. 1977).

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1. T.S. Eliot, *Gerontion*, in THE WASTELAND AND OTHER POEMS 17, 20 (1930).

When I was a staff attorney for a Puget Sound Tribe in Washington, local property owners sued the Tribe, objecting to the Tribe's new housing development. They were a group of local non-Indian landowners residing within the reservation boundaries trying to stop the development. Many of them had moved out across the sound to get away from the city lights of Seattle, and they fought development unless it was their own. Others were long-time residents who had been fighting the Tribe tooth-and-nail for decades. In their complaint, which could have been a form prepared by the Federal District Court for the Western District of Washington in Tacoma based on how often these types of complaints are filed against Washington tribes, they claimed the reservation was disestablished and the Tribe wasn't really the successor in interest to the people that signed the treaty in 1855, the same arguments many of the same people had made in cases like *United States v. Washington*² and *United States v. Aam*.³ Their attorneys — my co-worker called them “elevator lawyers” — practically threw the entire collected volumes of the United States Reports, the Federal Reporter Third, the United States Code, and the Code of Federal Regulations at the Tribe. Instead of just trying to oppose the development, they argued that the Tribe should be gone for good.

A few weeks after I began work on the responsive pleading it was time for my dentist appointment, so I drove over to the Indian Health Service clinic to see a dentist. After the standard IHS wait, I was called in and a woman I'll call Kelly Clark cleaned my teeth. I recognized the name Kelly Clark from the caption on the complaint. One of the local landowners calling for the end of the Tribe was named Kelly Clark. I didn't think too much of it and I didn't say anything to the woman holding my mouth open. I figured there were many Kelly Clarks out there. Next day, I said something to one of the women working for the Tribe's housing department, joking that Kelly Clark, one of our “deadliest enemies,”⁴ was an IHS employee and had cleaned my teeth. The housing department employee knew Kelly Clark because she had kids who went to the dental clinic. She pointedly informed me that Kelly Clark the Indian Fighter and Kelly Clark the Indian Health Service dental hygienist were one and the same. She wouldn't let this Kelly Clark even look at her kids, let alone clean their teeth. Kelly Clark probably wouldn't have a job but for the recognition of the Puget Sound Tribes in *United States v. Washington*⁵ and yet, she found the time and resources to help finance a lawsuit to overturn many of its core principles.

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2. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1975).
 3. 670 F. Supp. 306 (W.D. Wash. 1986), *aff'd*, 887 F.2d 190 (9th Cir. 1989).
 4. *United States v. Kagama*, 118 U.S. 375, 384 (1886).
 5. 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1989).

That is a backdrop of Federal Indian Law.⁶

Federal Indian Law is a complex body of law growing more multifarious each day.⁷ Title 25 of the United States Code already encompasses four volumes in the United States Code Annotated and Congress could easily add a few more volumes by the end of the first decade of the twenty-first century.⁸ The three levels of sovereignty in the United States — federal, state, and tribal⁹ — practically guarantee work for lawyers involved in tribal issues for the foreseeable future. With the additional complexity and expansion of federal statutes and regulations comprising Federal Indian Law comes increasing exposure of Indians and Indian tribes to federal and state courtrooms and administrative adjudicatory forums, federal and state legislatures and legislative committees, and administrative rulemaking. This state of affairs is no different for any of the other subjects covered in the remaining forty-nine titles in the U.S. Code, but unlike most other subjects comprising federal law, Federal Indian Law comes replete with emotional and passionate history both in nationhood and in family.

Law for Indians is not sterile. Indians focus more on the interconnection between human beings and the natural world that surrounds them. Indian leaders expressed that understanding, passion, and intense emotion when the federal government forced them to sign removal agreements or land cession agreements under duress and they could not stop crying for the loss of their lands and people. Pokagon, one of the principle chiefs of the Potawatomi and my relative, “cried like a child as he signed” an 1833 treaty that caused the removal of hundreds of his people.¹⁰ Tribal leaders, in tears and under duress,

6. “Indian sovereignty is ‘a backdrop against which the applicable . . . federal statutes must be read.’” *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701 (1st Cir. 1994) (quoting *McClanahan v. State Tax Comm’n*, 411 U.S. 164, 172 (1973)).

7. At least three Supreme Court Justices admit that, in the context of Indian tribal adjudicatory jurisdiction over nonmembers, the Court’s “own pronouncements on the issue have pointed in seemingly opposite directions.” *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., concurring).

8. *But see generally* Letter from Neal A. McCaleb, Assistant Secretary-Indian Affairs, U.S. Department of the Interior, to Sue Masten and Tex Hall, Co-Chairs, Trust Reform Task Force, National Congress of American Indians 1 (June 20, 2002) (on file with author) (informing recipients that the Department of Interior will recommend to repeal “outdated and conflicting laws” in Title 25).

9. *See generally* Justice Sandra Day O’Connor, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997) (acknowledging Indian tribes as one of the three sovereigns in the United States).

10. Elizabeth A. Neumeyer, *Indian Removal in Michigan, 1833-1855*, at 21 (1968) (unpublished M.A. dissertation, Central Michigan University) (on file with author).

signed away large portions of their reservations to land reclamation and other Bureau of Land Management projects in the Secretary of Interior's office in the 1940s and 1950s.¹¹

Just as Congress can take away, it can also give. Occasionally, Congress establishes an Indian tribe's very existence as a viable political entity in the United States form of government. For example, several Indian tribes are federally recognized Indian tribes only because of their inclusion in the U.S. Code via an Act of Congress. Examples from the past several years include the act restoring federal recognition to the Pokagon Band of Potawatomi Indians,¹² the Auburn Indian Restoration Act,¹³ the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act,¹⁴ the Paskenta Band of Nomlaki Indians of California Act,¹⁵ and the Graton Rancheria Restoration Act.¹⁶ Without their inclusion on a list prepared and expanded only by political actors, those Indian tribes do not exist in the eyes of the federal government.¹⁷ Though these Indian tribes have existed for centuries longer than the United States government and every other national government in the Western Hemisphere, they must stoop to seek recognition from the still-immature American government. An Indian tribe may not simply file a copy of its constitution and bylaws like corporations. Unrecognized Indian tribes are forced to live outside the boundaries of federal law, rendering them completely unprotected and completely without rights as Indian tribes. From the

11. The emotional strain experienced by tribal leaders was evident and documented by many.

Although the [Supreme] Court suggests that the Cheyenne River Sioux consented to the taking of their lands for the Oahe dam and reservoir . . . , anyone who doubts that the tribes on whose reservations Pick-Sloan reservoirs were located were under duress should examine the photograph of George Gillette, the Tribal Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation, who broke down in tears while signing the contract with the Army Corps of Engineers for the Garrison Dam and reservoir.

Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection, and the Consent of the Governed*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59, 74 n.56 (1994) (photo reproduced in NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992, at 343 (Peter Nabokov ed., 1991)).

12. 25 U.S.C. §§ 1300j-1300j-8 (2000).

13. 25 U.S.C. §§ 1300l-1300l-7 (2000).

14. 25 U.S.C. §§ 1300k-1300k-7 (2000).

15. 25 U.S.C. §§ 1300m-1300m-7 (2000).

16. 25 U.S.C. §§ 1300n-1300n-6 (2000).

17. See *Western Shoshone Bus. Council for & on Behalf of the Western Shoshone Tribe of the Duck Reservation v. Babbitt*, 1 F.3d 1052, 1057 (10th Cir. 1993) (“[T]he Tribe’s absence from [Interior’s] list [of federally recognized tribes] is dispositive.”).

perspective of the federal government, the genocide perpetrated on all Indians¹⁸ is complete for tribes that are unrecognized — and for the federal government, that is okay.¹⁹

The genocide perpetrated on Indian people is unprecedented in world history in terms of its continuity.²⁰ Even many schoolchildren now know that the Cristobal Colón of 1492 was no hero,²¹ but very few schoolchildren are taught that the acts of genocide continued well into the present generation. For example, from at least the 1930s until the 1980s, the federal government perpetrated forced sterilizations upon Indian women.²² As much as forty-two percent of all Indian women of childbearing age had been forcibly sterilized by the early 1980s.²³ Around the same time, Congress passed the Indian Child

18. See generally Lindsay Glauner, *The Need for Accountability and Reparation 1830-1976: The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002) (arguing that the federal government's actions in dealing with Indians and Indian tribes amounts to genocide).

19. See generally Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 218 (1989) ("Whatever motives of justice may inspire congressional action, the usual practice of allowing the administrative branch to promulgate the rules and regulations under which the statute will be enforced and the programs implemented quickly blunts any sense of having won something.").

20. Cf. DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD* xiv (1992) (describing the continuing genocide against Native peoples throughout the Western Hemisphere). Stannard wrote:

Reminders are all around us, if we care to look, that the fifteenth- and sixteenth-century extermination of the indigenous peoples of Hispaniola, brought on by European military assault and the importation of exotic diseases, was in part only an enormous prelude to human catastrophes that followed on other killing grounds, and continue to occur today — from the forests of Brazil and Paraguay and elsewhere in South and Central America, where direct government violence still slaughters thousands of Indian people year in and year out, to the reservations and urban slums of North America, where more sophisticated indirect government violence has precisely the same effect — all the while that Westerners engage in exultation over the 500th anniversary of the European discovery of America, the time and the place where all the killing began.

Id. at xiv.

21. See generally KIRKPATRICK SALE, *THE CONQUEST OF PARADISE: CHRISTOPHER COLUMBUS AND THE COLUMBIAN LEGACY* (1990) (depicting Columbus as the sad product of a disease-ridden, war-ravaged Europe).

22. See Glauner, *supra* note 18, at 939 (citing Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 328 (1998)).

23. WARD CHURCHILL, *A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE*

Welfare Act²⁴ in part because state courts were contributing part and parcel to the destruction of whole generations of Indian families.²⁵ Twenty-five to thirty-five percent of all Indian children had been separated from their families.²⁶ The result was often suicide.²⁷ That amounts to one quarter to over one third of Indian children. In yet another example of genocide, Congress systematically destroyed Indian tribes' land base before,²⁸ during,²⁹ and after the allotment

AMERICAS 1492 TO THE PRESENT 249-50 (1997) (arguing as much as forty-two percent were sterilized); *see also* PAULA GUNN ALLEN, *OFF THE RESERVATION: REFLECTIONS ON BOUNDARY-BUSTING, BORDER-CROSSING, LOOSE CANONS* 38 (1998) (arguing more than twenty-five percent were sterilized).

24. 25 U.S.C. §§ 1901-1903, 1911-1923, 1931-1934, 1951-1952, 1961-1963 (2000).

25. *See generally* 25 U.S.C. §§ 1901(4), (5) (2000) (finding that an "alarmingly high percentage" of Indian families are broken up, an "alarmingly high percentage" of Indian children are placed in non-Indian foster homes, and states often fail to recognize essential tribal relations and prevailing social and cultural standards of Indian people); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 162 (Tex. App. 1995) ("Thus, by passing the ICWA, Congress sought to ensure the continued viability of Indian tribes by protecting Indian children from cultural genocide.") (citation omitted); *Quinn v. Walters*, 881 P.2d 795, 803 (Or. 1994) (Fadeley, J. dissenting) ("Without notice to the tribe or valid consent, an adoption is an act of genocide, an elimination of the tribe's future.").

26. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989) (citing *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler)).

27. *See In re Adoption of Baby Boy D*, 742 P.2d 1059, 1075-77 (Okla. 1985) (footnote and citations omitted), *cert. denied sub nom. Harjo v. Duello*, 484 U.S. 1072 (1988).

28. *See, e.g., United States v. Michigan*, 471 F. Supp. 192, 208 (W.D. Mich. 1979) ("The liquidation of Indian reservations in the Old Northwest was largely accomplished between 1829 and 1843.").

29. *See HON. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL* 22 (3rd ed. 1998). Canby, a Senior Ninth Circuit Judge, wrote:

The primary effect of the Allotment Act was a precipitous decline in the total amount of Indian-held land, from 138 million acres in 1887 to 48 million in 1934. Of the 48 million acres that remained, some 20 million were desert or semidesert. Much of the land was lost by sale as tribal surplus; the remainder passed out of the hands of allottees. Allottees who received patents after 25 years found themselves subject to state taxation, and many forced sales resulted from non-payment. In addition, the Indians' new power to sell land provided many opportunities for non-Indians to negotiate purchases of allotted lands on terms quite disadvantageous to the Indians. The allottees were frequently left with neither their land nor with any benefits that might have resulted from its disposition.

Id.

era,³⁰ an example at least one Supreme Court Justice acknowledged as genocide.³¹

That is also the backdrop of Federal Indian Law.

Judicial opinions and legislative determinations in Federal Indian Law impact Native Americans and Indian tribes to the very core of their being. Corporations winning or losing tax shelter cases do not feel the emotional impact of an emotionless judicial opinion written in a vacuum like a traditional Indian winning or losing the right to participate in healing and cleansing ceremonies while incarcerated.³² Whether or a not a condominium development company succeeds in removing a notice of *lis pendens* on their proposed development property does not invoke the passion or sense of justice and injustice tribal members feel when their reservation boundaries that they have held sacred for over a hundred years are declared disestablished by federal statutes and treaty interpretations they never agreed to and could never have anticipated.

Judges writing the opinions in federal and state courts must refuse to allow their emotions to control their rulings, lest they fail to remain impartial adjudicators. Yet, attorneys and policymakers that shape Federal Indian Law in other ways can, and often do, allow their emotions to shape policy. In fact, emotions often serve to dramatically alter the landscape of the political world and, by extension, the statutory and regulatory landscape that molds our everyday existence. In Federal Indian Law, absent emotional calls for reform from the states or the tribes, the Indian Gaming Regulatory Act,³³ the Indian

30. See, e.g., Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 364 (1953) [hereinafter Cohen, *Erosion of Indian Rights*] ("Within the past two years, the former habit of Indian Bureau officials of disposing of Indian tribal lands without the consent of the Indians — a practice which has already resulted in more than 80 million dollars in judgments against the United States by its own courts — generally has been reestablished as approved Interior Department practice.") (footnote and citations omitted).

31. See *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 276 (1992) (Blackmun, J., dissenting) ("Allotment and the subsequent sale or lease of Indian lands accomplished what the 'genocide' of epidemics, war and bootlegged alcohol had not been able to do: a systematic 'ethnocide' brought about by a loss of Indian identity with the loss of land.") (quoting HELEN H. SCHUSTER, *THE YAKIMAS: A CRITICAL BIBLIOGRAPHY* 70 (1982)).

32. See, e.g., LEONARD PELTIER, *PRISON WRITINGS: MY LIFE IS MY SUNDANCE* 183-98 (Harvey Arden, ed. 1999).

33. Pub. L. No. 100-497, 102 Stat. 2467-2486 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)).

Reorganization Act,³⁴ and the so-called *Duro Fix*,³⁵ attempting to repeal *Duro v. Reina*,³⁶ would not exist.

For one reason or another, state and federal courts often do not assess the human impacts of their decisions. Often, strict constructionism dominates the courts to the detriment of Indians and Indian tribes.³⁷ Perhaps tribal courts can serve as a model for federal and state court judges. As the former Chief Judge of the Grand Traverse Band Tribal Court put it in 1996, “[o]ne of the important concerns that should always be at the forefront of the decision-making process is the social (community) consequences of a particular contemplated action or decision.”³⁸ It seems so simple, yet the profundity of this comment must be emphasized, especially considering the harshness of results of many federal and state court decisions.

The new generation of treaty-making is underway and Indian tribes are fast falling behind the states, the corporations, and the federal government, losing ground gained at various times and places and losing that ground in federal courts.

With the advent of Indian Gaming³⁹ and Self-Determination (even self-reliance⁴⁰), Indians and Indian tribes are on the cusp of real political power. For some tribes, the money is already there to make huge strides and power plays in

34. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-463 (2000)).

35. Pub. L. No. 101-511, 104 Stat. 1892 (1990) (codified at 25 U.S.C. § 1301(2), (3) (2000)).

36. 495 U.S. 676 (1990).

37. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451-52 (1988) (finding that the Constitution does not expressly protect tribal religions and denying the tribal petitioners relief).

38. *Raphael v. Grand Traverse Band of Ottawa & Chippewa Indians*, No. 90-01-001, at 2 (Grand Traverse Band Tribal Ct., Apr. 16, 1996) (Michael Petoskey, C.J.), *aff'd*, Appellate Decision, No. 90-01-CV (Grand Traverse Band Ct. App., Oct. 15, 1999) (on file with author).

39. See generally *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987) (“The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.”); 25 U.S.C. §§ 2701-2721 (2000) (Indian Gaming Regulatory Act).

40. See generally Colman McCarthy, *Congress Kicking Indians While They're Down*, GRAND RAPIDS (MICH.) PRESS, Sept. 22, 1995 (copy on file with author) (“Another argument heard in the House and Senate to justify the budgetary hacking is that Indians, along with others on welfare, need to acquire self-reliance. It’s forgotten that social programs for Indians are matters of justice, not charity, largesse or the dole.”).

the halls of state legislatures and in Congress,⁴¹ even if state and federal courts remain reluctant to acknowledge tribal sovereignty.

Part I of this article examines three older Supreme Court decisions, the cases that form the backdrop of modern Indian Law as interpreted and enforced by federal courts, the federal government, and even Indian tribes. Part II examines five Supreme Court cases decided in the so-called Modern Era of Indian Law and the species of cases that followed each specific decision. Part III of this article explores a hypothetical scenario in which a small Indian tribe in Michigan learns that the mythical Fountain of Youth actually exists and that it is situated on land owned in trust for the benefit of the tribe by the federal government; how that tribe acquires self-reliance; and how Congress decides to solve "the Indian Problem" with one swift stroke.

In its conclusion, this article calls for practitioners to assess the impact that federal and state litigation has on the everyday world of Indians throughout the United States. The meaning of Indian Law cases are right there on the page in black and white, buried beneath blank citations to the Marshall Trilogy, the Indian Reorganization Act, the special canon for construction of Indian statutes and treaties, and all the rest — the faceless boilerplate of Federal Indian Law. Most importantly, this article asks tribal attorneys (and tribal leaders) to look to a future where many Indian tribes will garner unprecedented political power. We should be aware of the possible pitfalls and the potential advantages.

All of the cases reviewed in this article have been carefully analyzed and revisited by academics and practitioners alike in a plethora of excellent books, articles, and other commentary.⁴² It is easy for new tribal attorneys to lose sight of the forest for all the trees when reviewing and analyzing Federal Indian Law. Yet it is all right there if one takes the time to look for it.

I. Historical Cases

The Supreme Court has passed judgment on Indians and Indian tribes throughout its history in sometimes brutal and pitiless language, defining the

41. See, e.g., Philip Matier & Andrew Ross, *State Indian Tribes Cover Their Political Bets with Cash*, SAN FRAN. CHRON., Jan. 8, 2003, at A17 ("[T]he state's Indian tribes have emerged as some of California's biggest political donors in recent years, handing out millions to [Cal. Gov. Gray] Davis and other pols alone.").

42. E.g., DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* (1997) [hereinafter WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT*]; David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) [hereinafter Getches, *Beyond Indian Law*].

term “Indian” as synonymous with “savage” or “uncivilized” or “barbarous/barbaric,”⁴³ as though the Brethren believed Crazy Horse or Chief Pokagon would ride into D.C. like the British and destroy the immature Nation’s capitol just as the Vandals sacked Rome. Fear in that vein spawned the Wounded Knee and Sand Creek massacres.⁴⁴ Apparently, the dominant culture’s fear of Indians from before the beginning of this Nation’s history has made its mark on this highest court of law.

The definition of “Indian” by the Supreme Court still sits squarely in the broad tapestry of federal common law underlying all decisions the current Court makes involving Indian tribes and Indians. Though the terms “savage” and “barbaric” no longer permeate Supreme Court opinions, the Court still relies ever more heavily on the same atavistic opinions and reasoning. Of course, the Court must surely understand that to reject those old opinions would possibly unravel the fabric of modern Indian Law jurisprudence.⁴⁵ Maybe the modern

43. See generally Felix Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 263 (1950) (comparing *United States v. Joseph*, 94 U.S. 614 (1876), and *United States v. Sandoval*, 231 U.S. 28 (1913)). Cohen wrote:

Take, for example, the decisions of the United States Supreme Court in *United States v. Joseph*, and in *United States v. Sandoval*. Both cases involved the question whether the people of the Rio Grande Pueblos were or were not Indians. In the former case, the Supreme Court noted that “Integrity and virtue among them is fostered and encouraged In short, they are a peaceable, industrious, intelligent, honest, and virtuous people.” The Court concluded these people were not Indians, and therefore not entitled to the protection of federal laws prohibiting trespass upon Indian lands. In the *Sandoval* case, the Court accepted evidence supplied by the Bureau of Indian Affairs to the effect that the Pueblos indulged in “a ribald system of debauchery,” “cruel and inhuman punishment,” and “immorality and a general laxness in regard to their family relations.” From these and other similar characteristics the Supreme Court concluded that the Pueblo villages are really Indian communities after all and that its earlier decision in the *Joseph* case was erroneous. The moral premise underlying both decisions is obvious but, for reasons of politeness or otherwise, it was left unexpressed: “Intelligent, honest, and virtuous” people cannot be Indians, but debauchery, cruelty, inhumanity, and immorality are prima facie evidence of Indianhood.

