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# FINALITY IN INDIAN TRIBUNAL DECISIONS: RESPECTING OUR BROTHERS' VISION

Michael M. Pacheco\*

*The white man is greedy, demanding [and] shrewd,  
but sees only what he wants to see and accordingly  
misses rather a lot.<sup>1</sup>*

## Introduction

The demise of tribal self-governance<sup>2</sup> for American Indians began with the white man's success in securing treaties early in American history.<sup>3</sup> Those treaties became, in large part, the launching pad for an endless debate on the status of Indians in white American society.<sup>4</sup> By reducing the entirety of Indians' rights to a "bundle of rights" contained wholly within the boundaries of a treaty, the next step in eroding Indian self-government was to simply abrogate the treaty.

The many attitudes towards Indians have found expression in an array of inconsistent judicial cases and scholarly opinions,<sup>5</sup> some justifying the treatment of American Indians as less than

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1. R. COLES, *ESKIMOS, CHICANOS, INDIANS* 526 (1977). Coles is a Pulitzer prize-winning author.

2. Self-government has been described by the United States Supreme Court as the highest and best of all among the arts of civilized life. According to Justice Matthews, self-government for Indians includes "the regulation by themselves of their own domestic affairs, [and] the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte Crow Dog*, 109 U.S. 556, 568 (1883).

3. It is arguable, of course, that the demise actually began shortly after Columbus landed in the New World. His sending of 500 Indian slaves to Spain occurred within only three years of Europe's "discovery" of the New World. See Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 37 n.147 (1983) (citing T. FLOYD, *THE COLUMBUS DYNASTY IN THE CARIBBEAN* 1492-1526, at 28 (1973)).

4. See, e.g., Indian Law Resource Center, *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination*, in *RETHINKING INDIAN LAW* 15 (1982) (noting unrestrained federal power over Indians was not part of the law during the nation's infancy and that treaties would have been meaningless if such were the case).

5. See, e.g., *infra* note 109 and accompanying text.

equals to white Americans,<sup>6</sup> which in turn purported to justify the subsequent breaking of the original treaties.<sup>7</sup> Although it is clear that Indians are treated uniquely in the United States Constitution, it is not as clear that it was due to an acknowledgment of tribes as political entities with whom the Founding Fathers felt a need to negotiate. Yet, when an Indian tribunal decides a case today, the value and justness of the decision are evaluated by non-Indians according to white American jurisprudential principles and not the Indians' own order of reason.<sup>8</sup> This is not intended as a statement of contumacy but rather an avowal of white society's single-minded vision.

This article examines the gradual erosion of Indian sovereignty and the concept of Indian self-government.<sup>9</sup> First, the article overviews the historical development of the Discovery Doctrine<sup>10</sup> and how the doctrine set the tone for the rationalizing process that followed it. Second, the modern-era judicial cases leading up to and those interpreting the Indian Civil Rights Act<sup>11</sup> are examined to demonstrate their limiting effect on the scope of tribal governments' sovereignty and powers. The third section addresses the traditional and current method of maintaining the white man's vision as the standard by which to measure the

6. It is convenient to baldly assert that Indians have special rights and receive special treatment by the federal government. But one writer notes

[a]ny American who has been on an Indian reservation knows very well that Indians are not "equal." The highest infant mortality rate and lowest life expectancy in the country reflect massive unmet health needs. Family income by far is the lowest in the nation. Housing and education deficits are greater than in any other sector of our society . . . . It is ironic, and brutally so, that there are those who would claim that the Indians are "favored" or "more than equal."

Wilkinson, *Several Myths Muddy Understanding of Indian Fishing Dispute*, OREGON J., July 20, 1976, at 10.

7. Treaty-making ended by congressional action on March 3, 1871. This law, however, did not impair the obligations of any treaty lawfully made before that date. See 25 U.S.C. § 71 (1982).

8. For a similar perspective, see de Raimis, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D.L. REV. 59 (1975).

9. Self-government in this context refers to *tribal* government. Historically, the idea of joint action or a confederacy of tribes was foreign to American Indians. Thus, one writer notes that "instead of presenting a unified front against European intruders they allowed themselves to be isolated and defeated tribe by tribe." D. WORCESTER, *FORCED TONGUES AND BROKEN TREATIES* xvi (1975). For examples of exceptions, see 15 *HANDBOOK OF NORTH AMERICAN INDIANS* 418-41 (1978).

10. The doctrine is based on the principle "that discovery gave title to the government by whose subjects, or by whose authority, it was made . . . ." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

11. 25 U.S.C. §§ 1301-1303 (1982). See *infra* note 107 for the text of the act.

value of competing public policies and goals in the American judicial process. The last section of the article and the conclusion suggest that we should create a separate Federal Indian Court of Appeals comprised solely of Native Americans. The suggestion is based on the premise that only by considering and respecting the uniqueness of each tribe and its heritage can American federal courts administer true justice.<sup>12</sup>

*Development of the Discovery Doctrine and its Progeny*

*The Discovery Doctrine*

The Discovery Doctrine was first articulated by Chief Justice John Marshall in *Johnson v. M'Intosh*,<sup>13</sup> wherein a group of non-Indian plaintiffs claimed title to land which they had bought directly from the Illinois and Piankeshaw Indian Nations. The defendant claimed title to the same land, basing his ownership on a subsequent purchase from the United States. The defendant argued that the Indian Nations had ceded the disputed land to the United States by treaty; thus, the federal government owned the land and was free to sell it.<sup>14</sup>

As some scholars have noted, Chief Justice Marshall strained to justify America's invasion of a native peoples' land, by setting forth an asserted right to impose upon the Indians a European-derived form of subjugation.<sup>15</sup> This right ostensibly resulted from the discovery of land in the New World. Yet, even by the time of the seventeenth century, it was not clear "whether the term 'discovery' meant more than the mere finding of the lands previously unknown to European civilization."<sup>16</sup> According to Marshall, discovery gave to the European discoverer "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."<sup>17</sup> Marshall added that the rights of the Indians, though not entirely disregarded, were considerably

12. A similar argument with regard to uniqueness of subject matter was made in the patent law area in justifying the creation and existence of the Court of Appeals for the Federal Circuit. See generally Note, *An Appraisal of the Court of Appeals for the Federal Circuit*, 57 S. CAL. L. REV. 301 (1984).

13. *Johnson*, 21 U.S. (8 Wheat.) at 543.

14. *Id.* at 572. The defendant argued that the "later in time" treaty cession to the United States gave a title superior to the "earlier in time" sale of the same land to plaintiffs.

15. See, e.g., D. GETCHES, C. WILKINSON, *FEDERAL INDIAN LAW* 37 (2d ed. 1986) [hereinafter *FEDERAL INDIAN LAW*].

16. W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 272 (1953).

17. *Johnson*, 21 U.S. (8 Wheat.) at 587.

impaired. In his view, “[t]heir power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”<sup>18</sup> Therefore, the *Johnson* Court held that the plaintiff’s title was not one cognizable in a United States federal court, because discovery had divested the Indian nations of their power to convey their lands to anyone other than the discoverer or its successor, the United States of America. The decision thereby effectively stripped the Indian Nations of legal title to their own homelands.<sup>19</sup>

Justice Marshall further refined his concept of the American Indians’ legal status in *Cherokee Nation v. Georgia*.<sup>20</sup> In this case the Cherokee Nation sought to prevent the state of Georgia from encroaching upon land recognized by treaty with the United States.<sup>21</sup> Basing his decision upon the then-accepted discovery doctrine, Marshall surmised that Indians were merely “wards” of the United States and not independent, foreign nations.<sup>22</sup> Instead, he concluded that the Indian Nations were “dependent domestic nations” which could be controlled only by the United States and not the state of Georgia.<sup>23</sup> Thus, Marshall reinforced the idea that these “savages,” who were “in a state of pupilage,”<sup>24</sup> had no external powers beyond their boundaries; because the Cherokee Nation was not a foreign state in a controversy of the sort which the framers of the Constitution had contemplated, the suit was dismissed for lack of jurisdiction.<sup>25</sup>

18. *Id.* at 573-74.

19. *Id.* at 604-05. See also Berman, *The Concept of Aboriginal Title in the Early History of the United States*, 27 BUFFALO L. REV. 637 (1978). For white Americans to inhabit a territory cooperatively “was apparently beyond the scope of the 17th century English thought. The result is an Anglo-American legal system with an inherent cultural bias that attributes an anomalous and inferior status to non-European forms of land tenure.” *Id.* at 644 n.31.

20. 30 U.S. (5 Pet.) 1 (1831).

21. See generally Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

22. 30 U.S. (5 Pet.) at 17.

23. *Id.*

24. *Id.* at 17.

25. *Id.* at 18. One commentator noted the lasting effects of Marshall’s opinion in *Cherokee Nation*:

The Doctrine of Discovery, the primordial mythic icon of Europe’s imperial past, had been preserved and brought to readability in a form which spoke with reassuring continuity to a nation about to embark on its own colonial vision quest; a quest which would seek to determine whose vision of life would prevail on the American continent.

Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258.

*Worcester v. Georgia*<sup>26</sup> appears to be the first instance where the Court questioned the discovery theory. In *Worcester* a white man, Samuel Worcester, was charged with “residing within the limits of the Cherokee nation without a license” required by the state of Georgia and “without having taken the oath to support and defend the constitution and laws of the state of Georgia.”<sup>27</sup> Worcester was found guilty by a Georgia court and was sentenced to hard labor for four years in a Georgia penitentiary.<sup>28</sup> He appealed to the United States Supreme Court, challenging the jurisdiction of the state of Georgia in the Cherokee Nation.

Justice Marshall wrote in great detail to explain the “national character of the Cherokees”<sup>29</sup> and the relationship between the Cherokees and the United States resulting from the Treaty of Hopewell of 1785. In the end, Marshall made clear that he was not departing from his earlier pronouncements on the status of American Indians:

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.<sup>30</sup>

Thus, the law of the state of Georgia condemning Worcester to hard labor was deemed void, and the judgment was accordingly reversed.<sup>31</sup>

In concurring with Marshall, Justice McLean noted that “in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community.”<sup>32</sup> Such a community, McLean reasoned, can be so surrounded by a white population that it would be impossible to treat the tribe as being under federal law. Under those

26. 31 U.S. (6 Pet.) 515 (1832).

27. *Id.* at 528-29.

28. *Id.* at 532.

29. One writer suggests that Cherokee tribal sovereignty is what rendered Georgia law invalid. See Walters, *Preemption, Tribal Sovereignty, and Worcester v. Georgia*, 62 OR. L. REV. 127 (1983).

30. *Worcester*, 31 U.S. (6 Pet.) at 560.

31. *Id.* at 561-62.

32. *Id.* at 583 (McLean, J., concurring).

circumstances, he argued, the practical solution is to apply state law.

In essence, McLean was stating that federal power over Indians was not applicable in all cases.<sup>33</sup> His restrictive view of national power, however, did not become the consensus view of the Court in the years that followed.<sup>34</sup>

### *Removal, Reservations and Assimilation*

It is significant to note that the Marshall "trilogy" of cases took place during the Jacksonian period in American history when Indians were forcibly removed from their homelands. The infamous "Trail of Tears" left by the Five Civilized Tribes (Cherokee, Choctaw, Creek, Chickasaw, and Seminole) from Georgia to Oklahoma occurred during President Andrew Jackson's administration. Jackson favored the removal and relocation of Indians; thus, he lent political support for states like Georgia to flatly disobey rulings by the Supreme Court. He is credited with saying in regard to the *Worcester* case: "Marshall has made his law, now let him enforce it."<sup>35</sup>

Since *Worcester*, review of state court decisions by federal courts has become the primary method of protecting tribal sovereignty.<sup>36</sup> As one might expect, the protection of tribal sovereignty was not without its limits. In *Ex parte Crow Dog*<sup>37</sup> the alleged murder of one Sioux by another was found outside the criminal jurisdiction of the United States Territorial Court

33. This was not a new position for Justice McLean. Previously, as a circuit judge, he had expressed the same views in *United States v. Cisna*, 25 Fed. Cas. 422, 424 (C.C.D. Ohio 1835) (No. 14,795) and *United States v. Bailey*, 24 Fed. Cas. 937 (C.C. Tenn. 1834) (No. 14,495).

34. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886) (congressional power upheld); Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 149 (1940) (noting Marshall's analysis consistently followed). See also *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (federal sale of tribal land upheld).

35. See generally V. DELORIA, JR. & C. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 6-7 (1983) [hereinafter DELORIA]. See also F. PRUCHA, *INDIAN POLICY IN THE UNITED STATES, HISTORICAL ESSAYS* 138-52 (1981). In the cited essay, noted historian Francis Paul Prucha makes an interesting attempt to understand Jackson's endorsement of his Indian removal policy. Prucha's stated purpose in writing the essay "was to examine the removal policy in the perspective of the times in which it was adopted." *Id.* at 138. However, his conclusion that in assessing Jackson's Indian policy, contemporary critics and historians "have certainly been too harsh, if not, indeed, quite wrong," is clearly subject to debate.

36. See de Raismes, *supra* note 8, at 61. See also Note, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972) [hereinafter *Tribal Self-Government*]; S. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE* 6 (1978).

