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### Law, Violence, and the Neurotic Structure of American Indian Law

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#### Citation Information

Sarah Krakoff, *Law, Violence, and the Neurotic Structure of American Indian Law*, 49 WAKE FOREST L. REV. 743 (2014), available at <https://scholar.law.colorado.edu/articles/88>.

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Citation: 49 Wake Forest L. Rev. 743 2014

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# LAW, VIOLENCE, AND THE NEUROTIC STRUCTURE OF AMERICAN INDIAN LAW

*Sarah Krakoff\**

## INTRODUCTION

In American Indian law, judges (and the bureaucratic machinery of which they are a part) have inflicted a largely one-sided story on native peoples. Legal interpretations that dispossessed this country's indigenous peoples of vast swaths of their territory,<sup>1</sup> folded them, without their consent, into the domestic legal order<sup>2</sup> and yet recurrently (if discontinuously) afforded them a measure of independence and freedom to govern themselves.<sup>3</sup> This has beyond a doubt taken place in fields "of pain and death."<sup>4</sup> Robert Cover's important rebuke to Ronald Dworkin, James Boyd White, and others that legal interpretation does not exist separate from its power to eliminate and destroy resonates deeply throughout the laws that govern U.S. relations with American Indian tribes.<sup>5</sup> Cover's essential point—that *legal* interpretation, unlike its purely literary cousins, must be in bed with force and violence<sup>6</sup>—maps well onto every aspect of this fraught body of legal doctrine.

Cover focused on the enmeshed nature, or as he put it: "bondedness" of legal interpretation.<sup>7</sup> Interpretation is not legal, according to Cover, unless it is situated within a web of social and

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1. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 284–85 (1955) (holding that the Fifth Amendment prohibition on taking land without just compensation did not apply to aboriginal lands not recognized by treaty); *Johnson v. M'Intosh*, 21 U.S. 543, 573–74 (1823) ("discovery" of continent by Europeans resulted in limitations to aboriginal title).

2. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (holding that Indian tribes are "domestic dependent nations" rather than foreign nations for the purpose of the Supreme Court's original jurisdiction).

3. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that Indian tribes have exclusive jurisdiction over claims against tribal members arising on tribal lands); *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (stating that tribes have inherent power to govern their members and their territory).

4. Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

5. *Id.* at 1601–02 n.2.

6. *Id.* at 1606–07.

7. See *id.* at 1617.

institutional machinery that can effectuate it.<sup>8</sup> The implication is that words alone cannot enact the violence that law entails. But sometimes the words of American Indian law themselves have constituted the violence. Legal interpretation has not just taken place in a field of pain and death; it has at times constructed the field. Cover drew short of concluding that violence is embedded in legal language, but others have not been shy to do so.<sup>9</sup> Christopher Tomlinson has argued that the texts and technologies of North American colonization “fueled and realized the colonizer’s violent ideology of differentiation and exclusion from the outset.”<sup>10</sup> Robert Williams Jr. has made similar observations about American Indian law’s historical origins, as well as what he concludes to be its inevitably poisoned status today.<sup>11</sup> Historically, the words of American Indian law alone cleaved tribal property,<sup>12</sup> diminished tribal sovereignty,<sup>13</sup> and erased U.S. acts of unilateral violence, coercion, and corruption.<sup>14</sup> (To say that words caused independent violence is not to say that other kinds of violence were not involved; but words often pulled their own weight, while other state and privately sponsored projects engaged in complementary acts of violence.) Today, tribes are boxed in by the terms set by this colonizing framework. They are forced to make arguments that

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8. *Id.*

9. See *id.* at 1613 (emphasizing legal interpretation’s tie to action). Scholars who have argued otherwise include Pierre Bourdieu and Carol Greenhouse. Richard Terdiman, *Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 809 (1987) (“The texts of the law are thus quintessentially texts which produce their own effects. Bourdieu devotes particular attention to this special linguistic and social power of the law ‘to do things with words.’”); see also Carol J. Greenhouse, *Reading Violence*, in LAW’S VIOLENCE 105, 111 (Austin Sarat & Thomas R. Kearns eds., 1995).

10. Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQUIRIES L. 451, 454 (2003).

11. See ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 161–63 (2005); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 325–27 (1990).

