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# UNDERSTANDING THE VALUE OF JUDICIAL DIVERSITY THROUGH THE NATIVE AMERICAN LENS

Paige E. Hoster\*

*Although Indians constitute less than 1% of the national population, the lives of Indians are impacted by law more pervasively than are the lives of most other Americans.<sup>1</sup>*

## I. Introduction

Diversity is the United States' defining characteristic. As the "melting pot,"<sup>2</sup> this country continues to pursue diversity through policies like affirmative action.<sup>3</sup> Universities seek a diverse student body to attain a "robust exchange of ideas."<sup>4</sup> Corporations hire and retain a diverse workforce to increase their client bases and to stimulate innovation through diversity of thought.<sup>5</sup> But America's preoccupation with diversity does not

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\* Second-year student, University of Oklahoma College of Law. I would like to thank my family (Kirk, Daria, and Erin) for their constant, loving support of my academic endeavors. I would also like to thank Dana Good for allowing me to test the ideas of this comment with him and for guiding the inspiration of my topic. Finally, I have deep appreciation for the editorial input of both Professor Mary Sue Backus and Crystal D. Masterson. These women have helped me to become a better writer and were integral to the success of this comment.

1. 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, 296 (2001).

2. See generally ISRAEL ZANGWILL, *FROM THE GHETTO TO THE MELTING POT: ISRAEL ZANGWILL'S JEWISH PLAYS* (Edna Nahshon ed., 2005).

3. See generally Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006) (suggesting that the Affirmative Action conversation be re-framed with scientific findings of implicit bias in mind).

4. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). The Supreme Court recognizes that student body diversity is a compelling state interest. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In practical terms, this means that the Court considers racial variety an essential component to a student's higher education.

5. See Leslie Kwoh, *Firms Hail New Chiefs (of Diversity)*, WALL ST. J., Jan. 5, 2012, <http://online.wsj.com/article/SB10001424052970203899504577129261732884578.html?KEYWORDS=Diverse+CEO>. In fact, minorities are responsible for launching over half of the technology groups in Silicon Valley, for creating more than a quarter of the nation's global patents, and for comprising nearly a quarter of our science and engineering sector. Richard Florida, *The Melting Pot That Isn't: Why America Needs Better Immigration*, ATLANTIC

mean that there is complete agreement regarding its value or how to achieve it.<sup>6</sup> This comment focuses on the value of diversity within the judicial context. It asserts that judicial diversity (and the lack thereof) matters, especially when Native American law is involved.

This comment examines the significance of judicial diversity within the Native American context. Native Americans have been, and currently are, severely underrepresented on the federal bench. Moreover, when federal courts make decisions regarding tribal interests, the outcomes historically favor the non-tribal position.<sup>7</sup> Federal decision making's dramatic impact on Indian law, coupled with diversity's symbolic and empirically supported benefits,<sup>8</sup> suggest that Native American federal judges are necessary to yield fair outcomes regarding tribal issues. But Congress inexplicably thwarted the most recent effort to appoint a qualified Native American to the federal bench, inspiring the topic of this comment.

Part II of this comment discusses the two-fold role of judicial diversity. Diversity on a judicial panel not only influences societal perceptions of justice and fairness, but also influences substantive decision making, with a marked correlation between diversity on a given judicial panel and the respective case outcomes. Research suggests that this correlation stems from minority judges' ability to empathize with minority interests.

Drawing on related observations about empathy, Part III summarizes the aspects of Indian law and federal Indian relations that make judicial empathy even more compelling in the tribal context. It first explores the history of federal Indian law, noting how the differences between tribal and non-tribal interests are complex, multi-faceted, and affect various aspects of tribal life. It then examines Professor Matthew Fletcher's study of tribal-interest certiorari petitions. Fletcher's study finds that the United States Supreme Court is not only less likely to grant certiorari when a case implicates tribal interests, but the Court is also less likely to find in favor of tribal interests when certiorari is indeed granted.<sup>9</sup>

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(Apr. 19, 2011, 9:30 AM ET), <http://www.theatlantic.com/business/archive/2011/04/the-melting-pot-that-isnt-why-america-needs-better-immigration/72048/>.

6. In fact, many critics of diversity believe that forcing diversity is arbitrary, uncalled for, and even unconstitutional. See *Grutter*, 539 U.S. at 316-17 (discussing petitioner's argument that race-conscious admission programs violate Equal Protection rights).

7. Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 935 (2009) [hereinafter Fletcher, *Factbound and Splitless*].

8. See *infra* Part II.

9. See generally Fletcher, *Factbound and Splitless*, *supra* note 7.

Collectively, Parts II and III establish that judicial diversity and the empathy that accompanies it have tangible value, that tribal interests differ markedly and meaningfully from those of their non-tribal counterparts, and that the Supreme Court historically disregards and disfavors tribal interests. With these points in mind, Part IV first reviews the recent attempt to nominate a Native American to the federal judiciary and then considers the various benefits that could flow from a successful nomination. As this comment will demonstrate, Native American presence on the federal judiciary would increase public confidence in the justice system, enhance substantive decision making, and place tribal litigants in front of judges familiar with their unique circumstances.

This comment concludes in Part V.

## *II. The Role of Diversity in the Courts*

Diversity on the judicial bench has long been valued. Scholars argue that diversity helps to achieve “judicial impartiality,”<sup>10</sup> “dispel traditional stereotypes,”<sup>11</sup> “enhance[] the quality of judicial decision making,”<sup>12</sup> promote a sense of fairness to the public,<sup>13</sup> “enrich[] development of the law,”<sup>14</sup> and sharpen the deliberation process.<sup>15</sup> All of these benefits can be distilled into two key ideas: (1) judicial diversity enhances public confidence in the judicial system; and (2) judicial diversity enhances substantive decision making.

### *A. Social Perception*

Scholars recognize judicial diversity’s impact on public perception. Ciara Torres-Spelliscy asserts that judicial diversity adds a sense of “legitimacy” in the minds of the public because both the constituents in court and the public at large are becoming increasingly diverse.<sup>16</sup> She

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10. Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 156 (2004) (quoting Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 449-58 (2000)).

11. *Id.* (quoting Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CAL. L. REV. 1109, 1117-20 (2003)) (internal quotation marks omitted).

12. *Id.* (internal quotation marks omitted).

13. *Id.*

14. Ciara Torres-Spelliscy, *A Bench That Looks Like America: Diversity Among Appointed State Court Judges*, JUDGES’ J., Summer 2009, at 12, 14.

15. Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity on the Federal Bench*, 83 IND. L.J. 1423, 1424 (2008).

16. Torres-Spelliscy, *supra* note 14, at 13.

references Professor Jeffrey Jackson's discussion of the need for the bench to reflect a cross section of the community:

Judges are not the exclusive province of any one section of society. Rather they must provide justice for all. In order for a judicial selection to be considered fair and impartial, it must be seen as representative of the community. It is important for a selection system insofar as it is possible, to advance methods that provide for a judicial bench that reflects the diversity of its qualified applicants.<sup>17</sup>

The closer the bench resembles the American people, the more the public trusts the bench is free from bias and prejudice.<sup>18</sup> When the bench's racial composition does not resemble that of the greater American society, "both public support of the courts and perceptions of fairness on the part of racial and ethnic groups are affected."<sup>19</sup>

In addition to discussing the impact of judicial diversity generally, Professor Barbara Graham also exposes the need for the judicial bench to "move beyond tokenism" into actual representation.<sup>20</sup> In the context of the judiciary, tokenism is the practice of making a perfunctory or symbolic effort to increase diversity on the bench.<sup>21</sup> Tokenism results in limited recruitment of people from underrepresented groups to give the appearance of equality, while in actuality minorities remain underrepresented. Having actual, representative diversity means obtaining a proportion of minority judges commensurate to that minority's population within the community. Tokenism, though a marginal improvement from outright absence, falls far short of representative diversity.

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17. *Id.* (quoting Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 *FORDHAM URB. L.J.* 125, 145 (2007)).

18. Professor Barbara Graham also recognizes the general public's increased confidence when the representation on courts is diverse. Graham, *supra* note 10, at 156. She maintains that "[a] diverse judiciary signals the public acknowledgement of historically excluded communities and sends an invaluable message of inclusion." *Id.* (quoting Chen, *supra* note 11, at 1117-20) (internal quotation marks omitted). Similarly, Professor Sylvia Lazos Vargas argues that "as a democratic institution, [the judiciary] should be derived from and representative of 'we the people.'" Vargas, *supra* note 15, at 1427.

19. Graham, *supra* note 10, at 156.

20. *Id.*

21. See *Tokenism*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com> (last visited June 6, 2012).

A recent study of the factors that influence selection of judicial candidates highlighted tokenism as a barrier to incorporating minorities. The study showed that selections of minority judges to courts are much less likely to occur when the given minority is already represented, even when that representation is marginal.<sup>22</sup> For example, within the specific context of gender diversity, “women are much more likely to be selected to otherwise all-male courts than to courts with some gender diversity,” even if that diversity consists of only one female.<sup>23</sup>

Tokenism amounts to an incomplete step in the right direction. The value of having at least one minority on a federal panel is significant and should not be discounted. Even minimal diversity can alter outcomes in certain cases.<sup>24</sup> Tokenism is harmful, however, when it prevails over long-term goals of full diversity. When diversity ends at tokenism, the institution will not reflect a cross section of the community and will therefore fail to achieve true representative diversity.