37. 109 U.S. 556 (1883).

of Dakota. The holding caused a furor among neighboring non-Indians.<sup>38</sup> The furor led to the passage of the Major Crimes Act of 1885,<sup>39</sup> which gave the federal courts original jurisdiction over crimes such as murder, rape, burglary, arson, larceny, and assault with intent to kill. Such jurisdiction applied, however, only when the crime was committed in "Indian country" by one Indian against another.<sup>40</sup> Recently, there has been growing support for the argument that these "exclusive" jurisdiction crimes should be handled by the tribes under a "concurrent power" theory.<sup>41</sup>

In 1883, the same year *Crow Dog* was decided, Congress established the Courts of Indian Offenses in an effort to provide law and order on Indian reservations.<sup>42</sup> Their creation, however, proved to provide only illusory justice for American Indians. The lessons of events such as the tragic removal of Indians from their homelands onto reservations should have taught the inappropriateness of white law when applied to Indians. On the other hand, the Courts of Indian Offenses may have been viewed at the time as a shrewd (though insensitive) method of eroding still further the inherent powers of a tribe. Such was the result in *United States v. Clapox*,<sup>43</sup> in which the district court in Oregon characterized the new courts as educational and disciplinary instrumentalities with the purported purpose of "civilizing" the Indians.<sup>44</sup> The idea of civilizing the "savage" Indian led the white man to his next logical step in the attempt "to make them like us."<sup>45</sup>

38. See, e.g., *Tribal Self-Government*, *supra* note 36, at 957.

39. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385, *as amended*, 18 U.S.C. § 1153, 3242 (1982).

40. *Id.*

41. S. BRAKEL, *supra* note 36, at 8.

42. See 25 C.F.R. § 11.1-306 (1982). The Bureau of Indian Affairs selected and paid the judges and police for these courts, thus rendering the courts mere instruments of the Bureau. The goal was "to fill the void caused by declines in traditional authority and to reduce the remaining power of traditional chiefs by creating a competing center of authority." F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 333 (1982 ed.).

43. 35 F. Cas. 575 (D. Or. 1888).

44. *Id.* at 577.

45. Felix Cohen notes that the Commissioner of Indian Affairs in 1889 reflected this attitude in his assertion that "[t]he American Indian is to become the Indian American." F. COHEN, *supra* note 42, at 139 (quoting COMM'R IND. AFF. ANN. REP., H.R. Exec. Doc. No.1, 51st Cong., 2d Sess. at vi (1890)). Cohen's handbook has been called "one of the greatest treatises in all the law; like Blackstone, [Cohen] sorted, analysed, and compiled a mass of previously diffuse authorities in order to give Indian law a center. It became, in Justice Frankfurter's words, 'an acknowledged guide for the Supreme Court in Indian litigation.'" *FEDERAL INDIAN LAW*, *supra* note 15, at 137 (citing F. FRANKFURTER, *OF LAW AND LIFE AND OTHER THINGS THAT MATTER* 143 (1967)).



In principle, the allotment of lands to Indians in 1887 was supposed to provide the opportunity for Indian prosperity. It was believed that ownership of a tract of land somehow would transform and assimilate the Indian into the mainstream of white American culture. The actual impact of allotment was that it broke up communal ownership of land by conveying individual allotments to allottees, and by ceding or selling the "surplus" land to first the United States and then non-Indians. Not surprisingly, the allotment system was a failure. As Judge William Canby notes: "[I]n much of the country the long-range effect of the [Dawes] Act was to separate Indians from their lands without accomplishing any of the benign purposes intended by the Act's sponsors."<sup>46</sup>

### *Reorganization, Termination and Self-Determination*

Following the failure of the allotment system and the attempt to change the Indian by assimilation, white American attitudes in Indian policy took on a different hue. Tribalism and the idea of self-government received greater tolerance and "even some respect, for many traditional aspects of Indian culture."<sup>47</sup> This new, ostensibly beneficent change in direction was successful in blocking passage of several bills that would have further reduced Indian land holdings.<sup>48</sup>

The new policy also led to passage of the Leavitt Act of 1932,<sup>49</sup> which authorized the Secretary of the Interior to adjust or discharge debts in which Indians had been gouged by white contractors. One year later John Collier, an active reformist in the Indian movement, was appointed Commissioner of Indian Affairs.<sup>50</sup> As a result of Collier's efforts to preserve Indian heritage and to revive tribalism, Congress passed the Indian Reorganization Act of 1934 (IRA).<sup>51</sup>

46. W. CANBY, *AMERICAN INDIAN LAW* 22 (1988). Cohen notes that [o]f the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, a loss of 90 million acres. Of this, about 27 million acres, or two thirds of the total land allotted, passed from Indian allottees by sale between 1887 and 1934. An additional 60 million acres were either ceded outright or sold to non-Indian homesteaders and corporations as "surplus" lands.

F. COHEN, *supra* note 42, at 138.

47. F. COHEN, *supra* note 42, at 144.

48. *Id.*

49. Ch. 369, 47 Stat. 564 (codified at 25 U.S.C. § 386a (1982)).

50. F. COHEN, *supra* note 42, at 146 (citing K. PHILIP, *JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920-1954* at 24 (1977); A. DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 338 (1970)).

51. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)).

The IRA was intended to halt the alienation of tribal lands so that the economic condition of Indians could improve. Under the IRA, tribes were permitted to politically organize, following non-Indian governmental norms, to form business corporations, and to receive preference in federal employment. The IRA also gave power to the Secretary to promulgate conservation regulations and to exempt certain acquisitions of land from taxation.<sup>52</sup> Still, the IRA had its deficiencies.

In actuality, the supervisory role of the federal government was probably enlarged to a greater degree than the self-government of the Indians. This is evidenced, for example, by the Indian tribes' limited autonomy,<sup>53</sup> embodied in the requirement of congressional sanction before the adoption of an Indian constitution. Although a few tribes did in fact revive or establish some form of tribal government, many remained either unorganized or under existing tribal governments.<sup>54</sup> All things considered, "[p]rogress toward the strong tribal self-government that John Collier and the IRA encouraged was slow but, many believe, significant."<sup>55</sup>

Toward the end of World War II, "the tenor of the times was beginning to run against further Indian renaissance."<sup>56</sup> Attacks on reforms brought about by the IRA became increasingly hostile during the 1940s.<sup>57</sup> The attacks came from a diverse and "strange coalition of forces [which] now called for the unilateral termination of federal assistance to Indians . . ."<sup>58</sup> Conservatives wanted federal budget cuts. Liberals wanted anti-discrimination legislation. Many others wanted a stronger focus on international affairs and the war effort.<sup>59</sup> Keeping in step with traditional white politics, these attacks served "as vehicles for noisy criticism."<sup>60</sup>

52. F. COHEN, *supra* note 42, at 148-49.

53. See *Tribal Self-Government*, *supra* note 36, at 966-69.

54. Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559, 569 (1968). See also de Raimés, *supra* note 8, at 69. "Today there are approximately 250 Indian tribes with identifiable governments; 95 of these have constitutions written in conformity with the Indian Reorganization Act." *Id.* (citing Kerr, *Constitutional Rights, Tribal Justice and the American Indian*, 18 J. PUB. L. 311, 316 (1969).

55. F. COHEN, *supra* note 42, at 151.

56. DELORIA, *supra* note 35, at 16.

57. See generally S. TYLER, *INDIAN AFFAIRS: A STUDY OF CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS* (1964).

58. DELORIA, *supra* note 35, at 16.

59. F. COHEN, *supra* note 42, at 154; DELORIA, *supra* note 35, at 16-17.

60. D. McNICKLE, *THEY CAME HERE FIRST* 249 (1975).

Between 1945 and 1950, federal budget cuts continued, reflecting America's postwar faith in free enterprise. The termination policy<sup>61</sup> in 1950 also brought the appointment of Dillon S. Myer as Commissioner of Indian Affairs. Myer had been the former director of the detention camp program for Japanese-Americans during World War II.<sup>62</sup>

During Myer's tenure, due in part to lobbying by Republican Senator Arthur Watkins of Utah, two major tribes were legislatively terminated: the Klamath of Oregon and the Menominee of Wisconsin.<sup>63</sup> Many smaller tribes were also terminated.<sup>64</sup> Overall, however, "the large tribes with treaty commitments and political sophistication were not touched although they were nearly frightened into submission."<sup>65</sup>

The termination policy cut deeply into Indian culture. As usual, the consent of those governed by the termination legis-

61. Termination meant denial of federal education, health, welfare and housing assistance as well as other social programs. Termination also meant the imposition of state legislative and judicial jurisdiction over terminated Indians resulting in the inapplicability of federal and tribal law. Most of the termination legislation had such common provisions as: 1) the requirement of completion of the termination process within two to five years, 2) preparation of final tribal rolls during that time, 3) members on the rolls were to be given a personal property right in individual tribal assets and 4) the Secretary of the Interior was to publish a proclamation announcing final termination. See generally Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

62. F. COHEN, *supra* note 42, at 158.

63. DELORIA, *supra* note 35, at 18.

64. See, e.g., F. COHEN, *supra* note 42, at 173-74 nn.224-37. In addition to the Klamath and Menominee tribes, the following tribes were also terminated:

<u>Indian Tribe</u>	<u>State</u>	<u>Population</u>	<u>Acres</u>
Western Oregon (61 tribes)	Oregon	2,081	3,158
Alabama-Coushatta	Texas	450	3,200
Mixed-blood Ute	Utah	490	211,430
Southern Paiute	Utah	232	42,839
Wyandotte	Oklahoma	1,157	94
Peoria	Oklahoma	640	0
Ottawa	Oklahoma	630	0
California Rancherias	California	1,107	4,315
Catawba	S. Carolina	631	3,388
Ponca	Nebraska	442	834

2 F. PRUCHA, *THE GREAT FATHER, THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* 1048 (1984) (citations omitted). In all, "approximately 109 tribes and bands were terminated. A minimum of [1,362,801] acres and [13,263] individuals were affected." Wilkinson & Biggs, *supra* note 61, at 151.

65. DELORIA, *supra* note 35, at 18.

lation was not considered necessary for its implementation.<sup>66</sup> Critics of the policy note that tribal sovereignty and the trust relationship were effectively ended<sup>67</sup> during this dark period in American history.

Although the *Handbook of Federal Indian Law* states that coercive termination as a policy was abandoned in 1958,<sup>68</sup> other authorities suggest that "a persistent strain of opposition to termination remained strong throughout the period when it was the official policy of Congress."<sup>69</sup> The move away from termination as a solution to Indian "problems" was clear in 1960 by the pro-self-determination positions of both Richard Nixon and John Kennedy.<sup>70</sup> Characteristic of the change in political winds, President Johnson, in addressing Congress in 1968, proposed "a new goal for our Indian programs; a goal that ends the old debate about termination and stresses self-determination."<sup>71</sup>

Such was the state of affairs on the pendulum of white America's Indian policy. The red man had gone through a series of characterizations by his white neighbor: from "savage heathen" to "potential prosperous farmer," from a race to be "terminated" to a tribe determining its own destiny. The Indian remains today as unique as he was in the days of John Marshall.<sup>72</sup>

During the century that followed the *Worcester* case, federal courts generally paid substantial deference to the doctrine of tribal sovereignty.<sup>73</sup> Yet, with the passing years, it became evident that since Indians were citizens of both the United States<sup>74</sup>

66. RED MAN'S LAND, *infra* note 112, at 91.

67. See Wilkinson & Biggs, *supra* note 61.

68. F. COHEN, *supra* note 42, at 180.

69. DELORIA, *supra* note 35, at 21. For a general summary of federal government policy toward Indian sovereignty, see K. KICKINGBIRD, L. KICKINGBIRD, C. CHIBITTY & C. BERKEY, *INDIAN SOVEREIGNTY* (1983).

70. F. COHEN, *supra* note 42, at 182.

71. DELORIA, *supra* note 35, at 22.

72. Indians today continue to be stereotyped and categorized. Melanie Smith-Walking Bull (Santee-Dakota), acting director of a health foundation for Indians notes that "[i]f you're a Native American, then people assume you get a big, fat check every month that's sufficient to take care of your needs. The reality is that most Native Americans are still living on subsistence wages or incomes." Sylwester, *Indians Find Aid, Culture, Community at Salem House*, Statesman J., Feb. 18, 1990 (Salem, Or.), at 1C, col. 4. See also F. SHIPEK, *PUSHED INTO THE ROCKS* 152-53 (1987) ("Problems continue to exist because of the stereotyped views [we have] of Indians . . .").

73. See, e.g., *Talton v. Mayes*, 163 U.S. 376 (1896) (Cherokee powers of self-government not operated upon by fifth amendment).

74. See Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1982)); Johnson, *Sovereignty, Citizenship and the American Indians*, 15 ARIZ. L. REV. 973 (1973).

and of the states in which they lived,<sup>75</sup> federal courts eventually would have to more clearly define where the Indian stood with respect to fundamental rights and liberties under the Constitution.<sup>76</sup> The imposed authority of the federal government to define such rights was obviously a giant leap from the "sovereign tribes" perspective of the *Worcester* era to the more current view of tribal governments and courts as being within the federal legal and governmental structure.