12. See *Johnson v. M’Intosh*, 21 U.S. 543, 586 (1823).

13. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that Indian tribes have no criminal jurisdiction over non-Indians); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

14. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (concluding that there is no judicial review of treaty violations, based in part on the government’s entitlement to a presumption of good faith, notwithstanding a factual record to the contrary). This aspect of *Lone Wolf* has since been repudiated. See *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (stating that the Court has not been deterred from “scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment”).

support their self-governing status in the language that aimed at their elimination.<sup>15</sup>

All of this is true. American Indian legal interpretation has created and taken place in a field of pain and death. And yet today there are 566 federally recognized tribes as well as a number of non-recognized and state-recognized tribes,<sup>16</sup> all of which perpetuate distinctly indigenous forms of law and culture.<sup>17</sup> In addition, there are swaths of the country that, for lack of a more precise term, still feel like Indian country. If you are not an American Indian, you will feel like an outsider, a stranger, or a tourist when you visit. You will feel, in other words, awkward and uncomfortable, like you are in a place that is not yours, because it isn't. Law's violence continues to operate as a structure in Indian country, but native agency and resilience, as well as ambivalence within the law itself (both inherently and in terms of fluctuating policy periods), have created spaces beyond the totalizing violence of the law. As postcolonial theorists have posited, these spaces do not erase the structures of violence, which continue to deform and construct the operative domain for indigenous expression and action.<sup>18</sup> But at the same time, the violence of legalized settler-colonialism has not succeeded in snuffing out or making impossible independent indigenous communities of meaning.<sup>19</sup>

What I want to explore in this Essay is whether there is something about the persistence of American Indian communities and their ability to make their own laws and meanings—their ability to be “jurisgenerative” in the way that only local communities can, according to Cover<sup>20</sup>—that nags at the federal judiciary, that taunts them to try repeatedly to cabin this ungovernable “other.” After more than two and a half centuries of legal (and legalized)

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15. See WILLIAMS, LIKE A LOADED WEAPON, *supra* note 11, at 326–28; see also Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 94 (2002).

16. *Frequently Asked Questions*, BUREAU OF INDIAN AFF., <http://bia.gov/FAQs/index.htm> (last visited June 15, 2014).

17. *Id.*

18. See generally Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889 (1991) (reviewing several books examining the law's role in colonial and postcolonial societies).

19. See *id.* at 917 (“Law often serves as the handmaiden for processes of domination, helping to create new systems of control and regulation. At the same time, it constrains these systems and provides arenas for resistance.”). American Indian tribes have also used international forums and international human rights law to further the development of their own local laws and, to some degree, to subvert the jurispathic course of U.S. American Indian law. See Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 208–11 (2014).

20. See Cover, *supra* note 4, at 1602 n.2; see also Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 18 (1983).

violence, American Indian tribes still persist, and they do so in a way that protects an ineffable and unconquerable indigeneity.<sup>21</sup> I wonder whether the disproportionate number of federal judicial decisions (and in particular Supreme Court decisions) devoted to defining, diminishing, cabining, and parsing tribes and their rights and powers is as much a reflection of law's impotence (the limits of its violence) to erase tribes as it is of its power to destroy. Does judicial anxiety about these limits drive the Court to try, over and over, to extend its interpretive stance into communities decidedly unlikely to act in concert with the Court's commands? This Essay will probe that question.

### I. AN EXCESS OF AMERICAN INDIAN LAW?

Since 1959, when the Supreme Court decided *Williams v. Lee*,<sup>22</sup> which many consider to be the beginning of the "modern era" in American Indian law,<sup>23</sup> the Court has decided more than 150 cases involving the rights of American tribes or tribal members.<sup>24</sup> In the early years of the modern era, the cases were a mixed bag for tribes. Several landmark cases revived long-standing doctrines supporting tribes' inherent authority to govern their territory and their members, despite several decades of mixed outcomes in the lower courts.<sup>25</sup> Other cases furthered contemporary policies of tribal self-determination by allowing older statutes, whose aims of tribal elimination had been repudiated, to fall into desuetude.<sup>26</sup> Some decisions, on the other hand, limited tribal powers or allowed a degree of state regulation to intrude into Indian country.<sup>27</sup>

21. For more on this notion, see generally Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (arguing that tribal sovereignty, for all of its batterings and flaws, provides a protective shell around the evolution of distinctly tribal norms and culture); see also Carpenter & Riley, *supra* note 19, at 222.

22. 358 U.S. 217 (1959).

23. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1574 n.3 (1996).