The general public may not be consciously aware of the limiting effects that tokenism has on establishing actual representative diversity — or even what tokenism is and how to recognize it. But the public will recognize that the federal bench does not resemble their communities, and this awareness will hurt the public’s perception of the federal bench.

Because scholars suggest that public confidence is diminished whenever the judicial bench’s demographic composition does not mirror the public at large,<sup>25</sup> appearing before an entirely white, Judeo-Christian, male bench likely engenders discomfort for parties who are female or a minority. Even without considering the notable substantive benefits that flow from minority representation on a federal panel, the symbolic benefits of judicial diversity are similarly significant and worthy of pursuit.

### *B. Enhanced Judicial Decision Making*

Not only does judicial diversity give the general public a greater sense of confidence in the judicial process, but it also enhances the judicial process itself.<sup>26</sup> The presence of individuals with varied backgrounds improves judicial decision making because “member[s] of [] previously excluded group[s] can bring insights to the Court that the rest of its members lack.”<sup>27</sup>

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22. See Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, 123 (2005).

23. *Id.*

24. See *infra* Part II.B.

25. Graham, *supra* note 10, at 156.

26. Torres-Spelliscy, *supra* note 14, at 13.

27. *Id.* (citation omitted).

These unique insights are a product of varied social experiences that stem from cultural diversity. A judge's cumulative social experiences affect the way the judge construes testimony and comprehends the full weight of the court's ruling.<sup>28</sup> Essentially, a judge's cultural outlook supplies a human factor to the decision-making process, as it is inevitable that one's own life experiences affect one's view on the facts of a case or aspects of the law.<sup>29</sup>

Many scholars believe that factors such as race, ethnicity, culture, and life experiences affect the way people make decisions in their daily lives.<sup>30</sup> Such a view stands in stark contrast to legal formalism, the dominant strand of philosophy regarding decision making in the judicial context. Legal formalism posits that judges are capable of remaining color blind, applying the law in a neutral and dispassionate manner.<sup>31</sup> In fact, "the judicial code of ethics dictates impartiality," as judges must "independently derive 'what the law is'" from the Constitution and fundamental precedents alone.<sup>32</sup> The code of ethics presumes that no matter the facts, judges can apply the law in a purely mechanical way.

On the other hand, advocates of legal realism argue that who people are affects how they judge.<sup>33</sup> More scholars are beginning to recognize that

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28. Graham, *supra* note 10, at 156.

29. *Id.*

30. See, e.g., Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010).

31. In his book, *The Federal Courts*, Richard Posner discusses the legal tradition known as "formalism." RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 307 (2d prtg. 1996). Formalism "is the idea that the judge has no will, makes no value choices, but is just a kind of calculating machine." *Id.* The proponents of formalism see a difference between the role of the "passive transmitter[]" of the law and the role of "creators" of the law. *Id.* at 308. Under a formalistic approach, the judge uses "logical deduction" and receives "principles of the law from his predecessors, from custom, from judges of higher courts . . . and from the Constitution . . ." *Id.*

32. Vargas, *supra* note 15, at 1426.

33. Legal realists have vastly different views regarding jurisprudence when compared to formalists. One prominent realist, Justice Oliver Wendell Holmes, Jr., wrote the famous line, "The life of the law has not been logic: it has been experience." *Id.* at 305 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881)); see also *id.* (quoting HOLMES, *supra*, at 1) ("The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."). Several modern authors agree with Holmes, arguing that formalism is actually "a myth" supported by a false notion that decision making must and can be done objectively. See generally Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L.

judges are human and that a judge's ability to make purely mechanical decisions might be "largely theoretical."<sup>34</sup> There is nonetheless a current lack of consensus, and the battle between legal formalism and realism may affect whether a judicial candidate is nominated based on his or her minority status. This comment, in its assertion that minority status both affects and enhances substantive judicial decision making, reflects a legal realist perspective.

Empathy is central to understanding legal realism in the context of the judicial process.<sup>35</sup> Empathy is not the equivalent of sympathy. While sympathy is "an emotional response stemming from another's emotional state or condition that is not identical to the other's emotion, but consists of feelings of sorrow and concern for another," empathy is "an affective state that stems from the apprehension of another's emotional state or condition and that is congruent with it."<sup>36</sup> In relative terms, sympathy is to empathy what knowledge is to appreciation. Empathy involves a deep appreciation of another's circumstance through shared human experience.

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REV. 1117 (2009). Professor Barbara Graham quotes Harry Stumpf's discussion on the "great paradox of the judicial role":

Courts and other things legal continue to be important symbols of government, under girding the wish-fulfilling notions we have of impartial decision-making. At the same time, one can hardly deny that courts are political, for in construing statutes, executive orders, or constitutions, they inevitably weigh competing arguments, interests, and philosophies in arriving at decisions that cannot be neutral.

Graham, *supra* note 10, at 160 (quoting HARRY P. STUMPF, *AMERICAN JUDICIAL POLITICS* 187 (2d ed. 1998)).

34. Chew & Kelley, *supra* note 33, at 1131 (citation omitted).

35. Prior to his presidential election, Barack Obama stated that he would nominate judges who have the "empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old." Ilya Somin & Erwin Chemerinsky, *Is There a Conflict Between Empathy and Good Judging?*, L.A. TIMES (May 28, 2009), <http://www.latimes.com/news/opinion/opinionla/la-oe-chemerinsky-somin28-2009may28,0,4921073.story>. This statement led to an argument about whether empathy is a legitimate basis for judicial rulings. While the formalist argues that empathy should not factor into judicial decision making because it clouds logical deduction with emotion-based considerations, the realist counters that judging has never been a calculated process, and that it has always been a highly discretionary and human-based activity. Moreover, interpreting legal rules that were implemented as a result of social norms requires the use of a judge's values, not "any objective methodology." *Id.*

36. Nancy Eisenberg & Paul Miller, *Empathy, Sympathy, and Altruism: Empirical and Conceptual Links*, in *EMPATHY AND ITS DEVELOPMENT* 292 (Nancy Eisenberg & Janet Strayer eds., 1987).



Scholars maintain that empathy promotes better judicial outcomes.<sup>37</sup> Judicial diversity places judges on the bench who, through empathy, can readily appreciate the experiences of a broader spectrum of litigants. This appreciation allows judges to understand individual actions and the motivations behind them, making the judges better able to assess whether such actions are legally or equitably justified. For example, a judge whose parents emigrated from a politically volatile region shortly before her birth will undoubtedly be better able to appreciate the experiences of those seeking asylum from persecution. Through empathy, this judge will be more capable of assessing the fairness and justice that accompany each potential outcome.<sup>38</sup>

Just as there is empirical evidence suggesting that judicial diversity enhances the public's perception of the justice system, so too are there empirical studies examining the impacts of diversity and empathy in judicial decision making. Researchers are beginning to test legal formalists' claim that judges can remain neutral, dispassionate, and color blind in decision making. To examine this claim, scholars are studying how judges make decisions and whether minority status has any impact on judicial outcomes.

In his article on cultural cognition, Professor Paul Secunda discusses the impact of culture on judicial functions.<sup>39</sup> He comments that culture and ideology generally are not active motivators when making judicial decisions, but that a judge "cannot help but be influenced by his or her cultural background."<sup>40</sup> Although a judge's values, ideologies, and cultural biases are not conscious motivators, Secunda asserts that they nevertheless contribute greatly to how a judge arrives at a legal conclusion.<sup>41</sup>

Secunda defines "cultural cognition" as the process by which culture influences the subconscious thought process.<sup>42</sup> Whether noticed, life experiences and cultural outlooks have an effect on the decision-making process. Secunda draws a distinction between using culture "as a source of normative judgment or evaluation" and as "an unconscious influence of perceptions of fact."<sup>43</sup> For example, Secunda references a study examining

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37. See *infra* notes 38-69 and accompanying text.

38. While some skeptics may counter with the argument that empathy engenders bias, that same line of reasoning would suggest an overall judicial bias in favor of white, upper-class males.

39. See generally Secunda, *supra* note 30.

40. *Id.* at 108.

41. *Id.*

42. *Id.* at 109.

43. *Id.*

the Supreme Court's decision in a police brutality case.<sup>44</sup> The study found that ideology was the dividing factor between justices supporting the majority and dissenting opinions.<sup>45</sup> To be specific, the justices siding with the dissent shared a common ideology of "egalitarianism and social solidarity," and would most likely be classified as liberal.<sup>46</sup> Alternatively, those supporting the majority opinion shared an ideology of individualism and "hierarchic worldviews," approving of "highly punitive responses to law-breaking."<sup>47</sup> Essentially, the study found that a judge's ideological slant determines how that judge responds to a given set of facts within the parameters of law.