### *The Jurisdiction Cases and Tribal Sovereignty*

#### *The Intrusive Power of Appellate Review*

The Ninth Circuit was faced with a question of individual Indian constitutional rights in *Colliflower v. Garland*.<sup>77</sup> In that case, Madeline Colliflower was charged with and found guilty of disobeying "a lawful order of the [Indian] Court by failing to remove her cattle from land leased by another person, after being ordered to do so by the [Indian] Court . . ."<sup>78</sup> She was sentenced to a fine of \$25 or five days in jail. Because she could not afford to pay the fine, Mrs. Colliflower elected to serve the jail sentence.

In her petition to the United States District Court, she alleged a denial by the tribal government of her rights to counsel, trial, and confrontation of witnesses. She also sought a writ of habeas corpus. The district court denied the petition for lack of jurisdiction<sup>79</sup> and Mrs. Colliflower appealed to the Ninth Circuit Court of Appeals. The appellate court addressed only the question of whether the district court had jurisdiction to issue a writ of habeas corpus.<sup>80</sup>

75. See *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975), *aff'd sub nom.* *Apache County v. United States*, 429 U.S. 876 (1976) (holding that 14th amendment protections apply to Indians).

76. See Lazarus, *Title II of the 1968 Civil Rights Act: An Indian Bill of Rights*, 45 N.D.L. REV. 337, 341 (1969).

77. 342 F.2d 369 (9th Cir. 1965).

78. *Id.* at 370. Colliflower was a member of the Gros Ventre tribe whose court she alleged violated her rights under the United States Constitution. The Gros Ventre tribe is part of the Fort Belknap Indian community on the Indian reservation in Blaine County, Montana.

79. United States constitutional guarantees expressly protect United States citizens from state and federal governmental infringements of their rights but *not* from tribal governments. See, e.g., U.S. CONST. amend. XIV. Cohen suggests that "[a]n analogy may be made to the so-called Insular Cases, holding that the Constitution does not apply to newly acquired United States territory until Congress applies it by statute." F. COHEN, *supra* note 42, at 664 n.11.

80. *Colliflower*, 342 F.2d at 371.

Finding that an Indian court is "in part, at least, [an] arm of the federal government,"<sup>81</sup> the Ninth Circuit determined that "it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court."<sup>82</sup> Thus, the appeals court broke new ground in the degree of federal intrusion into tribal self-government. The reasoning of the court was based on its assertion that Indian courts function in a manner similar to federal agencies, and that they are under "partial control" of the federal government.<sup>83</sup> As a result, the district court's order denying the petition for habeas corpus was reversed.<sup>84</sup>

In a fashion not unlike the Congress in 1885, the Ninth Circuit in *Colliflower* took upon itself the task of defining the status of Indians within the federal judicial structure. This, of course, was also an indirect way of defining the status of the Indian courts in that same structure.<sup>85</sup>

### *Indian Courts as "Agencies"*

By classifying and analogizing Indian courts to federal agencies, the Ninth Circuit was assuring tribal courts a certain death. Granted, under an agency concept Indian courts will exist and, generally, courts will not decide an issue within the jurisdiction of an Indian tribunal prior to a decision by that tribunal.<sup>86</sup> However, any decision rendered by the tribal courts will be constrained by judicially and legislatively established boundaries on the tribal courts' discretion. Furthermore, tribal decisions may be subject to de novo review.<sup>87</sup> This is evidenced by the treatment given to the Securities and Exchange Commission, the

81. *Id.* at 379.

82. *Id.*

83. *Id.* One critic suggests that despite the court's disclaimer that it did not "pass upon the merits," *id.* at 379, the court actually did so: "What emerges from a close reading of *Colliflower* . . . is not a cohesive new theory of constitutional law, but rather a distinct impression that the Court of Appeals found a gross injustice to have been perpetrated and simply decided to stop it." Lazarus, *supra* note 76, at 344.

84. *Colliflower*, 342 F.2d at 379.

85. For a discussion on the extent to which courts can effectively legislate new law, see Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983-84).

86. Note, *The Doctrine of Primary Jurisdiction: Was It Inverted?*, 2 PEPPERDINE L. REV. 190 (1974). See generally *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (Congress intended NLRB to be primarily responsible for applying law).

87. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). See also *Ng Fung Ho v. White*, 259 U.S. 276 (1922) (held citizenship to be jurisdictional fact, thus reviewing court should conduct trial de novo).

Interstate Commerce Commission, and other like agencies of the federal government.<sup>88</sup>

It is true that, in many cases, deference is given to the fact-finding of federal agencies.<sup>89</sup> Legislative acts and court decisions suggest that, in some instances, agencies may be experts in a given area and thus be more aware than courts of the proper resolution of a matter. For example, the Supreme Court has stated that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over . . ."<sup>90</sup> On its face, the Court's statement seems clear, but in its application to Indian tribunals, its breadth is unclear. Even the Administrative Procedure Act is not very helpful "in directing when the reviewing court is able (or required) to find the facts *de novo*, without any deference to the agency's factual determinations."<sup>91</sup> This muddies the waters for the practitioner, who must predict the likelihood of the court substituting its judgment for that of the Indian "agency."

Arguably, under the agency concept, Indians seek to enforce their rights pursuant to treaty agreements and thus, also, pursuant to a legislatively delegated power. Therefore, if one considers treaties as approved enactments of Congress,<sup>92</sup> the treaties should be handled by courts in the same manner as statutes—requiring interpretive, statutory construction. Such construction, of course, would require that the court use the same judicial standards of the Indian tribal court. This follows from the fact

88. See Administrative Procedure Act, § 10 (e) (1946) (as amended at 5 U.S.C. § 706 (1982)). See also *Medical Comm'n for Human Rights v. SEC*, 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972) (permitting review of agency's no-action letter).

89. See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (agency finding on question of fact upheld if supported by "substantial evidence").

90. *United States v. Western Pac. Ry.*, 352 U.S. 59, 64 (1956).

91. E. GELLHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESS* 74 (2d ed. 1981).

92. See, e.g., F. COHEN, *supra* note 42, at 238 (quoting the Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, art. 3, wherein Congress essentially re-enacted the Northwest Ordinance of 1787):

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

that looking upon the treaty as a statute would provide the "manageable standards" by which the reviewing court could detect abuse.<sup>93</sup> Accordingly, a court should uphold a reasonable Indian "agency" interpretation even if it does not agree with it.<sup>94</sup> Further, a tribal "agency" decision, under this theory, could not be reviewed on the ground that the prior decision was erroneous.<sup>95</sup> However, as will be discussed later, something more crucial than a determination of the proper scope of review is missing under an agency theory—finality on matters of Indian affairs.

Upon reviewing an agency decision, federal courts have the power to make their own determinations on constitutional questions.<sup>96</sup> In effect, this means Mrs. Colliflower was free to assert constitutional claims and not be bound by any determination of those claims by the Indian court. The ruling by the district court allowing review apparently was valid, even though it meant sacrificing sovereign, tribal powers. The district court's review apparently was viewed as just because it sought to provide basic fairness via an impartial decision maker, especially in sensitive matters of fundamental rights. The district court also may have considered the withholding of judicial review as a hardship for Mrs. Colliflower.<sup>97</sup> Such a view, however, flies in the face of many traditional tribal concepts of fairness and justice.

Impartiality is not a feature that Indians seek in meting out their justice. On the contrary, the Indian justifiably seeks a decision partial to Indian tribal customs and traditions to assure "real justice" as he perceives it.<sup>98</sup> The Indian concept of justice is based on judgments made by the tribe according to the unique

93. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

94. *Chevron, USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

95. *See, e.g., ICC v. Brotherhood of Locomotive Engrs.*, 482 U.S. 270 (1987).

96. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

97. Yet Professor C. Wilkinson notes that "[o]ne cannot completely reconcile classic political rights, as enjoyed by citizens in other political units in the United States, with the kind of rights that exist within Indian tribal governments for the fundamental reason that Indian tribal governments are literally foreign: they exist outside of the Constitution." C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 112 (1987). *See also* 5 J. STEIN, G. MITCHELL & B. MEZINES, *ADMINISTRATIVE LAW* § 48.04 (1988) ("Hardships due to withholding review may occur when the agency action has a direct and immediate effect on or causes change in the day to day behavior of the complaining party . . . . Hardship may be established by showing detrimental economic impact, added expense, untoward social consequences or significant environmental damage.

98. *See, e.g., Tso, The Process of Decision-Making in Tribal Courts*, 16 RES. L. NOTES 2 (1989). "In traditional Navajo culture the concept of a disinterested, unbiased decision maker is unknown." *Id.* at 4.



circumstances of each situation. This means that Indian tribunals are not likely to view themselves as agents of their "Great Father," whose will they must carry out according to a set code of laws. Consequently, any attempt to characterize Indian tribunals as federal agencies should fail. This is true more so when one takes into account that Indian tribunals existed even before the federal government.<sup>99</sup>

Since *Colliflower*, in fact, did involve an Indian court resulting from legislation (the IRA), the court technically could be considered an agency creature of the federal government. Yet, many of today's Indian tribunals were created not by statute but by the tribes themselves. Precisely because of the narrow precedential quality of *Colliflower*, the strength of the argument against the agency theory is not diminished.<sup>100</sup>

Although the Ninth Circuit in *Colliflower* stood alone among federal courts in finding jurisdiction to review tribal court decisions, some state courts began to reflect a similar reasoning as to their ability to review tribal court decisions. Encroachment upon tribal sovereignty thus extended beyond the federal court system. For example, the Colorado Supreme Court agreed to hear a case where the plaintiff had been excluded from the reservation in *Martinez v. Southern Ute Tribe*.<sup>101</sup> The court reasoned that to deprive the plaintiff of the right to be heard in some court, amounted to a deprivation of equal protection of the laws. The judgment of the lower Colorado court was thus reversed and the case was remanded with directions to overrule the motion to dismiss for lack of subject matter jurisdiction.<sup>102</sup>

99. See, e.g., *National Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) ("The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (noting tribes as separate sovereigns preexisting the Constitution); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) (stating tribe's sovereignty substantially predates Constitution).

100. One author states that "*Colliflower* was thus an intrusion into tribal affairs although of an admittedly restricted nature since the appellate court would not venture to suggest that the doctrine be applied indiscriminately to other tribes." DELORIA, *supra* note 35, at 131-32.

101. 150 Col. 504, 374 P.2d 691 (1962). A similar result was reached in *Boyer v. Shoshone-Bannock Indian Tribes*, 92 Idaho 247, 441 P.2d 167 (1968).

102. *Martinez*, 374 P.2d at 694. More recent decisions suggest, however, that equal protection guarantees do not necessarily have to parallel constitutional provisions when applied in a tribal context. See, e.g., *McCurdy v. Steele*, 506 F.2d 653, 655-56 (10th Cir. 1974); *Groundhog v. Keeler*, 442 F.2d 674, 682 (10th Cir. 1971); *Conroy v. Frizzell*, 429 F. Supp. 918, 925 (D.S.D. 1977). See also *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

*Colliflower* was decided in 1965 just as the civil rights movement was gaining popular momentum in the United States. Perhaps due in part to the nature of the political climate of the 1960s, the white man began showing signs of restlessness. Congressional concern that "reservation Indians [did] not possess the same constitutional rights which are conferred upon all other Americans by the Bill of Rights of the Constitution"<sup>103</sup> led to an extensive series of congressional hearings.<sup>104</sup> These hearings were conducted in Washington, D.C. as well as on or near Indian reservations. Not surprisingly, legislators focused on abuse of Indians' rights by tribal courts as much as, if not more than, the issue of Indian justice.<sup>105</sup> From those hearings emerged the Indian Civil Rights Act of 1968 (ICRA).<sup>106</sup>

### *Judicial Maintenance of a White Vision*

#### *Systematic Erosion of Indian Rights*

It is perhaps no coincidence that there are ten provisions in the "Indian Bill of Rights," as the ICRA has become known.<sup>107</sup>

103. 113 CONG. REC. S35,472 (daily ed. Dec. 7, 1967). It is true, of course, that there were Indians concerned as United States citizens with protecting their constitutional rights. However, the tone of the legislative hearings was clearly toward a limitation on the latitude of self-government which tribes previously had enjoyed. See generally NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, *INDIAN COURTS AND THE FUTURE* (D. Getches ed. 1978).

104. E.g., S. REP. NO. 841, 90th Cong., 1st Sess. (1967); *Hearings on Const. Rights of the Am. Indian Before the Subcommittee on Const. Rights of the Sen. Committee on the Judiciary*, 87th Cong., 1st Sess., pt. 1 (1961); 87th Cong., 1st Sess., pt. 2 (1961); 87th Cong., 2d Sess., pt. 3 (1962); 88th Cong., 1st Sess., pt. 4 (1963); *Hearings on Const. Rights of the Am. Indian S. 961-68 & S.J. Res. 40, Before the Subcommittee on Const. Rights of the Sen. Committee on the Judiciary*, 89th Cong., 1st Sess. (1965); *Subcommittee on Const. Rights of the Sen. Committee on the Judiciary, Const. Rights of the Am. Indian: Summ. Rep. of Hearings and Investigations Pursuant to S. Res. 194*, 89th Cong., 2d Sess. 8-11, 25 (1966).