Id. (quoting *Joseph*, 94 U.S. at 616, and *Sandoval*, 231 U.S. at 42- 44).

44. See generally Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 319-21 (2002).

45. See generally Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003) [hereinafter Pommersheim, *Constitutional Crisis*] (discussing *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001); *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998), *vacated by* 165 F.3d 1209 (8th Cir.) (en banc); *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998) (arguing that the *Duro* fix may create a constitutional crisis), *overruled by Enas*, 255 F.3d at 675 n.8).

Court still maintains the fear that any day they might look up from their studies and see Winona LaDuke at the head of a horde of Anishinaabekwe (Odawa, Potawatomi, and Ojibwe women) on horseback parading up and down the Washington Mall, with the American military concomitantly surrendering its arms. Or, what about if the Indians of South Dakota have voted in record numbers and decided the race for United States Senator?⁴⁶ Their fear of the dominant culture, and by extension the Supreme Court, is all too apparent when it appears that Indians and Indian tribes can make a substantial difference in the dominant culture's political establishment. As such, the importance of the old cases requires comment.

A. *United States v. Kagama*⁴⁷ — *Power Created Out of Thin Air*

Every Indian lawyer and student of Indian Law knows about the Marshall Trilogy⁴⁸ of cases, especially given their prominent placement at the beginning of Indian Law casebooks.⁴⁹ Often, one or all of these cases begins a long boilerplate citation of Indian Law in a legal opinion or a court opinion, but their actual relevance to the modern era is highly suspect. Later nineteenth century and early twentieth century cases with much less fanfare, written by much less celebrated Justices are more persuasive to current Justices and judges, mostly due to the cases overt rejection of Indian rights and tribal sovereignty.

Kagama is a case largely borne out of the fact that the U.S. Army had a long-standing policy to control the Indians by destroying their food supplies and

46. The *Wall Street Journal* reported that: "Senate voter turnout was up 27% statewide for this year's close contest compared with 1998, but in Shannon County turnout increased by 89%. Again, no other county in the state showed comparable turnout increase. Shannon County is largely Indian Country, home to the Oglala Sioux nation, and is heavily Democratic." Editorial, *The Oglala Sioux's Senator*, WALL ST. J., Nov. 14, 2002, at A14. As soon as Republican John Thune conceded the South Dakota Senate race to Democrat Tim Johnson, conservative commentators declared that, since the race was largely decided by Indian voters, the Democrat's victory was "highly suspicious, if not crooked . . ." *Id.* But see David Kranz, *No Evidence Fraud Tainted Vote Results, Barnett Says*, ARGUS LEADER (SIOUX FALLS, S.D.), Nov. 21, 2002, at A ("[W]e have yet to see evidence of widespread voter fraud, [South Dakota Attorney General Mark Barnett] said.").

47. 118 U.S. 375 (1885).

48. The three cases comprise the origins of Federal Indian Law and the critical opinions are all authored by Chief Justice John Marshall. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

49. E.g., DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 63-72, 104-26 (4th ed. 1998); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 2-33 (3d ed. 1991).

feeding them enough rations to keep Indians at or below starvation levels.⁵⁰ The Supreme Court took the fact that many Indians were dependent upon the United States for their “daily food”⁵¹ and used that dependency to state that, as a matter of law, “Indian tribes are the wards of the nation.”⁵² They might well have used the terms “slaves” or “butlers” or “mules.” The Supreme Court exploited the fact that the United States and its citizens had totally subjugated so many Indians and tribes and practically turned them into slaves. At least one court has acknowledged that the Court’s reasoning was “an embarrassment of logic.”⁵³

The federal government has used this ward status for the purpose of exploiting Indians, as in the Peabody Coal case, *United States v. Navajo Nation*,⁵⁴ and the Individual Indian Money trust account case, *Cobell v. Norton*.⁵⁵ Former Secretary of the Interior Donald Hodel was Peabody Coal’s best friend in 1985 by helping the mining conglomerate make amazing amounts of money exploiting Navajo coal resources, paying only two percent of gross proceeds as royalty to the Navajo Tribe.⁵⁶ BIA officials were about to approve an increase in royalties to twenty percent agreed to during an administrative appeal, but a man named Stanley Hulett, a close friend of Secretary Hodel, approached him on behalf of Peabody Coal and asked him to not increase royalties.⁵⁷ Secretary Hodel complied with Mr. Hulett’s *ex parte* request to take personal jurisdiction over the request and agreed to lower the royalty rate to 12.5 percent.⁵⁸ The Navajo Nation faced severe economic pressure and was forced to accept the

50. See HELEN HUNT JACKSON, A CENTURY OF DISHONOR: THE EARLY CRUSADE FOR INDIAN REFORM 177 (Andrew F. Rolle ed., 1965) (describing the actions of the Indian Bureau forcing Sioux bands to move against their will by placing them in “almost a starving condition”).

51. *Kagama*, 118 U.S. at 384.

52. *Id.* at 383 (emphasis in original omitted).

53. *United States v. Doherty*, 126 F.3d 769, 778 n.2 (6th Cir. 1997) (quoting Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996)).

54. *United States v. Navajo Nation*, 437 U.S. 488 (2003).

55. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); see also *Cobell v. Norton*, 260 F. Supp. 2d 98, 108 (D. D.C., 2003) (“[The federal] defendants have consistently chosen the coward’s route by failing to provide the IIM beneficiaries with the information that the beneficiaries were entitled to by law, while simultaneously insisting that they were fully complying with their fiduciary obligations to the beneficiaries.”); *Cobell v. Norton*, 231 F. Supp. 2d 315, 317 (D. D.C. 2002) (finding that the “actions taken by [the Secretary of the] Interior to be anathema to the orderly administration of this litigation”).

56. *Navajo Nation v. United States*, 263 F.3d 1325, 1327 (Fed. Cir. 2001).

57. Brief for Respondent at 7-9, *United States v. Navajo Nation*, 537 U.S. 488 (2003) (No. 01-1375).

58. *Navajo Nation*, 263 F.3d at 1328.

reduced royalty rate.⁵⁹ The Department did not mention to the Navajo Nation anything about the visit from Mr. Hulett or the fact that Peabody Coal lawyers had written the memorandum that became the Department's decision.⁶⁰ The Court ruled against the Navajo Nation, relying in part on their decision that federal law did not prohibit the activities of either the Secretary or Peabody Coal.⁶¹

The Individual Indian Money trust case, *Cobell v. Norton*, is the story about how the BIA mishandled individual Indians' trust accounts for decades, over generations of Indians. The BIA is in charge of royalties from natural resources on trust land exploited by mining conglomerates. Because of a combination of incompetence and corruption, BIA officials stole resource-rich land from Indians, incorrectly debited amounts from trust accounts that should have been credited, and literally skimmed money off the top of accounts into slush funds.⁶²

Even when the United States assists the tribes, their motives are mixed. Vine Deloria reported that:

A ludicrous example of jurisdictional nonsense was *State v. Moses* [422 P.2d 775 (Wash. 1967)], wherein a tribe, having changed

59. *Id.*

60. Brief of Amicus Curiae National Congress of American Indians at 2-3, *United States v. Navajo Nation*, 537 U.S. 488 (2003) (No. 01-1375).

61. *Navajo Nation*, 537 U.S. at 503-04. The Court cited portions of the oral argument transcript where the Nation's attorney, Paul Frye, repeatedly reminded the Justices about the incredible and almost fantastical behavior of the government. *Id.* at 503. But that hardly captures what must have been a spirited defense of the Navajo Nation before very hostile Justices. Before the Court, Mr. Frye characterized the case as being "about the Secretary colluding with Peabody Coal Company to swindle the Navajo Nation." Transcript of Oral Argument 30, *United States v. Navajo Nation*, 537 U.S. 488 (200) (No. 01-1375). Mr. Frye described the government's activities as being "actively disloyal . . . to the beneficiary." *Id.* at 34. Mr. Frye described the coal company's activity as "skullduggery." *Id.* at 40. Mr. Frye described the entire process as follows:

Well, the beneficiary of a trust shouldn't have to guess what they trustee is really telling him. If that's what his trustee wanted to say, the trustee should have said, I've met with Peabody. I like their lobbyist. I'm not going to do something that Peabody doesn't like and . . . we're going to sit on this thing, as his subordinate said, until hell freezes over until you agree . . . with something that Peabody likes and you can live with.

Id. at 51. As Mr. Frye noted in a phrase he stole from one of the Justices' own questions, effectively summing up the entire debacle, "[t]he key modifier is if [the Secretary] can get away with it." *Id.* at 38.

62. See generally Johnnie P. Flynn, "One Family's Individual Indian Money Account Odyssey," INDIAN COUNTRY TODAY, Nov. 22, 2002, available at <http://www.indiancountry.com/?1037980361> (last visited Dec. 4, 2002).

its name to correspond with the name of its reservation, was found not to be the signatory of the treaty. But the climax of the struggle [for treaty fishing rights] in Washington was *United States v. Washington* [520 F.2d 676 (9th Cir. 1975)], the famous “Boldt” decision, which awarded half of the fish in the state to the Indians. Interior Secretary Morton, allegedly the Indians’ trustee, when told that the Indians had won, wanted to appeal the decision until informed that Interior had been supporting the tribes.⁶³

The government that acts in this manner is the entity in which Indians and Indian tribes are forced to place their trust.

*B. Lone Wolf v. Hitchcock*⁶⁴ — *The Power to Break Treaties*

Lone Wolf, firmly cementing the principle of congressional plenary power over tribal relations and tribal lands, has been called by commentators the *Plessy v. Ferguson*⁶⁵ of Federal Indian Law.⁶⁶ It is as if federal courts continued to cite to *Plessy* in race discrimination and affirmative action cases long after the Court overruled *Plessy* in *Brown v. Board of Education*.⁶⁷ However, unlike desegregation, a federal court has never seriously challenged congressional plenary power over Native Americans, Indian tribes, and their respective property.⁶⁸

The *Lone Wolf* Court upheld Congress’ attempts to statutorily modify a treaty involving the Kiowa, Comanche, and Apache Tribes by holding that:

The power exists to abrogate the provisions of an Indian treaty, though *presumably* such power will be exercised only when circumstances arise which will not only justify the government in

63. Vine Deloria, Jr., *Legislation and Litigation*, 436 ANNALS AM. ACAD. POL. & SOC. SCI. 86, 93 (1978).

64. 187 U.S. 553 (1903).

65. 163 U.S. 537 (1896).

66. See, e.g., Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 99 (1993) (describing *Lone Wolf* as “a decision as devastating to Indians and their rights as *Plessy v. Ferguson* was to the cause of civil rights for African-Americans”).

67. 347 U.S. 483 (1954).

68. See generally Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 244 (2002) [hereinafter Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*] (“Nevertheless, despite the lack of any justification for federal supremacy over Indian tribes that withstands careful constitutional scrutiny, cases, such as *Duro v. Reina*, repeatedly suggest an overriding federal authority that binds Indian tribes.”).

disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with *perfect good faith* towards the Indians.⁶⁹

In essence, the Supreme Court upheld Congress' power to break treaties with Indian tribes, treaties that constituted the sacred agreements and understandings that, to this day, the tribes and tribal members themselves defend. The Court's only limitation on Congress' power to break treaties with Indian tribes is the extraordinarily subjective concept of "perfect good faith,"⁷⁰ with which the Court merely "presum[ed]" Congress would act toward the tribes.⁷¹

The Supreme Court created the "good faith" concept in *Lone Wolf* and ran with it in cases such as *United States v. Sioux Nation*,⁷² where good faith and the "transmutation of property doctrine" merged.⁷³ One commentator described Congress' position regarding Indian takings of tribal property as acting "in *Lone Wolf* garb" and that *Lone Wolf* operates to immunize Congress "from any just compensation claim regardless of the economic injuries that may have been inflicted on the affected Indians."⁷⁴ For the United States as trustee to Indians and Indian property, "good faith" of the United States is utterly meaningless.

*C. Tee-Hit-Ton v. United States*⁷⁵ — *The Power to Take Indian Property Without Just Compensation*

Often, commentators refer to the 1959 Supreme Court decision *Williams v. Lee*⁷⁶ as the first case in the Modern Era of Federal Indian Law.⁷⁷ Unfortunately,

69. *Lone Wolf*, 187 U.S. at 566 (emphasis added and emphasis in original removed).

70. *Id.*

71. *Id.*

72. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 414 (1980).

73. *Id.* at 416 (citing *Fort Berthold v. United States*, 390 F.2d 686, 691 (Ct. Cl. 1968)).

74. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 473 (1998) (citing Daniel G. Kelly, Jr., *Indian Title: The Right of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655, 672-74 (1975)).

75. 348 U.S. 272 (1955).

76. 358 U.S. 217 (1959).

77. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 1 (1987).

the federal courts continue to read and cite Indian cases dated many years earlier than 1959.⁷⁸ The same Supreme Court Justices that decided *Brown v. Board of Education* also decided *Tee-Hit-Ton* in 1955, a case in which dubious legal reasoning is bolstered by blatant racism.

Tee-Hit-Ton involved a claim by Alaskan Natives to recover compensation from the United States for its taking of timber on tribal land.⁷⁹ The Court rejected the claim, citing the principle established in cases such as *Johnson v. M'Intosh*,⁸⁰ that, absent a treaty or statute establishing a reservation or other property rights, Congress may take Indian property whenever it so desires.⁸¹ In the next sentence, Justice Reed notes that Indians aren't really worth the trouble anyway, because:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.⁸²

Justice Reed seemed to be saying that it was okay for the federal government to take and take and keep taking, in part because the continual oppression of Native Americans was justified by their savagery and weakness. Apparently, it was meaningless to the Court that Indians were forced to give up everything because the U.S. Army was starving them to death.⁸³ Justice Reed concludes by

78. For example, the Supreme Court recently cited *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), for the proposition that "Congress can unilaterally alter reservation boundaries." *Hagen v. Utah*, 510 U.S. 399, 404 (1994). The Supreme Court often cites *United States v. Kagama*, 118 U.S. 375 (1886), for the proposition that the Court has always held the interests of the states over those of the tribes. *E.g.*, *Nevada v. Hicks*, 533 U.S. 353, 364-65 (2001); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978). The Court cited *Utah & N. R.R. Co. v. Fisher*, 116 U.S. 28 (1885), when it stated, "'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'" *Hicks*, 533 U.S. at 361-62 (other citations omitted). The Minnesota Court of Appeals cited *Lone Wolf* and *Ward v. Race Horse*, 163 U.S. 504 (1896), for the proposition that sovereignty is a "myth." *See Granite Valley Hotel Ltd. P'ship v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 164-65 (Minn. Ct. App. 1997).

79. *Tee-Hit-Ton*, 348 U.S. at 273.

80. 21 U.S. (8 Wheat.) 543 (1823).

81. *Tee-Hit-Ton*, 348 U.S. at 288-89 ("The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.").

82. *Id.* at 289-90.

83. *See* Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 382 (1998).

disingenuously stating that, "Our conclusion does not uphold harshness as against tenderness toward the Indians . . ." ⁸⁴ Such a statement is a throwaway line, equivalent to giving away ice in the winter.

Tee-Hit-Ton stands for the proposition that Indians and Indian tribes have no compensable property rights in aboriginal Indian title. Subsequently, the Supreme Court ruled in *United States v. Dann*⁸⁵ that a taking of aboriginal title might, for all practical purposes, be taken "by operation of those courts themselves in applying the constructive taking date adopted for one purpose in a claims tribunal as the historical date of extinguishment of title in the law courts."⁸⁶ In *Dann*, even though the Western Shoshone Tribes refused payment through the Indian Claims Commission in exchange for its land, the Court ruled that payment had taken place when the government placed the money in a trust fund and that act had effectively extinguished the title.⁸⁷ *Tee-Hit-Ton* set the bar for extinguishments of aboriginal title very, very low, and that allowed the government to continue to exploit tribes to its advantage.

With that type of justification underlying fundamental tenants of Federal Indian Law, one sees Vine Deloria's justification for the argument that science and religion are driven by assumed European biological dominance over all races.⁸⁸ If one begins to realize that Native Americans are equals and that their culture and society rivaled and exceeded European culture at the time of first contact,⁸⁹ then fundamental principles underlying the current dominance of the European-descended culture and government — and even "well-established" Federal Indian Law⁹⁰ — starts to crumble.

The historical cases were simply awful, but the cases in the modern era continue the trend.

84. *Tee-Hit-Ton*, 348 U.S. at 290-91.

85. 470 U.S. 39 (1985).

86. John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle — 1861 to 1991*, 42 NAT. RESOURCES J. 765, 798 (2002).

87. *Dann*, 470 U.S. at 50.

88. See generally Vine Deloria, Jr., *Evolutionary Prejudice*, in RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT 47, 47-65 (1997).

89. See generally STANNARD, *supra* note 20, at 52 ("[O]ther social practices of certain native Americans in the pre-Columbian era — from methods of child rearing and codes of friendship and loyalty, to worshipping and caring for the natural environment — appear far more enlightened than do many of the dominant ideas we ourselves live with today.").

90. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 434 (1989) (Stevens, J., dissenting) (arguing that an Indian tribe's power to exclude nonmembers is "well-established") (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)).

II. Modern Cases

The modern cases, beginning with *Williams v. Lee*,⁹¹ suffer from a complete lack of context in terms of the practical realities of Indian tribes at the beginning of the era to the more recent decades. *Williams v. Lee* involved a fact situation on a relatively closed reservation with an Indian-dominated demographic outlook — the Navajo reservation — reaching the conclusion oft-quoted by Indian tribal advocates regarding “the right of *reservation Indians* to make their own laws and be ruled by them.”⁹² The Court implicitly took into consideration the practical realities of the reservation and ruled in favor of the exclusive jurisdiction of the Navajo Tribal Court over a non-Indian.⁹³

The Supreme Court’s cases moved away from that high-water mark in large part because the demographic reality of the Navajo Nation does not translate to heavily allotted or disestablished reservations such as the various Sioux reservations or the terminated tribes with little or no land base such as the California Rancherias and the eastern tribes. The Court does not see itself taking the side of the tribes using the relatively broad language in *Williams* in the context of the Suquamish Tribe’s Port Madison Reservation, for example.⁹⁴ Since the Court “generally resolves cases based on universal principles, imposing one-size-fits-all ‘solutions’ to problems that have a myriad of local wrinkles,”⁹⁵ and because the Court treats Indian tribes, for purposes of the litigation at hand, as “adversaries with irreconcilable goals,”⁹⁶ the strong and reasonable (for the Navajo Nation and tribes with similar situations) law of *Williams v. Lee* erodes as smaller Indian tribes bring claims — or are forced to defend positions — the Court considers less reasonable.

91. 358 U.S. 217 (1959).

92. *Id.* at 220 (emphasis added).

93. *Id.* at 223.

94. See discussion *infra* Part I.A.

95. 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, 11 (2002) [hereinafter Frickey, *Doctrine, Context, Institutional Relationships, and Commentary*].

96. Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 482 (2003).

A. *Oliphant v. Suquamish Indian Tribe*⁹⁷

Commentators, pro-Indian activists, and Indian Law practitioners started to believe after the end of the Termination Era in 1958⁹⁸ that most, if not all, Indians and Indian tribes might actually survive the trusteeship of the federal government. In fact, tribes made progress in front of the Supreme Court and even President Richard Nixon declared the beginning of the Self-Determination Era in 1970, but *Oliphant v. Suquamish Indian Tribe* stopped that progress dead in its tracks. Few really believed it at the time, though hindsight seems to support that thesis.

In *Oliphant*, the Supreme Court held that Indian tribes do not have inherent criminal jurisdiction over non-Indians, even within their reservation boundaries.⁹⁹ Mark David Oliphant, a non-Indian, assaulted a tribal police officer and resisted arrest during the Suquamish Tribe's annual Chief Seattle Days,¹⁰⁰ the Tribe's largest gathering of the year that takes place on the shores of Puget Sound in the heart of the Port Madison Reservation. Naturally, the Tribe arraigned Mr. Oliphant and intended to proceed with prosecuting him for his crimes. Another non-Indian individual, Daniel P. Belgarde, petitioned the Supreme Court with Mr. Oliphant. Mr. Belgarde allegedly engaged in a high-speed automobile chase through the reservation, stopping only after colliding with a tribal police car.¹⁰¹ In any other jurisdiction, both men would have been prosecuted by the appropriate state or county or municipal court, but not in Indian Country. In fact, only about fifty Indians lived on the reservation at that time and it makes some sense to acknowledge that the Suquamish Tribe probably should not have been exercising criminal

97. 435 U.S. 191 (1978).

98. See FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 180 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN'S HANDBOOK]. It is not clear if the Termination Era ended in 1958 or in the early 1970s when President Richard Milhous Nixon initiated the Self-Determination Era. Regardless, the enthusiasm of members of Congress for termination of federal supervision, sometimes referred to as "decontrol," cannot be overstated. As late as 1957, one Senator wrote in surely one of the purest forms of Orwellian Doublespeak: "Following in the footsteps of the Emancipation Proclamation of ninety-four years ago, I see the following words emblazoned in letters of fire above the heads of all Indians — *THESE PEOPLE SHALL BE FREE!*" Sen. Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions over Indian Property and Person*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 55 (1957).

99. *Oliphant*, 435 U.S. at 195.

100. *Id.* at 194.