Secunda's article recognizes the subconscious (and likely unintended) effects that one's cultural background can have on the decision-making process. Although judicial ideology and cultural cognition are difficult to measure with precision, the theory Secunda proposes is logical: because cultural cognition is linked to a person's perceptions of "socially beneficial conduct,"<sup>48</sup> life experience influences what that person perceives to be socially beneficial. And more directly apropos to the scope of this comment, judges often decide what qualifies as socially beneficial conduct. Those decisions will undoubtedly incorporate life experience, even if subconsciously. A judge's life experience includes not only the communities in which the judge was raised and the judge's socio-economic status, but also race, ethnicity, gender, and customs. From Secunda's work, one can draw the reasonable inference that diversity has a subconscious effect on judicial decision making.

In a similar study, Professor Pat Chew examines gender diversity's effect on judicial decision making.<sup>49</sup> Chew's article recognizes the symbolic value of having increased female presence on the bench.<sup>50</sup> But her article goes beyond diversity's symbolic value to evaluate the actual, substantive effects that increased female presence in the judiciary has on judicial outcomes.<sup>51</sup> Chew's study "offers a macro-level review of the empirical research done on judges' gender in U.S. federal courts and how a judge's

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44. *Id.* at 118-21.

45. *Id.* at 120-21.

46. *Id.* at 120.

47. *Id.* (quoting Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 863 (2009)).

48. *Id.* at 112.

49. See generally Pat K. Chew, *Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER RACE & JUST. 359 (2011).

50. *Id.* at 360.

51. *Id.*

gender affects the outcomes in employment discrimination cases” and in sexual harassment cases.<sup>52</sup> Although focused on particular areas of law, Chew’s study tests Secunda’s theory that culture, including gender, influences judicial outcomes.

While balancing other factors such as court venue, time period, legal subject area, and the judge’s other characteristics, Chew notes a correlation between a judge’s gender and legal outcomes.<sup>53</sup> For example, in sexual discrimination cases, female judges are more likely than male judges to rule in favor of the plaintiffs.<sup>54</sup> The same holds true for sexual harassment cases.<sup>55</sup> And not only are female judges more likely to rule in favor of plaintiffs in sexual harassment cases than their male counterparts, but male judges are more likely to “rule in favor of the plaintiff if at least one female judge sat on the appellate panel.”<sup>56</sup> In sexual discrimination cases, when a judicial panel is all male, it is extremely unlikely that the plaintiff will prevail.<sup>57</sup> On the other hand, when at least one female judge sits on the panel, the likelihood of a plaintiff victory may increase by as much as 85%.<sup>58</sup> These findings suggest that gender may influence both the decision-making process of the female judge, as well as the deliberation process of the male judge, when at least one female joins them on the same panel. The study therefore supports the conclusion that in certain types of

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52. *Id.* at 361.

53. *See id.* at 362-66.

54. *Id.* at 366 (citing Christina L. Boyd, Lee Epstein, & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging 2* (2009) (unpublished paper) (on file with the *Journal of Gender, Race & Justice*)).

55. *Id.* (citing Nancy E. Crowe, *The Effects of Judges’ Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996* (1999) (unpublished doctoral dissertation, University of Chicago) (on file with the *Journal of Gender, Race & Justice*); Tajuana Massie et al., *The Impact of Gender and Race in the Decisions of Judges on the United States Courts of Appeals* (Apr. 25-28, 2002) (unpublished manuscript) (on file with the *Journal of Gender, Race & Justice*); Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 *YALE L.J.* 1759 (2005)). Another study, however, found that gender made no difference in judicial decision making. *Id.* (citing Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 *LAW & HUM. BEHAV.* 69 (2003)). Because of the reliable research methodologies it employed, Chew’s article focuses on a particular sexual discrimination study that found a correlation between female judges and plaintiff victories. *Id.* at 367.

56. *Id.* at 367.

57. *Id.*

58. *Id.*

cases, having a mixed-gender panel of judges has a measurable effect on the outcome for litigants.<sup>59</sup>

In the context of these findings, it is particularly noteworthy that both sexual discrimination and sexual harassment cases are historically and notoriously female-centric, supporting the idea that empathy goes hand-in-hand with judicial diversity and its substantive impact on decision making.

But the effects of female judicial presence are not limited to cases that concern characteristically female interests.<sup>60</sup> Similar studies have been conducted within the broader context of employment discrimination.<sup>61</sup> One study, analyzing “400 federal appellate court employment discrimination cases from 1998-1999,” found that a panel including at least one female judge voted pro-plaintiff more often than all-male panels.<sup>62</sup> The findings suggest that the presence of both genders affects the deliberation process, as varying perspectives are exchanged.<sup>63</sup> The simple presence of one minority judge’s viewpoint shifts the ruling of the entire panel.

Overall, Chew concludes that the presence of mixed gender on the federal bench has the greatest impact within the sexual discrimination field and a slightly lessened impact within the field of employment discrimination.<sup>64</sup> This conclusion supports Secunda’s theory on cultural cognition. Because the fact patterns within sexual harassment and discrimination cases often involve gender-based issues, female judges will perceive the facts in a way that comports with their cultural (or gender) outlook and empathize accordingly. The cultural cognition theory supports Chew’s empirical finding that female judges hold in favor of sexual-harassment and discrimination plaintiffs more often than male judges, as well as her finding that female judges can induce a mixed-gender panel into pro-plaintiff findings in these types of cases.

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59. *See id.*

60. Although employment discrimination cases may often concern gender-based discrimination, they also often relate to race, ethnicity, religion, or some other minority-based factor. It is therefore fair to state that while sexual harassment and sexual discrimination cases characteristically concern gender-based claims, employment discrimination cases only sometimes center on gender.

61. While some studies found similar correlations between gender and pro-plaintiff outcomes, other studies found no correlation between these factors. *Id.* at 367-68.

62. *Id.* at 368 (citing Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 301 (2004)).

63. *Id.* at 369.

64. *Id.* at 371.

Along with studies examining the impact of judges' gender in gender-based cases, several studies also examine the impact of a judge's race in race-based cases. Chew's article canvasses a twenty-year study investigating the outcomes of racial harassment cases by comparing the rulings of African American judges to Caucasian judges.<sup>65</sup> The study found that where African American judges preside over cases involving racial discrimination, the "plaintiffs had the highest success rate."<sup>66</sup> But when the judges are all Caucasian, plaintiffs have lower success rates than that of the baseline average outcome for these types of cases, which is already low.<sup>67</sup>

The study also examines the specific nature of racial harassment claims. When the case concerns explicit forms of racial harassment, such as the use of racial slurs, plaintiffs are even more successful in front of African American judges, having a "60% success rate."<sup>68</sup> When racial slur cases come before Caucasian judges, however, the plaintiffs' success rate drops to "only 27.6%."<sup>69</sup> The study concludes that the judge's race does have an impact on the outcomes of racial harassment cases generally, but the impact is amplified when the racial quality of the harassment complained of is particularly egregious.<sup>70</sup>

Like the gender-based studies, this race-based study supports Secunda's cultural cognition theory. When cases involve heightened degrees of race-based considerations, the race of the presiding judge has an effect on the outcome. And the more blatant the claim's racial quality, the starker the correlation. The egregiousness of the claim's racial nature widens the success-rate gap for litigants depending on whether the presiding judge is African American or Caucasian. These specific findings support the general notion that when the judge's minority status (race or gender) matches the minority-centered issue (racial or sexual harassment), the substantive outcome is affected.

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65. See generally Chew & Kelley, *supra* note 33. The authors of the study admit that they cannot predict judicial outcomes based on the judge's race. *Id.* at 1117. They do conclude, however, that African American and Caucasian judges "perceive racial harassment" cases differently. *Id.* The cases discussed in this study predominantly feature Caucasian judges presiding over cases involving African American plaintiffs complaining of racial employment discrimination by their Caucasian superiors or fellow employees. *Id.* at 1135-36.

66. *Id.* at 1141.

67. *Id.*

68. *Id.* at 1150.

69. *Id.*

70. *Id.* at 1156.

Collectively, the aforementioned studies establish a meaningful correlation between minority status and judicial decision making. Judicial empathy impacts not only the minority judge, but also the perspective of fellow judges. Bringing an empathetic perspective to the courtroom both impacts and enhances substantive decision making.

### *III. The Unique Circumstance of Native American Litigants*

Nowhere is empathy more needed — or more lacking — than in decisions involving Native American parties. Native Americans, and the cultural empathy they could bring, are conspicuously lacking on both the state and federal bench. Though Native Americans comprise 1% of the general population, they make up only 0.1% of state court judges. There are currently no Native American federal judges.<sup>71</sup> In fact, in all of United States history, only two Native Americans have served on the federal judiciary.<sup>72</sup> The two Native Americans to ever hold federal judgeships did so only at the district court level in the state of Oklahoma.<sup>73</sup> This means that a Native American has never served as a judge at the appellate level, nor on the United States Supreme Court, and that forty-nine states have had no Native American representation in the federal judiciary.