105. S. BRAKEL, *supra* note 36, at 8.

106. 25 U.S.C. §§ 1302, 1303 (1982).

107. The ICRA provides in relevant part:

No Indian tribe in exercising powers of self-government shall -

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) [prohibits unreasonable searches];
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;

This is because since "the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens, [including Indians,] be protected by the United States from unwarranted intrusions on their personal liberty."<sup>108</sup>

Many commentators have written about the likely intent of Congress in using almost verbatim the language of the United States Constitution.<sup>109</sup> The general consensus is that Congress had a sincere desire to protect American Indians' constitutional rights, while acknowledging that Indians are not subject to parallel constitutional constraints. Significantly, the ICRA does not prohibit the establishment of religion, nor does it require jury trials in civil cases. Furthermore, a criminal defendant can have appointed counsel but only at the defendant's expense. One expert in Indian law asserts that the "guarantees" of the ICRA "strike at the heart of tribal sovereignty and threaten the basis of tribal self-government by allowing review of tribal action in the federal courts according to criteria borrowed from the

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(5) take any private property for a public use without just compensation;

(6) [right to speedy trial, confrontation of witnesses and counsel at own expense];

(7) [prohibits cruel and unusual punishment];

(8) [guarantees equal protection of tribe's laws and due process];

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1302 (1982).

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

25 U.S.C. § 1303 (1982).

108. D. WACHTEL, *Indian Law Enforcement*, in *INDIANS AND CRIMINAL JUSTICE* 119 (L. French ed. 1982).

109. Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969); Rieblisch, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968); Warren, *An Analysis of the Indian Bill of Rights*, 33 MONT. L. REV. 255 (1972); Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557 (1972); Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1 (1975); Note, *Indian Bill of Rights*, 5 SW. U.L. REV. 139 (1973); Note, *Indians—Criminal Procedure, Habeas Corpus as an Enforcement Procedure Under the Indian Civil Rights Act of 1968*, 46 WASH. L. REV. 541 (1971); Smith, *Tribal Sovereignty and the Indian Bill of Rights*, 3 CIV. RTS. DIG. 9, 15 (1970).

Bill of Rights and couched in the familiar language of American constitutional jurisprudence."<sup>110</sup> It is this "familiar language" that brings with it all the baggage of western European civilization. This explains why "[t]o many Indians the Act is an assault on tribal sovereignty, for it allows an action to be brought in federal court for matters that, in the eyes of its detractors, are solely the concern of the Indians."<sup>111</sup>

At first glance, it may seem unclear why white Americans would attempt to apply specific traditions of European legal heritage to the totally different situation of the American Indian. This is especially true since the unique traditions of Indians have been well known since the days of the Founding Fathers. Furthermore, no attempt was ever made "to equate these traditions with the traditions of English common law or to force the Indians, in their internal judicial procedure, to follow English models."<sup>112</sup> So why start in 1968?

The answer presents itself when we examine the historical roots of American jurisprudence. The United States Constitution begins with "We the people." But to whom does that phrase refer? This written instrument, agreed upon by the people of the Union as the absolute rule of action and decision, was never consented to by the American Indians. Yet, despite the clear understanding that Indians were not included in "We the people,"<sup>113</sup> Congress decided in 1968 to impose upon Indians white American democratic traditions.<sup>114</sup> These imposed rights arose

110. See de Raismes, *supra* note 8, at 59. Ironically, this same expert concludes his article in support of the ICRA with a few revisions. See *Id.* at 101-03.

111. *AMERICAN INDIANS AND THE LAW* 5 (L. Rosen ed. 1976). As one might expect: Indian response [to the ICRA] was mixed during the legislative process. Some tribes had no objection in principle but believed that the legislation was unnecessary. Others argued that the legislation would unduly formalize tribal court systems. Still others, including the traditional Pueblos of the Southwest, opposed any incursions whatsoever on their tribal sovereignty.

*FEDERAL INDIAN LAW*, *supra* note 15, at 368. For a discussion on the desire of Indians who sought protection from their own governments, see W. WASHBURN, *THE INDIAN IN AMERICA* 272 (1975).

112. W. WASHBURN, *RED MAN'S LAND / WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 173 (1971).

113. See generally *id.* at 174-76; *Elk v. Wilkins*, 112 U.S. 94, 99-100 (1884) ("Under the Constitution . . . as originally established . . . General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.").

114. The issue was really joined in 1924 when the Citizenship Act of 1924 naturalized all Indians born within the territorial limits of the United States. See 8 U.S.C. § 1401(a)(2) (1982). For many Indians the quest for citizenship was not an important

“from the white man’s culture—from manifest destiny, missionary zeal and from capitalist individualism—indeed from the very aspects of the white man’s culture which have acted as the motivating force behind the exploitation of the Native American people and their homeland.”<sup>115</sup>

It thus becomes clear that the answer to the above question is that white Americans never attempted to equate European traditions with Indian traditions. Thus, the ICRA was really not as extraordinary for Indians as one might suppose. The forceful imposition of white ways upon the red man started long before the ICRA. However, it was from this essentially paternalistic legislation<sup>116</sup> that arose the case of *Dodge v. Nakai*.<sup>117</sup>

In *Dodge*, the white plaintiff, Theodore Mitchell, had been permanently excluded from the Navajo Indian Reservation by the tribal council after laughing during an Advisory Committee meeting. The tribal leaders viewed the plaintiff’s laughter as full of ridicule and scorn for the committee. Mitchell’s conduct had such an effect on the members of the committee that it compelled Mrs. Annie Wauneka to admonish him for laughing in the Council Chambers. The next day, upon the committee’s reconvening, Mrs. Wauneka asked Mitchell if he intended to laugh again. Mitchell attempted to apologize but Mrs. Wauneka struck him several times and ordered him to leave the Council Chambers, which he did. The following day, the Advisory Committee passed a resolution to remove Mitchell from the reservation. The decision to remove Mitchell also appears to have been based in part on a history of difficulty between Mitchell and the Navajo Tribe.<sup>118</sup>

In his appeal to the United States District Court, Mitchell sued the tribal chairman to set aside the exclusion order. The

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cause:

Indeed, some Indians resist the notion that they, as members of a tribe that is an independent sovereign, can be made citizens without their request or consent . . . [However,] Congress’ [plenary] power over Indian affairs [has been deemed] adequate to confer citizenship on Indians notwithstanding their personal sentiments or seemingly contrary treaty provisions.

FEDERAL INDIAN LAW, *supra* note 15, at 552. See also *Ex parte Green*, 123 F.2d 862 (2d Cir. 1941), *cert. denied* 316 U.S. 668 (1942).

115. See de Raismes, *supra* note 8, at 99.

116. See Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49, 50 (1971).

117. 298 F. Supp. 26 (D. Ariz. 1969).

118. *Dodge*, 298 F. Supp. at 30-31.

district court found jurisdiction pursuant to 28 U.S.C. §§ 1331,<sup>119</sup> 1343(1), 1343(4),<sup>120</sup> 1361,<sup>121</sup> and 1651.<sup>122</sup> The only question the court addressed was “whether the exclusion of Mitchell from the Navajo Reservation was lawful in light of Title II of the Civil Rights Act of 1968.”<sup>123</sup>

After finding that the Navajo Advisory Committee had excluded Mitchell on “wholly unreasonable” grounds, i.e., the committee’s interpretation of his laughter, the district court concluded that Marshall’s exclusion was lacking in due process and abridged his freedom of speech.<sup>124</sup> Accordingly, the exclusion order was invalidated and the defendant was enjoined from removing or excluding Mitchell.<sup>125</sup>

The *Dodge* decision was significant because “based as it is on Anglo-American legal principles, [it] not only open[ed] the substantive tribal law to challenge but also allow[ed] the federal court to scrutinize both the structure and procedures of the traditional Indian governments.”<sup>126</sup> Additionally, the *Dodge* ruling rendered the decision of the Navajo Tribal Council meaningless. During Congressional hearings on the ICRA, the Pueblos of New Mexico had expressed this same concern. In opposing the habeas corpus provision, they argued that it opened “an avenue through which Federal courts, lacking knowledge of [the Pueblos] traditional values, customs, and laws, could review and offset the decisions of [their] tribal councils.”<sup>127</sup> Thus, even at the embryonic stage of the ICRA’s history, problems of its application loomed on the horizon.

119. Section 1331 confers general jurisdiction on federal district courts over actions arising under the Constitution, laws, or treaties of the United States.

120. Section 1343 confers jurisdiction on federal district courts over various kinds of civil rights actions such as violations of federal constitutional or statutory rights alleged to have taken place under color of state law.

121. This section made available nationally a mandamus remedy to federal district courts.

122. Section 1651 enables federal courts to issue “all writs necessary or appropriate in aid of their respective jurisdictions.” However, the statute may only be invoked in a district court as an aid to already existing jurisdiction. *See, e.g.,* *Stafford v. Superior Court*, 272 F.2d 407, 409 (9th Cir. 1959).

123. *Dodge*, 298 F. Supp. at 29. Mitchell’s civil suit charged violations of the free speech (25 U.S.C. § 1302(1)), due process (25 U.S.C. § 1302(8)), and bill of attainder (25 U.S.C. § 1302(9)) provisions of the ICRA.

124. *Id.* at 32.

125. *Id.* at 34.

126. Note, *Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 MICH. L. REV. 210, 212 (1976).

127. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70 n.30 (1978) (citation omitted).

According to Navajo custom, there is nothing unusual in banishing an Indian from a tribe when the tribe deems an Indian's conduct such as to warrant exclusion. In that respect, Mrs. Wauneka and the Advisory Committee merely followed the procedure that would have been followed had an Indian been guilty of Mitchell's disrespectful laughter. One critic of the *Dodge* case notes that "[f]or a white man who had previously placed himself in defiance of tribal government to enter into the seat of government of that tribe, on their reservation and to laugh scornfully in the face of tribal government, may within the culture of the Navajo tribe constitute a grave transgression."<sup>128</sup>

The exclusion of Mitchell from the reservation was a pill too hard to swallow, not only for him but for the district court that heard his appeal as well. In deciding that Mitchell's exclusion was "wholly unreasonable," the district court revealed its white man standard by which it measured the Navajos' reasonableness. However, such an approach misses the mark.

The better approach would have been to ask: Did the Navajos treat Mitchell the way they would have treated a Navajo for the same offense? If the answer is yes, as it probably should be, then Mitchell must accept the Navajo decision as final.<sup>129</sup> If the answer was that Mitchell was singled out for harsher treatment than an Indian would have been by Navajo custom, Mitchell's position is strengthened.

The result of *Dodge v. Nakai* is a court-sanctioned intrusion into the sovereignty of all Indian tribes. It substantiated the fears many Indians held about the ICRA's intrusive nature upon Indian independence.<sup>130</sup> The decision also effectively reduced the level of deference one would expect be paid to a sovereign, Indian nation. The Indian continued to be viewed by the federal

128. Ziontz, *supra* note 109, at 50-51.

129. In this respect, Mitchell's claim would be obviated since 25 U.S.C. § 1302(8) guarantees a person within a tribe's jurisdiction "the equal protection of *its* laws . . ." *Id.* (emphasis added). No mention is made in the ICRA of a guarantee of white man's laws. Thus, banishment is appropriate since that *is* part of the Navajo's laws. This remains true notwithstanding that Anglos view banishment as "a fate universally decried by civilized people." *Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1042 (D. Md. 1974). It makes little sense to say that the federal government will respect the substantive criminal laws of a state but not those of a dependent domestic nation. See, e.g., Comment, *The Armed Career Criminal Act: When Burglary Is Not Burglary*, 26 WILLAMETTE L. REV. 171, 190 (1989) (suggesting that a "state acting within its sovereign, constitutional powers, should be able to say what is burglary within its borders for use of [a federal] Act's enhancement penalties.").

130. DELORIA, *supra* note 35, at 132.

judiciary as incapable of remaining within the parameters of white-conceived notions of fairness and justice.

### *Supreme Court Inconsistency*

Upon examination of Supreme Court decisions, it is not surprising to discover that the Court, too, vacillates unpredictably in its Indian policy. One case in the modern era which supports the exercise of substantial tribal governing powers within Indian territory is *Williams v. Lee*.<sup>131</sup>

In *Williams*, a non-Indian merchant sued a Navajo Indian and his wife to collect a debt for goods sold them on the reservation. The Supreme Court of Arizona affirmed the lower Arizona court's finding of proper jurisdiction, since no act of Congress expressly forbade Arizona courts from doing so. The United States Supreme Court granted certiorari "[b]ecause this was a doubtful determination of the important question of state power over Indian affairs . . . ."<sup>132</sup>

Following a discussion of the extensive background of the *Worcester* decision, the Court determined that without doubt, Arizona's exercise of state jurisdiction would undermine tribal court authority over reservation affairs. Such jurisdiction

would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [was] not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.<sup>133</sup>

The Court noted that where there is no governing act of Congress, the question is whether state action infringes on "the right of reservation Indians to make their own laws and be ruled by them."<sup>134</sup> Since Arizona did infringe on Indian rights, the Court reversed the decision of the Arizona Supreme Court.<sup>135</sup>

A reading of only the *Williams* case might leave one with a mistaken impression of unreserved support by the Court for

131. 358 U.S. 217 (1959).

132. *Id.* at 218.