24. *Supreme Court*, TURTLE TALK (Aug. 22, 2014), <http://turtletalk.wordpress.com/resources/supreme-court-indian-law-cases/>.

25. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978); *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Williams*, 358 U.S. at 221–22.

26. See *Bryan v. Itasca Cnty.*, 426 U.S. 373, 393 (1976); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968).

27. See *Montana v. United States*, 450 U.S. 544, 545 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161–62 (1980); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 198 n.8 (1978). For scholarship assessing the cases during this period and coming to somewhat different conclusions about the uniformity of the decisions, see Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1231–40 (1990); David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1573–74 (1996).

As the decades wore on, however, the record of wins and losses shifted dramatically. Since the mid-1980s, American Indian tribes or tribal members (or clients representing tribal interests) have had a win/loss ratio of less than 1:4.<sup>28</sup> In 2002, David Getches testified before Congress that the tribes' record before the Supreme Court was the worst of any subset of litigants:

I looked at possibilities ranging from immigration to criminal cases, and the worst record I found for any litigants other than Indians was convicted criminals seeking reversals of their convictions. I found that convicted criminals won 34 percent of the time while Indian tribes have won only 23 percent of the time. Nobody does worse in this Supreme Court than Indian tribes.<sup>29</sup>

The situation has not improved under the Roberts Court, and advocates for tribes and tribal interests have adopted a simple, if not foolproof, strategy: if at all possible, keep cases out of the Supreme Court.<sup>30</sup> This is not easy to do, however, because non-Indian litigants seek review of cases that they lose in the lower courts,<sup>31</sup> and the Supreme Court seems to have a significant appetite for cases involving Indian law issues.<sup>32</sup> Almost as striking as tribes' win/loss ratio is the disproportionate number of Indian law cases that the Court takes. In the last eleven years, the Court has decided twelve such cases.<sup>33</sup> When one considers that American

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28. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001).

29. *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 6 (2002) [hereinafter *Hearings*] (statement of David Getches, Professor, University of Colorado at Boulder, School of Law).

30. The Native American Rights Fund has organized a Supreme Court working group, whose focus is to avoid the Court if possible, and if not, to create, through an organized briefing and amicus strategy, multiple options for the Court to issue narrow rulings that will do the least damage to Indian law principles. *Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, <http://sct.narf.org/index.html> (last visited July 12, 2014).

31. Krakoff, *supra* note 21, at 1156.

32. *Hearings*, *supra* note 29, at 4–5.

33. See *List of United States Supreme Court Cases Involving Indian Tribes*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_United\\_States\\_Supreme\\_Court\\_cases\\_involving\\_Indian\\_tribes](http://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases_involving_Indian_tribes) (last visited July 12, 2014) (listing *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2255 (2013); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012); *United States v. Navajo Nation*, 556 U.S. 287 (2009); *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008); *Wagnon v. Prairie Band Potawatomi Indians*, 546 U.S. 95 (2005); *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *United States v. Lara*, 541 U.S. 193 (2004); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003); *United States v. Navajo Nation*, 437 U.S. 488 (2003); *United States v.*

Indians make up less than two percent of the population, and tribes, though numerous, represent small slices of the economy,<sup>34</sup> it is all the more puzzling that these cases take up such a high proportion of the Court's limited docket. One possible explanation is that American Indian tribes and tribal members, though representing a small fraction of the population and economy, are, by virtue of their unique history and status in the United States, much more likely to engage in activities that instigate or require federal litigation. That is certainly true, but in addition to being a pretty boring story, it does not account for the high number of Supreme Court cases, even if it helps to explain the greater percentage of federal litigation. With that brief brush-off, we will leave the realm of alternative explanations and swerve into the one that relates to Cover's thesis about law and violence. What if there is too much American Indian law because a great deal of what it purports to affect remains always beyond its reach?

## II. TRIBAL COURT JURISDICTION

The Supreme Court has been particularly active in the area of policing the subject matter jurisdiction of tribal courts. Tribes, as governments with attributes of sovereignty that were never extinguished by the United States, do not derive their power from the U.S. Constitution and are not subject to the constraints in the Bill of Rights.<sup>35</sup> Further, there is no mechanism, constitutional or statutory, for either parallel or appellate jurisdiction over the substance of tribal court decisions.<sup>36</sup> In this respect, tribal courts

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White Mountain Apache Tribe, 537 U.S. 465 (2003)); see also Matthew L. M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 944–45 (2009) (analyzing tribal success in the Supreme Court through 2006).