101. *Id.*

jurisdiction over non-Indians at that time,¹⁰² but now about 2000 Indians live on that reservation. Yet because of a “commonly shared presumption,”¹⁰³ the Supreme Court held that Indian tribes could not prosecute non-Indians forever and under every circumstance, even if the reservation demographics point to a predominantly Indian presence.¹⁰⁴ Regardless, this wide-ranging result was a huge shock to the Suquamish Tribe and every other tribe. As soon as tribes establish their tribal courts and seek to establish their political legitimacy and credibility, the Supreme Court shoots them down, saying they cannot prosecute non-Indians, no matter what the circumstances. The Court did this, even though the federal government had long recognized that tribal “criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power.”¹⁰⁵ Perhaps the Justices took a poll of themselves and their clerks to determine what the commonly held presumption was.

Numerous commentators have picked apart then-Justice Rehnquist’s opinion in *Oliphant* for one reason or another,¹⁰⁶ but the bare fact remains that

102. *But see* Frickey, *Doctrine, Context, Institutional Relationships, and Commentary*, *supra* note 95, at 31-32 (“[C]onsider what might have happened if the Court had allowed the tribe to prosecute. Had fundamental unfairness occurred, a federal court, through habeas corpus, could have remedied it.”). David Wilkins wrote:

Equally puzzling is why this case with such an anomalous demographic situation was ever taken before the Supreme Court. But even more important is the question of why the Supreme Court, rather than recognizing the uniqueness of this case as proposed by the Suquamish tribe’s attorneys in oral arguments, used it as an excuse to carefully set about the task of dismantling the right of all tribes to criminally punish non-Indian offenders.

WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT*, *supra* note 42, at 213.

103. *Oliphant*, 435 U.S. at 206.

104. *See generally* Frickey, *Doctrine, Context, Institutional Relationships, and Commentary*, *supra* note 95, at 21-22 (“Instead of denying this tribe jurisdiction because of the dreadful [demographic] circumstances [resulting from the allotment of the Port Madison Reservation], the Court announced a general rule: tribes lack criminal jurisdiction over non-Indians.”).

105. *Powers of Indian Tribes*, 55 Interior Dec. 14, 19, 57 (1934), *reprinted in* 1 U.S. DEP’T OF THE INTERIOR, *OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974*, at 445, 447, 472 (1979) (opinion of Oct. 25, 1934). Felix S. Cohen, who likely drafted the opinion, wrote that once the opinion “had been reviewed and approved by the proper authorities of the Interior Department and properly mimeographed, I learned to my dismay that all copies of the opinion in the Indian Office had been carefully hidden away in a cabinet . . .” FELIX S. COHEN, *Indian Self-Government*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 305, 307 (Lucy Kramer Cohen ed., 1970) [hereinafter COHEN, *Indian Self-Government*].

106. *E.g.*, Getches, *Beyond Indian Law*, *supra* note 42, at 274 (describing *Oliphant* as “aberrant”); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian*

Indian tribes cannot, after March 6, 1978, prosecute non-Indians under any circumstances.

The human effect of this decision is substantial. Indian tribes and tribal members know that non-Indians feel completely free to commit whatever crimes they so desire, as long as they avoid the Major Crimes Act,¹⁰⁷ which would possibly (but not necessarily¹⁰⁸) interest the United States Attorneys Office.¹⁰⁹ Often, non-Indians can commit anything short of a violent crime and get away with it in non-Public Law 280 states or Public Law 280 states where the state has not accepted criminal jurisdiction in Indian Country. In *Oliphant*, the Supreme Court created a perception of lawlessness in Indian Country by handing down this decision that no congressional policy has ever expressly promoted in any context. To this day, tribal police officers daily encounter arrogant, abrasive, and angry non-Indian motorists with the opinion and attitude that the tribal law enforcement badge is somehow worthless and illegitimate. State and federal courts have generally upheld the authority for tribal police officers to hold suspected lawbreakers until the "real" police arrive,¹¹⁰ but that does not sway the anti-Indian sentiment generated by a single Supreme Court opinion. Even BIA officers are afflicted with this taint of illegitimacy and accosted by motorists.¹¹¹

Cases, 16 PUB. LAND L. REV. 1, 11-12 (1995) (criticizing *Oliphant* as creating an "unspoken assumption" test to determine whether Congress intended tribal sovereignty to be minimized); Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 60 *passim* (1979) (criticizing then-Justice Rehnquist's majority opinion line-by-line).

107. 18 U.S.C. § 1153 (2000).

108. See generally *Impact of Supreme Court Rulings on Law Enforcement in Indian Country: Hearing Before the Comm. on Indian Affairs, United States Senate*, 107th Cong. 32 (2002) (prepared statement of Hon. Darrell Hillaire, Chairman of the Lummi Nation) ("[T]he local FBI agents recently informed their tribal law enforcement officers that resources that were previously targeted to address organized crime on reservations are now being transferred to address national security matters. How much of the FBI's resources that were devoted to addressing issues in Indian country prior to September 11 are now being reallocated to address national security interests?").

109. *E.g.*, *United States v. Cardinal*, 782 F.2d 34 (6th Cir. 1986).

110. See, *e.g.*, *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975); *Austin's Express, Inc. v. Arneson*, 996 F. Supp. 1269, 1272 (D. Mont. 1998) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997)); *State v. Schmuck*, 850 P.2d 1332, 1337 (Wash. 1993); *Ryder v. State*, 648 P.2d 774, 776 (N.M. 1982).

111. See *United States v. Billadeau*, 275 F.3d 692, 693 (8th Cir. 2001). In *Billadeau*, an allegedly drunk non-Indian motorist stopped by a BIA police officer on a state highway within the reservation drove off after the BIA officer, admitted to not being cross-deputized by the county sheriff. *Id.* The Eighth Circuit held that the non-Indian was properly charged with

Oliphant also spawned *Duro v. Reina*,¹¹² a case where the Supreme Court held that Indian tribes could not exercise criminal jurisdiction over nonmember Indians. In *Duro*, the Court merely extended the logical reasoning of the “commonly shared presumption” to encompass nonmember Indians.¹¹³ In other words, once the Court announced the “commonly shared presumption” against tribal jurisdiction, it could allow *Oliphant* to filter into the prejudices and expectations of many non-Indians for a little over a decade, and then it could announce that tribes have no criminal jurisdiction over nonmember Indians.¹¹⁴

After *Duro*, Congress enacted an amendment to the Indian Civil Rights Act to “return” criminal jurisdiction over nonmember Indians to Indian tribes.¹¹⁵ The enactment of the remedial statute is still repeatedly under direct challenge by nonmember Indians. One could argue that the Circuits are split on this issue.¹¹⁶ The Court could wipe out the whole doctrine of congressional plenary power and effectively assume that mantle for itself. A legal concept

interfering with a federal officer engaged in the performance of his official duties.

112. 495 U.S. 676, 689 (1990).

113. *Id.* at 701 (Brennan, J., dissenting).

114. Barsh and Henderson wrote:

The ultimate danger of *Oliphant* is, however, to the entire judicial system. A judicial system cannot long maintain its authority when its written opinions appear insincere, or the product of distortion, unreason, or sloppiness. One may well reject our criticisms of the holding in *Oliphant*, even with our disapproval of the practice of submitting social issues of such magnitude to judicial, as opposed to legislative, judgment. We do not necessarily expect others to share our conclusions as to good social policy in the case of tribes. Poor judicial craftsmanship is, however, a matter that affects our society and the legal profession as a whole, to the detriment of all.

Barsh & Henderson, *The Betrayal*, *supra* note 106, at 637.

115. 25 U.S.C. §§ 1301(2) (3) (2000).

116. See *United States v. Lara*, 324 F.3d 635 (8th Cir. 2003) (holding that Indian Tribe prosecuted Indian under delegation of congressional power), *cert. granted*, 2003 WL 21704146, at *1 (Sept. 30, 2003); *United States v. Long*, 324 F.3d 475 (7th Cir. 2003) (upholding Indian Tribe’s inherent authority to prosecute Indians); *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (upholding *Duro* fix as restoration of inherent sovereign authority of Indian tribes to prosecute Indians); *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998) (holding that the *Duro* fix was a congressional delegation), *vacated by* 165 F.3d 1209 (8th Cir.) (en banc), *cert. denied*, 528 U.S. 829 (1999); *Means v. N. Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998) (treating the *Duro* fix as a delegation of congressional authority), *overruled by Enas*, 255 F.3d at 675 n.8. See generally Pommersheim, *Constitutional Crisis*, *supra* note 45 (discussing *Enas*, *Weaselhead*, and *Means*); Frickey, *Doctrine, Context, Institutional Relationships, and Commentary*, *supra* note 95, at 32 & n.149 (“Of course, [*Oliphant* and *Duro*] are ‘only’ federal common law, so Congress may alter them . . . Or can it?”) (citing *Weaselhead* and *Enas*).

that has floated around for a couple centuries is the concept of inherent sovereignty, meaning that Indian tribes were sovereign nations before the United States Army conquered them. John Marshall gave them the name domestic dependent nations.¹¹⁷ It means that tribes retain elements of sovereignty, such as criminal jurisdiction, that Congress has not legislated away. The *Duro* fix is legislation where Congress is basically saying, "Maybe so, but we're giving it back to them because we are empowered with plenary power over Indian affairs."

To avoid that problem, the feds and the tribes argue that the *Duro* fix is not a delegation but a sort of reaffirmation of inherent sovereign authority. The argument seems to be that Congress wrote the statute to say that the Court got its history wrong — tribes never lost their inherent criminal jurisdiction over nonmember Indians. Congress's trump card is plenary power. It can say that the Court was wrong on the history, effectively rewriting the history the Supreme Court wrote, which may or may not be accurate, depending on which Justice wrote the opinion. If Congress can rewrite history with plenary power, then the *Duro* fix is a reaffirmation of inherent tribal authority. If not, not.¹¹⁸

Congress may think it has plenary power, but the Supreme Court actually decides if it does or not in this instance. So who really has the plenary power? It seems to me that it is a question of timing. Let's say Congress acted in 1988, pre-*Duro*, with a nonbinding resolution stating clearly that Indian tribes retain their inherent sovereign authority to prosecute nonmember Indians. All the resolution would be is a statement of history, but because it is Congress, the feds and the tribes could argue that the statement of history is binding on the Court when *Duro* reached it. Maybe the Court would not have gone into a historical analysis and just rubber-stamped Congress' statement of history. After all, congressional intent was the most critical aspect of the decision. Only Congress can state its intent. The tribes would win. However, the Court might have disagreed with the resolution and held that the 1988 Congress

117. *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet.) 17 (1831).

118. The question of whether Indian tribes and individual Indians should have a say when it comes their histories and their "social contract" with the government is a question that deserves treatment in a separate setting. In Barcelona, the Catalans said to those who would be king, "We, who are as good as you, swear to you, who are no better than us, to accept you as our king and sovereign lord, provided you observe all our liberties and laws — but if not, not." ROBERT HUGHES, BARCELONA 119 (1992); see Vine Deloria, Jr., *Minorities and the Social Contract*, 20 GA. L. REV. 917, 918 (1986) ("Non-political minorities have no significant constitutional protection, nor have they ever. Insofar as they enjoy constitutional rights and protections, their status is the result of an intense and continuing struggle for equal treatment in the courts and legislatures of the land.").

cannot state the intent of Congress in 1908 or 1850 or whenever. The tribes would have lost that case.

It is the chicken and the egg problem, in part, but it is also a fundamental problem for both Congress and the Court. All three branches have been butchering Federal Indian Law from Day One. The Supreme Court might actually say that it was wrong all along — Congress's plenary power was an illusion; it never existed — in order to hold that the *Duro* fix was a delegation and that Indian tribes really did lose their inherent powers to prosecute nonmember Indians. That opens up Pandora's Box for all of Title 25. Cases such as *Morton v. Mancari*¹¹⁹ and *Delaware Tribal Business Committee v. Weeks*¹²⁰ would be overruled by implication¹²¹ if not expressly.

*B. Lyng v. Northwest Indian Cemetery Protective Ass'n*¹²²

At least for the Rehnquist Court, *Lyng v. Northwest Indian Cemetery Protective Ass'n* is the closest the modern Supreme Court has come to expressly holding that, "Our way is just better than the Indian way, that's why."¹²³ *Lyng* lined up tribal culture and religion against an obscure,

119. 417 U.S. 535 (1974).

120. 430 U.S. 73 (1977).

121. Compare DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 143-75 (2001) [hereinafter WILKINS & LOMAWAIMA, *UNEVEN GROUND*] (discussing "repeal by implication" in the context of Federal Indian Law) with *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.") and *United States v. Santee Sioux Tribe of Neb.*, 324 F.3d 607, 611-12 (8th Cir. 2003) (construing the Johnson Act, which prohibits certain Class II-type gaming devices, and the Indian Gaming Regulatory Act, which allows Class II gaming to be regulated solely by Indian tribes, to require tribes to comply with both).

122. 485 U.S. 439 (1988).

123. Vine Deloria, Jr., wrote that the *Lyng* decision is an "attack[] on Indian rights . . ." Vine Deloria, Jr., *Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 267 (M. Annette Jaimes ed., 1992) [hereinafter Deloria, *Trouble in High Places*]. Deloria described Justice O'Connor's opinion as such:

The basic "threat" perceived by the high court was that of a "sudden revelation" of sacredness to individuals, as well as the equally necessary task of recognizing and accommodating beliefs. O'Connor seized on the most remote possibility, a revelation at the Lincoln Memorial to one individual, and pretended that this was comparable to the continuing religious practices of three groups of Indians which extended back perhaps thousands of years. Her basic logical structure appeared to be: "Socrates is a man. Socrates is insane. All men are therefore insane." Such

unnecessary federal government road construction development (that was later abandoned)¹²⁴ and chose the federal government over tribal culture, all in the name of strict constructionism of the Constitution.

This case amounts to the Court's continued arrogant assertion of the dominant culture's superiority over that of the Indians', treating Indian culture as an assimilated subcategory of Euro-Americans culture. Commentators have noted the incredibly disturbing aspects of the Supreme Court's position in *Lyng*.¹²⁵ It should not have come as a surprise. Presaging *Lyng* by a few years, one prescient commentator noted, "Indians are aware that in a balancing test between kachinas and skiers, skiers will generally prevail as they already have."¹²⁶ The Court in *Lyng* upheld the so-called G-O Road project on the Hoopa Valley Reservation that the Ninth Circuit found would "virtually destroy the . . . [Yurok, Karuk, and Tolowa] Indians' ability to practice their religion."¹²⁷

Lyng is classified as a First Amendment case but actually amounts to a Supreme Court determination that native religions and beliefs, particularly sacred places, carry very little weight in federal court and federal policy. The shockwaves of *Lyng* are felt every day by Indian tribes and traditional Indians, particularly in the Western United States. There, traditional cultures are under constant pressure by the federal government and its constituent corporate natural resource exploitation interests.¹²⁸

Lyng directly led to *Manybeads v. United States*,¹²⁹ where the federal district court of Arizona upheld the Navajo-Hopi Land Settlement Act¹³⁰ from

thinking is applicable perhaps to the netherworld inhabited by the current Supreme Court justices, but is hardly relevant to the issue at hand.

Id. at 283.

124. *See id.* at 286 ("The tremendous irony of *Lyng* is that the road construction was later abandoned, as it should have been, so that the case need never have been heard in its own right.").

125. *E.g.*, Christopher E. Smith, *The Supreme Court's Emerging Majority: Restraining the High Court or Transforming Its Role?*, 24 AKRON L. REV. 393, 412-13 (1990).

126. John F. Petoskey, *Indians and Religious Freedom*, CHURCH & SOCIETY, Jan./Feb. 1985, at 68, 76.

127. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 693 (9th Cir. 1986) (quoted in *Lyng*, 485 U.S. at 451) (ellipses in Supreme Court opinion; brackets added by author).

128. *See generally* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109 (1995).

129. 730 F. Supp. 1515 (D. Ariz. 1989), *aff'd*, 209 F.3d 1164 (9th Cir. 2000).

130. 25 U.S.C. §§ 640d to 640d-31 (2000).

challenge that the forced relocation of Hopis and Navajos did not violate their right to religious freedom. The Act partitioned land and was intended to complete the relocation process that created the so-called Navajo-Hopi land dispute.¹³¹ The court did not even describe the grievances of the petitioners, Navajo tribal members residing on the Hopi Reservation, providing in its opinion merely a list of claims.¹³² The court summarily rejected each of the claims, quoting extensively from *Lyng* that, even if the proposed federal project would destroy the Indian tribe's religion, "'the Constitution simply does not provide a principle that could justify upholding respondents' legal claims.'"¹³³ In a companion case, *Attakai v. United States*, the court upheld the Navajo-Hopi Land Settlement Act despite the fact that many Navajos would no longer be able to practice their religion after the Act's implementation.¹³⁴

The indirect progeny of *Lyng* is legion. For example, in *Havasupai Tribe v. United States*, the court upheld a United States Forest Service plan to approve a uranium mine near where the Havasupai practice their religion.¹³⁵ The court had the superciliousness to interpret the Indians' religion for them, noting that, in its opinion, "The Havasupai do not necessarily have to be present at the Canyon Mine site to practice their religion."¹³⁶ In *Miccosukee Tribe of Indians of Florida v. United States*, the court upheld the United States' actions in flooding land in the Everglades occupied by tribal members.¹³⁷ The court interpreted *Lyng* as so many others have to expunge all guilt from the federal government for destroying tribal cultures and literally rendering tribal land uninhabitable. The court merely states, in a twisted pun, that the federal government "did not attempt to penalize any tribal members who wished to undertake the spring corn planting ritual, nor take any action to pressure Tribe members into giving up the rite."¹³⁸

Other cases follow the lead of *Lyng*, even when not directly citing to the opinion. For example, the Hoopa Valley Tribe also suffers the indignities of its neighbors due to the *Lyng* decision. In an opinion issued by the Ninth

131. See generally Todd Howland, *U.S. Law as a Tool Of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain*, 7 B.C. THIRD WORLD L.J. 61 (1987).

132. See *Manybeads*, 730 F. Supp. at 1516-17.

133. *Id.* at 1518 (quoting *Lyng*, 485 U.S. at 452).

134. 746 F. Supp. 1395, 1403-04 (D. Ariz. 1990).

135. 752 F. Supp. 1471, 1505 (D. Ariz. 1990).

136. *Id.* at 1485 n.8.

137. 980 F. Supp. 448, 460-65 (S.D. Fla. 1997), *aff'd*, 163 F.3d 1359 (11th Cir. 1998), *cert. denied*, 528 U.S. 810 (1999).

138. *Id.* at 464.

Circuit in *Bugenig v. Hoopa Valley Tribe*¹³⁹ that was subsequently reversed by an en banc panel, the court lent zero credence and respect to the highly important cultural practices of the Hoopa Valley Tribe in favor of a slash-and-burn logger and property owner. The court noted that since the religious activity at issue was practiced only once every two years, it couldn't possibly be that important and the private property ownership of the non-Indian mattered more.¹⁴⁰

*C. Hagen v. Utah*¹⁴¹

The *Hagen* Court inspected treaty and statutory language regarding the Uintah Valley Reservation and went out of their way to find the language unambiguous in order to reject the special canon of statutory construction relating to Indian statutes and treaties.¹⁴² Instead of granting deference to remedial statutes such as the Indian Reorganization Act, the Court "resolv[ed] every ambiguity in the statutory language, legislative history, and surrounding circumstances in favor of the State and imputing to Congress, where no clear evidence of congressional intent exists, an intent to diminish the Uintah Valley Reservation."¹⁴³

Hagen has allowed the Supreme Court and federal courts to unleash the dogs of war on the special canon of statutory construction reserved for Indian treaties and statutes adopted for the benefit of Indian tribes. The canon that states ambiguous provisions in Indian treaties should be construed in favor of the Indians made its first appearance in 1832 in Justice McLean's concurrence in *Worcester v. Georgia*.¹⁴⁴ Justice Blackmun, in his dissent, listed fifteen Supreme Court cases that had been applied to treaties in favor of Indians in the areas of tribal water rights, hunting and fishing rights, other land rights, and against state taxation authority.¹⁴⁵ The Court gave little or no weight to the

139. 229 F.3d 1210 (9th Cir. 2000), *reh'g en banc granted*, 240 F.3d 1215 (9th Cir. 2001), *rev'd*, 266 F.3d 1201 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 927 (2002).

140. *See id.* at 1222 ("Simply stated, any arguable impact that cutting second-growth timber might have upon the holding of a tribal dance once every two years, at a site some distance away, 'has no potential to affect the health and welfare of a tribe in any way approaching the threat inherent in impairment of the quality of the [tribe's] principal water source.'") (quoting *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998)).

141. 510 U.S. 399 (1994).

142. *Id.*

143. *Id.* at 424 (Blackmun, J., dissenting).

144. 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring).

145. *Hagen*, 510 U.S. at 424 n.3 (Blackmun, J., dissenting).

canon of statutory construction, citing it early in the opinion but never again incorporating the rule favoring tribes into its analysis.¹⁴⁶

The death-knell (implied) of the special canon was seen in *Chickasaw Nation v. United States*.¹⁴⁷ There, the Court stated that Congress made a mistake in its statutory language and ruled against the Chickasaw and Choctaw Nations rather than apply the special canon.¹⁴⁸ In other words, the special canon is overruled. It matters not that the statute at issue, the Indian Gaming Regulatory Act, is intended to benefit Indian tribes.¹⁴⁹ According to the Court, congressional intent, “on balance,” supported its interpretation.¹⁵⁰ The Court gave no weight at all to the special canon.