133. *Id.* at 223.

134. *Id.* at 220 (citing *Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885)).

135. *Id.* at 223. However, Judge Canby notes that "[t]he object of *Williams v. Lee*—protection of tribal government—is frustrated by a division of jurisdiction between state and tribal courts that is solely dependent upon who sues first, particularly when plaintiff must seek relief in his adversary's native court." Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 222 [hereinafter *Indian Jurisdiction*].



Indian self-government. This impression would likely be strengthened when *Williams* is viewed together with the decision rendered nearly two decades later in *Santa Clara Pueblo v. Martinez*.<sup>136</sup>

In *Santa Clara Pueblo*, a female member of the Santa Clara Pueblo tribe and her daughter sought declaratory and injunctive relief in Federal District Court against the Pueblo tribe and its Governor pursuant to section 8 of the ICRA. The original complaint alleged that a tribal ordinance which denied tribal membership to the children of female members who marry outside the tribe, but not to similarly situated children of men of that tribe, violated the equal protection provision of the ICRA.<sup>137</sup>

The district court found jurisdiction and concluded that the ICRA impliedly authorized civil actions for declaratory and injunctive relief and that the Pueblo tribe was not immune to such suit. After a full trial, the court found for the Pueblo tribe on the merits.<sup>138</sup> The Tenth Circuit Court of Appeals agreed on the jurisdictional issue but reversed on the merits.<sup>139</sup> Thereafter, the United States Supreme Court granted certiorari.

The Court recognized one threshold issue: does the ICRA impliedly authorize civil actions for declaratory or injunctive relief against a tribe or its officers in federal courts?<sup>140</sup> Justice Marshall began his opinion with a succinct overview of federal-tribal relationships since the days of Chief Justice Marshall.<sup>141</sup> The Court's opinion pointed out the historical attributes of American Indian tribal sovereignty and the tribes' power to make their own substantive law in internal matters. It noted that the tribes' powers of self-governance as separate sovereigns pre-date the United States Constitution. However, Marshall also acknowledged Congress' plenary power to limit, modify or eliminate those powers.<sup>142</sup>

Marshall viewed the ICRA as an exercise of Congress' plenary power. But since Indian tribes had traditionally enjoyed common law immunity from suit, the Court determined that immunity could not be implied but must be unequivocally expressed. Here,

136. 436 U.S. 49 (1978).

137. *Id.* at 51.

138. *Id.* at 53.

139. *Id.* at 54-55.

140. *Id.* at 52.

141. *Id.* at 55 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

142. *Id.* at 55-56 (citations omitted).

there was no such expression by Congress. Thus, the suit against the tribe was barred.<sup>143</sup>

The Court noted in dicta that Congress had held extensive hearings on whether or not to provide more methods of relief than habeas corpus under the ICRA. Thus, Congress' decision not to mention review of civil cases was well-considered. The Court also recognized the likelihood of undermining tribal authority by resolving Indian disputes in a forum other than their own. In this manner, the Court apparently sought to show "proper respect both for tribal sovereignty itself and for the plenary power of Congress."<sup>144</sup> Accordingly, the Court of Appeals decision was reversed.<sup>145</sup>

As of 1985, the Ninth Circuit appeared to remain true to the spirit and tenor of the *Santa Clara Pueblo* decision in *Chemehuevi Indian Tribe v. California State Bd. of Equalization*.<sup>146</sup> In *Chemehuevi*, the tribe brought suit challenging California's tax on tribal cigarette sales on the Chemehuevi reservation to non-Indians. The tribe sought injunctive relief to prevent enforcement of the state cigarette law against it. Thereafter, the Board of Equalization filed a counterclaim for the amount of taxes allegedly due. The Ninth Circuit Court of Appeals found that the tribe's sovereign immunity barred a counterclaim by California state. Also, the disputed tax on tribal cigarette sales was determined to be preempted by federal law because it imposed the state tax directly upon the tribe.<sup>147</sup> Thus, to the uninitiated, the Court's pro-sovereignty policy seemed to be followed fairly consistently.

However, in the very same year as the Ninth Circuit's decision in *Chemehuevi*, the Supreme Court rendered an obscurely reasoned opinion in *National Farmers Union Ins. Co's v. Crow Tribe of Indians*.<sup>148</sup> It is unclear whether the Court in *National Farmers* was attempting to apply existing federal Indian law to the facts before it, or whether it intended to make new federal inroads on tribal sovereignty. The ambiguity is evident in Justice Stevens' treatment of the jurisdictional issue in the case.

*National Farmers* involved a Crow Indian minor whose guardian had obtained a default judgment in a Crow tribal court

143. *Id.* at 57-59.

144. *Id.* at 60.

145. *Id.* at 72.

146. 757 F.2d 1047 (9th Cir. 1985), *rev'd*, 474 U.S. 9 (1985), *remanded*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987).

147. *Id.* at 1050.

148. 471 U.S. 845 (1985).

against the school district on whose property the minor had suffered injury. The default judgment was awarded pursuant to the Indian's remedy available in tort law as administered by the Crow tribal court. The default judgment thus resulted from the Indian's right under tribal law. Still, the school district's insurer, National Farmers, sought injunctive relief in federal district court, invoking federal jurisdiction under 28 U.S.C. § 1331. The district court held that the tribal court had no jurisdiction over a civil action against a non-Indian and thus enjoined execution of the tribal court judgment. Finding a lack of federal jurisdiction in the district court, a divided panel of the Ninth Circuit Court of Appeals reversed the district court decision.<sup>149</sup>

The Supreme Court began its analysis by quoting section 1331 of the Judicial Code, which provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."<sup>150</sup> Justice Stevens took this to mean that a "suit arises under the law that creates the cause of action."<sup>151</sup> He reasoned that since the question of the Crow tribal court's civil jurisdiction must be answered by reference to federal law, the query becomes a "federal question" under section 1331.<sup>152</sup> But it is the simplicity of this appealing solution to a complex problem that belies its error.

On the one hand, the Court recognizes Congress' commitment to a policy of support for self-government and self-determination. Further, the Court noted that although criminal jurisdiction over Indian offenses does lie in the federal courts, "there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation."<sup>153</sup>

On the other hand, the Court elevated a mere court rule of procedure to a level of significance that nullifies centuries of substantive case law and statutory law. The petitioner-insurance company successfully converted what was once a problem of civil rights under Indian law to one of procedural rights under the white man's law.

A more sound, analytical approach would have been for the Court to have initially determined whether the federal govern-

149. *Id.* at 847-49.

150. 28 U.S.C. § 1331 (1982).

151. *National Farmers*, 471 U.S. at 850-51 (quoting *American Well Works Co. v. Layne and Bowler Co.*, 241 U.S. 257, 260 (1916)).

152. *Id.* at 852.

153. *Id.* at 854 (citing F. COHEN, *supra* note 42, at 253).

ment had ever divested the Crow Tribe of jurisdiction over cases like the present one. This preliminary determination would seem to be mandated by the Court's own recognition that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."<sup>154</sup> Yet, the Court did not begin with such a preliminary query.

Instead, the Court appeared to proceed on the insurance companies' contention that the Crow Tribe had somehow been divested of its inherent tribal sovereignty. But that contention was a mere defense and had little, if anything, to do with the underlying right of the plaintiff. Moreover, "[t]he possible necessity of interpreting a federal statute or treaties to resolve a potential defense [has been] deemed insufficient to sustain federal question jurisdiction."<sup>155</sup> Thus, the insurance companies' complaint should have been dismissed for failure of the complaint to raise a question "arising under" the laws of the United States within the meaning of section 1331. This is owing to the fact that a claim fails "where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation."<sup>156</sup>

According to Justice Stevens, the question of jurisdiction had to be answered by reference to federal law and was therefore a federal question. But Justice Stevens was answering the wrong question. The underlying cause of action for the injured Crow Tribe member arose under tribal law. Therefore, the focus of inquiry should have been on the source of the right. Here, the focus was shifted to section 1331, a statute that provided a

154. *Id.* at 852 n.14 (quoting *United States v. Wheeler*, 435 U.S. 313, 323-26 (1978)).

155. *Oneida Indian Nation of New York State v. Oneida*, 414 U.S. 661 (1974). See also Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953):

Starting with the almost self-evident postulate that a court's jurisdiction of a suit must be determined as of the entrance of the litigation into the tribunal, it [becomes] clear that although appellate jurisdiction may be made to depend upon the whole record below, the only material available in the court of first instance is the initial pleading. From this, it would seem to follow that original jurisdiction must be established by what is contained in the complaint.

*Id.* at 164.

156. *Oneida*, 414 U.S. at 662, 675. Cf. *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). See also C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3566 (1984) (noting that United States Supreme Court has consistently required that a federal question must be presented on the face of plaintiff's well-pleaded complaint and cannot depend on an anticipated defense).

federal procedural right. Accordingly, the proper result from the district court should have been a decision in part like the Supreme Court's, holding that tribal remedies must be exhausted. However, unlike the Supreme Court's conclusion, a proper evaluation of the district court's jurisdiction would reveal that it was nonexistent.

By granting jurisdiction under section 1331, the Court effectively extended the degree to which federal law may curtail the powers of tribal courts. Without any detailed explanation, the Court sidestepped the jurisdictional question and proceeded to develop a judicial rule of exhaustion of tribal remedies.

An exhaustion rule provides the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. It also requires that a federal court stay its hand until after the tribal court has determined its own jurisdiction and corrected any errors it may have made. Since tribal remedies had not been exhausted, the Supreme Court reversed and remanded the case, adding still another phase to the "procedural nightmare" which the Crow Indian victim had to endure.<sup>157</sup>

*National Farmers* is a puzzling decision, since clear statements of Indian policy on jurisdictional questions had already been articulated by the Court in 1978. In *Santa Clara Pueblo*, the Court had recognized that "unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty" that adjudication of civil claims would represent, the Court would not find implied authority for granting declaratory or injunctive relief against either a tribe or its officers.<sup>158</sup> A clearer case of *res judicata* than that in *National Farmers* is difficult to imagine, since *National Farmers* sought injunctive relief where there clearly was no express authority for such relief.

Given the preceding account of American Indian history from *Johnson v. M'Intosh* to *National Farmers*, one would expect some degree of consistency, at least in Supreme Court cases. However, as seen from the discussion on the ever-shifting federal government policies, Indian law presents a landscape of many hills and valleys. Forced to function in this setting, Indian tribal courts still have shown so strong a resilience that they have survived from pre-Constitution days until the present. But all is not well on the reservation.

157. *National Farmers*, 471 U.S. at 853-57.

158. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

As seen in *National Farmers*, a slow but gradual erosion of tribal governments and their courts is occurring.<sup>159</sup> Perhaps it is not a conscious effort, but the continuance of this trend will surely be the death knell of any real sovereignty which Indian tribes enjoy. Such a dismal view recognizes that a right of sovereignty which can be abolished at the will of the federal courts is largely meaningless as a legal right.<sup>160</sup> The next section of this article proposes one solution to the erosion of tribal court sovereignty: a Federal Indian Court of Appeals.

### *An Alternative Within the Existing Judicial Schemata*

It would be convenient to be able to resolve disputes involving American Indians and Indian lands by simply resorting to the courts as we routinely do with many other disputes, but “[n]othing ever seems routine in Indian cases.”<sup>161</sup> The uniqueness of these cases comes from the attempt of the federal government to treat Indian tribes as “dependent domestic nations”<sup>162</sup> and at the same time as separate sovereigns with powers of self-government.<sup>163</sup> Thus, “Indian people face the same contradiction when they recognize the injustice of a legal system that explicitly precludes recognition of native governmental rights, but are nevertheless forced by practical realities to argue within that system for protection of their remaining rights.”<sup>164</sup> The clash between these two themes becomes readily

159. See, e.g., Indian Law Resource Center, *Indian-State Relations and “Tribal-State Compacts,”* in *RETHINKING INDIAN LAW* 85, 86 (1982) (“The crumbling of court protection is relatively recent. It is not yet clear whether this signifies a permanent shift in the evolution of the United States Indian Law.”). One author notes that “[t]raditional Indian justice has survived in spite of four hundred years of outside attempts to convert Native Americans to the Western model of formal justice.” L. FRENCH, *Introduction: An Historical Analysis of Indian Justice*, in *INDIANS AND CRIMINAL JUSTICE* 12 (L. French ed. 1982).

160. For a discussion on the Court’s lack of conceptual clarity on Indian law, see Berkey, *Recent Supreme Court Decisions Bring Confusion to the Law of Indian Sovereignty*, in *RETHINKING INDIAN LAW* 77 (1982); Barsh, *Is There Any Indian “Law” Left? A Review of the Supreme Court’s 1982 Term*, 59 *WASH. L. REV.* 863, 863-64 (1984) (“There has been no consistent authorship of opinions because the Justices hold little enthusiasm for Indian law cases, and the Court seems to treat each dispute as if it were a matter of first impression.”) (citing B. WOODWARD & S. ARMSTRONG, *THE BRETHERN*, 57-58, 359, 412 (1980)).

161. Hughes, *Indian Law*, 18 *N.M.L. REV.* 403, 467 (1988).

162. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

163. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); Note, *In Defense of Tribal Sovereign Immunity*, 95 *HARV. L. REV.* 1058 (1982).

164. Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 *BUFFALO L. REV.* 669, 671 (1978).

apparent in questions of appellate review of Indian tribunal decisions. For the purpose of understanding this dissonance, some background of Indian courts may be helpful.

Some of the current tribal courts resulted from the era of the Indian Reorganization Act of 1934 (IRA),<sup>165</sup> but many more are modified versions of older tribal adjudicatory mechanisms.<sup>166</sup> Since there never was statutory authorization for these latter types of courts, "[i]t was recognized from the first that there was, at best, a shaky legal foundation for these tribunals."<sup>167</sup> Still, Indian tribunals and their existence in our modern-world judicial system are an accomplished fact. Yet are they really within the federal judicial system, or are they actually outside the system while the federal government and judiciary tries to drag them in? The following discussion attempts to answer this question and to offer an alternative to the present federal appellate court structure as it affects review of Indian tribunal decisions.

### *Legitimizing Indian Tribunals*

In order for courts to be legitimate, non-Indian America calls for the administration of justice according to the rule of law. What this has meant is that judicial decisions must logically follow from rules and not from personal or other values not validated by the law.<sup>168</sup> Yet the strength of the white man's legal system is the weakness of the Indian's system.<sup>169</sup> Exemplifying

165. 25 U.S.C. §§ 461-62, 464-79 (1983); 25 U.S.C. § 463 (Supp. 1987). The IRA provides in part that "[a]ny Indian tribe, or tribes . . . shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe." *Id.* § 476. See also *Indian Jurisdiction*, *supra* note 135, at 206. "Although the traditional methods of resolving disputes varied tremendously among the different tribes, the first Indian courts in the West were uniformly imposed by the federal government upon the tribes without any attempt to pattern them after existing Indian institutions." *Id.* at 215 (citation omitted).

166. See, e.g., K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941). See also Zion, *The Navaho Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); *Indian Jurisdiction*, *supra* note 135, at 215-16 ("While a few Courts of Indian Offenses still exist, most of the tribes have organized their own tribal courts, usually under the power of self-government confirmed by the Indian Reorganization Act.") (citations omitted).

167. Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M.L. REV. 49, 51 (1988) (citing W. HAGAN, *INDIAN POLICE AND JUDGES*, 110 (1966)).

168. *Id.* at 59.

169. See generally Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. REV. 1, 49 (1975).

this view, one critic of the Anglo legal system suggests that federal judges "are often handicapped by ignorance of, or insensitivity to, the operative standards of Indian political and personal relationships, by ethnocentrism, or by simple prejudice against the idea of Indian separatism."<sup>170</sup> Moreover, the Indian way of resolving disputes usually does not involve a sterile analysis of a given situation.<sup>171</sup> For example, concepts of fairness and social harmony are basic to the traditions of the Navajo tribe.<sup>172</sup> Thus, in settling disputes, "[i]t was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case and where who could speak and what they could say was closely regulated."<sup>173</sup> Accordingly, because of unique Indian traditions such as that of the Navajos, tribal court adjudications will only be legitimate in the eyes of Indians when tribal courts function in a social, historical and cultural context.

Assuming a tribal court can convince its tribal members to abide by the tribe's law, a still more difficult hurdle must be overcome—recognized legitimacy in the federal courts. Although the United States Supreme Court occasionally has paid respect to tribal courts through an expansive reading of the concept of tribal immunity,<sup>174</sup> it has also refused to abide by established law when dealing with Indians. As a result, tribes are in a conundrum when faced with a particular issue on tribal immunity or sovereignty before the Supreme Court.<sup>175</sup>

170. *Id.* at 48.

171. *But see* CRIMINAL COURT PROCEDURES MANUAL: A GUIDE FOR AMERICAN INDIAN COURT JUDGES, NAT'L AM. INDIAN COURT JUDGES ASS'N (1971). The president of this association in 1971 (Hon. Virgil Kirk, Sr.) was of the opinion that "the crowning glory of our Society is its *independent* Judicial System." *Id.* at v (emphasis added). The reference here clearly must have been to our *non-Indian* society.

172. In another example of cultural differences one historian notes that when a British attempt was made to arrest a non-Indian on Indian land, the Cherokee voiced concern and opposition. "They might not know why the British quarreled—they most likely did not care—but sensing a menace to their harmonious way of life, they let the British know they did not want altercations within their towns." J. REID, *A BETTER KIND OF HATCHET* 178 (1976).

173. Tso, *The Process of Decision-Making in Tribal Courts*, 16 RES. L. NOTES 4 (1989). *See also* S. BRAKEL, *supra* note 36, at 9:

Historically, law, order, and justice in Indian culture were dispensed in widely varying ways, matching the wide variety in cultures and life-styles among the tribes . . . . But there were no "courts" and "judges" in the sense of the "independent" and "exclusively adjudicative" institutions and personnel that Anglo-American ideals have them to be.

174. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

175. *See* Berkey, *supra* note 160.



It is fundamental that "[l]egitimacy becomes illegitimacy when large numbers of people in fact cease to recognize an obligation to abide by law or judicial decisions with which they disagree."<sup>176</sup> This is essentially what occurred in the case of *National Farmers Insurance Co's v. Crow Tribe of Indians*.<sup>177</sup>

Prior to *National Farmers*, the rule of law established in *Santa Clara Pueblo* was that the only vehicle available to seek review of decisions under the ICRA was a writ of habeas corpus.<sup>178</sup> Notwithstanding this unambiguous law, the Court allowed a party to invoke federal-question jurisdiction in a private civil tribal court action in order to allow a federal court to determine whether the tribe had jurisdiction.<sup>179</sup> The Court reasoned that "[b]ecause [National Farmers contended] that federal law ha[d] divested the Tribe of this aspect of sovereignty, it [was] federal law on which they rel[ie]d as a basis for the asserted right of freedom from Tribal Court interference."<sup>180</sup> The decision of the Court effectively refused to honor not only the legitimacy of the tribal court but of the Court's own precedent as well.

In finding a federal question in what was essentially a civil suit, *National Farmers* followed the trail blazed by *Oliphant v. Suquamish Tribe of Indians*<sup>181</sup> in denying respect to the Indian's vision of self-government.<sup>182</sup> In *Oliphant*, which has been criticized as an aberration in federal Indian law jurisprudence,<sup>183</sup> Justice Rehnquist dealt a serious blow to the federal government's progress toward a policy favorable to Indians.<sup>184</sup>

176. Pommersheim, *supra* note 167, at 60.

177. 471 U.S. 845 (1985). See also *Montana v. United States*, 450 U.S. 544, 564 (1981) (holding that hunting and fishing rights bore "no clear relationship to tribal self-government or internal relations.") (relying on *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

178. See generally *Santa Clara Pueblo*, 436 U.S. at 49; 25 U.S.C. § 1303 (1982) (expressly providing for writ of habeas corpus to test detention by Indian tribe).

179. *National Farmers*, 471 U.S. at 852-53.

180. *Id.*

181. 435 U.S. 191 (1978).

182. *E.g.*, only three years prior to *Oliphant* the Court had recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

183. See, *e.g.*, Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610-13 (1979); Note, *Criminal Jurisdiction and Enforcement Problems on Indian Reservations in the Wake of Oliphant*, 7 AM. INDIAN L. REV. 291 (1979).

184. Although not perfect in carrying out their intended effect, various federal statutes embody the policy to promote tribal government. See, *e.g.*, 25 U.S.C. §§ 450, 450a (1982) (Indian Self-Determination and Education Assistance Act); 25 U.S.C. §§ 476-479 (1982) (IRA); 25 U.S.C. §§ 1301-1341 (1982) (ICRA).

The issue in *Oliphant* was whether an Indian tribe, as part of its inherent powers of self-determination, retained the right to try and punish non-Indians for minor crimes committed in Indian communities. Rehnquist stated that "Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status* as domestic dependent nations."<sup>185</sup> But who is to decide what is "inconsistent with their status?"

Clearly, Rehnquist cannot claim to have relied on Court precedent. By his own admission the *Oliphant* issue was a "relatively new phenomenon." "It [was] therefore not surprising to find no specific discussion of the problem before [the Court] in the volumes of the United States Reports,"<sup>186</sup> and accordingly no binding authority. Still, Rehnquist managed to fashion a test based on little more than his apparently-perceived need to avoid radical divergence from Eurocentric norms. His test amounts to making a determination whether in a given case tribal interests conflict with the overriding sovereign interests of the United States. If they do, then those tribal interests are inconsistent with their status as dependent, colonized peoples.

One critic noted that "[i]n effect, this form of discourse enforces a highly efficient process of legal auto-genocide, the ultimate hegemonic effect of which is to instruct the savage to self extinguish all troublesome expressions of difference that diverge from the white man's own hierachic [sic], universalized worldview."<sup>187</sup> Therefore, *National Farmers* is not as shockingly different from case law protective of Indian self-government as one might surmise when considered in light of *Oliphant*.

There remains no easy solution to understanding the complex maze of federal Indian law. Still, one recent case, *Iowa Mutual Insurance Co. v. LaPlante*,<sup>188</sup> does seem to provide further clarity on the question of Indian self-government.

185. *Oliphant*, 435 U.S. at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)) (emphasis in original). Cases decided after *Oliphant*, that use this rubric and logic, are said to use the jurisdictional ploy fashionably called the "Oliphant spin-off theory." See generally Gover & Laurence, *Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 *HAMLIN L. REV.* 497 (1985).

186. *Oliphant*, 435 U.S. at 196-97.

187. Williams, *supra* note 25, at 274. Still another critic notes that Rehnquist "sees tribal authority as something that Congress must bestow on tribes, rather than something that tribes possess because they are sovereign entities." See Note, *Tribal Sovereignty: Federal Court Review of Tribal Court Decisions—Judicial Intrusion Into Tribal Sovereignty*, 13 *AM. INDIAN L. REV.* 175, 188 (1988) [hereinafter *Federal Court Review*].

188. 107 S. Ct. 971 (1987).

In *LaPlante*, the insurer brought an action seeking a declaration that it had no duty to defend or indemnify LaPlante, the insured, with respect to an incident which was the subject of a suit against Iowa Mutual in tribal court.<sup>189</sup> The tribal court had held that "the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. [Therefore], since the Tribe's adjudicative jurisdiction was co-extensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit."<sup>190</sup> Subsequently, Iowa Mutual filed an action in federal district court, alleging diversity of citizenship under 28 U.S.C. § 1332 as the basis for federal jurisdiction. The district court dismissed the action for lack of subject matter jurisdiction and the Ninth Circuit Court of Appeals affirmed the order.

The Supreme Court began its analysis by acknowledging that Indian tribes retain attributes of sovereignty "to the extent that sovereignty has not been withdrawn by federal statute or treaty."<sup>191</sup> The Court then pointed out that 28 U.S.C. § 1332 makes no reference to Indians, and nothing in the legislative history, old or recent, suggests any intent to render inoperative the established federal policy promoting tribal self-government. Neither has there been any expressed intent to limit the civil jurisdiction of tribal courts.<sup>192</sup>

Relying on *National Farmers*, the Court held that the issue of jurisdiction properly should be resolved by the tribal courts in the first instance. However, the Court also determined the district court did have subject matter jurisdiction and accordingly reversed and remanded the case.<sup>193</sup>

Upon close analysis of *LaPlante*, one fact becomes strikingly clear. Writing for the 8-1 majority, Marshall articulated a positive restatement of federal Indian law but he argued an unper-  
suasive application of that law to *LaPlante's* facts. For example,

189. *Id.* at 974. LaPlante suffered personal injuries when the cattle truck he was driving "jackknifed." At the time of the incident he was an employee of a ranch located on the Blackfeet Indian reservation and owned by Indians. LaPlante brought suit seeking compensation from the ranch for his injuries and compensatory and punitive damages from Iowa Mutual, the ranch's insurer, for its alleged bad faith refusal to settle the personal injury claim.

190. *Id.* (footnote omitted).

191. *Id.* at 975-76.

192. *Id.* at 977-78.

193. The Court held that the district court should consider whether Iowa Mutual's suit should be stayed pending further tribal court proceedings or dismissed under *National Farmers* prudential rule. *Id.* at 978-79.

Marshall stated that “unconditional access to the federal forum would place [federal courts] in direct competition with the tribal courts, thereby impairing the latter’s authority over reservation affairs . . . . [Moreover], adjudication of such matters by any nontribal court also infringes upon tribal law making, because tribal courts are best qualified to interpret and apply tribal law.”<sup>194</sup> These statements reasonably could lead one to believe that Indian tribunals are competent to address and resolve all issues involving non-Indians on reservation lands. Apparently, such is not the case.

In the next to the last paragraph of the majority opinion, Marshall took away with one hand what he had previously given with the other. He stated that if a tribal appellate court “upholds the lower court’s determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court.”<sup>195</sup> The obvious question then becomes: Does the Indian appellate court decision mean anything of significance? The answer should be a resounding yes. In actuality, however, its significance is only illusory, in light of *LaPlante*. Upon appeal, the petitioner is now in a federal forum applying federal laws. He is no longer in the legal-political community in which the underlying cause of action arose. Consequently, he is like a fish out of water.