34. U.S. DEP'T OF COMMERCE: AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH 1 (2012), available at [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff22.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html).

35. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–59 (1978) (stating that tribes are pre- and extra-constitutional governments and Congress must be clear when abrogating aspects of tribal sovereignty); *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (holding that tribes are separate sovereigns and therefore the double jeopardy clause does not bar federal prosecution for the same crime as previous tribal prosecution); *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (tribes' sovereignty does not derive from the Constitution, and therefore the Bill of Rights does not apply to tribal prosecution). Tribes are, however, constrained by the Indian Civil Rights Act, a federal law passed in 1968 that contains many of the provisions in the Bill of Rights. Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301–1303 (2012). For more on the ICRA, its history, and its applications, see *THE INDIAN CIVIL RIGHTS ACT AT FORTY* (Kristen A. Carpenter et al. eds., 2012).

36. Eugene R. Fidell, *An American Indian Supreme Court*, 2 AM. INDIAN L.J. 1, 3 (2013).



are less subordinate to the federal judiciary than are state courts.<sup>37</sup> Nonetheless, as a result of a string of cases that began with the seemingly innocuous conclusion that the question of a tribal court's jurisdiction was itself a federal question, and therefore reviewable by the federal courts,<sup>38</sup> the Supreme Court has narrowed the types of cases that can be brought in tribal courts and has subjected the inquiry to wooden and inflexible categorical rules that are out of step with similar jurisdictional standards in the non-Indian law context.<sup>39</sup>

A detailed review of the leading case will highlight the curious nature of the Court's outsized attention to this area of law. In *Strate v. A-1 Contractors*,<sup>40</sup> Mrs. Gisela Fredericks, the non-Indian wife of a deceased member of the Fort Berthold Tribe, was involved in a car accident with a non-Indian who worked for a construction company employed by the Tribe.<sup>41</sup> Mrs. Fredericks sued the construction company in tribal court.<sup>42</sup> For Mrs. Fredericks, the Fort Berthold Reservation was home.<sup>43</sup> She had lived there since she emigrated from Germany to the United States in order to marry her husband, whom she met overseas when he was serving in World War II.<sup>44</sup> Mrs. Fredericks and her husband had five children who were tribal members, all of whom were raised on the Reservation.<sup>45</sup> Lyle Stockert, the non-Indian who collided with Mrs. Fredericks, was driving on a dead-end road on the Reservation that terminated at a reservoir.<sup>46</sup> While the road was a state highway, it was not a throughway, and virtually the only reason to be on it would be to access tribal buildings or the homes of tribal members.<sup>47</sup> *A-1 Contractors*, the construction company, filed an action in federal court to challenge the tribal court's subject matter jurisdiction.<sup>48</sup>

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37. While federal courts lack subject matter jurisdiction over many state law matters, state decisions on federal issues are subject to review by the United States Supreme Court. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331 (2012). Moreover, federal diversity jurisdiction allows federal courts to hear many state law matters. See U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (2012).

38. See *Nat'l Farmers Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985); see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

39. For a review and analysis of recent tribal civil jurisdiction cases, see generally Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

40. 520 U.S. 438 (1997).

41. *Id.* at 438.

42. *Id.*

43. *Hearings*, *supra* note 29, at 8–9.

44. *Id.*

45. *Id.*; see also Brief for Petitioners at 28, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872), 191996 WL 656356, at \*18.

46. Transcript of Oral Argument at 10–11, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (No. 95-1872).

47. See *id.*

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

The Eighth Circuit held that the tribal court lacked jurisdiction over the case, and the Supreme Court granted certiorari and affirmed.<sup>49</sup>

The Court, in a unanimous decision authored by Justice Ginsburg, held that a tribe's judicial jurisdiction over nonmembers for claims arising on non-tribal lands within the tribe's reservation (in this case, a ribbon of state highway surrounded by tribal land) was limited to two narrow circumstances: when the nonmember enters into a consensual relationship with the tribe or a tribal member that gives rise to the claim, or when the nonmember's actions have "direct effect[s]" on the political integrity, economic security, or health or welfare of the tribe.<sup>50</sup>