After *Hagen*, Federal courts jumped on the bandwagon in reducing the canon to meaninglessness. In *Williams v. Babbitt*, the Ninth Circuit rejected the pro-tribal rule of construction, ruling instead in favor of non-Indian reindeer herders.¹⁵¹ There, the court brushed aside the very concept behind the canon on statutory construction and instead called into question the very existence of Title 25, noting that *Adarand Constructors, Inc. v. Pena*¹⁵² implicitly spells the end for *Morton v. Mancari*¹⁵³ and Indian preference.¹⁵⁴

146. *See id.* at 411.

147. 534 U.S. 84 (2001).

148. *See id.* at 89-91.

149. *See generally* 25 U.S.C. § 2702(1) (2000) (declaring that the purpose of the Indian Gaming Regulatory Act is to promote tribal “economic development, self-sufficiency, and strong tribal governments”).

150. *Chickasaw Nation*, 534 U.S. at 91.

151. 115 F.3d 657, 666 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Ass’n v. Williams*, 523 U.S. 1117 (1998).

152. 515 U.S. 200 (1995).

153. 417 U.S. 535 (1974). *But see* U.S. Air Tour Ass’n v. FAA, 298 F.3d 997, 1012 n.8 (D.C. Cir. 2002) (noting that the Court would not treat *Morton* as overruled until the Supreme Court expressly does so) (citing *Narragansett Indian Tribe v. Nat’l Indian Gaming Comm’n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998)).

154. *Williams*, 115 F.3d at 665. Other courts have read the *Williams* dicta narrowly. The California Court of Appeals wrote, “We believe that Judge Kozinski’s provocative dicta, when considered in context, can best be understood as casting constitutional doubt on Indian-run gaming monopolies formed solely for business purposes untethered to any declared federal objective of strengthening tribal self government or promoting the tribe’s economic development.” *Flynt v. Cal. Gambling Control Comm’n*, 129 Cal. Rptr. 2d 167, 182 (2002); *see also* *Artichoke Joe’s v. Norton*, 216 F. Supp. 2d 1084, 1127 n.56 (E.D. Cal. 2002) (“Although the Secretary’s interpretation of IGRA raises a constitutional question, it is not sufficiently serious to require a different reading of the statute.”) (citing *Williams*, 115 F.3d at 662 and *Morton v. Mancari*, 417 U.S. 535 (1974)).

It no longer matters that Congress passed the Reindeer Industry Act¹⁵⁵ "to give natives a big leg up in the business."¹⁵⁶

Another aspect of *Hagen* was that the Supreme Court strongly implied that Indian tribes are an anachronism, that their reservation boundaries are utterly meaningless. The Court cited demographic information in their attempt to inject their version of reality into Indian tribes, stating that the Uintah Indians living on their own reservation were only fifteen percent of the population.¹⁵⁷ The fact that relatively few Indians lived within the reservation boundaries, the Court concluded that congressional intent to diminish the reservation was properly satisfied, thereby proving that the Court's statutory analysis was correct.¹⁵⁸ By the same reasoning, the Court could conclude that since Congress intended to assimilate or destroy all Indians and Indian tribes during allotment and that they nearly succeeded because few Indians remained alive, Congress actually did eliminate Indian tribes and they no longer constitute a substantial body of political entities. For several members of the Supreme Court, possibly as many as four, Indian tribes should not exist as political sovereigns at all.

While the Supreme Court has not said it yet, state court judges around the United States say that Indian tribes are completely illegitimate all the time. It was not very long ago that the Chief Judge of the Washington State Supreme Court wrote:

The view that an incorporated Indian tribe possesses any attributes of sovereignty whatever and that its members are citizens of the nation, the state, and have a kind of tribal citizenship too, is, therefore, a manifest absurdity for it rests on the ludicrous premise that an exclusive group having a preordained and common bloodline and of a predetermined race may possess powers of government and have special rights in state and national resources not available to all other national, state and local governmental entities. It is an erroneous premise necessarily acknowledging that a political entity or subdivision dependent for its existence solely on race and ancestry may, under the constitution, possess some degree of sovereignty independent of the state and the nation.¹⁵⁹

155. 25 U.S.C. §§ 500-500n (2000).

156. *Williams*, 115 F.3d at 659.

157. *Hagen*, 510 U.S. at 421 (citation omitted).

158. *Id.*

159. *Anderson v. O'Brien*, 524 P.2d 390, 399 (Wash. 1974) (Hale, C.J., dissenting).

Another state court judge, this time in Minnesota a mere six or seven years ago, quoted an anti-Indian author for the proposition that Indian tribes stopped being sovereign in 1871 when Congress stopped ratifying Indian treaties.¹⁶⁰ The judge emphasized that the idea that Indian tribes were ever sovereign is a “ridiculous pretense.”¹⁶¹ The *Hagen* decision rests the context of criminal jurisdiction, but other contexts are implicated by the Supreme Court’s skepticism that tribes located within allotted reservations are otherwise opened up to the public domain, such as the Clean Water Act and the Clean Air Act jurisdiction, the reach of state taxation authority, and treaty hunting and fishing rights. Just as important as the black letter rights of Indians and Indian tribes are preserved reservation boundaries.

Imagine tribal leaders from 1855, say Aghosa and Eshquagonabe, head men of the Ottawa bands that lived and gathered around the Grand Traverse Bay in what is now called Michigan. Imagine those leaders writing to a federal agent, asking him to allow members of the Grand Traverse Band to remain in the bay area. They wrote: “We feel such an attachment to this our native place, from whence we derive our birth, that it looks like certain death to go from it”¹⁶² Now imagine those same men and leaders of tribes during the removal age who signed sacred documents that they thought would preserve their people and small portions of their land forever watching seven men and two women who have never set foot on the reservation or met any of their descendants deciding that the sacred document is of no value, that the reservation is described by nothing more than the adjective “disestablished,” and that the treaties they signed have been broken repeatedly with no remedy.

The finding of a diminished reservation hurts Indian tribes in more ways as well. In *Wisconsin v. Stockbridge-Munsee Community*, the court held that a finding of a diminished reservation adversely affects the Tribe’s ability to operate Class III gaming.¹⁶³ Even more crucially, in *Michigan v. EPA*, the D.C. Circuit held that the EPA could not approve applications by Indian tribes to operate Clean Air Act programs on land where “Indian Country” status was in question.¹⁶⁴ This means that Indian tribes without litigated reservation boundaries cannot operate many environmental programs. It also means that

160. 25 U.S.C. § 71 (2000).

161. *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 382 (Minn. Ct. App. 1997) (Randall, J., dissenting) (quoting RALPH K. ANDRIST, *THE LONG DEATH: THE LAST DAYS OF THE PLAINS INDIANS* 246 (1993)), *aff’d*, 561 N.W.2d 889 (Minn. 1997).

162. Letter from Peter Dougherty to Daniel Wells (Feb. 6, 1841) (on file with author).

163. 67 F. Supp. 2d 990, 1019-20 (E.D. Wis. 1999).

164. 268 F.3d 1075, 1087 (D.C. Cir. 2001).

those tribes cannot exercise their jurisdiction for the general welfare of their people to improve the environment on the reservation. In effect, disestablishment not only removes the opportunity for tribes to establish their governmental presence but also precludes tribes from reacting to States (like Michigan) that have gone far to reduce environmental protections in favor of smokestack industries and other polluters.¹⁶⁵

*D. Montana v. United States*¹⁶⁶

Montana is now a "pathmarking case," according to the Supreme Court.¹⁶⁷ It was not declared a "pathmarking case" until 1997, sixteen years after its 1981 genesis. *Montana* seems to be a convenient case for the Supreme Court to rely upon in its quest to eradicate an Indian tribe's ability to govern within its own reservation boundaries. *Montana* and its progeny have been thoroughly researched and commented upon by many academics and commentators, few of whom seem to think that *Montana* should mean what it does to the Court.¹⁶⁸

Montana went through a few road bumps on its way to being the most feared Supreme Court case in Indian Country. First there was *National*

165. See WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 2 (1999) ("According to the Worldwatch Institute, 317 reservations in the United States are threatened by environmental hazards, ranging from toxic wastes to clearcuts."). LaDuke largely blames corporate greed for the threat to Indians:

The preamble of the U.S. Constitution declares its intent to "secure the blessings of liberty, to ourselves, and our posterity." In reality, U.S. laws have been transformed by corporate interests to cater to elite interests in society. While the U.S. Constitution makes no mention of corporations . . . , the history of Constitutional law is, as former Supreme Court Justice Felix Frankfurter said, "the history of the impact of the modern corporation on the American scene." Over the course of two centuries of court decisions, corporate contracts and their rates of return have been redefined as property that should be protected under the Constitution. In this way the "common good" has been redefined as "maximum corporate production and profit."

Id. at 198-99 (citation and quotation marks omitted).

166. 450 U.S. 544 (1981).

167. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

168. See, e.g., Sarah Krakoff, *Undoing Indian Law One Case At A Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1255-56 (2001) (arguing that *Montana* did not have the impact it does now until *Strate* declared it a "pathmarking" case).

*Farmers*¹⁶⁹ and *Iowa Mutual*,¹⁷⁰ then *Brendale*¹⁷¹ and then *Bourland*,¹⁷² but the *Montana* doctrine came to full maturity with the Supreme Court's opinion in *Strate v. A-1 Contractors*.¹⁷³

Under a basic conflict of laws analysis, if a tort occurs between a citizen of the state of Michigan and a citizen of the state of Alaska in Ann Arbor and the Michigan victim sues in Washtenaw County Circuit Court, the Michigan court undergoes an analysis involving significant contacts with the state to determine whether Michigan's long-arm statute would compel the Alaskan defendant to appear and face the suit. If, for example, the Alaskan defendant owned land within the state of Michigan or perhaps had several family members in Michigan and typically spent several months a year in Michigan, the Michigan court would have jurisdiction over the defendant from Alaska. Even more importantly, if the Alaskan defendant had conducted the tort in the course of conducting business with the Michigan plaintiff, then definitely the Michigan court would have jurisdiction over the Alaskan.

Not so in Indian Country, according to the Supreme Court. In Indian Country, a person who is married to an Indian, has Indian children, and lives on the reservation and sues a company that regularly conducts business on the reservation and commits the tort while conducting business on the reservation has no recourse in the court with jurisdiction over that reservation. Why? Because maybe the specific parcel of land within the reservation has a right-of-way over it controlled and maintained by the state.¹⁷⁴ Because the defendant does not vote in that reservation.¹⁷⁵ Because the defendant could not serve on a jury in that reservation.¹⁷⁶ Because the defendant is unfamiliar

169. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that litigants must exhaust their tribal court remedies prior to seeking federal court review of tribal court jurisdiction).

170. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (holding that federal diversity jurisdiction does not allow litigant to avoid exhaustion of tribal court remedies).

171. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that Indian tribes could not zone land within their own reservations that were opened to the public for settlement).

172. *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that Indian tribe could not exercise its inherent authority over non-Indian hunting and fishing on land taken for reservoir and dam project).

173. *Strate*, 520 U.S. at 438.

174. See *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir. 1999), *cert. denied sub nom. Estates of Red Wolf & Bull Tail v. Burlington N. R.R. Co.*, 529 U.S. 1110 (2000).

175. *Cf. Duro v. Reina*, 495 U.S. 676, 688 (1990).

176. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 n.4 (1978).

with the court procedures of the local tribal court.¹⁷⁷ All of these factors are present when an Ohio resident sets foot inside Michigan.

Strate takes away the right of Indian tribes to deal with civil conflicts that occur on their respective reservation. *Strate* takes the concept of self-determination that has been the paradigm of congressional Indian policy since 1970,¹⁷⁸ perverts it, twists it, and reverses it.

Strate immediately spawned cases such as *Wilson v. Marchington*,¹⁷⁹ *Boxx v. Long Warrior*,¹⁸⁰ *Burlington Northern Railroad Co. v. Red Wolf*,¹⁸¹ and *Ford Motor Co. v. Todocheene*.¹⁸² These cases uniformly reject the relatively benign concept that Indian tribes and their tribal courts can adjudicate civil disputes within their own reservation. *Wilson*, *Boxx*, and *Red Wolf* are not exactly like *Strate*, in which the Supreme Court emphasized the non-Indian character of both parties. These three cases involve individual Indians trying to seek a civil remedy in their own court of law, their tribe's own self-determined forum for adjudicating disputes. In all these cases, the federal courts followed *Strate*'s lead. Tribal self-determination and sovereignty takes a back seat whenever non-Indians are involved. For the Supreme Court, tribal courts are the equivalent of tv justice. In the eyes of the Supreme Court, tribal judges are the equivalent of Judge Wapner, Judge Judy, and probably a touch of Springer thrown in to complete their impression of the savage, mob-style justice handed down in tribal courts.¹⁸³ Indian families who suffer wrongful deaths at the hands of multinational corporate conglomerates who do business of their own free will on Indian reservations must suffer the indignity of not

177. See *Strate*, 520 U.S. at 459; *Boxx v. Long Warrior*, 265 F.3d 771, 778 (9th Cir. 2001).

178. See COHEN'S HANDBOOK, *supra* note 98, at 185-86.

179. 127 F.3d 805 (9th Cir. 1997).

180. 265 F.3d 771 (9th Cir. 2001).

181. 196 F.3d 1059 (9th Cir. 2000).

182. 221 F. Supp. 2d 1070 (D. Ariz. 2002); see also *Tribal Court Can't Hear Tribal Cop Case*, INDIANZ.COM, Nov. 1, 2002, available at <http://www.indianz.com/News/show.asp?ID=2002/11/01/court> (last visited Sept. 22, 2003).

183. Cf. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) ("Although some modern tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'") (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-31 (1995)). One attorney characterized Justice Souter's opinion in *Hicks* as saying, "[W]e don't trust these tribal courts; who are they?; and we are not about to send non-Indians in there." Martha Vasquez et al., *Current Issues in Native American Law*, 51 U. KAN. L. REV. 249, 263 (2003) (quoting Samuel Winder).

having a forum to help remedy their injuries in their own court systems.

Strate and its progeny also imply that tribal governments are not real governments. *Montana*'s second exception states that tribes will have civil regulatory and adjudicatory jurisdiction over nonmembers when their activities affect the tribe's ability to govern itself and provide for the general welfare of its members.¹⁸⁴ In these cases, the Supreme Court's decision has virtually eradicated the exceptions, not by overruling *Montana*, but by saying that the tribe's ability to govern itself and provide for its members general welfare is totally subservient to non-Indians' comfort levels in court. Tribes' attempts to regulate highway safety and save tribal members lives is subservient to non-Indians' comfort levels in court. Tribes' attempts to establish themselves as stable and internationally respected governing bodies is also subservient to non-Indians' comfort levels in court. Indian tribes cannot even authorize their tribal police to ticket non-Indians who drive like maniacs on the reservation because their concerns for their tribal members is subservient to non-Indians' comfort levels in court. One commentator argued that the post-*Strate* jurisprudence is "legally (and politically) destabilizing to tribal courts and creates a genuine crisis of federal legitimacy."¹⁸⁵

The plaintiffs in *Red Wolf* argued that the Tribe's interest was to prevent the deaths of potential or actual "council members, teachers and babysitters,"¹⁸⁶ but to allow the Tribe to govern itself to save lives would result in "severely shrink[ing] the [Montana] rule"¹⁸⁷ protecting non-Indians from the perceived horrors of tribal jurisdiction. The Supreme Court has weighed what it considers important as to Indian Country and the actual Indians who reside there, who are stubbornly refusing to go extinct, still finish last.

Another place the Supreme Court, after *Strate*, has taken Indian tribes is to allow federal courts and exploitative non-Indian corporations to make a mockery of Indian culture and Indian families, specifically the descendants of Crazy Horse. In *Hornell Brewing Co. v. Rosebud Sioux Tribe*, the Eighth Circuit stated that a large corporate body that conducted business on the Rosebud Sioux Reservation and exploited, manipulated, and took advantage of the good name of a famous Indian leader to sell malt liquor to depressed, poor, underprivileged, inner city minorities (not to mention Indians) could not

184. See *Montana v. United States*, U.S. 450 U.S. 544, 566 (1981).

185. Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 463 (1999).

186. *Red Wolf*, 196 F.3d at 1065.

187. *Id.* (quoting *Strate*, 520 U.S. at 458).

validly be sued in tribal court.¹⁸⁸ One commentator stated, "[T]he name of Crazy Horse is just another resource [for multinational corporations] to invest in, like coal and timber. But this time, it is not native land that is being stripped away, but native culture and spirit."¹⁸⁹ Here, the Supreme Court has weighed Indian lives and Indian dignity against the privilege of a corporation (a legal fiction) to exploit Indian culture and, once again, the Indians finish last.

In *Burlington Northern Santa Fe Railroad Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation*, a Ninth Circuit panel remanded a case for discovery on the issue of whether a tribe could ever show that non-Indian activity could affect the integrity of an Indian tribe's government. In a concurrence, one judge stated:

[f]or if the trains crossing a tribe's reservation carry toxic or dangerous chemicals, nuclear waste, biological dangers, or other threats to the reservation, then the tribe has a right to know what company it keeps, and then to assess whether any taxing strategy could fairly cover the tribe's protective costs.¹⁹⁰

*E. Seminole Tribe of Florida v. Florida*¹⁹¹

In *Seminole Tribe*, Indian tribes became victims of circumstance as they became enmeshed in the jurisdictional war between the federal government and the Supreme Court over states' rights.¹⁹² In states where the tribe and the state government had not yet entered into a Class III gaming compact, Seminole Tribe practically constituted an overruling of *California v. Cabazon Band of Mission Indians*,¹⁹³ which established that Indian tribes may engage in gaming not completely prohibited by state law¹⁹⁴ and that states cannot regulate that gaming.¹⁹⁵ The *Seminole Tribe* Court held that Congress lacked

188. 133 F.3d 1087, 1093-94 (8th Cir. 1998).

189. Wenona T. Singel, *Cultural Genocide?: The Impact of Crazy Horse Malt Liquor*, NATIVE VOICES, Winter/Spring 1994, at 2, 2 (on file with author).

190. 323 F.3d 767, 775-76 (9th Cir. 2003) (Gould, C.J., concurring).

191. 517 U.S. 44 (1996).

192. See generally Alex Tallchief Skibine, *The Court's Use of The Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267 (2000).

193. 480 U.S. 202 (1987).

194. See *id.* at 211-12.

195. See *id.* at 213-14.

authority to force states into federal court if sued by Indian tribes for failure to negotiate Class III gaming compacts in good faith.¹⁹⁶

Gaming constitutes the best bet for economic development for many Indian tribes, allowing tribes revenue to provide housing, health care, jobs, and other innumerable social services, and helping to impart political integrity and stability for tribal government,¹⁹⁷ just as contemplated by the congressional announcement of policy behind the Indian Gaming Regulatory Act.¹⁹⁸

Seminole Tribe could have stopped Indian gaming in its tracks. Immediately after the Court announced its decision, many states stopped negotiating at all with Indian tribes¹⁹⁹ and many tribes had no choice but to offer monetary, jurisdictional, and other concessions to states in order to negotiate Class III compacts.

The Supreme Court's reverence for the Eleventh Amendment affects tribes and tribal members in many more ways than gaming compact negotiations. In *Idaho v. Coeur D'Alene Tribe*, the Supreme Court held that Indian tribes could not force States into federal court to litigate land claims.²⁰⁰ In *Blatchford v. Native Village of Noatak*, the Supreme Court held that Indian tribes could not force States into federal court to litigate an alleged violation of equal protection laws by a particular State.²⁰¹ In *Nevada v. Hicks*,²⁰² the Supreme Court held that State officials may not be sued in accordance with 42 U.S.C. § 1983 in tribal courts.²⁰³ Another recent case, *Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*,²⁰⁴ afforded

196. *Seminole Tribe*, 517 U.S. at 76.

197. See Letter from Tex G. Hall, President, National Congress of American Indians, to Time Magazine Editorial Staff 1 (Dec. 13, 2002) (on file with author) ("Indian gaming has provided one very important mechanism for providing jobs and economic activity in a number of tribal communities where no other option has been available to address the extreme conditions of poverty and unemployment that exist.").

198. 25 U.S.C. §§ 2701-2721 (2000).

199. See, e.g., *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998); *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997); *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535 (10th Cir. 1997); *Santee Sioux Tribe of Neb. v. Nebraska*, 121 F.3d 427 (8th Cir. 1997). Even prior to *Seminole Tribe*, stubborn states refused to negotiate with Indian tribes. See *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 5 F.3d 147 (6th Cir. 1993).

200. 521 U.S. 261, 269 (1997).

201. 501 U.S. 775, 782 (1991).

202. 533 U.S. 353 (2001).

203. *Id.* at 369. See generally *id.* at 397-402 (O'Connor, J., concurring) (arguing that the case should have been decided as a matter of state immunity).

204. 123 S. Ct. 1887 (2003).

the Supreme Court the opportunity to shield the States from liability.²⁰⁵

Eleventh Amendment immunity requires tribes to seek redress against state actors in state courts, a forum the Supreme Court's own favorite cases acknowledge are inherently and often expressly biased against tribal parties. At the beginning of the twentieth century, the Supreme Court conceded that states are Indian tribes' greatest enemy.²⁰⁶ By the 1970s, according to the Supreme Court, there was nothing wrong with state courts adjudicating Indian claims any longer,²⁰⁷ but only a few years later, Congress found, in passing the Indian Child Welfare Act, that states (and their courts) were responsible for continuing to take Indian children away from their families and were generally uninterested in respecting tribal custom and tradition.²⁰⁸ The Supreme Court continues to insist, in spite of a plethora of learned opinion to the contrary,²⁰⁹

205. *See id.* at 1892-94.