Ideally, the opinion would have made a plea for recognition of finality in Indian tribunal decisions. Those decisions should be accorded full faith and credit no less than the highest court of any state. Only by demonstrating this level of deference to Indian tribunals can Marshall’s opinion approximate some semblance of coherence.

Although it appears internally inconsistent, the *LaPlante* holding adheres to the view that Indian tribunals are reviewable in federal courts, thus opening the door still further for potentially dangerous intrusions into what remains of Indian self-government. Despite the increasing federal intrusion on Indian self-government, white America still continues to treat Indians in a unique manner. It is in the effort to maintain this “traditional solicitude for the Indian tribes”<sup>196</sup> that the following proposal for a Federal Indian Court of Appeals is advanced.

194. *Id.* at 977 (citations omitted).

195. *Id.* at 978 (citing *National Farmers*, 471 U.S. at 853).

196. See *Solem v. Bartlett*, 104 S. Ct. 1161, 1167 (1984).

*The Structure and Logistics  
of a Federal Indian Court of Appeals*

One way to avoid the inconsistent rulings rendered by the various federal courts on Indian matters is to remove those matters from the current federal appellate review scheme.<sup>197</sup> Transfer of Indian matters from current federal courts to an Indian forum would also increase Indian trust and confidence in the appeals process. This is not to suggest that Indian tribunals should be under a separate judicial system. On the contrary, this article agrees with the view that “[t]he burden of persuasion for separatist ideas should fall on the proponents of separatism.”<sup>198</sup> As such, the suggestion here is to keep fundamentally within the present concept and operation of our judicial system by creating a Federal Indian Court of Appeals (FICA). Such a court may be created pursuant to article III of the U.S. Constitution, which provides in relevant part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [eleven types], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.<sup>199</sup>

197. Cf. C. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 113 (1987) (“Respecting substantial tribal authority over non-Indians while allowing limited federal review in individual cases of alleged injustices is the best method of substantially reconciling the legitimate interests of both tribes and non-Indians.”).

198. S. BRAKEL, *supra* note 36, at 100.

199. U.S. CONST. art. III, §§ 1-2. Another rationale for the creation of a FICA is that the basis for power over tribes was not contemplated by the United States Constitution and Congress simply can create a FICA in exercise of its plenary power.

First, it is necessary, in order to obviate claims of concurrent federal or state jurisdiction, that Indian tribunals have original jurisdiction over all civil cases<sup>200</sup> or controversies arising under tribal customary law, the Constitution, federal law or treaties. With tribes having such jurisdictional power to hear cases, the review of tribunal decisions takes on a new, more significant meaning. In order for a FICA to be effective, the following corollaries must logically occur:

- (1) Congress should create and maintain the FICA.
- (2) The FICA should hear all appeals from Indian tribunals.
- (3) FICA decisions may only be reviewed by the United States Supreme Court by writ of certiorari.
- (4) The FICA should be comprised of panels with seven Native Americans on each panel.
- (5) A simple majority of the appellate panel should originate from the litigant tribe's membership. If two tribes are involved, one neutral tribe panelist should preside.
- (6) The governing law should be that of the litigant tribes, the United States Constitution, and the relevant states, in that order of preference.
- (7) The judges for the appellate panels should be elected for life by the tribes' members with no requisite amount of Anglo legal training.
- (8) The judgments of the FICA should be respected, receiving full faith and credit from all the states and other tribes.
- (9) The guiding principle of the FICA should be to assure that tribal rights are upheld even when adverse to a federal claim. Technical violations of federal law should not suffice for Supreme Court review.

These propositions are discussed in turn.

(1) *Congress should create and maintain the FICA.* The first proposition is a practical consequence of the need for ultimate federal supremacy. Since Congress has the power to create new courts and the power to finance those courts by congressional appropriations, the burden should be upon Congress, pursuant to its trust responsibilities, to provide the necessary means for an Indian court of appeals. Also, by placing Indian tribunal

200. A more extreme view might argue for inclusion of criminal jurisdiction as well. See, e.g., *Ex parte Crow Dog*, 109 U.S. 556 (1883). The *Crow Dog* Court noted that Anglo law judges Indians "by a standard made for others, and not for them, . . . and makes no allowance for their inability to understand it." *Id.* at 571. *But see* Clinton, *Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951 (1975).

courts on financial par with state supreme courts, Congress would bring the FICA into a judicial scheme in which the federal government is involved and the United States Supreme Court is still the final interpreter of the law of this land.

Additionally, tribes are not and should not be expected to fund what could amount to a substantial fiscal undertaking. One might also argue that it is, in part, because of the Anglo lack of understanding of Indian dispute resolution that a need for a FICA has been created. Therefore, it is incumbent upon the federal government, pursuant to its trust relationship with the Indians,<sup>201</sup> to pay for the cost of the "cure." By not imposing a new financial burden upon the tribes, we can reduce the risk of preempting much of the decision-making and initiative functions of the talented and "progressive" groups and individuals on the reservations.<sup>202</sup>

Moreover, since it is clearly established that Congress has plenary power over Indians,<sup>203</sup> congressional omnipotence is unlikely, in good conscience, to be used to blatantly suppress the rights of Indians. The difficulty in creating a mechanism to protect Indian rights in place of the mechanism that currently is eroding those rights lies in gaining not only popular support for the idea but political support as well.<sup>204</sup> One method of persuasion may be to lay bare the realities of Indian tribes' dependency on the federal government for financial support, and moral support—to whatever degree it exists—in the quest for self-governance. This is especially true due to the longstanding belief that "[the United States as] trustee is held to something stricter than the morals of the market place. Not honesty alone,

201. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indian relation to United States resembles that of ward to guardian). *See also United States v. Kagama*, 118 U.S. 375 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."), *Id.* at 384-85.

In some cases the federal trust duty has even extended to protection of Indians from their own improvidence. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942); *Menominee Tribe v. United States*, 101 Ct. Cl. 22 (1944).

202. *See generally Reitz, Leadership, Initiative, and Economic Progress on an American Indian Reservation*, 2 *ECON. DEV. AND CULTURAL CHANGE* 60, 62 (1953).

203. *See generally Talton v. Mayes*, 163 U.S. 376, 384 (1896).

204. *But see Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903) (congressional action abrogating treaties upheld because "consistent with perfect good faith toward the Indians"). *See generally Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *STAN. L. REV.* 1213 (1975).

but the punctilio of an honor the most sensitive, [should be] the standard of behavior."<sup>205</sup>

(2) *The FICA should hear all appeals from Indian tribunals.* The second proposition suggests that the FICA should have exclusive jurisdiction of all appeals from Indian tribunals. This means the FICA "circuit" would be nationwide. Sessions of the FICA would best be held on the reservations, conducted in federal buildings. Such "riding" of the circuit would bring the FICA within reach of those for whose benefit it was created—the Indians themselves.

(3) *FICA decisions may only be reviewed by the United States Supreme Court by writ of certiorari.* The third proposition is aimed at granting dignity and finality to the FICA and ultimately to the Indian tribunals. This is not inconsistent with the current Supreme Court rule that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."<sup>206</sup> Accordingly, under the FICA scheme, Supreme Court review should balance tribal interests against the federal claim at stake, utilizing favorable Indian law canons of construction. For example, when treaty language is construed, it should be construed as it was understood by the Indian tribal representatives who negotiated the treaty.<sup>207</sup> Also, treaties should be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians.<sup>208</sup> Of course, where there is no ambiguity, treaty language should be applied regardless of the favorable or not-so-favorable outcome to the Indians.<sup>209</sup>

(4) *The FICA should be comprised of panels with seven Native American Indians on each panel.* The fourth proposition is suggested so as to mirror the makeup of the original court of

205. *Seminole Nation*, 316 U.S. at 297 n.12 (quoting Chief Judge Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)).

206. SUP. CT. R. 17.

207. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). See also Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). "The process of ascertaining the meaning of a written text ultimately involves a search for the collective subjective understanding held by the drafters of the document." *Id.* at 746 n.11.

208. *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363 (1930).

209. *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). For an examination of the historically unequal bargaining position of Indian tribes, see Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).



claims panels. Nine-member panels might reflect more commonality with the Supreme Court, but such a number might also put a strain on some of the tribes' available resources. Also, the problems accompanying employment preference should be nonexistent in the FICA since the new appellate structure is an exercise of congressional authority for people outside normal constitutional constraints.<sup>210</sup>

The reason for having only Native Americans on the panels is to remain true to the concept of an *Indian Court of Appeals* as opposed to a Court of *Indian Appeals*. The latter type of court is exclusive as to subject matter. The former is exclusive in its subject matter and in its decision makers.

(5) *A simple majority of the appellate panel should originate from the litigant tribe's membership. If two tribes are involved, one neutral tribe panelist should preside.* The fifth proposition addresses an important concern of many who have criticized the current federal appellate review process. For some, removing a case from an Indian tribunal to a white legal institution such as a federal court of appeals is tantamount to de novo review under different standards than at trial, simply by virtue of the fact that Anglo jurists are reviewing the matter.<sup>211</sup> By requiring that at least half of the panel judges come from the litigant tribe's membership, Indians can be better assured of a "fair" appeal.

If two tribes are involved in a case, at least one neutral judge should preside over an appeal of that case. Some critics suggest Indians are probably better able to resolve their own disputes amongst themselves, than by having to succumb to outsiders' solutions.<sup>212</sup>

(6) *The governing law should be that of the litigant tribes, the United States Constitution, and the relevant states, in that order of preference.* The sixth proposition is designed to establish a clear guide as to the choice of law for the FICA. This

210. Cf. *Morton v. Mancari*, 417 U.S. 535 (1974).

211. In a similar vein, legal scholars urge that "[w]here either Indian or non-Indian attorneys who are not members of the tribe become involved in tribal proceedings, they obviously need to be sensitive to tribal values." M. PRICE & R. CLINTON, *LAW AND THE AMERICAN INDIAN* 359 (2d ed. 1983). See also *Federal Court Review*, *supra* note 187, at 190 (suggesting that "non-Indian involvement [in a particular case, is] the key to whether sovereignty is used by the Court to rule for the tribe, or whether sovereignty is limited by the Court to decide against the tribe").

212. See, e.g., G. Cox, *Spirits in Collision*, Nat'l L.J., Feb. 5, 1990, at 18, col. 1. Regarding the legal battle between the Hopi and the Navajo in the nation's largest land title lawsuit, one attorney for the Navajo commented that "it is possible that the two tribes might have been better off without the intervention of the Anglo legal system." *Id.* at 23, col. 2.

proposition is in accord with the general rule that the forum applies its own substantive law.<sup>213</sup>

Traditionally, "very few tribes have [had] comprehensive codes or bodies of common law dealing with civil matters, [thus,] state law [was] likely to govern a large proportion of the civil cases, particularly those of a nature likely to involve non-Indian parties."<sup>214</sup> Because of the supplanting of Indian customary law with state law, it is understandable why Indians have little faith in our current federal courts of appeal. Historically, Indian tribes resolved their disputes without any written law. There was a system incorporating religious, social, political, and cultural concepts working toward a goal of social harmony.<sup>215</sup> Clarifying the choice of law for the FICA aims to achieve that goal.

Toward that end, the sixth proposition attempts to provide a guarantee that review of Indian tribunal decisions will be exercised according to Indian standards. It follows that, in some instances, there may not be a written code by which to abide. That, however, is the value of the sixth proposition, i.e., no written code is essential for resolving a case.

This proposition is in contradistinction to Senator Orin Hatch's proposed Senate Bill 517 to amend the ICRA.<sup>216</sup> The proposed bill purportedly "strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self-government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act."<sup>217</sup> Nothing could be farther from the truth.

213. This is a common, although not exclusive, conflict of laws means by which true conflicts between the laws of interested jurisdictions are resolved. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 1-2 (1971).

214. W. CANBY, *AMERICAN INDIAN LAW* 173-74 (1988). One of the effects of this proposition would be to essentially nullify certain sections of title 28 of the United States Code. For example, 28 U.S.C. § 1360 (1988) requires federal courts to pay due deference to tribal customs and laws but only if not inconsistent with state law. According to the proposed FICA structure, this part of § 1360 would no longer be of any consequence. *See also* 28 U.S.C. § 1362 (1988) (jurisdiction of district courts would be similarly affected).

215. *See, e.g.*, *Indian Jurisdiction*, *supra* note 135.

Tribal judges, if they are Indian, usually attempt to settle disputes rather than decide them . . . . This judicial attitude may reflect a tribal tradition of resolving disputes by long discussion intended to achieve and maintain harmony. From the viewpoint of an Indian litigant, the non-adversary nature of tribal courts may be more comprehensible and less threatening than the strict adversary proceeding of state [and federal] courts.

*Id.* at 217 (citations omitted).

216. S. 517, 101st Cong., 1st Sess., 135 CONG REC. 2190 (1989).

217. *Id.* (comments of Sen. Hatch).

First, Congress could not have extended rights to Indians which they possibly already had, even without legislative action. Second, true self-government for the tribes should mean, in part, being able to refuse those "protections" which the federal government has provided. The Hatch bill, however, gives the "beneficiaries" of this law no choice.

The language of the Hatch bill takes Indians one step forward and two steps back. It provides that "[i]n any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made . . . ." <sup>218</sup> Up to this point, the bill sounds promising. In fact, it would not be inconsistent with proposition six stated *supra*. This is due to the fact that Indians are fully capable of determining for themselves what should be required substantively and procedurally.