But the greater problem lies not in the numbers themselves; it lies in what those numbers mean on a practical level. As highlighted in the previous section, judicial diversity enhances substantive decision making by placing litigants before empathetic judges. While such findings suggest that judges generally have difficulty appreciating the motivations of litigants with characteristics that differ from their own, the divide would undoubtedly be far greater for Native American parties. The reason for this greater divide stems primarily from the unique legal relationship between the federal government and the Indian tribes and flows to other aspects of tribal life. Although a full discussion of the myriad ways in which Native American legal issues differ from those of their non-Native counterparts is outside the scope of this comment, a high-level overview is necessary to appreciate the context-specific need for increased Native American judicial diversity and the attendant empathy it creates. After reviewing the complex

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71. *Id.* at 1122-24, 1126.

72. Andrew Cohen, *The Mikkanen Nomination and the White Man*, ATLANTIC (Feb. 6, 2011, 12:13 PM), <http://www.theatlantic.com/national/archive/2011/02/the-mikkanen-nomination-and-the-white-man/70752/> [hereinafter Cohen, *Mikkanen Nomination*]. This underrepresentation is not limited to the judiciary. In 2002, only “0.2% of lawyers were Native American.” Chew & Kelley, *supra* note 33, at 1127.

73. Cohen, *Mikkanen Nomination*, *supra* note 72.

web of legal rules that are so prohibitively convoluted as to impede judicial sympathy (let alone empathy), this section then examines Professor Matthew Fletcher's findings that the certiorari process inherently disfavors tribal interests.

### *A. A Primer in Indian Law and Tribal Life*

#### *1. The Beginnings*

Federal Indian law finds its roots in three seminal cases known as the Marshall Trilogy, which establish the foundational underpinnings of federal Indian relations.<sup>74</sup> The first of these cases, *Johnson v. M'Intosh*,<sup>75</sup> established that discovery<sup>76</sup> gave the federal government title to all lands within its borders, "subject only to the Indian right of occupancy."<sup>77</sup> In other words, although the Indians have the right to occupy tribal lands, they enjoy this right at the sufferance of the federal government, which holds the underlying fee title.<sup>78</sup>

The second case in the Marshall Trilogy is *Cherokee Nation v. Georgia*.<sup>79</sup> In this case, Chief Justice John Marshall was called upon to define the status of tribes within the greater political structure. Relying on the express distinction in Article I, Section 8, Clause 3 of the Constitution that distinguishes "foreign nations" and the "several states" from "Indian tribes," Marshall held that tribes were neither foreign states nor "one of the several states composing the union."<sup>80</sup> This finding forced Marshall to

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74. Jen Camden & Kathryn E. Fort, "Channeling Thought": *The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 86 (2008-2009).

75. 21 U.S. (8 Wheat.) 543 (1823).

76. The discovery doctrine "provided that newly arrived Europeans immediately and automatically acquired legally recognized property rights in native lands and also gained governmental, political, and commercial rights over the inhabitants without the knowledge or the consent of the Indigenous peoples." ROBERT J. MILLER ET AL., *DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES* 2 (2010).

77. *Johnson*, 21 U.S. (8 Wheat.) at 585.

78. Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 602-03 (2000) ("The 1823 decision of *Johnson v. M'Intosh* constructed the current foundation for federal Indian land policy by swiftly sweeping Indian land 'ownership' into the oddly-hybrid form it retains today: tribal use at federal sufferance. *Johnson* involved claims of colonial speculators to enormous land parcels through purchase from two tribes. Denying their claim in favor of purchasers from the federal government, *Johnson* held that, via the British Crown, discovery conferred fee title, and, thus, transferability, upon the United States, subject only to tribal rights of use and occupancy which were extinguishable by federal conquest or purchase.").

79. 30 U.S. (5 Pet.) 1 (1831).

80. *Id.* at 18.

fashion “a new form of sovereign — neither domestic state nor foreign nation — but instead a domestic dependent nation, whose relationship to the United States was akin to that of a ward to its guardian.”<sup>81</sup> Marshall’s characterization of tribes as “domestic dependent nations”<sup>82</sup> spawned the trust doctrine, which forms the basis of federal Indian relations.<sup>83</sup> Under the trust doctrine, Congress “acquired not only power over affairs ‘with’ but also ‘of’ Indians.”<sup>84</sup> As guardians of the Indian wards, the federal government is charged with protecting the Indians and their rights.<sup>85</sup>

The final case in the Marshall Trilogy, *Worcester v. Georgia*,<sup>86</sup> was decided just one year after *Cherokee Nation*. In *Worcester*, Marshall held that “Congress had ‘plenary’ power over Indian affairs.”<sup>87</sup> He wrote that “[t]he whole intercourse between the United States and [the tribes], is, by our constitution and laws, vested in the government of the United States.”<sup>88</sup> Because of Congress’s plenary power over Indian affairs, Marshall held

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81. Taiawagi Helton, *Introduction to the IACHR Report on Indigenous and Tribal Peoples’ Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 257, 257-58 n.4 (2010-2011).

82. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

83. George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction*, 27 AM. INDIAN L. REV. 399, 402-03 (2002-2003) (“Marshall wrote that the Indian Nations may be more correctly ‘denominated as domestic dependent nations,’ with their relationship to the United States resembling ‘that of a ward to his guardian.’ These words, now the touchstone of Federal Indian law, established the trust relationship between the federal government and the Indian tribes that remains to this day.”).

84. Helton, *supra* note 81, at 257 n.3.

85. Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 424 (1999-2000) (“Critical to an understanding of the context of tribal sovereignty and the impetus behind the various past federal Indian policies is an awareness of the nature of the relationship of Native Americans to the federal government. The relationship is known as a trust relationship, with Congress as trustee, Native Americans as the beneficiaries, and Native Americans’ real property and natural resources as the corpus, whereby the federal government owes a fiduciary duty or obligation to Native Americans. One commentator defined the trusteeship as ‘the legal and moral duty of the United States to assist Indians in the protection of their property and rights.’”) (quoting GILBERT L. HALL, *THE FEDERAL-INDIAN TRUST RELATIONSHIP* 3 (1979)).

86. 31 U.S. (6 Pet.) 515 (1832).

87. 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, 33-34 (2002-2003).

88. *Worcester*, 31 U.S. (6 Pet.) at 561.



that state laws cannot reach the tribal lands that fall within their boundaries, nor the Indians that occupy them.<sup>89</sup>

Collectively, these three cases establish that Indians hold property differently from other American citizens, that their relationship with the federal government differs from that of other American citizens, and that their relationship with states differs from that of other American citizens. With such marked distinctions in the most basic aspects of their existence, one can appreciate how it is both more difficult and more important for judges charged with determining tribal litigants' rights and responsibilities to understand the circumstances of Native Americans.

## 2. *Shifting Federal Policies*

Adding to the already labyrinthine "basics" of Indian law, federal policy regarding Indians has constantly shifted over the centuries,<sup>90</sup> leading to era-dependent goals and rules. The first policy era was one of isolation and separation, lasting "[t]hroughout the colonial era, and continuing after the ratification of the United States Constitution."<sup>91</sup> This era of "peacekeeping through separation"<sup>92</sup> ended with the federal government's proposed "solution to the Indian problem."<sup>93</sup> Rather than accommodate the Indians' unique customs within the broader social order, the government adopted an assimilationist policy: "to introduce among the Indians the customs and pursuits of civilized life and gradually to absorb them into the mass of our citizens."<sup>94</sup> The General Allotment Act<sup>95</sup> of 1887 provided the means

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89. *Id.* ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.").

90. Darla J. Mondou, *Our Land Is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 AM. INDIAN L. REV. 259, 262-63 (1997).

91. John D. Barton & Candace M. Barton, *Jurisdiction of Ute Reservation Lands*, 26 AM. INDIAN L. REV. 133, 133 (2001-2002).

92. Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM INDIAN L. REV. 575, 580 (2010-2011).

93. Padraic I. McCoy, *The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land into Trust through 25 C.F.R. Part 15*, 27 AM. INDIAN L. REV. 421, 447 (2002-2003) (internal quotation marks omitted).

94. *Id.* (internal quotation marks omitted).

95. Act of Feb. 8, 1887, ch. 119, 24 Stat. 288 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (2006)). The General Allotment Act is also known as the Dawes Act. Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on*

through which the federal government would advance its assimilative goals.<sup>96</sup> By allotting tribal lands to individual Indians, the Act was designed such that the Indians would “become agrarian, Christians, and citizens.”<sup>97</sup> The federal government’s other, more sinister goals with respect to assimilation included “breaking up tribal ownership of land, opening the reservations for settlement, and destroying tribal existence.”<sup>98</sup>

As a federal policy, allotment not only failed to achieve its stated goals,<sup>99</sup> but also had devastating consequences for tribes and their members,<sup>100</sup>

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*American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 348 (2008-2009).