*Strate* was a pivotal case in American Indian law. The Supreme Court had already decided, as a matter of its own common law of tribal sovereignty, that tribes lacked criminal jurisdiction over nonmembers.<sup>51</sup> But the cases addressing the reach of a tribe's civil jurisdiction pointed in two directions, one tending toward a presumption in favor of tribal jurisdiction and the other against it.<sup>52</sup> *Strate*, in many respects, had "good" facts to present the question: the case was local in nature, Mrs. Fredericks and her tribal member children (who were also parties to the case initially) lived on the Reservation, the accident occurred within the Reservation's boundaries, and the defendants were present on the Reservation to do work for the Tribe.<sup>53</sup> Had the Court approached the question in a manner similar to the due process inquiry applied in personal jurisdiction cases in state or federal courts, the non-Indian defendants would unquestionably have been subject to suit in the tribal court.<sup>54</sup> Instead of viewing the case through that lens, however, the Court stated that tribes presumptively lack jurisdiction over nonmembers, and that the facts must fit into one of the two exceptions mentioned above to overcome that presumption.<sup>55</sup> Since *Strate*, the Court has decided two other tribal court civil jurisdiction cases, neither of which changed the Court's basic

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49. *Id.* at 444-45.

50. *Id.* at 456-57 (citing *Montana v. United States*, 450 U.S. 544, 565-66 (1981)).

51. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978).

52. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (in favor); *Nat'l Farmers Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985) (in favor); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (in favor). *But see Montana*, 450 U.S. at 545 (against).

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

54. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-73 (1985); *World Wide Volkswagen v. Woodson*, 444 U.S. 286, 299 (1980); *Hanson v. Denckla*, 357 U.S. 235, 249-52 (1958) (discussing due process approach to personal jurisdiction in federal and state courts).

55. See *Strate*, 520 U.S. at 456.

approach, but both of which held that the tribal court lacked jurisdiction in discrete circumstances.<sup>56</sup>

There is little question that the Court's civil jurisdiction cases have had significant impacts on some tribes.<sup>57</sup> Some non-Indian litigants flee to federal court shortly after they are sued in tribal court, whether or not there are sound bases for the tribal court to keep the case.<sup>58</sup> The procedural wrangling causes delay and uncertainty for the tribal judicial system as well as the parties. In addition, non-Indians who want to do business in Indian country are more likely to resist forum selection or consent-to-jurisdiction clauses when entering into lease agreements with tribal parties, even for arrangements that arise on and involve tribal resources or property.<sup>59</sup> Less concretely, but with more profound implications for tribal self-governance, tribes cannot uniformly impose their standards for due care, health, and safety throughout their territory (the norms of tort law) due to the Court's piecemeal land status approach to jurisdictional rules for Indian country.<sup>60</sup>

Despite these serious effects, there is a paradoxical sense in which the Court matters very little to tribes. Every day in Indian country, non-Indians do business with tribes and tribal members and enter into relationships, commercial and otherwise, that link their fates; tribes therefore regularly subject non-Indians to the influence of tribal norms and laws.<sup>61</sup> In Indian country (as in the rest of the country), very few interactions and arrangements, legal or not, make their way to the courts.<sup>62</sup> To the extent that tribes

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56. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008); *Nevada v. Hicks*, 533 U.S. 353, 367–68 (2001).

57. See Krakoff, *supra* note 21, at 1148–49.

58. See *id.* at 1159.

59. See *id.* at 1161.

60. See *Strate*, 520 U.S. at 454 & n.9 (concluding that a ribbon of state highway running through a reservation is not “Indian country”); *Nord v. Kelly*, 520 F.3d 848, 857 (8th Cir. 2008) (holding that there was no tribal court jurisdiction over an action arising on state right-of-way running through a reservation); *Boxx v. Long Warrior*, 265 F.3d 771, 774–78 (9th Cir. 2001) (holding that there was no tribal court jurisdiction over action arising on non-tribal road running through a reservation); see also Krakoff, *supra* note 39, at 1236–43 (providing a table of federal tribal civil jurisdiction cases from 1997–2009).

61. See, e.g., Gabriel S. Galanda, *Getting Commercial in Indian Country*, BUS. L. TODAY, (July-Aug. 2003), <http://www.americanbar.org/content/dam/aba/publications/blt/2003/07/full-issue-200307.authcheckdam.pdf> (last visited June 21, 2014) (“Both the cause and effect of the dramatic rise in Indian economic development is the increased interaction of tribes and nontribal parties who seek business, employment, or recreation on Indian reservations.”).