The last phrase would have read better if it said "when such findings, if any, have been made . . . ." Such phraseology acknowledges the uniqueness of Indian tribe dispute settlements. Moreover, it is quite possible that a record of findings of fact by the tribal court is not in the tribe's tradition and is superfluous for settlement of the dispute.

At any rate, the language of the bill proceeds to dispel whatever hope there was for strengthening tribal self-government. This is because the tribal findings of fact are adopted "unless the district court determines that: (1) the tribal court was not fully independent from the tribal legislative or executive authority; . . . ." <sup>219</sup> This proviso undoes the work of the preceding phrase regarding tribal findings of fact, since many tribes do not have, nor do they believe in, completely separate and independent judicial branches of government. For some, a harmonious way of life means being involved in every aspect of the tribal community. This translates into tribal legislative councils that may well be the "peacemakers" of the community too. Thus, the requirement that a tribal court be "fully independent" is unrealistic in view of the variety of tribal governmental structures, many of which are not fashioned after the Anglo model.

The Hatch bill would also deny a defense of tribal sovereign immunity to those subject to the ICRA. <sup>220</sup> This provision too, runs counter to proposition six, for the creation of a Federal Indian Court of Appeals. A blanket denial of the sovereign

218. *Id.*

219. *Id.*

220. *Id.*

immunity defense amounts to an overly broad articulation of what should properly be a rule applied on a case-by-case basis. Only by examining each unique tribe, its customs, its laws, its treaties, and the particular facts of the case can anyone fairly judge if sovereign immunity should apply.

Granted, section (d) of the Hatch bill requires that “whenever a question of tribal law is at issue, [the federal court shall] accord due deference to the interpretation of the tribal court of tribal laws and customs.”<sup>221</sup> But the force of this mandate is terribly weakened by the fact that the district court must conduct a de novo review whenever one of the eight determinations regarding findings of fact is made. The two mentioned here are only by way of example. The remaining six are equally disingenuous.<sup>222</sup>

(7) *The judges for the appellate panels should be elected for life by the tribe’s members with no requisite amount of Anglo legal training.* The seventh proposition is designed to obviate charges of personal prejudice and bias exercised by some current Indian judges. The requirement that judges be elected for life also requires the corollary benefit of a lifetime pension for judges upon their retirement, such cost to be borne by the federal government. Federal responsibility for meeting these requirements would alleviate the problem of inadequate funding that has hampered tribal courts since their inception. Thus, the federal government should no longer fund any of the tribal courts with “what is commonly called ‘soft money’—funding calculated to run out after a year or two. Obviously, [that] approach portends chaos in tribunal judicial systems.”<sup>223</sup>

The training for FICA judges should be the equivalent of that required of any other “peacemaker” within the tribe. No req-

221. *Id.*

222. *E.g.*, tribal court findings will not be adopted if:

(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

. . . .

(4) The tribal court failed to resolve the merits of the factual dispute;

(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

(6) the tribal court did not adequately develop material facts;

(7) the tribal court failed to provide a full, fair, and adequate hearing;

or

(8) the factual determinations of the tribal court are not fairly supported by the record . . . .

*Id.*

223. AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., JUSTICE IN INDIAN COUNTRY 54 (C. Small ed. 1980).

uisite amount of Anglo-American legal training should have to be obtained in order to qualify as a FICA judge, though optional training should be made available.

Using peacemakers without legal training raises one major concern. Would the untrained peacemaker of one tribe be fit to judge disputes originating from another tribe, whose traditions and views may differ from his own? The best response to this concern may simply be that by virtue of being Indian and being respected by their own community as peacemakers, those Indians on the panels will be capable of doing a better job than current Anglo jurists. Certainly from an Indian perspective they could not do much worse, judging from the dissatisfaction with the existing system.

Additionally, if a tribal decision was in fact totally out of step with established law and subsequently affirmed by the FICA, the United States Supreme Court would have the power of review. One might suggest that this check on the FICA would provide the necessary balance in keeping Indian tribunals under the federal supremacy umbrella while granting those tribunals a substantial degree of self-governance.

(8) *The judgments of the FICA should be respected, receiving full faith and credit from all the states and other tribes.* The eighth proposition addresses the enforceability of tribal judgments in state and federal courts. This proposition coincides with the Supreme Court view that tribal court judgments "in some circumstances" have already been regarded as entitled to full faith and credit.<sup>224</sup> They are regarded as such due to the realization that Indian tribes are not going to disappear. Therefore, "it is necessary to begin to integrate tribal governments into the permanent fabric of America. Extending full faith and credit to Indian tribes is a starting point for institutionalizing this process."<sup>225</sup> Such respect for Indian tribunal judgments arguably is already due under 28 U.S.C. § 1738,<sup>226</sup> but in all likelihood a tribe is "higher" than a state<sup>227</sup> and its judgments

224. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978). See also *In re Buehl*, 87 Wash. 2d 649, 555 P.2d 1334 (1976).

225. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. Rev. 133, 142-43 (1977).

226. The full faith and credit clause of the United States Constitution applies only between states, but Congress now requires "the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (1982).

227. *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959) (characterizing tribes as "higher than states").

thus deserve more deference than that accorded a territory.<sup>228</sup>

Congress, and not the Supreme Court, should be the branch of government to extend full faith and credit to tribunal judgments. Such delegation of authority would help avoid possible confusion in attempting to rely on present inconsistent court decisions.<sup>229</sup> In this way, judgments of Indian tribunals would be given full effect, thereby providing enforcement beyond a matter of mere comity.<sup>230</sup>

Another approach by which to bring the eighth proposition to realization would be to amend the full faith and credit clause of the U.S. Constitution. In doing so, there is less danger of altering the Indians' "nation" status into "state" status. Since Indians possess an acknowledged unique status in our legal structure, it is fitting that a unique, hybrid amendment be enacted which would treat tribes both as nations requiring comity, and as entities requiring full faith and credit for their courts' judgments be passed.

(9) *The guiding principle of the FICA should be to assure that tribal rights are upheld even when adverse to a federal claim. Mere technical violations of federal law should not suffice for Supreme Court review.* The ninth proposition could easily be considered the most important of all. It operates on the premise that an Indian tribe is as close as a political entity can be to existing as a foreign nation, without actually being one. The premise adopts the view that, historically, Indian tribal sovereignty was limited in only two respects: (a) the conveyance of land, since the United States holds fee title; and (b) the ability to make treaties or deal with a foreign power. Beyond these two limitations, the tribes have remained in possession of their sovereign powers. Thus, the appropriate resolution of most cases on the merits should be at the trial level so that upon appeal to the FICA, proper deference to the tribal courts will preclude further litigation.<sup>231</sup> This allows an Indian tribe, as an inde-

228. See generally Ragsdale, *supra* note 225 (*passim*).

229. See, e.g., *Jim v. CIT Financial Servs. Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (Navajo reservation is a territory); *Begay v. Miller*, 70 Ariz. 380, 222 P.2d 624 (1950) (Navajo divorce not entitled to full faith and credit).

230. Currently, the view of the Court is that exhaustion of Indian tribunal remedies is required only as a matter of comity, not as a jurisdictional prerequisite. *Iowa Mut. Ins. Co. v. LaPlante*, 107 S. Ct. 971, 976 n.8 (1987).

231. See, e.g., *id.* at 978. The ninth proposition also implies, or at least should be read to imply, that all avenues of tribal relief must be exhausted before FICA review is permitted. The usual exceptions should be made available, i.e., exhaustion would be futile or untimely. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 856-57 (1978).

pendent government, and the tribe's members to decide for themselves what rights the tribes must give them.<sup>232</sup>

### Conclusion

"From time immemorial" is how some Indian tribes describe their tenure on American soil.<sup>233</sup> The phrase communicates well the Indian notion that they have occupied the Americas for a very long time. It is significant to note that during that entire time, Indian tribes lived with a "harmony ethos" and its fundamental values of cooperation and sharing. Historians note that "[t]his holistic view extended to the universe providing a metaphysical explanation of time and space, essence and being. From this perspective emerged the aboriginal sense of justice."<sup>234</sup>

It was this unique Indian perspective of their culture and traditions with which the early Anglo-Americans came face to face during the infancy of the United States and which was virtually ignored by Justice Marshall in his now-famous "trilogy" of Indian cases. On the other hand, Marshall's vision is understandable given the socio-political climate of the times. But understanding his vision also means realizing its injustice.

From *Johnson v. M'Intosh* in 1823 to *Iowa Mutual* in 1987 the message from the federal government and courts, both state and federal, to American Indians takes on a definite tone: You may retain attributes of sovereignty and inherent powers of self-governance, but you may only exercise those powers to the extent that it does not affect a white man. This statement, as we have seen, is substantiated by a multitude of examples ranging from the noticeable lack of Presidential support for the *Cherokee Nation* decision to the lack of understanding by the court of Navajo customary law in *Dodge v. Nakai*.

Our lamentable treatment of Indians is traceable to the roots of our own Eurocentric culture and its subsequent expression in Anglo tribunals. Marshall was speaking on one level of understanding when he addressed the question of fee title to land, while the Cherokee viewed the issue on an entirely different level. But given that the trial was in a white man's court, white man's rules dominated. This meant that there had to be a winner and a loser.

Such would not have been the case had it been heard in a tribal court. The goal in tribal court would have been to reach

232. See, e.g., S. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 207 (1983).

233. E.g., *Oneida Indian Nation*, *supra* note 155, at 664.

234. *Indians and Criminal Justice*, *supra* note 159, at 2.

a solution agreeable to all parties, one that would help maintain the peace. Not until modern times have we begun to see the wisdom of that goal.<sup>235</sup> It is because Indians have suffered a unique experience of discrimination and injustice that they "speak with a special voice to which we should listen."<sup>236</sup>

Nowadays, we strive to save the environment because we realize we are all interdependent on this earth: the people, the oceans, the forests, Father Sky, and Mother Earth. From these indications one might surmise that the Indian vision and the white man's vision are on a path of convergence. Yet, given the current mindset of Anglo-America, resistance to anything which suggests control from or by anything other than Eurocentric principles will not allow this convergence to materialize.

So how do we peacefully coexist, when one race of people is operating on one metaphysical plane in community with nature and solving problems according to the circumstance of the situation, while the other race operates on a worldly plane, solving its problems using principles of individualized culpability and a written set of strictly applied laws? The answer lies in the return to the vision of the parties to the original treaties.

The Indians trusted our forefathers. Yet if it is true that great nations, like great men, should keep their word, we have been anything but great. The examples of our failings are many. First, we essentially said to the Indians, "Don't attack us and in return you may occupy a reservation with a federal protection." Then we said, "We'll protect you only if you move from the land we let you occupy." Subsequent to removal we said, "If you want federal protection and assistance, you've got to be like us." Finally, we declared to the Indian, "You do not legally exist anymore." Given our neurotic historical tendencies, it is no wonder our system of justice is incomprehensible to the American Indian.

A more practical method than interpreting original intent for achieving coexistence between different cultures and traditions

235. See, e.g., S. O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* (1989) ("Today, for example, arbitration is heralded by the legal establishment as a new and important procedure for administering justice, but the process was long used by traditional [Indian] tribal governments.") *Id.* at xi. See also Tornquist, *Why Create a Dispute Resolution Center?*, 21 WILLAMETTE L. REV. No.3, v (1985) In his introduction to a Dispute Resolution Symposium, Professor Tornquist notes that "[d]ecisions reached through the adversary process are generally accurate and fair, but are circumscribed by the type of remedy available. Courts can do little to solve the underlying social and psychological causes of the dispute."

236. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).



is to accommodate both of these cultures and perspectives. With regard to American Indians, this is best done by formally acknowledging the validity of the Indians' value system. Certainly the Indians know, by definition, what they value in their culture. Lest we be "Imperial Scholars," telling Indians what is best for them, we should listen closely to their plea.<sup>237</sup>

There is much we can learn from each other. Surely we could have benefitted from dispute resolution techniques utilized successfully by Indians even before Anglos set foot on this continent, and from an understanding and appreciation of what is now termed the "Ecosystem."

In order to accommodate two distinct cultures, there must be a formal mechanism to propagate their existence. A FICA would be one facet of that mechanism. The central idea would be to displace all notions of state and federal law supremacy within an Indian reservation in order to maintain Indian sovereignty. For example, if a tribal decision adversely affects non-Indians as a result of an incident occurring on a reservation, respect for the sovereignty of the tribes should honor the tribal ruling, whatever it may be. That is part of the price of being a great nation that keeps its word and respects the rights of others.

Allowing Indians to review decisions made by Indians would create a new and distinct branch of the federal judiciary, an area that should require Indian tribal law expertise for all practitioners in the field. The idea of a FICA is consistent with the original intent of our forefathers to treat Indians as a distinct, sovereign people. Moreover, it is clear, as demonstrated by *Olyphant*, *National Farmers*, *Iowa Mutual*, and similar cases, that our current judicial structure can foster only one vision.

In order to coexist in a world where we see God as a spirit to which we aspire and where the Indian sees himself in sacred communion with the spirits, the least we can do as human beings is respect our brothers' vision.

237. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566 (1984).