96. John Fredericks III, *Indian Lands: Financing Indian Culture: Mortgaged Indian Lands and the Federal Trust Responsibility*, 14 AM. INDIAN L. REV. 105, 105 (1989); Guzman, *supra* note 78, at 597 (“In 1887, Congress passed the General Allotment Act to privatize Indian reservations and advance the assimilationist sentiment of the day. The Act divested land from tribes to their members, each of whom received a tract of land on a wing and a prayer: become an autonomous Christian agrarian.”); Painter-Thorne, *supra* note 95, at 349 (“It was hoped that allotment would solve the problems of the Indians in one generation, as the effect of ownership of private property would impel the native person into a ‘civilized’ state.”) (quoting VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS*, AMERICAN JUSTICE 9 (1983)) (internal quotation marks omitted); McCoy, *supra* note 93, at 447-48 (“The purpose of this policy was to assimilate Indian people and tribes into American society, to dissolve the uniqueness of individual Indians and tribal communities, and to ‘rescue’ Indians and tribes from their ‘primitive’ life-ways.”).

97. Davidson, *supra* note 92, at 580.

98. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 212 (2000-2001) [hereinafter Miller, *Cultural Self-Determination*].

99. Scott A. Taylor, *State Property Taxation of Tribal Fee Lands Located Within Reservation Boundaries: Reconsidering County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation and Leech Lake Band of Chippewa Indians v. Cass County*, 23 AM. INDIAN L. REV. 55 (1998-1999) (noting that “Congress concluded that the allotment system was a failure”); *see also* Guzman, *supra* note 78, at 605 (“Unless its covert purpose was to force precipitous declines in Indian-held acreage, allotment failed.”); James T. Hamilton, *Progressing Back: A Tribal Solution for a Federal Morass*, 27 AM. INDIAN L. REV. 375, 377 n.7 (2002-2003) (“Allotment was a tremendous ‘success,’ at least insofar as it was intended to be a massive land grab.”).

100. John W. Ragsdale, Jr., *Values in Transition: The Chiricahua Apache from 1886-1914*, 35 AM. INDIAN L. REV. 39, 79 (2010-2011) (“Allotment resulted in a dramatic loss in tribal land holdings . . . . It also meant impoverishment for most of the Indian individuals (who often got the worst of the allotments), inadequate capital to make new beginnings, little instruction, limited access to markets, and a weakened tribe and social service network to buffer them.”).

virtually decimating their land base.<sup>101</sup> “With a declining and fragmented land base and scores of displaced families, the fabric and strength of tribal government withered.”<sup>102</sup>

Recognizing the damage that allotment was inflicting upon tribal communities, the federal government reversed its assimilationist policy in 1934 with the adoption of the Indian Reorganization Act,<sup>103</sup> designed to salvage whatever remnants of tribal sovereignty remained.<sup>104</sup> The Act “was intended to foster cohesive, land-based tribal communities . . . and to encourage Indian tribes to revitalize their self-government.”<sup>105</sup> In an effort to rebuild tribal communities, the Act “establish[ed] territorial tribal governance by incorporating communities of Indians as tribes” and “created new tribal polities based on the existing reservation system.”<sup>106</sup>

But after only a short time, the federal government once again grew weary of promoting tribal sovereignty, and a new policy era was ushered in: termination. Similar in sentiment to the allotment era, the termination policy went a step further, and was “designed to end the authority and legal existence of tribal governments.”<sup>107</sup> Despite settled law holding that Congress has plenary power over tribal matters and that tribes are to remain free from state interference,<sup>108</sup> Congress “took [] steps to limit its involvement in Indian affairs and to increase state powers over reservations.”<sup>109</sup>

101. Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 8 (1997) (“The effects were devastating — of 138,000,000 acres Indians held when the Dawes Act was passed, only 48,000,000 were left in 1934, and nearly half of these were desert or semidesert.”).

102. Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147, 151 (2001-2002).

103. Ch. 576, 48 Stat. 984 (1934) (codified as amended 25 U.S.C. §§ 461-495 (2006)).

104. See Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 409 (2005-2006) (noting that the Indian Reorganization Act “encouraged the promotion of tribal self-government”).

105. Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 234, 274 (2008-2009).

106. *Id.* at 275.

107. Miller, *Cultural Self-Determination*, *supra* note 98, at 213.

108. See *supra* Part III.A.1.

109. Miller, *Cultural Self-Determination*, *supra* note 98, at 213-14.

After several years of termination policy, the fickle<sup>110</sup> federal government changed its tune, once again favoring tribal sovereignty over assimilative efforts.<sup>111</sup> This new era of self-determination began in the 1960s,<sup>112</sup> but achieved “official” status in 1970 with President Nixon’s pronouncement that federal policy was “to shift from forced tribal assimilation to tribal freedom to determine the appropriate paths for the present and the future.”<sup>113</sup> Self-determination meant “the ability of a people to decide their political status and to direct their own social, cultural, and economic development.”<sup>114</sup> But despite that “every President since 1960” has supported the self-determination policy and that “Congress has also passed numerous statutes empowering tribal governments,”<sup>115</sup> the Court has not followed suit.<sup>116</sup> In other words, not only has the federal government completely reversed its policy stance toward tribes numerous times, but the branches within the government appear fragmented with regard to their commitment to the self-determination policy. For judges unfamiliar with the storied history of Indian law, making sense of the patchwork of policies and the shifting rules that accompany them is nearly

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110. Aaron F.W. Meek, Comment, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 142 (2010-2011) (noting that “[t]hroughout United States history, Indian law has been subject to the ebb and flow of a fickle Congress”).

111. See Nathaniel T. Haskins, Note, *Framing Concurrent Jurisdiction Issues in the Self-Determination Era: Accepting the First Circuit’s Analysis but Rejecting its Application to Preserve Tribal Sovereignty*, 32 AM. INDIAN L. REV. 441, 444 (2007-2008).

112. Ann Richard, Note, *Application of the National Labor Relations Act and the Fair Labor Standards Act to Indian Tribes: Thwarting the Economic Self-Determination of Tribes*, 30 AM. INDIAN L. REV. 203, 219 (2005-2006).

113. Whitney Kerr, *Giving Up the “I”: How the National Museum of the American Indian Appropriated Tribal Voices*, 29 AM. INDIAN L. REV. 421, 422 (2004-2005) (citing Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. No. 91-363 (1970)); see also Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 32 (2000) (noting that “President Nixon’s 1970 message to Congress on Indian affairs is the landmark beginning of the ‘Self-Determination’ era”).

114. Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development through Partnerships with Rural Communities*, 32 AM. INDIAN L. REV. 525, 527 (2007-2008).

115. Meek, *supra* note 110, at 142-43.

116. See generally Matthew L.M. Fletcher, *Sawlawgezewog: “The Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 67 (2003-2004) (reviewing and summarizing the many Supreme Court cases that “take[] the concept of self-determination that has been the paradigm of congressional Indian policy since 1970, pervert[] it, twist[] it, and reverse[] it”).

hopeless, rendering the need to appoint Native American judges familiar with this history and culture to the bench all the more important.

### 3. Jurisdiction

The rules surrounding jurisdiction over tribal members and their lands are even more convoluted, multifarious, and riddled with nuance than the complex, ever-shifting policy eras. Depending on a variety of factors, tribal, state, or federal jurisdiction — or even some combination thereof — may apply.<sup>117</sup> There are different jurisdictional rules depending on whether the legal issue is criminal or civil.<sup>118</sup> Within the criminal context, there are different jurisdictional rules depending on the nature and severity of the crime.<sup>119</sup> Within the civil context, there are different jurisdictional rules depending on whether the nature of state involvement is adjudicatory or regulatory.<sup>120</sup> There are also different rules depending on the state in which the prescribed conduct occurred,<sup>121</sup> as well as depending on whether it occurred within Indian Country or outside its boundaries.<sup>122</sup> What qualifies as Indian Country, however, is unsettled and provides a nucleus for many disputes.<sup>123</sup> Moreover, different jurisdictional rules apply depending on whether each party appearing before the judge is considered a tribal member, a nonmember Indian, or a non-Indian.<sup>124</sup> And to make matters even more confusing, the questions of jurisdiction and choice of law are not necessarily coterminous. It is possible that a given set of circumstances will

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117. See Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 393 (2008-2009).

118. See Douglas B. Cubberley, Note, *Criminal Jurisdiction over Nonmember Indians: The Legal Void After Duro v. Reina*, 16 AM. INDIAN L. REV. 213, 235 (1991).

119. See Henry S. Noyes, *A "Civil" Method of Law Enforcement on the Reservation: In Rem Forfeiture and Indian Law*, 20 AM. INDIAN L. REV. 307, 307-08 (1995-1996).

120. See Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 338-39 (1991).

121. William V. Vetter, *A New Corridor for the Maze: Tribal Criminal Jurisdiction and Nonmember Indians*, 17 AM. INDIAN L. REV. 349, 350 (1992) (noting that Public Law 280 transferred limited jurisdiction over tribal matters to certain states).

122. Mary Beth West, *Natural Resources Development on Indian Reservations: Overview of Tribal, State, and Federal Jurisdiction*, 17 AM. INDIAN L. REV. 71, 87 (1992).

123. See, e.g., Jennifer Nutt Carleton, *State Income Taxation of Nonmember Indians in Indian Country*, 27 AM. INDIAN L. REV. 253, 255 (2002-2003).