62. For example, in 2000, 180,462 Navajo members lived on tribal lands. ARIZ. RURAL POLICY INST. ET AL, DEMOGRAPHIC ANALYSIS OF THE NAVAJO NATION 8 (2010), available at <http://azcia.gov/Documents/Links/DemoProfiles/Navajo%20Nation.pdf>. However, Navajo courts heard only 46,876 civil cases in the

enact their sovereignty on the ground (through cultural, economic, educational, and other institutions), they impose their norms and laws on non-Indians regardless of the jurisdictional battles that occur at the margins.<sup>63</sup> The Court has no power to reach into Indian country and disrupt the spread of tribal law that occurs in this way. Tribes, therefore, continue to be jurisgenerative, notwithstanding the Court's interpretive violence.

Leading scholars have articulated several sound explanations for the Court's recurring attempts to curb tribes' jurisdiction,<sup>64</sup> but Cover's thesis about law's violence provides one more. For interpretation to become legal, according to Cover, the law's words must be integrated with "role" and "deed."<sup>65</sup> Judges require the concerted actions of other legal actors to forge, agree with, enforce, and carry out their interpretations.<sup>66</sup> In American Indian law, those networks may stop at Indian country's borders. Some tribes have openly questioned whether the Court's doctrine applies to them when it strays from their own tribal law interpretations.<sup>67</sup> More subtly, to many people who live, work, and create meaning in Indian country, the Court's words may warrant nothing more than a shrug. They said what? What difference does that make to us? The limits of law's violence may explain, at least in part, the judiciary's recurring attempts to impose it.

### III. TRIBAL MEMBERSHIP

The Court has also exhibited anxiety about tribes' extraconstitutional status in the context of tribal membership. Last year, the Court decided *Adoptive Couple v. Baby Girl*,<sup>68</sup> a case involving the custody of a young child who spent the first two years of her life with white adoptive parents and the next two years with her biological father, an enrolled member of the Cherokee Nation of Oklahoma.<sup>69</sup> The fate of "Baby Veronica," as she became known in

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year 2001, including cases concerning non-Navajo parties. BUREAU OF JUSTICE STATISTICS, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY 57 (2002).

63. See Carpenter & Riley, *supra* note 19, at 219–20 (discussing the tribal courts' application of tribal common law to create norms that reflect the tribe's values and customs and respond to the tribe's needs).

64. See Philip P. Frickey, *A Common Law for Our Age of Colonialism*, 109 YALE L.J. 1, 57–81 (1999) (canvassing the possible explanations for the Court's anti-Indian jurisprudence); Getches, *supra* note 28, at 268 (theorizing that the Court uses Indian law cases to further other agendas, including states' rights and a color-blind approach to discrimination).

65. See Cover, *supra* note 4, at 1611–12.

66. See *id.*

67. See Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1618 & nn.104–07 (2004) (citing and discussing tribal court cases).

68. 133 S. Ct. 2552 (2013).

69. *Id.* at 2558–59.

the press,<sup>70</sup> captivated national attention. The case proved to be a good vehicle to challenge aspects of the Indian Child Welfare Act ("ICWA"),<sup>71</sup> a federal law that imposes distinct procedural and substantive requirements on the adoption and foster care placement of American Indian children, because the ICWA's application to Baby Veronica resulted in the tearful scene of her being taken away from her adoptive parents at the age of two by a father whom she had never met.<sup>72</sup> In an opinion that was clearly swayed by the adoptive parents' narrative of the story, the Court held that the ICWA did not apply to Baby Veronica's adoption.<sup>73</sup> This set in motion the second wrenching change of custody in the girl's short life, which was carried out with dispatch when the adoptive parents took her, at the age of four, from her Cherokee father back to a home that she likely barely recalled.<sup>74</sup>

*Adoptive Couple* seems like an object lesson in legal interpretation as violence. Twice, families were ripped apart as a result of judicial utterances. The second time, it was permanent. The Court's interpretation of a handful of words in the ICWA tore Baby Veronica from her Cherokee father, and every legal actor appealed to since has upheld that decision.<sup>75</sup> Moreover, the Court's opinion reflected more than just its rather strained approach to statutory interpretation.<sup>76</sup> Throughout the majority opinion, Justice Alito made reference to Baby Veronica's percentage of Cherokee blood.<sup>77</sup> At the outset of the decision, for example, the Court described her as "*classified* as an Indian because she is 1.2% (3/256) Cherokee."<sup>78</sup> Baby Veronica was "*classified*" as Indian not because of the percentage of her Cherokee blood, but because she was eligible for membership in the Cherokee Nation according to its citizenship rules, which are based on lineal descent from historic

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70. Lyle Denniston, "*Baby Veronica*" Case Back at the Court, SCOTUSBLOG (July 26, 2013, 4:11 PM), <http://www.scotusblog.com/2013/07/baby-veronica-case-back-at-the-court/>.