206. *See Kagama v. United States*, 118 U.S. 375, 384 (1886).

207. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 812 (1976). There the Court wrote:

The Government argues that because of its fiduciary responsibility to protect Indian rights, any state-court jurisdiction over Indian property should not be recognized unless expressly conferred by Congress. It has been recognized, however, that an action for the destruction of personal property may be brought against an Indian tribe where "(a)uthority to sue . . . is implied." Moreover, the Government's argument rests on the incorrect assumption that consent to state jurisdiction for the purpose of determining water rights imperils those rights or in some way breaches the special obligation of the Federal Government to protect Indians. Mere subjection of Indian rights to legal challenge in state court, however, would no more imperil those rights than would a suit brought by the Government in district court for their declaration, a suit which, absent the consent of the Amendment, would eventually be necessitated to resolve conflicting claims to a scarce resource. The Government has not abdicated any responsibility fully to defend Indian rights in state court, and Indian interests may be satisfactorily protected under regimes of state law.

Id. (quoting *Turner v. United States*, 248 U.S. 354, 358 (1919)).

208. *See* 25 U.S.C. § 1901(5) (2000).

209. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n.11 (1997) (Souter, J., dissenting) ("And when the plaintiff suing the state officers has been an Indian tribe, the readiness of the state courts to vindicate the federal right has been less than perfect."); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994) ("[T]he federal government is a more trustworthy guardian of Indian interests than the states . . ."); *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 553-54 (9th Cir. 1991) ("It would thus be ironic indeed if Congress then permitted only state courts, never believed by Congress to be the historical defenders of tribal interests, to determine the scope of tribal authority under the Act.") (citing 25 U.S.C. § 1901(5)); Carl H. Johnson, *A Comity of Errors: Why John v. Baker Is Only a Tentative First Step in the Right Direction*, 18 ALASKA L. REV. 1, 42 (2001)

that state courts are adequate to protect tribal interests.

III. The Discovery²¹⁰ of the Fountain of Youth²¹¹ and the Slippery Slope of Self-Reliance — An Anishinaabek²¹² Fable

A few years from now, imagine that, in the early spring, a little five-year-old boy named Niko Roberts, one of the newest members of the Grand Traverse Band of Ottawa and Chippewa Indians, stumbles across a small pond in between two hills while wandering around in the hilly woods in Peshawbestown, Michigan. The pond is shallow and the area around it is covered in dense weeds. Niko is captivated by the water's surface, which appears to sparkle radiantly. He also notices the very colorful underbrush surrounding the small pond. Niko is a very smart boy — he taught himself to read at age four — and quickly understands that there is something very special about this particular pond. In early spring on that portion of the Grand Traverse Reservation, just north of the forty-fifth parallel, there are not yet bright colors populating the woody floor, yet this pool appears to be fueling a dramatic outburst of voluptuous affectation in the immediate flora. Niko files his discovery away for future revelation to his grandmother.

("[R]ecognition of federal supremacy on this issue is important as state courts frequently misconstrue the nature and origin of tribal sovereignty.").

210. "It should be added that the English and Dutch are still quarreling about who discovered Africa even though the continent could be seen by the Spanish across the Straits of Gibraltar, not to speak of by its own millions of citizens." Jim Harrison, *Introduction, in* GEORGE WEEKS, MEM-KE-WEH: DAWNING OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS ix (1992).

211. The author takes heart in the words of the Second District of the California Court of Appeals, which wrote in 1951:

The mythical fountain of youth and the effect of its waters have been the subject of writers for hundreds of years. Ponce de Leon was in search of the fountain when the [sic] discovered Florida. Other explorers were equally optimistic in their search and equally unsuccessful. The fabulous Isle of Bimini was supposed by some to be the location of the youth preserving waters; others placed it in the heart of Africa. The fact that the legendary lost continent, Atlantis, Bimini and the fountain of youth have long been the subjects of folklore, song and story in many languages does not foreclose a modern writer from using the same situations and locales for the purpose of symbolization or for the manifestation of his imagination.

Weitzenkorn v. Lesser, 231 P.2d 889, 893 (Cal. App. 1951) (Wilson, J., concurring), *vacated on other grounds*, 256 P.2d 947 (1953).

212. People of the Three Fires — Odawa, Potawatomi, and Ojibwe. *See generally* BASIL JOHNSTON, OJIBWAY CEREMONIES 6 (1982) (describing the Anishinaabe people as "people of good intentions").

Of course, being the eternal child of the moment, Niko does not mention the pool to his Gramma for a full week. Niko's Gramma calls her favorite council member and dutifully reports that her grandson has found an interesting pond behind the tribal administration buildings and puts the chain of events in motion. Two weeks after Niko's discovery, Radica Morris and Ben Fatto, two tribal biologists from the Conservation Department, take a walk out to the pool to satisfy their curiosity. For decades, Peshawbestown residents have been walking around in the woods behind the area where the tribal government's buildings are located, blazing walking paths and trails. It would surprise both of the biologists, both of whom fancied themselves amateur geologists, to find a substantial, yet undiscovered, pool of water back there. The early and vibrant vegetation they find, as well as a few very bulky deer, shock them.

They return to the Conservation Department office, affectionately known as the Fish Office, where they conduct a few chemical tests on the water in the pool to ensure that there are no serious water pollution concerns. They notice the wild plant growth, which is weeks ahead of schedule, and suspect some form of phosphorus contamination or another chemical plant growth conductor. Neither biologist is an expert in miracles, but the tests indicate that the water in that pool is something special. After concluding the water in the shallow pool is safe, both take a test sip. Radica, the younger of the two biologists and a devoted sun worshipper, immediately notices the disappearance of the annoying brown moles on her arms. Ben, much older than Radica, instantly feels twenty years younger after trying a glass of the special water. Imagining themselves to be the guest stars in a very special episode of the *X-Files*, the two biologists choose to keep a tight lid on their experiences. They are wise because they have discovered the Fountain of Youth, upgraded to "legendary" from "mythical" as it turns out to be real after all.

At the end of the month, the Grand Traverse Band Tribal Council meets in an emergency session to decide on how to proceed. The seven council members sit and debate their various alternatives for several hours. Upon being asked, the General Counsel, Toledo Vader, for the Band, advises his clients that the pool is located on trust land held by the Department of Interior for the benefit of the Band and they can do with it whatever they please. He immediately wonders if he will regret his determination at a later date or if by showing up to work that day he has "step[ped] on some kind of political landmine."²¹³ One council member sees dollar signs and envisions the pool

213. Robert B. Porter, *A Seneca Indian in King Arthur's Law School: Observations Along*

as a major tourist destination surpassing Lourdes and Orlando combined. Another council member, a devout Catholic, also believes that the pool is more powerful than any previous miracle since the time of Jesus Christ, but recommends that the Council build a cathedral to guard the pool from ne'er-do-wells and do only the Lord's work. A third council member believes the pool to represent the coming of The New People and the end of 500-plus years of domination at the hands of the Europeans.²¹⁴ A fourth council member would like to see the pool as a purely tribal resource, available only to members of the Grand Traverse Band and jealously guarded to preserve the Band and its people, but also acknowledges that the existence of the pool could never be kept a secret for long.

Toledo knows the council members well because he has practically grown up with many of them in Peshawbestown and Harbor Springs and Cross Village. He knows that the majority of the council members see dollar signs because dollar signs mean per capita payments and increased funding for governmental services like housing and health care and law enforcement; all of those things mean re-election. Yet Toledo knows that vast influxes of cash inevitably create unforeseeable results for any organization. During a break in the debate, Toledo returns to his office to relax and sees four phone messages — two from a reporter at the *Traverse City Record-Eagle*, one from a reporter at the *Leelanau Enterprise*, and one from a reporter at the *Detroit News*. He now knows that the pool is no longer a secret on the Grand Traverse Reservation — the story is out. He does not return the calls.

When the council members return from the break twenty-five minutes later, Toledo sees in their eyes that at least two of them have returned phone calls back to reporters, probably the same reporters that left messages for him. He also knows that when the Council breaks, it means the debate is over and they have made up their minds. Within ten minutes, Toledo is on his laptop drafting a resolution approving the Band's privatization (or perhaps collectivization) of the pool. The Council, voting 6-1, compels Toledo to name the resolution, "The Anishinaabek Fountain of Youth Self-Reliance"²¹⁵ Ordinance." The new law adopts the proposal offered by the first council

the Journey, 7 MICH. J. RACE & L. 529, 532 (2002).

214. EDWARD BENTON-BANAI, *THE MISHOMIS BOOK* 111 (1979) ("The prophet of the Seventh fire of the Ojibwe spoke of an Osh-ki-bi-ma-di-zeeg (New People) that would emerge to retrace their steps to find what was left by the trail.").

215. Cf. McCarthy, *supra* note 40.

member and orders the Band's Economic Development Corporation²¹⁶ to open the pool up for business.

Within a week, the line of cars waiting in line to have a sip of the water from the Fountain of Youth stretches for miles south down M-22 all the way to Traverse City and north for miles up M-22, through Northport, and then back down south as far as Leland. Long-time Peshawbestown locals say they haven't seen anything like it since the days when the Band opened up its first high-stakes bingo hall in 1984 and then a modest casino in 1985.²¹⁷ Tribal and Leelanau County law enforcement officials are overwhelmed by the massive influx of automobiles and people into the lightly populated county.

Meanwhile, the governor of Michigan, embroiled like so many other state governors in a terrible budget crunch, personally calls the Tribal Council Chair, Wendy Singleton, to talk about the State's needs and to ask if the Band would do anything to help out, especially considering that the Band's new attraction has strained local government services well beyond the breaking point. Wendy reminds the governor that the Band already contributes more than its share to local governments in accordance with terms of the gaming compact.²¹⁸ In not so subtle phrasing, the governor talks about reopening the lawsuit that seven Michigan tribes and the state settled in order to agree over Class III gaming compacts.²¹⁹

"But this has nothing to do with gaming," Wendy says.

"Madam Chair, don't be greedy," the governor says. "No one wins if the state and local governments have to shut down services to the Band."²²⁰

216. See 25 U.S.C. § 477 (2000); 15 GRAND TRAVERSE BAND CODE §§ 201-268 (2002) (GTB Economic Development Corporation — Federal Charter of Incorporation).

217. See *United States v. Bay Mills Indian Cmty.*, 692 F. Supp. 777, 778-79 (W.D. Mich. 1988) (noting that four Michigan Indian tribes, including the Grand Traverse Band, operated casinos at that time), *vacated*, 727 F. Supp. 1110 (W.D. Mich. 1989).

218. See, e.g., *Gaming Revenue to Benefit 53 Causes*, TRAVERSE CITY (MICH.) RECORD-EAGLE, Feb. 6, 2003 ("The Grand Traverse Band of Ottawa and Chippewa Indians will distribute more than \$1.1 million to area schools, governments and other organizations as part of its semianual grant awards reflecting 2 percent of its electronic gaming revenue."), available at <http://www.record-eagle.com/2003/feb/06tribe.htm> (last visited Sept. 22, 2003).

219. Consent Judgment, *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, No. 1:90 CV 611 (W.D. Mich. Aug. 20, 1993) (on file with author); see also *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 93 F. Supp. 2d 850, 855 (W.D. Mich. 2000), *aff'd*, 271 F.3d 235 (6th Cir. 2001).

220. See generally *Chase v. McMasters*, 573 F.2d 1011, 1017 (8th Cir.) (holding that municipality could be liable for damages under § 1983 for withdrawing public services to Indian Tribe and its members); *Thompson v. New York*, 487 F. Supp. 212, 226-27 (N.D. N.Y. 1979) (holding that Indian Tribe and its members could sue municipality and municipal employees

The next day, a tribal court clerk serves Toledo with a notice that a large group of Grand Traverse Band members, dissatisfied with the Tribal Council's decision to open up the reservation to so many non-Indians and, particularly, the Council's decision to exploit the miraculous natural resource of the pool for its economic potential, has filed suit in tribal court to close down the EDC's operation. Toledo, knowing that the tribal court will likely treat the question as a nonjusticiable political question,²²¹ assigns the case to his Staff Attorney, an eager attorney just out of law school. Toledo is more worried about the possibility that the lawsuit is a precursor to a wave of litigation.

And Toledo's anxiety is justified because a week later, he is served with two federal suits seeking to enjoin the EDC operation. The first is from a group of "concerned taxpayers" that allege the Band is taking advantage of Leelanau and Grand Traverse Counties because of the Band's state tax exemption. The second is from a group of property owners²²² that have detested the Band from its recognition in 1980. They throw the kitchen sink at the Band. They claim the Bureau of Indian Affairs abused its discretion in recognizing the Band in 1980. They claim the Band is not really the successor in interest to the Grand Traverse Band that signed the 1836²²³ and 1855²²⁴ treaties.²²⁵ They claim that the Grand Traverse Reservation was

under § 1983 for damages sustained when municipality withdrew public services); Comment, *Tribal Self-Government and the Indian Reorganization Act of 1834*, 70 MICH. L. REV. 955, 980 (1972) ("The states may not continue to tolerate a situation that may require them to perform [education and welfare] services and at the same time forces them to recognize the special status that may free tribes from state taxation and such controls as conservation regulations.") (footnotes and citations omitted).

221. See generally *Tribal Members Advocacy Group v. Tribal Council*, No. 95-03-008-CV, at 2 (Grand Traverse Band Tribal Court, Apr. 13, 1995) ("It is not the role of this Court to expound upon any of the policy or political implications of this disputed sale of land owned by the tribe.") (on file with author).

222. See, e.g., FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 425 (1994) (identifying the "United Property Owners of Washington (UPOW)" as an anti-Indian treaty rights organization).

223. *Indian Treaty Chippewas*, Mar. 28, 1836, 7 Stat. 491.

224. *Indian Treaty Chippewas*, July 31, 1855, 11 Stat. 621.

225. See, e.g., *Ass'n of Property Owners/Residents of Port Madison Area (APORPMA) v. Suquamish Tribe*, No. C01-5317FDB (W.D. Wash. Apr. 17, 2002) (on file with author) [hereinafter APORPMA] (dismissing claim for lack of standing that Suquamish Tribe was not successor in interest to Indians that signed Treaty of Point Elliott), *aff'd*, 2003 WL 22098043 (9th Cir., Sept. 9, 2003); *United States v. Aam*, 670 F. Supp. 306, 308-09 (W.D. Wash. 1986) (holding that Suquamish Tribe was successor interest to Indians that signed Treaty of Point Elliott).

disestablished²²⁶ and that the Band has been exercising civil regulatory and adjudicatory jurisdiction over non-Indians in violation of federal law.²²⁷ They sue the federal government under § 1983 for allowing the Band to operate as a sovereign government and they sue the individual council members for violating their civil rights.²²⁸ They sue the feds for taking the land into trust arbitrarily and capriciously.²²⁹

Before Toledo can finish reading the 177-page complaint from the property owners, he receives a call from the Environmental Protection Agency. The regional EPA office has always treated the Band and the other Michigan tribes fairly, especially considering many of the Michigan tribes do not have litigated reservation boundaries.²³⁰ But the regional administrator believes that the Band must comply with the Safe Drinking Water Act²³¹ and regulations implementing the Clean Water Act because the EPA has jurisdiction over Indian Country.²³² Due to the fact that no one else has ever

226. See, e.g., *Wisconsin v. Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d 990, 1019 (E.D. Wis. 1999) (holding that the state maintains a reasonable likelihood of success in proving that the Stockbridge-Munsee Reservation was disestablished).

227. See, e.g., *County of Mille Lacs v. Benjamin*, 262 F. Supp. 2d 990, 996 (D. Minn. 2003) (citing APORPMA, *supra* note 225, at 4, and *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless*, No. 85-C-1052 (E.D. Wis., Sept. 28, 1990)).

228. See, e.g., APORPMA, *supra* note 225, at 1-2.

229. See, e.g., *Lincoln City v. United States Dep't of Interior*, 229 F. Supp. 2d 1109, 1123-26 (D. Or. 2002) (discussing claims that the Department of Interior acted arbitrarily and capriciously by taking lands into trust for the benefit of Indian Tribe); *Sault Ste. Marie, Mich. v. Andrus*, 458 F. Supp. 465, 468 (D. D.C. 1978) (holding that city had standing to challenge decision of Secretary of the Interior to take land into trust for the benefit of Indian Tribe); cf. *TOMAC v. Norton*, 193 F. Supp. 2d 182, 191-92 (D.D.C. 2002) (holding that Act that restored the federal recognition to the Pokagon Band of Potawatomi Indians and required the Secretary to take land into trust for the benefit of the Band did not violate the Nondelegation Doctrine).

230. Compare *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001) (holding that EPA lacks authority to administer Clean Air Act permitting program where Indian country status is in question), with *Keweenaw Bay Indian Cmty. v. Michigan*, 784 F. Supp. 418 (W.D. Mich. 1991) (declaring the borders of the Keweenaw Bay Indian Reservation to be extant). See generally John F. Petoskey, *Doing Business With Michigan Indian Tribes*, 76 MICH. B.J. 440, 445 n. 16 (1997):

The exterior boundaries of the Sault Ste. Marie Tribe of Chippewa Indians, the Bay Mills Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Band of Odawa Indians and the Little River Band of Ottawa Indians have not been subject to "exterior boundaries" litigation Presumably, the boundaries still exist as defined in the original treaties.

Id. (citations omitted).

231. 40 U.S.C. §§ 300f to 300j-26 (2000).

232. See *HRI, Inc. v. EPA*, 198 F.3d 1224, 1244-48 (10th Cir. 2000).

discovered a naturally occurring fountain of youth before, the EPA will have no choice but to ask the Band to close the EDC's operation until it can be studied. Toledo says he understands and informs the administrator that the Tribal Council has no choice but to fight the EPA on that ground.

That day, Tribal Council, in a 4-3 vote, decides from a business standpoint to continue operating the pool enterprise until the federal or tribal court orders it shut down. The EDC operation is generating over \$4 million per day and runs twenty-four hours a day. The Council hires expensive geologists and biologists to prove that the water is perfectly clean (in fact, it is the perfect water) and that it is not connected to the water table in any way (which Radica and Ben discovered from the first day).

The number of phone calls and emails Toledo receives that afternoon from large, multinational law firms with burgeoning Indian Law practice groups amazes him. None directly solicit the Band's employ, but they all want to make sure that Toledo is thinking about them. Toledo thinks about his younger brother, the big kid that colleges called all the time when he was dominating local high school football fields, but then stopped calling when he broke his ankle scoring a touchdown to win a game in the playoffs.

When Wendy stops returning the governor's phone calls, the governor commissions a quick study to determine the negative effects of the Band's operation. Within two weeks, a research group with ties to anti-Indian treaty protesters in Wisconsin presents a report that claims the Band's pool, even with its miracle qualities, devastates local governments and is well on its way to bankrupting the state government for good.²³³ The local papers turn strongly against the Band.²³⁴ Federal and state politicians begin speaking in

233. Cf. Scott Sullivan, *GR Chamber Contests Tribe's Casino Claims*, PENASSEE GLOBE (Wayland, Mich.), Mar. 17, 2003, at 1A ("A Grand Rapids Area Chamber of Commerce report released March 13 contends an Indian casino proposed for Bradley would benefit Allegan County by \$1.2 billion over 10 years, but cost neighbor counties \$880 million in that same time span.").

234. Cf. Alan Sayre, Associated Press, *Proposed Reservation Casino Doesn't Make Sense for State* (Jan. 19, 2003) ("From the revenue standpoint, an Indian casino makes no sense for [Louisiana] state government."); Katherine Hutt Scott, *Indian Casinos Generating Big Money, Opposition*, NORWICH (CONN.) BULL., Jan. 13, 2003 ("Indian gaming, the fastest-growing segment of casino gambling in the country, generated \$12.7 billion in revenue in fiscal 2001. But opposition to new casinos is increasing just as fast."); Editorial, *Engler Dealt Too Many to Michigan's Tribes*, DETROIT FREE PRESS, Jan. 11, 2003 ("Michigan doesn't need any more gambling."); Editorial, *Tribal Recognition Tainted by Gambling*, INDIANAPOLIS STAR, Nov. 26, 2002 ("Our position is: Gaming interests have disproportionately influenced the tribal recognition process since the late 1980s.") (emphasis omitted).

public about introducing bills to regulate and tax miracle pools.²³⁵

Weeks later, frustrated with the Band's refusal to share its scientific findings and its environmental tests, a couple universities and a couple environmental groups reluctantly file a NEPA suit to compel the closure of the pool until an environmental impact statement can be prepared. They are unsure of the consequences of the drawing down of the pool, unsure of even what the pool is even made, and very concerned about the ecological effects of the massive, gargantuan influx of people and automobiles in the fragile ecosystem of Leelanau County and the Grand Traverse Bay. They argue that if no one knows, then the public may be robbed of a critical and extremely limited resource.

And though the pool is constantly accessed by thousands of people paying \$1000 a sip every day, the water level miraculously does not decline.