124. See, e.g., Grant Christensen, *Creating Bright-Line Rules for Tribal Court Jurisdiction over Non-Indians: The Case of Trespass to Real Property*, 35 AM. INDIAN L. REV. 527, 560 (2010-2011).

mandate the application of tribal law in state courts, for example.<sup>125</sup> As a result, those judges deciding tribal interests without an understanding of the many factors that go into determining whether the court even has jurisdiction to make such decisions are wont to hand down ill-informed rulings.

#### 4. Land "Ownership"

The rules governing land held by Native Americans are unique and complex in comparison to other property law in the United States. The divergence of Native American property law originates in Chief Justice Marshall's characterization of tribal landholding.<sup>126</sup> Today, complicated legal rules continue to govern jurisdiction over tribal members and their lands, the way in which tribes hold their lands, and the uses to which those lands can be put. The closest non-Indian law parallel to Indian landholding is landlord-tenant law, with the federal government acting as landlord and the tribes as tenants.<sup>127</sup> A tribe's right of occupancy is similar to a tenant's right to occupy a leased property, and like the landlord, the federal government holds the underlying fee title to the subject lands.

But there are some important differences between a traditional landlord-tenant relationship and that of the federal government to tribes. First, the federal government owes a fiduciary obligation to the tribes and their members,<sup>128</sup> something that does not hold true in a traditional landlord-

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125. See Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 AM. INDIAN L. REV. 1, 23 (2010-2011) (noting that "[a]fter the state court determines that it has legislative jurisdiction, a separate question arises regarding what law applies in a civil dispute between private parties").

126. Recall that Marshall characterized the nature of tribes' landholding as a right of occupancy, with the federal government retaining the underlying fee title to the subject lands. In other words, the tribes hold possessory rights to the lands. David J. Bloch, *Colonizing the Last Frontier*, 29 AM. INDIAN L. REV. 1, 10 (2004-2005).

127. David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159, 164 (1994) ("The federal government, as the ultimate landlord, not only possesses the power to terminate the 'tenancy' of its occupants but also could materially affect the lives of Indians through its control and regulation of land use.") (quoting DELORIA & LYTTLE, *supra* note 96, at 26-27) (internal quotation marks omitted).

128. See, e.g., R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 210 (2002-2003) (articulating "the fiduciary relationship owed Indian tribes as the highest of moral obligations appropriately judged by the most 'exactng fiduciary standards'" (quoting *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001))).

tenant relationship. Second, while in a traditional tenancy, an unhappy tenant can terminate her lease and bring herself under the management of a new landlord in the building next door, tribal members wishing to remain on Indian lands cannot escape the control of the federal government.<sup>129</sup> Third, tenants' possessory rights are typically contractual, with no inherent right to remain indefinitely,<sup>130</sup> while tribal members' occupancy rights are not contractual and carry the right to remain until such time as the federal government "exercises its power of eminent domain," taking the Indians' lands under the Fifth Amendment's authority.<sup>131</sup> And more differences exist still. Accordingly, a judge who attempts to distill tribal landholding into nothing more than a landlord-tenant relationship would miss many of the nuances that accompany Indian title and could thereby leave important rights unvindicated.

Because of the unique way in which tribes hold land, the rights associated with such landholding are unique and tortuously complex. The nature of land ownership affects everything from the states' rights (or lack thereof) to levy taxes on tribal lands and tribal members,<sup>132</sup> to the tribes' abilities to acquire private loans.<sup>133</sup> Moreover, tribes and their members are governed by separate federal legislation for a variety of everyday matters

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129. See Eileen M. Luna, *The Impact of the Unfunded Mandates Reform Act of 1995 on Tribal Governments*, 22 AM. INDIAN L. REV. 445, 473 (1998) (noting that through its plenary power, the federal government asserts "ultimate authority over Indian peoples and lands").

130. Paul Sullivan, Note, *Security of Tenure for the Residential Tenant: An Analysis and Recommendations*, 21 VT. L. REV. 1015, 1016 (1997) ("The lease is a contractual instrument which conveys property, an 'estate,' for a period of time, a 'term,' which signifies not only the limitation of time, but the estate and interest that pass for such time.").

131. Mark Ulmer, *Tribal Property: Defining the Parameters of the Federal Trust Relationship Under the Non-Intercourse Act*: *Catawba Indian Tribe v. South Carolina*, 12 AM. INDIAN L. REV. 101, 108 n.32 (1985).

132. David B. Wiles, *Beyond, Tribal Taxation, Secretarial Approval, and State Taxation* — *Merrion and Beyond*, 10 AM. INDIAN L. REV. 167, 178 (1983) ("It has long been recognized that states have no power to tax Indian trust lands, nontrust property owned by a tribal member on tribal land, and income earned by a tribal member on tribal land.").

133. Crystal D. Masterson, Comment, *Wind-Energy Ventures in Indian Country: Fashioning a Functional Paradigm*, 34 AM. INDIAN L. REV. 317, 353 n.275 (2009-2010) ("On account of the nature of ownership in Indian Country, tribes confront unique barriers in acquiring private loans. The federal government owns fee title to all Indian lands held in trust, with the Indians retaining a right of occupancy. Because lenders are invariably wary of granting unsecured loans, tribes and their members may confront difficulty in acquiring private loans since homes and other buildings on trust land cannot serve as reliable collateral. . . . [T]o secure private loans, tribes and their members must therefore possess alternate collateral of sufficient value to satisfy the loan.").

on account of the nature of tribal landholding.<sup>134</sup> While a full discussion of tribal land rights is outside the scope of this paper, suffice it to say that judges cannot make informed, well-reasoned decisions without appreciating the many earmarks of tribal landholding and its concomitant rights.

*B. The Prejudices of the Certiorari Process*

As the previous section detailed, the tribes' unique status within the governmental structure means that the federal government, as guardian to the tribes, must act in the tribes' best interests pursuant to the fiduciary duty it owes them.<sup>135</sup> The term fiduciary comes from the Latin word *fiducia*, which "carries connotations of total trust, good faith, and honesty."<sup>136</sup> A fiduciary is "charged by law and equity with a higher duty [of] care" and is "required by law to place [its beneficiary's interests] ahead of [its] own in all dealings . . ."<sup>137</sup> But despite these most exacting legal obligations, the federal government, through the certiorari process, effectively disfavors tribal interests.

Professor Matthew Fletcher published an extensive study of the certiorari process surrounding tribal-interest petitions. His study reached some startling conclusions regarding the inherent barriers to Supreme Court review of tribal-interest cases, finding that the Supreme Court's certiorari process "creates an affirmative barrier to justice for parties like Indian tribes and individual Indians" by rejecting certiorari for nearly all petitions filed in favor of tribal interests.<sup>138</sup> Moreover, if the Supreme Court decides to accept a petition regarding tribal interests, there is a 75% chance that the tribal interest will lose.<sup>139</sup> During the period between 1986 and 1993, ninety-two tribal-interest petitions were considered for certiorari, with the

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134. See, e.g., McCulley, *supra* note 104, at 412-15 (overviewing the American Indian Probate Reform Act, which governs the intestate distribution of trust property); Aaron Drue Johnson, *Just Say No (to American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 113-15, 120-23 (2010-2011) (examining and critiquing the Model Tribal Secured Transactions Act, which is intended to govern secured transactions in the tribal setting, replacing the Uniform Commercial Code).

135. See, e.g., Todd Miller, *Easements on Tribal Sovereignty*, 26 AM. INDIAN L. REV. 105, 125 (2001-2002) ("When the Department of Interior is applying these regulations, they must do so in the tribes' best interest, in order to fulfill their fiduciary duty to the tribes.").

136. CHRISTIAN D. RAHAIM, *THE FIDUCIARY: AN IN-DEPTH GUIDE TO FIDUCIARY DUTIES — FROM STUDEBAKER TO ENRON 5* (2005).

137. *Id.*

138. Fletcher, *Factbound and Splitless*, *supra* note 7, at 933.

139. *Id.* at 935.



Supreme Court granting only one of those petitions.<sup>140</sup> During the same period, states and local governments, countering the positions of tribal interests, filed only thirty-seven certiorari petitions.<sup>141</sup> And yet, the Court granted fourteen of those petitions.<sup>142</sup> Native Americans are pleading with the Court for legal review of tribal issues far more often than states — and are being rejected far more often as well.<sup>143</sup>

Professor Fletcher asserts that this disparity in the certiorari process is not caused by “mere agenda-setting” on the part of the Supreme Court.<sup>144</sup> Rather, he maintains “that the certiorari process itself creates conditions that lead the Supreme Court to accept cases that are likely to be decided against tribal interests.”<sup>145</sup> Much of the problem stems from the value that the Supreme Court places on resolving jurisdictional splits<sup>146</sup> and unsettled law.<sup>147</sup> Tribal-interest cases fail to meet either of these criteria most of the time.<sup>148</sup>

But what happens if tribes, their members, or their supporters are able to get a case in front of the Supreme Court? Fletcher’s study suggests that, over the last few decades, even if tribal parties appear before the Supreme Court, they are unlikely to win. His study found that between 1986 and

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140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 937.