71. 25 U.S.C. §§ 1901–1963 (2012).

72. *Capobianco Adoption: Baby Veronica Case Brings Sadness, Joy*, EPOCHTIMES (Aug. 8, 2013, 7:01 PM), <http://www.theepochtimes.com/n3/236798-capobianco-adoption-baby-veronica-case-brings-sadness-joy/>.

73. *Adoptive Couple*, 133 S. Ct. at 2555.

74. Eyder Peralta, *Okla. Court Says 'Baby Veronica' Should Go to Adoptive Parents*, NPR (Sept. 23, 2013, 9:01 PM), <http://www.npr.org/blogs/thetwo-way/2013/09/23/225540776/okla-court-says-baby-veronica-should-go-to-adoptive-parents>.

75. See *Adoptive Couple v. Baby Girl*, 746 S.E.2d 51, 54 (2013) (directing entry of order finalizing adoption after remand from the U.S. Supreme Court).

76. See *Adoptive Couple*, 133 S. Ct. at 2572 (Sotomayor, J., dissenting) (criticizing and dissecting the majority's approach to interpreting the statute's terms).

77. *Id.* at 2556, 2559, 2565.

78. *Id.* at 2556 (emphasis added).

rolls.<sup>79</sup> The Court's mention of her percentage or fraction of Cherokee blood was irrelevant. (To sharpen the point, there are people with much greater degrees of Cherokee blood who are not eligible for membership because they cannot trace their ancestry to the historic rolls;<sup>80</sup> in short, no one is eligible for Cherokee membership *because of blood quantum*.) The Court's unsubtle implication, however, was that Baby Veronica was not really Indian enough to warrant the ICWA's coverage. The Court did not decide the case on that basis but instead interpreted the ICWA not to apply to biological fathers who never had physical custody of their children.<sup>81</sup> Nonetheless, toward the end of the opinion, Justice Alito mentioned that the Court's decision allowed it to avoid "equal protection concerns" raised by the adoptive parents.<sup>82</sup> Those concerns, presumably, were that classifying Veronica as Cherokee would have impermissibly checked her off by race for the purpose of determining her adoptive status and therefore violated the Equal Protection Clause. As I have discussed elsewhere, the Court would have had to second-guess the Cherokee Nation's membership criteria, which it had no power to do, and overturn settled precedent in order to decide that the ICWA violates the Equal Protection Clause on these facts.<sup>83</sup> It is not surprising that the Court chose not to go there. At the same time, it is a discomfoting sign for advocates of tribal self-determination that the Court employed tired and racialized stereotypes of Indians (that the only real Indians are "full-bloods") as a shadow principle of statutory interpretation.

As in the tribal court jurisdiction cases, *Adoptive Couple* has serious ramifications. First and foremost, Baby Veronica's Cherokee family and the Cherokee Nation are forever affected for the worse.<sup>84</sup> Second, lawyers for non-Indian adoptive parents, guardians ad litem, and some state courts will take this as a cue to ignore the ICWA whenever possible.<sup>85</sup> Third, American Indian birth fathers

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79. *Citizenship*, CHEROKEE NATION, <http://www.cherokee.org/Services/TribalCitizenship/Citizenship.aspx> (last visited June 18, 2014).

80. Brief for the Cherokee Nation at 38, *Adoptive Couple*, 133 S. Ct. 2552 (No. 12-399).

81. See *Adoptive Couple*, 133 S. Ct. at 2562.

82. *Id.* at 2565.

83. See Sarah Krakoff, *Constitutional Concern, Membership, and Race*, FLA. INT'L L. REV. (forthcoming 2014).

84. See Brian Daffron, *Q&A with Cherokee Counsel for Baby Veronica Case: The Supreme Court Decision Will Impact Every Tribe in the Country*, INDIAN COUNTRY (Apr. 11, 2013), <http://indiancountrytodaymedianetwork.com/2013/04/11/qa-chokeee-counsel-baby-veronica-case-supreme-court-decision-will-impact-every-tribe>.