Other fountains of youth pop up, first in Leelanau County and then all over northern Michigan, their proprietors trying to capitalize on the enormous profits being realized in Peshawbestown. Most shut down immediately, some of the bigger ones threatened by the state or the feds with fines for breaking federal law, but all of them are forced out of business because none of them can compete with the "genuine article."²³⁶

When it finally becomes impossible for tribal members to access the pool, the member lawsuits in tribal court multiply. Some of the members threaten violence. Citing the equal protection clause in the GTB Constitution²³⁷ and the strong tribal policy in favor of Indian preference, acknowledging the Band's waiver of immunity for suits by tribal members,²³⁸ and citing the immense wealth generated by the enterprise,²³⁹ the tribal court does what no federal or state court could — order the tribal police department to

235. Cf. Scott Rapp, *Cayuga County Moves to Block Casino*, POST-STANDARD (Syracuse, N.Y.), Nov. 27, 2002 ("Cayuga County will try to legally block the Cuyuga-Senecas from opening a casino or other tax-exempt business on land the Oklahoma tribe is buying . . .").

236. LEAP OF FAITH (Paramount Pictures 1992).

237. GRAND TRAVERSE BAND CONST. art. X, § 1(h) ("The Grand Traverse Band in exercising the powers of self-government shall not . . . [d]eny to any persons within its jurisdiction the equal protection of its laws or deprive any person of liberty or property with due process of law.").

238. GRAND TRAVERSE BAND CONST. art. XIII, § 2 (waiving the Band's immunity "for the purpose of enforcing rights and duties established by this Constitution and by the ordinance and resolutions of the Tribe.").

239. Cf. *In re McSauby*, No. 9702-001-CV-JR, at 5 (Grand Traverse Band Tribal Ct. July 29, 1997) (en banc) ("In this time of relative resource-rich ability to do many things for the community benefit . . . , the Tribal Council must pay Defendant McSauby's attorney fees and court costs.") (on file with author).

temporarily shut down the Anishinaabek Fountain of Youth.

A constitutional crisis develops at the Grand Traverse Band. A couple of council members talk about removing the entire tribal judiciary, but Toledo reminds the entire council that only the tribal judiciary sitting as one can remove any tribal judges and only for a limited number of reasons. The only reason that could possibly apply would be the provision on “gross misconduct”²⁴⁰ and the Council would be hard-pressed to prove to the remainder of the tribal judiciary that the tribal judge that issued the injunction, acting in her wise discretion, committed an act of “gross misconduct.” The two or three angry council members relent, but grumble loudly for impeachment and political reprisal.

Toledo responds immediately to the injunction and requests a fast hearing. The tribal court, understanding the critical character of the Band’s enterprise to the future of the Band, agrees to a hearing within a week. The local papers get a couple quotes from a few disgruntled tribal members complaining that the Tribal Council is despotic and rules by nepotism.²⁴¹ The national papers, hot on the lead of the biggest religion story in two millennia, dutifully report that the discovery of the Fountain of Youth has created terrible rifts between the haves and the have-nots on the Grand Traverse Reservation. Editorialists from D.C. to L.A. say they fear for another intratribal bloodletting like what happened at San Carlos Apache²⁴² or Seneca.²⁴³ More than a few editorialists quote so-called “experts” on tribal politics that claim the Indians have civilized enough to the point where they hold elections and stay in one place, but their savage and vulgar dispositions rear their ugly heads when money is involved, especially where huge amounts of money are involved.²⁴⁴

240. GRAND TRAVERSE BAND CONST. art. V, § 8(d) (providing that the tribal judiciary may remove a tribal judge for “[g]ross misconduct that is clearly prejudicial to the administration of justice”).

241. See, e.g., Donald L. Bartlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44-47 (“Tribal leaders sometimes rule with an iron fist. Dissent is crushed. Cronyism flourishes. Those who question how much the casinos really make, where the money goes or even tribal operations in general may be banished.”).

242. See Tom Holm, *The Constitutional Conflict at San Carlos*, RED INK, Spring 1998, at 31, 31-33.

243. See Porter, *supra* note 213, at 534 (citing Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997)).

244. See, e.g., Francis X. Donnelly, *Tribes Squabble over the Profits: Casinos Bring Infighting, Allegations, Threats Along with a Comfortable Lifestyle*, DETROIT NEWS, Dec. 18, 2000, at 5A (“Even the fledgling Little River Band of Ottawa Indians, which opened its first casino a year ago, has found itself embroiled in a dispute over direct payments.”).

Toledo, with the assistance of his able and eager new staff attorney, meets with the Tribal Council to propose and debate plans for tribal member access to the pool. Toledo presents their proposal to the plaintiffs, a pair of college educated sisters with an ailing grandmother who cannot easily gain access to the pool because of the enormous crowds, and they agree to the plan. The next week, Toledo and the plaintiffs present a reasonable plan to allow tribal members access to the pool, sort of a priority system. The tribal court immediately lifts the injunction and the illusory threat of bloodletting is staved off. The newspapers describe the Tribal Council meeting and the tribal court hearing as "pow-wows."²⁴⁵

Next on tap is the request for a preliminary injunction by the EPA. Toledo and the Tribal Council have called on their able outside litigation counsel located downstate to handle the hearing. As soon as the Band's attorney, Benjamin Fatto, arrives, he sees a throng of Assistant Attorneys General from the State of Michigan waiting to view the events as they unfold with rapt attention. Benjamin approaches the EPA's attorneys and asks them if they know why the entire Office of Attorney General is present. The EPA's attorney states that he believes the State intends to intervene as soon as the hearing is over. Benjamin asks the EPA attorney what he can offer to the EPA to make the case go away and keep the State out of the Band's hair, at least for the time being. The two attorneys walk out together and talk for twenty minutes in the coffee shop across the street from the Federal Building in Grand Rapids. Benjamin agrees to allow the EPA to access the site of the pool for testing and monitor the whole situation in exchange for the dismissal of the suit.

After the EPA agrees to sit out, temporarily putting off the charge from the state Attorney General's Seventh Cavalry, the case filed by the state universities and local environmental groups comes up. The pool is a miracle — healing the ailments of the people that consume its waters — that science cannot explain. The existence of the pool, halfway up the side of a

245. Editorial, *Big Chief Pataki*, WALL STREET J., Mar. 1, 2002, at A14. On the question of stereotypes, Paula Gunn Allen wrote:

A careful examination of the process by which the indigenous inhabitants of this hemisphere were dehumanized and made into Disneyesque characters, villainous or noble, will demonstrate how destructive of rational thought and consciousness stereotyping is. It is not only the target group that is distorted and dehumanized. The users of the stereotype are greatly harmed psychically as well, and they haven't any means of protecting or assessing the psychic damage done to themselves because they lack any outside reference.

GUNN ALLEN, *supra* note 23, at 99-100.

hill where no water has ever collected, is another oddity. The universities argue that the pool should be declared a rare and finite public property, one to be studied and preserved. Though no federal action has taken place, the universities argue that not a single federal agency has signed off on a finding of no significant impact (FONSI).²⁴⁶ The environmental expert witnesses estimate that the Band's enterprise disposes of hundreds of thousands of gallons of water every day. Benjamin files a motion to dismiss because none of the dollars going to the Fountain of Youth enterprise are federal dollars. No federal agency action takes place. The court agrees and dismisses the action.

Months pass and the Band focuses on the internal issues of being overrun by another non-Indian horde of invaders, this one paying as it goes. At the annual general meeting, the tribal membership confronts the Tribal Council on the issue of per capita payments. In five months, the revenues from the pool enterprise have reached \$600 million, several times what the gaming enterprises generate over the course of a whole year. The EBITDA ratio on the pool enterprise is an astonishing eighty percent. Toledo has already instructed the Council to inform the tribal membership that the Band cannot issue per capita payments for anything other than gaming and even then only upon the approval of a revenue allocation ordinance by the Secretary of the Interior.²⁴⁷ Given the enormous revenue generated by the Fountain of Youth, the Tribal Council maps out a plan to provide adequate health care, education, housing, social services, and any other governmental assistance desired to all tribal members. The Tribal Council agrees to employ all unemployed tribal members at a living wage and provide a pension to retired and disabled tribal members. The tribal membership generally approves.

And with that, the budget is set.

The backlash against the Tribal Council's plan on what to do with all the dough does not come from within, but from conservative reactionary politicians, commentators, and think tanks that accuse the Tribal Council of reinventing Soviet-style Communism,²⁴⁸ welfare state dependence,²⁴⁹ and

246. See, e.g., *TOMAC v. Norton*, 240 F. Supp. 2d 45, 47 n.2 (D.D.C. 2003) (describing FONSI law).

247. See 25 U.S.C. § 2710(b)3 (2000).

248. See generally Comment, *supra* note 220, at 977-78 (describing a claim by non-Indians that the Indian Reorganization Act was a subversive plot by the Soviet Union). The commentator described the story as such:

The IRA has encountered less subtle opposition from other quarters. Even in the earliest stages of its history, Indians were not the only persons concerned with the IRA. A small, white propaganda machine existed in Muskogee, Oklahoma, the

dictatorial paternalism.²⁵⁰ Members of Congress talk about how the need for Indian tribal sovereign immunity has passed, recalling the glory days of fierce Indian fighter Slade Gorton.²⁵¹ The State governor, angered by the Band's refusal to concede to some form of state taxation of their main revenue source and seeing an opportunity to garner a few votes come election time from the more rabid anti-Indians, joins the suit by the local property owners to destroy the Grand Traverse Band.

The Band's hearty outside litigation counsel Benjamin Fatto prepares to respond to the State's gargantuan motion for summary judgment with a hearty reply. Powerful lawyers from four or five multinational law firms based out of New York, DC, San Francisco, Seattle, etc. write letters and make personal phone calls to several council members. They are not directly soliciting the

center of approximately 100,000 Indians of the Five Civilized Tribes. This group has access to the news media, and it issued periodic charges that grossly misrepresented the Act and attributed fabricated statements to Commissioner [John] Collier. Through these charges ran the theme that the Act was a product of Moscow being put over on the Indians by the Roosevelt Administration and that it was an "inhumane, unconstitutional, and un-American scheme." A story based on "information" supplied by this group appeared in the *New York Herald-Tribune* on April 4, 1934. Under the headline, "Commissioner of Indian Affairs Urges Tribesmen of Oklahoma to Accept Soviet Style of Rule," the story contained lies, distortions, and prophesies of horror, hardly conducive to the acceptance of the IRA.

Id. at 977 (footnotes and citations omitted).

249. Author Vine Deloria, Jr. wrote:

A rather ingenious argument . . . emerged. People claimed that they did have Indian blood but that their grandparents had rejected the federal government out of hand, had moved to the nearest city or fled to the deepest woods, and had nobly and steadfastly refused all federal offers of aid over a period of three or four generations. Thus federal scholarships, the distribution of claims money per capita, and preservation of lands in trust had all been rejected out of hand by these superpatriotic Indians. So prevalent has this explanation become that its claimants have sniped at real blood enrolled Indians as being morally deficient for remaining on the reservations and within the tribes.

Vine Deloria, Jr., *More Others*, in *SPIRIT & REASON: THE VINE DELORIA, JR.*, READER 249, 251-52 (1999).

250. *Cf. Wheeler-Howard Act — Exempt Certain Indians, Hearings Before the House Comm. on Indian Affairs*, 76th Cong. 66-67 (1940) (statements of John Collier, Commissioner of the Bureau of Indian Affairs) (denying allegations from members of Congress that the BIA employed both Communists and Nazis).

251. *See generally* American Indian Equal Justice Act, S. 1691, 105th Cong. §§ 1-2 (1998) (restricting tribal jurisdiction over non-Indians and providing for a waiver of tribal governments' immunity from suit in federal court).

Band; they are just letting the Council members know that their firms' litigation practice groups handle complex litigation in federal courts all the time. The council members remember when their only attorney was a staff attorney for the Michigan Indian Legal Services fresh out of law school and are deeply impressed by the attention given to them by power-suited lawyers. Whenever a council member attends a self-governance conference or a National Congress of American Indians conference, a powerful lawyer is there to take them out to dinner at expensive steakhouses. A week before the scheduling conference with the federal district court judge to determine a briefing schedule on the cross-motions for summary judgment, the Tribal Council votes 5-2 to purchase the services of Berkman, Deloria, Goldman, and Petoskey,²⁵² a major east coast firm with strong ties to the Republican Party powerhouse in DC and Texas. At first, the firm's attorneys merely advise Benjamin on procedural matters, but by the time the Band's brief is due, Benjamin is shunted aside and Berkman, Deloria associates do all the drafting — at \$250-\$450 per hour.²⁵³ The Tribal Council finally relieves Benjamin from his work after the brief is completed.

Benjamin, somewhat bitter at losing most of the work for his biggest client, learns that Berkman, Deloria had represented several small towns in an eastern state that had litigated against the local Indian tribes when those tribes tried to open their own casino. Berkman, Deloria used a major public relations and slash-and-burn litigation scheme — a SLAPP-style²⁵⁴ strategy — to

252. See Matthew L.M. Fletcher, *"I Shall Hear You No Further,"* 27 VT. L. REV. 565, 604 (2003).

253. "The power of non-Indian attorneys in prestigious law firms cannot be underestimated. Reservation Indians feel fortunate to have large firms with luxurious offices in the nation's capital . . ." VINE DELORIA, JR. & CLIFFORD M. LYTTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 144 (1983).

254. SLAPP stands for "Strategic Lawsuit Against Public Participation." A New York court characterized SLAPP-type lawsuits as follows:

SLAPP suits come in many forms camouflaged as ordinary lawsuits The conceptual thread that binds them is that they are suits without substantial merit that are brought by private interests to stop citizens from exercising their political rights or to punish them for having done so.

. . . .

The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out

overwhelm the small tribes, and the casinos were never built. He digs around in his files until he finds the Berkman, Deloria letter disclosing the potential conflicts of interest with other clients. Apparently, the Tribal Council signed the letter waiving the conflict without reading much of the content.

An army of high-priced Berkman, Deloria lawyers counterattack against the State and the property owners with a barrage of pleadings and procedural motions, including no fewer than four motions to dismiss on procedural grounds. An army of lobbyists associated with Berkman, Deloria attack the State's rearguard with political pressure from Michigan's congressional delegation.

The brief filed by the State and the property owners contains a parade of horrors about the Fountain of Youth and the danger posed to American Democracy by the monstrous advent of Indian tribal economic clout. The plaintiffs argue that Indian tribes will not stop until the entire continent is safely in Indian hands.²⁵⁵ Using language culled from a brief filed by Berkman, Deloria lawyers in another case, the plaintiffs argue that the state and local governments will be overwhelmed by the effects of the Band's enterprise.²⁵⁶ The plaintiffs argue that if the Band is not stopped, then Indian tribal businesses will run rampant throughout the United States,²⁵⁷ the

the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.

Gordon v. Marrone, 590 N.Y.S.2d 649, 656 (N.Y. Sup. 1992) (footnote, quotation marks, and citations omitted), *aff'd* 616 N.Y.S.2d 98 (N.Y. App. Div. 1994), *leave to appeal denied* 84 N.Y.2d 813 (N.Y. 1995). See generally Lori Potter, *Strategic Lawsuits Against Public Participations and Petition Clause Immunity*, 31 ENVTL. L. REP. 10,852 (2001).

255. Cf. Brief for Amicus Curiae Proper Economic Resource Management, Inc. at 11, *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (No. 00-454) ("Unless a bright line is drawn, tribal governments and tribal courts will understandably continue to attempt to expand the extent and reach of tribal powers.").

256. Cf. Brief for Amici Curiae Towns of Ledyard, North Stonington, and Preston, Connecticut at 2-3, *Chickasaw Nation v. United States*, 534 U.S. 84 (2001) (No. 00-507) (listing problems with "traffic control, police, emergency services, social services, and others" as a result of the establishment and success of the Foxwoods Casino).

257. Cf. Brief of Amicus Curiae States of South Dakota, Alaska, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, Utah, Vermont, and Wisconsin at 17, *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998) (No. 96-1037) ("The business options open to each one of the 320 tribes, perhaps in combination with other financial interests, are virtually limitless.").

consequences of their enterprises amounting to little more than looting and pillaging.

The district court never rules on the motions. To settle the issues with the state government, local townships, and counties, the Band agrees to provide payments over and above the amount the governments expend in dealing with traffic congestion, increase in (mostly perceived) crime, sewage and water use issues, and other adverse effects of the pool enterprise. When the State pulls out, the property owners, unable to afford the price of countering the Berkman, Deloria legal assault, have no choice but to exit as well. To settle the issues with the environmental groups regarding the increased air, water, noise, and light pollution, as well as, the increased garbage problem, the Band agrees to remediate the whole area affected by the pool enterprise. The Band has enough left over to accomplish its goals for the tribal membership.

Lawsuits come and go regarding the Fountain of Youth. The Band prevails in most and settles a few for money and access for environmental testing, scientific study, and inspection, but the pool remains open virtually every day. Exactly one year after the Tribal Council opened the enterprise, the Chief Financial Officer reports that the net income from the pool alone exceeds \$1 billion. Staff members from the Conservation Department, the Environmental Quality Department, and the Economic Development Corporation advise the Tribal Council that, although millions of people have tasted a sip of the water through wet weather and dry weather, and although the pool itself appears to contain only a few hundred cubic liters of water, the water level never seems to drop measurably — yet another miracle.

Toledo writes a 100-page law review article with over 400 footnotes²⁵⁸ describing the abject (yet hypothetical) horror of asking the Secretary of the Interior to place the parcel of land upon which the Fountain of Youth is located into trust.²⁵⁹ He ends the article by stating that the advantages of the enterprise afforded to the Band would not have been possible if the land had not already been placed into trust. The dominant society would not have allowed it, he concludes.²⁶⁰ Toledo resigns his position about three years after

258. See Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741, 744 (1997) (“[T]hey told me I had to get tenure. The way for me to do that, as I soon came to learn, was to publish three 100-page law review articles with 400 footnotes.”).

259. Compare 25 U.S.C. § 465 (2000) (authorizing the Secretary to take land into trust for the benefit of Indian tribes) and 25 C.F.R. pt. 151 (implementing § 465) with Letter from Gale A. Norton, Secretary of the Department of the Interior, to Hon. Cyrus Schindler, Nation President, Seneca Nation of Indians 1, 3 (Nov. 12, 2002) (on file with author) (approving gaming compact allowing off-reservation gaming “reluctantly” and with “extreme[] concern[]”).

260. See, e.g., Cohen, *Erosion of Indian Rights*, *supra* note 30, at 368-69 (describing how

the opening of the Fountain of Youth to take a teaching job at a small law school in the far west. The young, eager staff attorney takes over and hires a younger, more eager staff attorney to assist.

New Age religious fakirs write books in the vein of Carlos Casteneda, exploiting the Anishinaabek Fountain of Youth and creating legends about a mythical voyage taken by Ponce de Leon up the Mississippi River and over the Illinois plains (never mind that the entire area was covered in huge, old-growth forests), into Lake Michigan and over to the Leelanau Peninsula. Kevin Costner talks about writing a new screenplay about Ponce de Leon (with himself in the lead role).

Over the next three years, the Fountain of Youth operates cleanly and efficiently, bringing incredible revenues to the Band (exceeding \$2 billion in the fourth year) and providing phenomenal medical care for the entire tribal membership. Lawsuits start up again intermittently as flashpoints of unrest occur such as bad automobile accidents, but the Band settles them quickly.

the BIA destroyed the Blackfeet Indians' thriving cattle enterprise in the 1950s). Cohen wrote:

During the drought years in the 1930's, the Government, as a measure of relief to distressed farmers, purchased drought cattle at an average price of about \$12 a head. Most of these cattle were given away free to relief clients. Under Commissioner Myer's administration, Indian tribes which received such drought cattle have been charged up to \$140 or more a head for what started out as a gift and was a gift to everybody who wasn't an Indian. The practice of making gifts to Indians and then charging the Indians for the gift was not invented by Commissioner Myer — it runs back many decades in our Indian history — but charging Indians \$140 or more for a gift that cost the giver only \$12 is a new wrinkle on an old game.

The Blackfeet Indians wouldn't have minded being charged for the wobbly, drought-stricken cows they received as a gift. They had no objection to paying retroactive interest on these gifts. In effect, for many of the cattle, the Indian Bureau charged interest at a rate of 70% per annum. But repaying cattle loans, even at 70% interest, was worthwhile, the Blackfeet felt, since only in this way would they achieve final and complete ownership of their own cattle. What shocked the Blackfeet, however, was that in June, 1950, after they had paid back the Indian Bureau many times over for the last cow they received, they were suddenly advised by the Indian Bureau that title to the cattle was still vested in the Bureau and that the Bureau would arrange for the disposition of the cattle as it thought best. Bitter protests as this breach of faith were completely futile. The Chairman of the House Interior Appropriations Subcommittee, Representative Michael Kirwan, declared that he "will not believe" that "this Government, your Government, and my Government" would do any such thing. But when the Indian Bureau itself supplied facts and figures confirming the charge, the House Committee quickly dropped the subject.

Id. (footnotes and citations omitted).