145. *Id.*

146. *Id.* Indian law cases have “limited territorial reach” making “splits in lower court authority [] unlikely.” *Id.* “Circuit splits tend not to arise in Indian law cases because often the only possible split is between a state court and a federal circuit.” *Id.* at 957. Moreover, it is “often the case that a fact pattern will be unique to a particular tribe or reservation, rendering the possibility of a split very unlikely.” *Id.* at 961. This inherent barrier allows a certiorari-pool memo writer to discount a case with a great deal of “practical significance” simply because “the questions are not of general legal significance.” *Id.* (quoting Cert Pool Memo at 13, *Oneida Indian Nation of Wis. v. New York*, 493 U.S. 871 (1989) (No. 88-1785), *Oneida Indian Nation of N.Y. v. New York*, 493 U.S. 871 (1989) (No. 88-1915), available at <http://epstein.law.northwestern.edu/research/BlackmunMemos/1989/DM-1989-pdf/88-1915.pdf>) (internal quotation marks omitted).

147. *Id.* at 937. Tribal-interest cases are often “complex,” involving “factbound applications of settled law.” *Id.* When cases are “factbound,” the memo writer will deny the certiorari petition so long as “the lower court correctly state[d] . . . the applicable rule.” *Id.* at 964. Compounding the already prohibitive barriers to granting certiorari for tribal-interest petitions, “the cert pool members assume tribal interests are not important to their audience,” and thus draft memoranda denying petitions in favor of tribal interests. *Id.* at 938.

148. See *supra* notes 146-47 and accompanying text.

2006, the Supreme Court decided forty-eight Indian law cases, with tribal interests winning only eleven times.<sup>149</sup> While these figures are troubling, there is hope to reverse these trends, and that hope lies in nominating Native American judges to the federal bench.

#### *IV. Arvo Mikkanen's Failed Nomination: What Might Have Been*

##### *A. The Failed Nomination of a Qualified Native American to the Federal Judiciary*

In February 2011, President Barack Obama nominated Arvo Mikkanen to the United States District Court for the Northern District of Oklahoma.<sup>150</sup> Former Oklahoma governor, Brad Henry, supported the President in this nomination.<sup>151</sup> President Obama's nomination and Governor Henry's approval were well deserved. Mikkanen graduated *magna cum laude* from Dartmouth College, received his Juris Doctor from Yale Law School, clerked for two federal judges, currently serves as an Assistant United States Attorney, and is the current president of the Oklahoma Indian Bar Association.<sup>152</sup> He also received a unanimous rating of "qualified" from the American Bar Association in consideration for his nomination to be a federal district judge.<sup>153</sup>

Mikkanen has strong ties to Oklahoma, serving as an Oklahoma lawyer for twenty-five years.<sup>154</sup> Mikkanen's former U.S. Attorney supervisor, Dan Webber, said that Mikkanen "has been recognized by the Oklahoma Bar Association for his pro bono service and by the FBI for his prosecutorial skills."<sup>155</sup> Further, as "an expert on federal criminal jurisdiction in Indian

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149. Fletcher, *Factbound and Splitless*, *supra* note 7, at 943.

150. Chris Casteel, *Senators Block Oklahoma City Federal Prosecutor from Judge Post*, NEWSOK, Dec. 18, 2011, <http://newsok.com/article/3633139>.

151. Jim Myers, *Nominee for Judgeship Listed Henry as Backer*, TULSA WORLD, Feb. 19, 2011, [http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20110219\\_16\\_A1\\_ULNSbr526639&PrintComments=1](http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20110219_16_A1_ULNSbr526639&PrintComments=1).

152. Andrew Cohen, *Judicial Nominee Arvo Mikkanen Deserves Answers*, ATLANTIC (Feb. 21, 2011, 9:14 AM), <http://www.theatlantic.com/politics/archive/2011/02/judicial-nominee-arvo-mikkanen-deserves-answers/71425/> [hereinafter Cohen, *Judicial Nominee*] (this "letter" was not written by Arvo Mikkanen).

153. Casteel, *supra* note 150.

154. Jim Myers, *Questions Surround Judicial Nomination of Arvo Mikkanen for Tulsa*, TULSA WORLD (Feb. 6, 2011, 2:30 AM), [http://www.tulsaworld.com/news/article.aspx?subjeid=11&articleid=20110206\\_16\\_A23\\_CUTLIN390175](http://www.tulsaworld.com/news/article.aspx?subjeid=11&articleid=20110206_16_A23_CUTLIN390175) [hereinafter Myers, *Questions*].

155. *Id.*

Country,”<sup>156</sup> Mikkanen helped launch the “use of child psychologists and specially trained pediatricians in the process of interviewing preteen victims of sexual abuse.”<sup>157</sup>

Despite Mikkanen’s strong credentials and deep ties to Oklahoma, his nomination faced immediate opposition from Oklahoma senators Tom Coburn and James Inhofe.<sup>158</sup> Senator Coburn<sup>159</sup> said that Mikkanen was “unacceptable” for the position,<sup>160</sup> offering as explanation nothing more than an alleged breach of protocol,<sup>161</sup> which itself was no fault of Mikkanen’s. The alleged breach of protocol concerned the executive branch’s failure to consult the Oklahoma Senators prior to announcing the nominations.<sup>162</sup> By mid-December 2011, the Oklahoma Senators were

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156. *Id.*

157. *Id.*

158. Cohen, *Judicial Nominee*, *supra* note 152.

159. Interestingly, Senator Coburn not only sits on the Senate Judiciary Committee, but is also a member of the Senate Indian Affairs Committee. Press Release, Senator Tom Coburn, Legislation & Issues: Native Americans (Feb. 2, 2011), *available at* <http://www.coburn.senate.gov/public/index.cfm/?p=NativeAmericans>. As a member of the Indian Affairs Committee, he vowed to have “regular meetings with tribal leaders and representatives to discuss the important issues facing tribes.” *Id.* And yet, despite his disagreement with this nomination, it has not been established that Coburn held a meeting with tribal leaders to discuss the implications of the nomination.

160. Cohen, *Judicial Nominee*, *supra* note 152.

161. Press Release, Senator Tom Coburn, Dr. Coburn’s Statement on the Nomination of Arvo Mikkanen to U.S. District Court for the Northern District of Oklahoma (Feb. 2, 2011), *available at* [http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord\\_id=b118e671-fce6-4767-aa0e-dcb5811be6d6](http://www.coburn.senate.gov/public/index.cfm/pressreleases?ContentRecord_id=b118e671-fce6-4767-aa0e-dcb5811be6d6) (stating that he was “disappointed in the White House’s lack of consultation with [him] on this nomination”).

162. Myers, *Questions*, *supra* note 154. It is customary for the home state’s senators to prescribe judicial nominations. These members even retain influence over the confirmation process itself. As a courtesy, home state senators are generally consulted prior to a formal announcement of a nomination and, in this case, it is unclear whether this courtesy occurred. *Id.* The nomination process begins with the announcement of a vacant seat in the federal judiciary. The President typically consults home state senators before formally announcing a nomination. Before the Senate confirms the nomination, the Senate Judiciary Committee collects information and holds hearings. During committee hearings witnesses may testify regarding nominees and the Committee members question the nominees. The Committee then votes in order to send the nomination to the full Senate for a confirmation vote. *See Federal Judicial Nomination Process*, LEADERSHIP CONF. ON CIVIL & HUMAN RIGHTS, <http://www.civilrights.org/judiciary/courts/nominations.html> (last visited Feb. 14, 2012). Although the Constitution prescribes no requirements for the selection of federal judges, the primary factors that determine who will sit on the federal bench consist of “politics and ideology.” Graham, *supra* note 10, at 161 (noting that these political and ideological factors

successful in completely blocking Mikkanen's nomination for a federal judgeship in the Northern District.<sup>163</sup> Absent a formal record, it is impossible to determine precisely why Mikkanen's nomination was considered "unacceptable."<sup>164</sup>

While rejecting without explanation a qualified Native American judicial nominee at a time when Native interests are suffering is troubling in itself, that the rejection came in Oklahoma is all the more troubling. Oklahoma boasts the second largest Native American population in the country.<sup>165</sup> Moreover, Mikkanen is a Kiowa Tribe member,<sup>166</sup> meaning that he would have been "*only the third* recorded Native American federal judge in U.S. history."<sup>167</sup>

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include "ideological compatibility with the views of the President, political party, representational factors such as race and gender, and professional qualifications").