85. See Matthew L. M. Fletcher & Kathryn E. Fort, *Indian Children and Their Guardians Ad Litem*, 93 B.U. L. REV. ANNEX 59, 59 (2013) (analyzing data of Guardian Ad Litem ("GAL") actions in ICWA cases and concluding that "many GALs throughout the nation subvert the national policy embodied by the ICWA by advocating against the implementation of the statute in case after

who are unable to obtain physical custody of their children before adoption will be deprived of the protections of the ICWA.<sup>86</sup>

Nonetheless, there are also ways to see the Court's opinion as a reflection of its limited powers in Indian country. The Court has no power over tribal membership rules.<sup>87</sup> Tribes' power to set their own citizenship criteria is one of a small number of areas wholly outside of federal judicial review, other than for a small number of procedural issues.<sup>88</sup> Many tribes consider the source of this power to be located in the history and structure of their relationship with the U.S. government and reinforced by the growing body of international law on the rights of indigenous peoples.<sup>89</sup> Similar to the tribal civil jurisdiction context, tribes do not necessarily feel constrained or defined by U.S. domestic law on the subject.<sup>90</sup> In addition, despite centuries of attempts to eliminate Indian tribes as separate political sovereigns and absorb their members into the general population, tribes have survived and their members have been steadily increasing.<sup>91</sup> Tribal people and their fidelity to an ever-evolving indigenous identity are the strongest rebuke to the Court's legal violence in *Adoptive Couple*, even if they cannot reverse the precise effects of the case. The Court's "equal protection concerns" in *Adoptive Couple* reflect its ahistorical approach to questions of race and equality generally—a trend that resonates with historic policies aimed at eliminating tribes as separate peoples.<sup>92</sup> But in the end the Court will always be a bystander to tribal strategies for survival, for reasons grounded in the Court's institutional limits as well as in the unstoppable agency of tribes themselves.

### CONCLUSION

Robert Cover's conclusions about law's violence were ambivalent. On the one hand, interpretations were not legal unless

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case"), available at <http://www.bu.edu/bulawreview/files/2013/11/FLETCHER-AND-FORT.pdf>.

86. See *In re J.S.*, 321 P.3d 103, 112 (Mont. 2014) (stating that the ICWA does not apply to the termination of parental rights and foster care placement where an Indian father never obtained physical custody); see also *In re Elise W.*, No. 3718-DEP, 2014 WL 98674, at \*9 (questioning whether the ICWA applies to a case where an Indian father never had physical custody).

87. *Montana v. United States*, 450 U.S. 544, 564 (1981).

88. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71–72 (1978) (explaining that the very small number of exceptions involve federal administrative review of tribal constitutional amendments, if the tribal constitution provides for such review).

89. See *Carpenter & Riley*, *supra* note 19, at 173.

90. See *id.* at 207.

91. See, e.g., Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1103 (2012).

92. See *id.* at 1131.

they were drawn in blood, sometimes figuratively but often literally.<sup>93</sup> On the other, Cover seemed to believe that law, or at least judicial actors within the legal system, could use their power to withhold law's violence.<sup>94</sup> Those acts, Cover implied, were no less legal for tempering its violence.<sup>95</sup> American Indian law raises the possibility of another limit to law's violence. Legal interpretations, and their power to destroy and kill, are limited by their reach. This is always true, of course. But in Indian country, the limits are not just a function of the law's jurisdictional boundaries. Even where domestic law purports to affect Indian country by its own terms, tribes and their members remain beyond its reach for reasons grounded in history, identity, and resistance. Tribes are extra-constitutional not just because a handful of federal court cases acknowledge that they are. Tribal people believe and act in a way that perpetuates that status, and this is true in ways that are not susceptible to analytic argument or empirical proof. It is, in some sense, a matter of faith. But millions of people and hundreds of tribes, federally acknowledged and otherwise, are a testament to its stubborn, irreducible reality. Tribes have and will continue to persist outside of the influence of American Indian law, and that may well mean we will always have a great deal of law to interpret. American Indian law's neurotic structure is not necessarily benign. Its potential, and often its effects, are violent. But tribes fight back through multiple mechanisms, one of which is the power to move always just beyond American Indian law itself.

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93. Cover, *supra* note 4, at 1607.

94. *See id.* at 1620-22 & n.48.

95. *See id.* Indeed, Cover is somewhat internally contradictory on this point. *See Tomlins, supra* note 10, at 460-62.