Nasty lawsuits are bad for business. Anti-Indian sentiment fails to take hold, overwhelmed by the large gifts donated by the Band to local schools and social service providers.²⁶¹ The entire business community becomes somewhat dependent on the Band's enterprise — the housing construction industry, the tourism industry, the cherry industry, and the litigation industry. Toledo and his eager young staff attorney devote less and less time to advising the Band's governmental services departments and managing litigation in federal, state, and tribal court. The Band relies less and less on the federal government for funding, eventually doing away with its grants department. The Band creates massive trusts for its elders, its children, its future investment, and for the purpose of purchasing land to reconstitute the two reservations. The Band purchases over 5000 acres of very expensive land in its six-county service area — Leelanau, Grand Traverse, Antrim, Charlevoix, Benzie, and Manistee Counties.²⁶²

The local newspapers treat the Band and its enterprise as though it is the big bad mother of Grendel²⁶³ running roughshod over the pitiful non-Indian inhabitants of Leelanau County. The Band's historians contribute stories about several parcels of land within the portions of the Grand Traverse Reservation created by the Treaty of 1855. The stories describe how the parcels were intended by the treaty to be owned by the Indians, but the non-Indians in the area used violence, intimidation, and lawyers to drive the Indians out. The Band's historians publicize how history until the late-1980s is one of poverty and misery. And yet the local newspapers do not relent in their biting and scathing journalistic assaults, as sort of journalistic microaggression.²⁶⁴ The newspapers acknowledge that the Band may have been politically weak and utterly destitute only a few decades before, but with the coming of the Fountain of Youth the Band is a giant among average

261. See generally WILKINS & LOMAWAIMA, *UNEVEN GROUND*, *supra* note 121, at 214 (“Gaming tribes in many states have poured money into their own infrastructural needs, but have also given generously to local schools, nonprofits, and arts, health, and social service agencies that serve citizens of all states.”).

262. See GRAND TRAVERSE BAND CONST. art. I, § 2(a).

263. See BEOWULF 23 (E. Talbot Donaldson trans., 1966) (“Grendel’s mother, woman, monster-wife, was mindful of her misery, she who had to dwell in the terrible water, the cold currents . . .”).

264. Cf. Peggy C. Davis, *Popular Legal Culture: Law As Microaggression*, 98 *YALE L.J.* 1559, 1560 (1989) (“The claim of pervasive, unconscious racism is easily devalued. The charge has come to be seen as egregious defamation and to carry an aura of responsibility. Nonetheless, the claim is well founded.”) (footnote and citation omitted).

citizens that cannot be tamed. The back-and-forth between the Band and its detractors continues, ebbing and flowing as time passes.

And then, four years to the day after the discovery of the Fountain of Youth by little Niko Roberts, the pool runs dry. Over the course of a few months, the lines fall back, the EDC focuses on other projects, and the Band moves on. The magic pool never returns.

The Band no longer needs (nor can it afford) to pay the huge retainer required to maintain its relationship with Berkman, Deloria and the firm moves on. Politicians and lawyers stop taking tribal council members to lunch and dinner and college basketball games. The rest of the riff-raff slowly drift off as well — all the New Agers and the people selling Fountain of Youth tee-shirts and figurines. There is no market for them anymore. Many supposedly sympathetic commentators say they believe the Band will return to poverty, robbed of its traditions, and vulnerable to extinction just as it was in 1980 before the Department of Interior finally recognized the Band.²⁶⁵ There is a wave of "I told you so"-type editorials claiming that this or that editorialist always knew the Fountain of Youth would dry up. They say the Band has sold its soul for the immoral dollar and probably deserved the troubles that lay ahead.²⁶⁶ Nothing like this happens.

The Band's relationship with the local governments improves. The Band becomes just another quiet property owner in Leelanau County. It even pays its taxes (through the gaming compact) on time. Its children return to the reservation after college and use their education for the benefit of the Band. The Band becomes a leader in efforts to preserve the relatively pristine quality of the Grand Traverse Bay area ecology. The Tribal Council and the tribal government continue to operate, dealing with animal control ordinances, treaty fishing and hunting rights, and Indian Child Welfare questions. Without realizing it, the Tribal Council rides the last revenue ripples of the Fountain of Youth tide to complete self-reliance. The Band no longer needs federal government grants and appropriations. Its members do not reside in poverty, nor are they tortured by excess wealth. Other than minor contracts and small

265. See Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (1980).

266. See, e.g., National Gambling Impact Study Commission Report, Executive Summary (June 18, 1999) (Statement of Richard C. Leone, Commissioner) ("I believe that, on balance, the American people are net losers in a society of pervasive gambling."); *id.* at 52 (Summary Statement by Commissioner James C. Dobson, Ph.D.) ("Clearly, gambling is a destroyer that ruins lives and wrecks families."), available at <http://govinfo.library.unt.edu/ngisc/reports/a1.pdf> (last visited Sept. 22, 2003).

claims, the Band rarely needs legal assistance. The Band cooperates with local governments in ways never before possible with the disputes over jurisdiction and taxation.²⁶⁷

Once the Fountain of Youth closes up, the local and national newspapers forget about the Band. Other Indian tribes take up the news — the New York tribes are resisting state taxation again;²⁶⁸ the Oklahoma tribes are pushing for Class III gaming again;²⁶⁹ the New Mexico tribes are threatening to exercise their water rights again;²⁷⁰ and the California tribes are pushing for the entire state to secede from the Union. The Band's enterprises do not charge ahead of non-Indian businesses and so the non-Indians do not complain. The Band provides financial assistance when needed for local schools and utilities and so the local governments do not complain. The Band's trust funds and investments keep the Band afloat, and its modest success keeps it out of the news.

Peshawbestown becomes the model for Indian tribes and indigenous peoples everywhere. There is wealth, but not too much. And there is work to do, but not too much. The Band breaks out of the cycle of perception placed upon modern Indian tribes — either a tribe is perceived as poor, weak, and pitiful, allowing the dominant culture to sympathize with it; or a tribe is perceived as wealthy, strong, and abusive, allowing the dominant culture to demonize it. The Band has moved through the first two phases into a third, unprecedented phase — the Band is modestly wealthy, uses its power sparingly or not at all, and beneficent.

267. *But cf.* Brief of Amicus Curiae National Congress of American Indians, National Indian Gaming Commission, and Individual Tribes at 12-17, *Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 123 S. Ct. 1887 (2003) (No. 02-281) (describing the numerous cooperative law enforcement agreements with jurisdictions around the United States).

268. *See, e.g.*, Glenn Coin, *Casinomania: A Casino in Every Neighborhood, Hope for Money in Every Coffer*, POST-STANDARD (Syracuse, N.Y.), Jan. 12, 2003, at A1 ("State legislators and the governor are betting that the largest expansion of gambling in state history will help resolve the state's fiscal crunch.").

269. *See, e.g.*, Dave Hinton, *Tribe Aims for Casino Deal*, PANTAGRAPH (Bloomington, Ill.), Jan. 12, 2003, at B3 ("Representatives for Gary, Ind., and the Miami Indian Tribe of Oklahoma continue to negotiate for the placement of a land-based casino in that city.").

270. *See, e.g.*, J.D. Bullington, *Casinos Are Only One Path to Tribal Clout*, ALBUQUERQUE TRIB., Dec. 16, 2002, at 2 ("The issue of water rights provides just one vivid example of the growing economic self-sufficiency of American Indians . . . Indians have reserved senior water rights that have gone largely unused for years because no money has been available to build Indian irrigation and water systems.").

Occasionally, a tribal member talks about the Band moving beyond self-reliance into nationhood — joining the United Nations, stepping outside of the three sovereign system of the United States, and forming its own government and its own nation. The tribal member has few listeners, for though there is much to gain from nationhood, there is also much to lose.

A year or so after the Fountain of Youth runs dry, the United States Congress, citing the examples of the Grand Traverse Band's Fountain of Youth, the Mashantucket Pequot Tribe's Foxwoods Casino, and the Mississippi Choctaw's staggering success in its business affairs, declares that the business of Indian Affairs as we know it is over. Citing its so-called plenary power,²⁷¹ the legislature enacts a law that would force the Indian tribes into a new paradigm. Following Self-Determination and Self-Governance, Congress calls it the Self-Reliance Act and claims that it is the solution to the "Indian problem."²⁷² Congress declares that, from now on, it will authorize expenditures to provide services for only 100 federally recognized Indian tribes.²⁷³ Congress prohibits the federal recognition of Indian tribes, excising the "Procedures for Establishing That an American Indian Group Exists as an

271. See *Rice v. Cayetano*, 528 U.S. 495, 529-30 (2000); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775, 791 (1991); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Hodel v. Irving*, 481 U.S. 704, 734 (1987); *Oneida County, New York v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 249 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 156 (1982); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 426 (1980) (Rehnquist, J., dissenting); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 146 n.12 (1980); *Washington v. Confederated Tribes & Bands of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *United States v. Wheeler*, 435 U.S. 313, 331 (1978); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 83-84 (1977); *Antoine v. Washington*, 420 U.S. 194, 203-04 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 165 (1973). But see generally Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, *supra* note 68.

272. See William Bradford, "With a Very Great Blame on Our Hearts": *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 71 (2002-03); Glauner, *supra* note 18, at 929; William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 348 (1990); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 261-62.

273. As of July 1, 2002, the federal government recognized 562 tribal entities. See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,328 (July 12, 2002).

Indian Tribe"²⁷⁴ from the Code of Federal Regulations. In order to avoid taking responsibility for its actions, it orders each of the Indian tribes to send a representative to a National Council for Unifying and Stabilizing Tribes Equally and Responsibly. The Council will have exactly one year from the passage of the new law to decide which of the 100 federally recognized Indian tribes will continue to receive services. The remaining 460-plus tribes will continue to exist, but will not be eligible for federal services or federal protections of any kind. If the Council does not make a decision within the one-year deadline, Congress will decide which tribes stay and which tribes go — randomly, through a process no different than the state lotteries on tv during the local news.

The return on the Indian tribes' investment in Congress' new plan is that each of the 100 remaining tribes will have everything Indians have been asking for since 1492 — established reservation boundaries in accordance with the express terms of treaties;²⁷⁵ protection of all treaty rights;²⁷⁶ unchallenged regulatory and adjudicatory jurisdiction over all criminal and civil actions within the reservation boundaries;²⁷⁷ the power to remove all unwanted persons (including wealthy property owners) from within the reservation boundaries (with Congress providing the just compensation);²⁷⁸ adequate funding for all BIA and IHS and other federal agency programs intended to benefit Indian tribes;²⁷⁹ recognition of tribal court judgments in federal courts;²⁸⁰ — everything save nationhood or membership in the United

274. 25 C.F.R. pt. 83 (2003).

275. See, e.g., *Hagen v. Utah*, 510 U.S. 399, 404 (1994) ("Congress can unilaterally alter reservation boundaries.") (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903)).

276. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-91 (1999) (holding that Indian Tribe's usufructory treaty rights were not extinguished).

277. See, e.g., *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 659-60 (2001) (Souter, J., concurring) ("*Montana's* 'general proposition' that 'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe . . . is, however, the first principle, regardless of whether the land at issue is fee land, or land owned by or held in trust for an Indian tribe.") (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

278. See, e.g., *Montana*, 450 U.S. at 557-63 (discussing Indian tribes' power to exclude).

279. See, e.g., *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1340 (D.C. Cir. 1996) (discussing claim by Indian tribes that the Secretary of the Interior did not distribute adequate contract support costs in accordance with the Indian Self-Determination Act) (citing 25 U.S.C. §§ 450-458 (1994)); cf. *Navajo Nation v. Dep't of Health & Human Servs.*, 325 F.3d 1133 (9th Cir. 2003) (en banc) (holding that Indian Tribe could not administer the Temporary Assistance for Needy Families program).

280. Cf. MICH. CT. R. 2.615 (establishing procedures to recognize Michigan tribal court judgments in Michigan courts). Cf. generally Kirsten Matoy Carlson, Note, *Towards Tribal*

Nations.

As an afterthought, several Senators attach riders eliminating the sovereign immunity,²⁸¹ tax exemptions,²⁸² Indian preference provisions,²⁸³ Title VII exemptions,²⁸⁴ and treaty rights²⁸⁵ of the tribes not included on the Hot 100 List. A few House members eliminate the special canon of statutory and treaty construction to the benefit of the tribes²⁸⁶ not included on the Hot 100 List. All of these riders pass.

Congress provides for the litigation over the constitutionality of the Act to be heard in the Supreme Court immediately, suggesting the Court certify a limited number of petitioners. Congress orders the tribes to meet in the Council during the time the suits are pending before the Court. The one-year deadline is firm, Congress says.

Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies, 101 MICH. L. REV. 569, 599 (2002) ("Some federal courts have asserted that the federal courts are not competent to decide matters of tribal law and that for them to do so undermines notions of tribal-federal comity.") (citing *Basil Cook Enters. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997)).

281. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

282. See, e.g., *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (excise tax exemption).

283. See, e.g., 25 U.S.C. § 472 (2000) (establishing Indian preference for qualified Indians in the Bureau of Indian Affairs).

284. 42 U.S.C. § 2000e(b) (2000).

285. See, e.g., *United States v. Michigan*, 471 F. Supp. 192, 213 (W.D. Mich. 1979) ("When the Indians granted to the United States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 treaty, they retained all those rights not specifically conveyed. Among the retained rights was their aboriginal right to continue to fish in the ceded waters of the Great Lakes."), *stay granted*, 623 F.2d 448 (6th Cir. 1980), *modified*, 653 F.2d 277 (6th Cir. 1980), *cert. denied*, 454 U.S. 1124 (1981); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 675 (9th Cir. 1975).

286. Statutes are "to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); see *Connecticut ex rel. Blumenthal v. United States Dep't of the Interior*, 228 F.3d 82, 92 (2d Cir. 2000) ("The fact that the Tribe today is at no practical disadvantage does not strip the Indian canon of its force."); *Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 879 n.3 (D.C. Cir. 2000) ("The United States Supreme Court has long recognized the canon of construction that resolves ambiguity in any document related to Indian lands in favor of the Indian claim.") (citing *Antoine v. Washington*, 420 U.S. 194, 199 (1975) and *Oneida County, New York v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247-48 (1985)); Jill de la Hunt, Note, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J. L. REFORM 681, 692 (1984) ("When assimilation policies conflicted with treaty provisions guaranteeing Indian autonomy, the courts continued nevertheless to construe treaty provisions in favor of Indian understanding.") (footnote and citation omitted).

The Grand Traverse Band Tribal Council convenes to debate a strategy. A few council members, deeply offended at Congress, would vote to ignore the whole process and rely on the Band's investments. These council members argue that federal recognition is a means to an end and no government agency needs to legitimize the Grand Traverse Band, not any more. The remainder of the Council agrees in principle with the minority but they also respect *realpolitik* — survival is at stake. The Band draws Toledo Vader, their aged,²⁸⁷ trusted²⁸⁸ warrior, out from his teaching gig and sends him to the Council. Toledo had been General Counsel across three decades and had assisted the Band through difficult times. Most importantly, the Council agreed that he is a tougher negotiator than any of the individual council members. Wendy, still the Chair of the Council, instructs Toledo do anything he can to ensure the preservation of the Band. Toledo brings with him a small vial of water he took from the Fountain of Youth for strength in the coming months.

With uncertainty hanging over Indian tribes like never before, the Council for Unifying and Stabilizing Tribes Equally and Responsibly convenes. The debates rage fast and furious. Some smaller tribes with no land base try to cut deals with neighboring tribes with a substantial land base to effectuate mergers, no matter the historical problems associated with consolidated reservations.²⁸⁹ Many of the largest tribes try to band together to consolidate a voting bloc to preserve their interests. The alliances fade in and fade out, some based regionally, some based on economic strength, some based on similar languages and cultures, some based on the personality of a particular representative, some based on common treaty issues and so on.

Meanwhile, the Supreme Court accepts four petitions on the

287. Cf. *Cree v. Flores*, 157 F.3d 762, 773-74 (9th Cir. 1998) (upholding district court's deference to Yakama tribal elder over testimony of other experts) (citing *United States v. Skokomish Indian Tribe*, 764 F.2d 676, 673 (9th Cir. 1985)).

288. “[L]onger-term decision-making about the society’s welfare — essentially strategic management — lay in the hands of often more senior individuals who, because of their accumulated wisdom, were trusted to interpret and protect the collective interest over the long run.” Steven Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO?: STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 1, 33 (Stephen Cornell & Joseph P. Kalt eds., 1992).

289. See generally WARD CHURCHILL, *STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION* 135-72 (2002) [hereinafter CHURCHILL, *STRUGGLE FOR THE LAND*] (blaming the federal government and private interests for conflating a non-existent confrontation between Navajos and Hopis).

constitutionality of the Self-Reliance Act. The first petition the Court accepts involves the Fifth Amendment challenge by Indian property owners in and around Indian Reservations.²⁹⁰ The second petition regards a Tenth and Eleventh Amendment challenge on the basis of States' rights.²⁹¹ The third petition is from a treaty rights group also making Fifth Amendment²⁹² and Equal Protection claims²⁹³ and claims based on the trust doctrine.²⁹⁴ The fourth petition is from the National Congress of American Indians and other national Indian rights advocacy groups and claims that Congress does not have plenary power²⁹⁵ to enact the Self-Reliance Act, or as they dub it, the "New Termination Act." The Solicitor General's office, with a stubborn and hard-nosed Indian fighter in office and support from the White House, comes down in favor of the Act.²⁹⁶ Dozens of Justice Department attorneys dedicate the

290. Cf. *Swim v. Bergland*, 696 F.2d 712, 719 (9th Cir. 1983) (rejecting claim by non-Indians that they have compensable property rights to license to graze on public property); *Bigelow v. Michigan Dep't of Natural Res.*, 727 F. Supp. 346, 352 (W.D. Mich. 1989) (holding that Indian treaty fishing rights do not violate non-Indian commercial fishers property interests), *vacated*, 970 F.2d 154 (6th Cir. 1992).

291. Cf. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 798-99 (W.D. Wis. 2003) (rejecting argument that the Indian Gaming Regulatory Act required the State of Wisconsin to regulate Indian tribal gaming).

292. Cf. *Karuk Tribe of Indians v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000) (rejecting plaintiffs' argument that they had a compensable Fifth Amendment property interest in the Hoopa Valley Indian Reservation), *cert. denied sub nom. Karuk Tribe of Indians v. United States*, 532 U.S. 941 (2001).

293. Cf. *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1340 (D.C. Cir. 1998) (holding that ordinary rational basis scrutiny applies to Indian classifications under the equal protection clause).

294. *Compare Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) ("Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.") *with United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1138 n.1 (2003) (Thomas, J., dissenting) ("Rather, the general relationship between Indian tribes and [the United States] traditionally has been understood to be in the nature of a guardian-ward relationship. A guardianship is not a trust.") (quoting *Cherokee Nation of Okla. v. United States*, 21 Ct. Cl. 565, 573 (1990)).

295. See generally Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, *supra* note 68; Comment, *Federal Plenary Power Over Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 235 (1982) ("Indian Tribes traditionally have been unsuccessful in litigation involving the plenary power rule because their aboriginal and treaty rights generally are not recognized as limits upon this federal power.").

296. Cf. Brief of Amicus Curiae United States at 21 n.10, *Inyo County v. Paiute-Shoshone*

first months of the year to prepare to respond to the several petitions on behalf of the legislation.

Legal commentators argue about what the Court will do. Most argue that the Court will reject the Act out of hand — there are too many private property interests at stake. But a few argue that the Court may agree with Congress and view the Act as a proper solution to the “Indian Problem.”²⁹⁷ For these commentators,²⁹⁸ the Act has many advantages — elimination of checkerboard jurisdiction,²⁹⁹ improved certainty of the law in future disputes,³⁰⁰ and much simpler administration of Indian affairs.³⁰¹ As the

Indians of the Bishop Community of the Bishop Colony, 123 S. Ct. 1887 (2003) (No. 02-281) (“The Tribes’ sovereignty, while subordinate to the sovereignty of the United States, is not subordinate to that of the States.”)

297. “[T]he Indian problem is now becoming a bureaucratic one and just as the country seems determined to abandon these federal initiatives in so many areas.” RENNARD STRICKLAND, *TONTO’S REVENGE* 111 (1997).

298. Compare L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 813 (1996) (identifying a Supreme Court “doctrine of consent-based sovereignty”) and Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 611 (1996) (arguing that “a history of statutes singling out the relevant group also will not create a special relationship”) with Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1765 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (criticizing Gould and Benjamin for, inter alia, failing to recognize that “[t]he Constitution became possible only by virtue of colonization, and the document rests awkwardly on top of that history”).

299. See generally *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 479 (1976) (“Congress by its more modern legislation has evinced a clear intent to eschew any such ‘checkerboard’ approach within an existing Indian reservation, and our cases have in turn followed Congress’ lead in this area.”); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (“[A]n impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.”).

300. Cf. John F. Petoskey, *Doing Business with Michigan Indian Tribes*, 76 MICH. B.J. 440, 445-46 (1997) (“[Tribal tax exemption] litigation has produced considerable confusion, largely as a result of apparent inconsistencies in the decision applying this test. Tribes, states, and potential investors cannot predict the outcome of the test as applied to a particular fact situation.”); Andrew S. Montgomery, *Tribal Sovereignty and Congressional Dominion: Rights-of-Way for Gas Pipelines on Indian Reservations*, 38 STAN. L. REV. 195, 222 (1985) (describing Indian Law as a “muddle”).