163. Casteel, *supra* note 150. Mikkanen's nomination, along with that of seven other judicial nominees, was never considered by the Committee members and was sent back to the White House on December 17, 2011. The Senate finalized its work for the year without a Committee hearing or any other type of debate on the return of Mikkanen's nomination. *Id.*

164. While an explanation certainly is elusive, speculation is nonetheless possible. The rejection of Mikkanen's nomination could simply be a product of divided government, where Mikkanen's fate was the same as the democratic President's other seven nominees, whose nominations were reflexively blocked by Republicans. In fact, the chance of a successful confirmation of the President's judicial nominees is markedly reduced when the home state's senators and the President do not share the same political party. Another possible reason for the outright block of Mikkanen's nomination could be the breach of courtesy between the two governmental branches, with the President failing to uphold the traditional protocol of consulting the state's senators on judicial nominations. *Id.*

165. Cohen, *Mikkanen Nomination*, *supra* note 72. The overall Native American population in the United States is 1%, but in Oklahoma, the Native American population is about 8%. *Id.*

166. See Casteel, *supra* note 150.

167. Andrew Cohen, *3 Questions for Justice Alito About Native American Concerns*, ATLANTIC (Aug. 21, 2011, 10:21 AM), <http://www.theatlantic.com/politics/archive/2011/08/3-questions-for-justice-alito-about-native-american-concerns/243895/> (emphasis added). The two Native Americans who have served on the federal judiciary are Billy Michael Burrage and Frank Howell Seay. Cohen, *Mikkanen Nomination*, *supra* note 72. Burrage, a member of the Choctaw Nation of Oklahoma, served as a federal judge for all three United States District Courts in Oklahoma. *History of the Federal Judiciary: Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=328&cid=999&ctype=na&inst=na> (last visited May 14, 2012). Seay, a federal judge for the United States District Court for the Eastern District of Oklahoma, "didn't even know about his native heritage until he was in his 50s" and already on the bench. Cohen, *Mikkanen Nomination*, *supra* note 72.

*B. What Could Have Been*

The startlingly low number of Native American judges throughout American history matters for all of the reasons discussed so far in this comment. First, it affects the public's perception of the judicial branch. Democracy flourishes when citizens trust the government and remain involved in its affairs. But in the American democratic system, citizens cannot cast votes for federal judges. Instead, members of the executive and legislative branches appoint these judges. When the public lacks a direct say in who will be the ultimate arbiters of their affairs, the onus on the government to appoint a diverse bench becomes critically important. Because public confidence increases when the federal bench reflects a cross section of society,<sup>168</sup> greater judicial diversity breeds a public more likely to accept that the judicial system is also a democratic system.

Had Arvo Mikkanen been confirmed as a federal judge, research suggests that it would have increased "both public support of the courts and perceptions of fairness."<sup>169</sup> The effects of such a judicial appointment in Oklahoma would have been even more pronounced because of its notably high Native American population. With 8% of Oklahoma's population self-identifying as Native American,<sup>170</sup> the presence of a Native American judge in the Oklahoma courts is necessary for its judiciary to reflect a cross section of society — the key ingredient to engendering public confidence in the judiciary.

In addition to its impact on public confidence, the lack of Native Americans on the federal bench affects substantive decision making by impeding empathy. In Part II, this comment examined various studies on judicial empathy, the collective results of which established a meaningful correlation between minority status and judicial decision making. Judicial empathy impacts not only the minority judge, but fellow judges as well. Bringing an empathetic, human perspective to the courtroom both impacts and enhances substantive decision making. For example, the studies indicate that the presence of female judges affects the outcomes of gender-based cases, that the presence of African American judges affects the outcomes of race-based cases, and that one's own minority status has a subconscious effect on the judicial decision-making process.<sup>171</sup> A logical extension of these principles would presume that the presence of a Native American judge, such as Arvo Mikkanen, would affect the outcomes of

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168. Torres-Spelliscy, *supra* note 14, at 13.

169. Graham, *supra* note 10, at 156.

170. Cohen, *Mikkanen Nomination*, *supra* note 72.

171. See *supra* Part II.B.

tribal-interest cases. And with Oklahoma's sizeable Indian population, tribal-interest cases are likely to arise in Oklahoma courts with relative frequency, making the presence of an empathetic judge all the more critical.

Intimately related to judicial empathy, the lack of Native Americans on the bench places Native American plaintiffs before judges who are often poorly versed in the intricate and nuanced field of Indian law.<sup>172</sup> Judges frequently do not appreciate the nature of the unique relationship between the federal government and the tribes.<sup>173</sup> They are also unlikely to appreciate the historically shifting patterns of federal Indian policy, which make many of the laws governing tribes and their members era-dependent.<sup>174</sup> They are unlikely to appreciate the manifold rules governing jurisdiction, which mandate that different government bodies deal with different matters, depending on countless factors relating to the nature of the dispute, as well as the tribal member, nonmember, or non-Indian status of each party.<sup>175</sup> They are unlikely to appreciate the nature of tribal landholding, which is unlike any other form of landholding with which they may be familiar.<sup>176</sup>

Not only are the laws governing Native Americans markedly different from the laws governing the rest of society, but the ultimate goal of the pro-tribal movement departs from all other minority-based movements with respect to its ultimate goal, making its understanding by outsiders all the more elusive. While traditional pro-minority movements advocate for equality in the form of civil rights, pro-tribal movements instead advocate for the right to remain different through the exercise of sovereign rights.<sup>177</sup> As Professor David Getches aptly notes, "open-minded judge[s], conscious of latent prejudices," may be able to sympathize "with a person disadvantaged by society's exclusion or disenfranchisement, but a new

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172. While there is no guarantee that a Native American judge would possess more knowledge in the area of Indian law than a non-Indian judge, it is nevertheless more likely that the Native American judge would be more familiar with federal Indian law and tribal culture than his non-Indian counterpart. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 663 (2006) (discussing Professor Krakoff's article regarding the virtual impossibility of explaining the "cultural quality of sovereignty . . . to non-Indians.").

173. See *supra* Part III.A.1.

174. See *supra* Part III.A.2.

175. See *supra* Part III.A.3.

176. Although tribal landholding shares some similarities with leasing, there are also countless differences. See *supra* Part III.A.4.

177. See BEYOND RED POWER: AMERICAN INDIAN POLITICS AND ACTIVISM SINCE 1900, at 35 (Daniel M. Cobb & Loretta Fowler eds., 2007).

dimension is added when the 'different' claimant or class asserts the right to remain different."<sup>178</sup> As a result of the different motivations behind traditional pro-minority movements and the pro-tribal movement, Professor Getches asserts that "a panel of elite, predominately white male lawyers" may find it easier "to understand the problem of employment discrimination against an African-American single mother whose goal is to come closer to the mainstream than . . . to appreciate the importance of cultural survival that depends on tribal traditions and autonomy that would allow killing eagles for ceremonial purposes."<sup>179</sup> In other words, there is a lack of familiarity with tribal interests compared with other minority interests, impeding the potential for judicial empathy to an even greater degree.

While the absence of Native Americans on the bench has symbolic and substantive effects through its impact on public perception and empathetic, informed decision making, it also has practical effects. The lack of Native American presence in the judiciary may exacerbate the barriers to tribal-interest petitions reaching the Supreme Court because tribes lack an internal voice to counter memo writers' assumptions that "tribal interests are not important to their audience."<sup>180</sup> Professor Fletcher's study found that tribal-interest certiorari petitions are disproportionately rejected.<sup>181</sup> Moreover, when tribal-interest issues do make it before the Supreme Court, the Court finds against tribal interests in the vast majority of cases.<sup>182</sup> Arvo Mikkanen might have been able to alter this trend. As a proven advocate of Native interests,<sup>183</sup> he could have brought greater awareness to Professor Fletcher's findings. He could have demonstrated that tribal interests are American interests. He could have shown that Indian law is anything but settled, bringing tribal-interest petitions within the class likely to be granted certiorari.<sup>184</sup>

And what if Arvo Mikkanen or another Native American eventually found himself on the Supreme Court? As studies indicate, the presence of a minority judge on a panel not only affects the substantive decision making of the individual minority judge, but similarly affects the substantive decision making of all the judges who sit with him on the given panel.<sup>185</sup>

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178. Getches, *supra* note 1, at 305.

179. *Id.*

180. Fletcher, *Factbound and Splitless*, *supra* note 7, at 938.

181. *Id.* at 933.

182. *Id.* at 935.

183. Myers, *Questions*, *supra* note 154.

184. *See supra* note 146 and accompanying text.

185. Chew, *supra* note 49, at 367.

From this, one could draw the logical conclusion that Native American representation on the Supreme Court would lead to more favorable outcomes for tribal parties. Federal Indian policy could become more settled.<sup>186</sup> Laws governing relations with Indians and tribes could become less ambiguous, more universally familiar, and more widely understood.

#### *V. Conclusion*

Nominating a Native American to the federal bench would have implications far beyond its symbolic social value. Not only would Native American presence on the judicial panel influence societal perceptions of justice and fairness, but it would also enhance substantive decision making, leading to empathetic holdings that respect tribal interests. Native American judges would bring unique tribal perspectives to the bench, elevating the panel's understanding of the convoluted field of Indian law; with its rich but serpentine history. Moreover, they would bring hope to tribal parties endeavoring to bring their disputes before the Supreme Court.

Arvo Mikkanen's nomination could have reinvigorated a Native American population suffocating under the weight of repeated rejections and defeats in federal courts. If the next Native American nominee is confirmed, this comment asserts that his or her presence on the federal judiciary will increase public confidence in the justice system, will enhance substantive decision making in tribal-interest cases, and will place tribal litigants in front of empathetic judges who are familiar with and respectful of their unique circumstance.

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186. See *supra* Part III.A.2 (overviewing the waves of federal policy regarding Indians throughout American history).