301. Cf. COUNCIL ON INTERRACIAL BOOKS FOR CHILDREN, *CHRONICLES OF AMERICAN INDIAN PROTEST* 372 (1971) (“At the Fort Peck Reservation jail which has a leak from a gas line under it, the BIA, instead of repairing the leak, installing a red light in the cells which flashes on and off when the density of gas gets too high.”).

months pass, these commentators acquire more and more disciples, liberal and conservative, Indian and non-Indian. Public opinion sways dangerously against the tribes.³⁰²

Infighting pervades the council for the first few months — sometimes bitter and sometimes almost sadistically personal. Toledo takes his first sip from the vial he brought and begins work. Around 350 tribes sign a petition generated by Toledo and the Grand Traverse Band to eliminate politics by approving a weighted lottery system³⁰³ or, failing that, a true lottery to determine which tribes may go forward. Most of the 350 tribes are the tribes that were on the federal recognition list on the date of its first publication in 1979.³⁰⁴ The tribes that refuse to sign generally are the tribes with large gaming revenues, many of them dependent entirely on gaming for their existence. The "Lottery Tribes," as they become known, break away from the rest, known as the "Gaming Tribes," and form their own council. Over the course of the next month or so, the Lottery Tribes begin to talk about how to weight the lottery. They start with the concepts articulated in 25 C.F.R. Part 83, recently abolished by Congress, and move on from there. The sessions break down quickly, with the same group of tribes with large land bases ganging up on the smaller tribes. Toledo takes more sips from the vial but the water appears to be losing its effectiveness.

Outside of the two "councils," the Gaming Tribes engage in a scheme to politically break down key members of Congress and overturn the Self-Reliance Act. These tribes knew that they are few and the remainder of the tribes will likely vote them out of existence. The scheme fails miserably. Members of Congress stand fast against the tribes, rejecting out-of-hand all lunches, dinners, and donations to the respective parties. The vast majority of Congress states uniformly that they want the tribes to decide this themselves.

A week after he sips the last of his vial, Toledo announces that he is sickened by the spectacle before him and withdraws in disgust against the wishes of the Grand Traverse Band's Tribal Council. The Council approves of the "weighted lottery" strategy, even with its flaws. Toledo returns to work and writes a piece for a national magazine condemning Congress for its sadism in forcing the tribes to choose among themselves for those who will be

302. Derrick Bell, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL* 158 (1992).

303. Cf. Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovating Ideal*, 84 CAL. L. REV. 953, 1012 (1996) (proposing a "weighted lottery" for choosing candidates for admission into highly-selective educational institutions).

304. 44 Fed. Reg. 7235 (1979).

executed and for those who will survive. His article is based on the work of Primo Levi, who wrote of the Holocaust victims that “[o]nly the worst survived.”³⁰⁵ Toledo likens Congress’s Council for Unifying and Stabilizing Tribes Equally and Responsibly to a Nazi death camp and the camp at Wounded Knee just prior to the massacre. Toledo predicts that the body Congress has created and imposed upon the tribes amounts to nothing more than a “Final Solution” — a genocide that is finally complete.

The Supreme Court hears a special set of four oral arguments over two days in late summer — one for each petitioner — and promises a quick return on a single decision by mid-autumn.

Toledo’s prediction rings true and the Council for Unifying and Stabilizing Tribes Equally and Responsibly breaks down into further camps — including a substantial portion of tribes that refuse to participate — none of which can garner the necessary votes to reach a complete decision. By late October, the camps generate five separate lists of 100, all of which contain mutually exclusive tribes.

A last-ditch effort by a collection of Indian activists argues with the various councils that they should not agree to concede to the federal government’s conceptions of Indian tribal relationships.³⁰⁶ There are a few days in which the five councils reunite to form a single council and discuss this new proposal. It calls for the reintegration of the great tribes into one mass. All of the Sioux nations would reunite into the Great Sioux Nation. All of the Chippewa tribes would reunite. All of the Ottawa tribes and the Apache tribes and the Potawatomis and the Seminoles and the Cherokees would join together again. But then the confederated tribes speak up. What about the Cheyenne-Arapaho? What about the Confederated Salish & Kootenai Tribes and the Confederated Tribes of the Colville and Yakama reservations? Are they going to be stuck together forever? And what about the various Chippewa tribes that feud with each other? How can they be one? The attempt breaks down completely when an unnamed prankster circulates a flyer likening the proposal to Kurt Vonnegut’s “granfalloon,” “a proud and meaningless association of human beings.”³⁰⁷ The Council disintegrates and all hopes rest

305. PRIMO LEVI, *THE DROWNED AND THE SAVED* 82 (1986).

306. “[T]hose indigenous governments which *traditionally* held regulatory and enforcement power within Indian Country — not the “more modern” and otherwise non-traditional “tribal councils” imposed upon Indians by the federal government under the Indian Reorganization Act of 1934 — should have the right to resume their activities *now*.” Winona LaDuke, *Preface: Succeeding into Native North America: A Secessionist View*, in CHURCHILL, *STRUGGLE FOR THE LAND*, *supra* note 289, at 12.

307. KURT VONNEGUT, *WAMPETERS, FOMA & GRANFALLOONS (OPINIONS)* xv (Dell

with the Supreme Court, the very worst place for Indian tribes to rest their case.³⁰⁸

The Wednesday before Thanksgiving, only two weeks before Congress's deadline, the Court returns with its decision. Four Justices uphold the act on the basis of the plenary power of Congress in Indian affairs,³⁰⁹ the political question doctrine,³¹⁰ the equal protection clause, attempting to expressly overrule *Morton v. Mancari*,³¹¹ just as the Ninth Circuit almost held in *Williams v. Babbitt*,³¹² based on the strict scrutiny test articulated in *Adarand Constructors, Inc. v. Pena*,³¹³ and the elimination of the trust doctrine, emphasizing Justice Thomas's footnote in his *White Mountain Apache* dissent.³¹⁴ These Justices state broadly in a footnote that, had Congress seen fit to de-recognize all Indian tribes, it had the power to do so. Two Justices begin and end their analysis on the Fifth Amendment takings jurisprudence of *Hodel v. Irving*³¹⁵ and *Babbitt v. Youpee*,³¹⁶ striking down the Act as an unconstitutional taking of property rights without due process. The final three Justices are split three ways. One strikes down the Act on the basis that cases such as *Seminole Nation*³¹⁷ that articulated the trust relationship still have validity and that Indian tribes are a critical part of the shared heritage of all Americans. This Justice agrees with the Indian petitioners that the Self-Reliance Act is thinly veiled genocide, quoting several times from Toledo's article. Another Justice strikes down the Act on the narrow (but patently

Publishing 1989).

308. See Getches, *Beyond Indian Law*, *supra* note 42, at 281 (noting that Indian tribes fare worse in the Supreme Court than prisoners); David E. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1594 (1996) ("[A]s tribal assertions of jurisdiction became more extensive, the Court started to retreat from its modern-era affirmations of unextinguished tribal powers, altering the margins of the tribes' jurisdiction in order to preserve the values and interests of the larger society.").

309. See cases cited *supra* note 271.

310. See *Miami Nation of Indians of Indiana v. Babbitt*, 255 F.3d 342, 346-47 (7th Cir. 2001) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

311. 417 U.S. 535 (1974).

312. 115 F.3d 657 (9th Cir. 1997), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 523 U.S. 1117 (1998).

313. 515 U.S. 200 (1995).

314. *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1138 n.1 (2003) (Thomas, J., dissenting).

315. 481 U.S. 704 (1987).

316. 519 U.S. 234 (1997).

317. *Seminole Nation v. United States*, 316 U.S. 286 (1942).

specious) basis that the Act does not meet the rational basis test of *Weeks*³¹⁸ and *Morton v. Mancari*.³¹⁹

The deciding Justice also agrees to strike down the Self-Reliance Act, ending the year-long misery of the Indian tribes. This Justice does not join any other opinion, nor does this Justice write an opinion on the merits. Instead, this Justice quotes from Felix S. Cohen:

In the history of Western thought, theologians, missionaries, judges, and legislators for 400 years and more have consistently recognized the right of Indians to manage their own affairs. Nothing that we could say today in defense of Indian rights of self-government could be as eloquent as the words of Francisco de Vitoria in 1532 or of Pope Paul III in 1537 or of Bartholomew de las Casas in 1542 or of Chief Justice Marshall in 1832. For 400 years, men who have looked at the matter without the distortions of material prejudice or bureaucratic power have seen that the safety and freedom of all of us is inevitably tied up with the safety and freedom of the weakest and the tiniest of our minorities. This is not novel vision but ancient wisdom.³²⁰

IV. Back to Reality: Treaty-Making in the Federal Courthouse

In the treaty era, the federal government sometimes used alcohol to coerce or trick Indian leaders into signing truly dreadful treaties. Intentionally or not, federal courts generate the same results in the modern era, the so-called self-determination era, as the old Indian Agents. A hundred or a hundred fifty years ago, Indian tribes agreed to trade off a chunk of land here and a slice of civil jurisdiction there in exchange for protection and the preservation of their culture and resources³²¹ and the federal or state government took ten or twenty times more than they promised. Now, the federal courts take the rest.

318. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

319. 417 U.S. 535 (1974).

320. COHEN, *Indian Self-Government*, *supra* note 105, at 306.

321. See Robert A. Williams, Jr., "The People of the States Where They are Found are Often Their Deadliest Enemies": *The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 992 (1996) ("Indians regarded the duty to provide protection to a treaty partner, like all of the sacred bonds of a treaty relationship, as a continuing legal and moral obligation If anything, because a treaty connected the two sides together literally as relatives, a treaty partner who had grown stronger over time was under an increased obligation of protection toward its now weaker partner.").

Congress stopped authorizing treaties with Indian tribes in 1871,³²² but treaties are still being signed. Sometimes they're called land claim settlement acts³²³ or reaffirmation acts³²⁴ or restoration acts³²⁵ or self-determination acts³²⁶ or social service remedial acts.³²⁷ The tribes are even signing treaties with the states, such as tribal-state tax agreements³²⁸ and gaming compacts.³²⁹ But when Indians and their adversaries bring those agreements or statutes or even the old treaties to federal courts for review or to resolve conflicts over their meaning, federal courts have little problem rewriting those agreements.³³⁰ Strong arguments matter not. Tribes only barely survived five centuries of genocide. Nevertheless, some believe that tribes did *not* survive. To them, the mere existence of Indians and Indian tribes in the modern day is implausible. The current logic appears to be that strong arguments supporting tribal sovereignty or tribal jurisdiction are, by definition, therefore, implausible.

This article serves as the narrative testimonial of an attorney who is a

322. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71).

323. *See, e.g.*, 25 U.S.C. §§ 1300i to 1300i-11 (2000) (Hoopa-Yurok Settlement Act).

324. *See, e.g.*, 25 U.S.C. §§ 1300k to 1300k-7 (2000) (reaffirming the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians).

325. *See, e.g.*, 25 U.S.C. §§ 1300l to 1300l-7 (2000) (restoring the Auburn Indian Rancheria).

326. *See, e.g.*, 25 U.S.C. § 4101 (2000) (Native American Housing Assistance and Self-Determination Act); 25 U.S.C. §§ 450 to 458bbb-2 (2000) (Indian Self Determination and Education Assistance Act).

327. *See, e.g.*, 25 U.S.C. § 1901 (2000) (Indian Child Welfare Act).

328. *See, e.g.*, Tax Agreement Between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan (Dec. 20, 2002) *available at* www.michigan.gov/documents/LTBB-Agreement-58762-7.pdf (last visited Aug. 24, 2003).

329. *See, e.g.*, Compact Between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan (Aug. 20, 1993) (on file with author).

330. *See, e.g.*, Hagen v. Utah, 510 U.S. 399, 404 (1994) ("Congress can unilaterally alter reservation boundaries.") (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903)); *cf.* Grand Traverse Band of Ottawa & Chippewa Indians v. United States Attorney for the Western District of Mich., 198 F. Supp. 2d 920, 924 (W.D. Mich. 2002) (finding that the Secretary of the Interior "improperly" terminated the trust relationship between the United States and the Grand Traverse Band through a misreading of a treaty). *But cf.* United States v. Washington, 235 F.3d 438, 442 (9th Cir. 2000) ("Here, the State in effect urges us to conclude that the 1864 secretarial order diminished the rights of treaty tribes. We reject that crabbed interpretation. We doubt that treaty rights, ratified by the United States Congress, can be so readily altered by mere orders of the Secretary of the Interior."). In *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), a case where the federal government took Indian land in exchange for a money payment where the Tribe had been promised the land forever, Justice Hugo Black (a former Klansman) wrote, "Great nations, like great men, should keep their word." *Id.* at 142 (Black, J., dissenting).

member of a Michigan Indian tribe and who also serves as a staff attorney for that tribe, has also served as a staff attorney for three other Indian tribes in Arizona, California, and Washington, and is an appellate judge for yet another Michigan Indian tribe. The process of learning the law as a practitioner is radically different than reading the law as a law student. What we learn by studying Federal Indian Law in law school or reading law review articles is merely “the sound of 500 footnotes clapping.”³³¹ The more important question is how the parties achieved that bottom line. Knowing that *Olipphant* stands for the proposition that Indian tribes do not have criminal jurisdiction over non-Indians is one thing. “It is a logical enough theory, impregnable in the library.”³³² Knowing how the Suquamish Tribe reacted to and suffered from that proposition is entirely another thing.

According to the Supreme Court, history is against Indian tribes.³³³ More and more attorneys are entering the field of Federal Indian Law and must be prepared to respond to accusations of perpetrating revisionist history³³⁴ and unmitigated hostility from politicians,³³⁵ other commentators,³³⁶ and, of

331. Frank Pommersheim, *Lone Wolf v. Hitchcock: A Little Haiku Essay on a Missed Constitutional Moment*, 38 TULSA L. REV. 49, 49 n.a1 (2002).

332. John Barker Waite, Comment, *Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685 (1944) (quoted in Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1823 (2002)).

333. See generally Douglas B.L. Endreson, *A Review of the 1990s and a Look at What's Ahead*, 22 AM. INDIAN L. REV. 611, 622 (1998) (“[Two hundred years] of federal neglect must be overcome . . .”); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 482 (1994) (“It is a great deal more than merely unfortunate that the Vermont Supreme Court failed to accord its American Indian citizens the same level of protection for their property rights as it accords its non-Indian citizens. It is tragic that this disparity of treatment existed not only in the distant past but persists to this day.”).

334. See generally Joseph D. Matal, *A Revisionist History of Indian Country*, 14 ALASKA L. REV. 283 (1997).

335. See, e.g., *Implementation of the Indian Gaming Regulatory Act: Hearing Before the Select Comm. on Indian Affairs*, 102d Cong. 5 (1992) (statement of Sen. Slade Gorton, Member, Senate Comm. on Indian Affairs) (referring to the Indian Gaming Regulatory Act as an “unmitigated disaster”); D’arcy McNickle, *Indian and European: Indian-White Relations from Discovery to 1887*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 9 (1957) (“What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic . . . ?”) (quoting President Andrew Jackson).

336. One commentator, reviewing a bizarre revisionist history of Andrew Jackson, wrote: “To his dying day . . .,” Remini concludes, “Andrew Jackson genuinely believed that what he had accomplished rescued these people from inevitable annihilation. And although that sounds monstrous, and although no one in the modern world wishes to accept or believe it, that is exactly what he did. He saved the Five

course, opposing attorneys. Attorneys advocating on behalf of Indian tribes must react to and quash unrelenting anti-Indian sentiment. It is not an easy task and the case law is against Indian tribes.³³⁷ Nevertheless, given the history of Indians and Indian tribes in the United States, few other areas of substantive law offer more compelling reasons to practice in those areas. That same continuing history also must be explored and utilized to persuade judges and policymakers.

Tribal advocates must never forget how it is Indians and Indian tribes came to be in the position they are in now.³³⁸ It is easy for opponents to state again

Civilized Nations from probable extinction.”

Richard White, *How Andrew Jackson Saved the Cherokees*, 5 GREEN BAG 2D 443, 452 (2002) (reviewing and quoting from ROBERT V. REMINI, *ANDREW JACKSON AND HIS INDIAN WARS* (2001)). For examples of anti-Indian commentaries, see Editorial, *supra* note 46, at A14; Fred Dickey, *Indian Casinos Open Way for Black Reparations*, L.A. TIMES, Nov. 13, 2002, at B13 (arguing that revenue from Indian casinos should be treated as reparations for Indians and in the process disparaging the case for Black reparations); Editorial, *Big Chief Pataki*, WALL ST. J., Mar. 1, 2002, at A14 (utilizing stereotypes and prejudice against Native Americans to criticize Indian gaming in New York State).

337. “My own sense is that, in its federal Indian law jurisprudence, the Court has been doing nothing more than balancing the interests it perceives as salient in the cases. The interests that the Court seems to find most understandable are on the non-Indian side of the case.” Frickey, *Adjudication and Its Discontents*, *supra* note 298, at 1775. And when the attorney for the White Mountain Apache described Fort Apache as a fort “established to kill Apaches and imprison them,” Transcript of Oral Argument at 38, *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126 (2003) (No. 01-1-67), the Court corrected him — “I thought the fort was to protect white settlers.” *Id.*

338. As to the history of the Grand Traverse Band, George Bennett wrote:

Property speculators used fraud, intimidation, and corrupt federal officials to steal land rightfully belonging to Grand Traverse Band members in the late 19th and on into the mid-20th Centuries. The 1855 treaty marks the first manifestation of the federal government’s devastating Allotment Policy, which history states began in 1887 with the passage of the Dawes Act. Not so. The federal government used Ottawa and Chippewa bands in Michigan as guinea pigs for allotment over 30 years before Congressional policy shifted into full gear. The 1855 treaty provided for the allotment in severalty of Indian lands with only a ten-year trust period, fifteen years fewer than the 24 or 25-year trust periods contained in most allotment statutes enacted after 1887. The resulting devastation brought the Grand Traverse Band to the absolute brink of extinction, near the “certain death” that Aghosa and Eshquagonabe feared. They thought they had preserved half of Leelanau County — about five townships — for the 1855 reservation, but by 1979, just prior to federal recognition, there remained no land held in trust by the federal government and only a few acres remained in a trust held by Leelanau County.

Hearing on S. 2986, a Bill to Provide for and Approve the Settlement of Certain Land Claims of the Bay Mills Indian Community, Michigan Before the Senate Comm. on Indian Affairs,

and again the Indians get tax exemptions, they get unregulated gaming, they get this and they get that,³³⁹ but tribal advocates must never allow their adversaries to get away with that sort of muckraking. Tribal advocates must arm themselves with knowledge and perspective of tribal history and inform the court and policymakers exactly how each federal court decision affects Indian people to their very core.

The fable of the discovery of the Fountain of Youth by an Indian tribe is intended to present the array of modern challenges Indian tribes will face as they become more political powerful and infused with more resources.³⁴⁰ Surely, John Marshall would never have envisioned that some Indian tribes would survive off of treaty fishing or their timber resources or with the assistance of gaming facilities. A congressional act essentially terminating over eighty percent of currently recognized Indian tribes seems remote in the modern age where many tribes wield incredible political influence.³⁴¹ Sadly, federal and state courts have not followed the tribes into the modern age. Even while century-old Indian cases become more archaic, they maintain their unfortunate relevance to judges and their clerks.

Sometimes, tribal advocates must remind their opponents and the decision makers just how the Indians and tribes that remain came ever so close to the brink of extinction. Federal Indian Law, unfortunately, defines the public existence of Indians and Indian tribes and, though rough attempts surely have been made, it must not be allowed to define Indian culture and tradition. The cold, sometimes heartless, language of the statutes and cases must be enlivened by tribal attorneys and advocates. It is ever so easy to treat Federal Indian Law as another scholastic enterprise, perhaps one more complicated

107th Cong. 15-16 (2002) (Prepared Statement of George Bennett, Council Member, Grand Traverse Band of Ottawa and Chippewa Indians) (on file with author).

339. See, e.g., Jenny Price, Associated Press, Wisconsin GOP Drops Controversial Cartoon (Apr. 17, 2003) ("The state Republican Party dropped a cartoon from its Web site that claimed taxpayers were 'scalped' by the governor's new gaming compact with an Indian tribe after complaints it was racist and derogatory. The cartoon depicted a tomahawk flying through the air at a Wisconsin taxpayer. The voiceover said: 'As taxpayers, we got scalped.'").

340. See generally Frickey, *Doctrine, Context, Institutional Relationships, and Commentary*, *supra* note 95, at 12 n.37 ("One major piece that is missing in the law review writing is a narrative of success, which identifies the local triumphs that arise in the field and demonstrates how more achievements along these lines can occur within the confines of the current state of the law.").

341. See *Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, slip op. at 4, 2003 WL 733094 (Cal. Super. Ct. Feb. 27, 2003) ("[T]he Tribe's contributions to political campaigns and employment of legislative lobbyists [are] . . . quite extensive . . .").

than others and rich in depth and history. One must never treat Federal Indian Law as a toy, as a curiosity.³⁴² Each word written on paper and each word spoken must have meaning — in some cases, over 500 years of meaning.

Migwetch.

*A warrior should not say something fainthearted even casually. He should set his mind to this beforehand. Even in trifling matters the depths of one's heart can be seen.*³⁴³

342. "Federal Indian law does not deserve its image as a tiny backwater of law inhabited by impenetrably complex and dull issues." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993).

343. YAMAMOTO TSUNETOMO, HAGAKURE: THE BOOK OF THE SAMURAI 51 (William Scott Wilson trans., 1979).

