

reacted, changed, and sometimes all but died, their rules changed as well. The introduction of European commerce, religion, and brutality into indigenous communities forced these changes – and sometimes these changes were radical. Underlying social mores of indigenous communities changed as some communities maintained a state of active hostility with the Europeans for months, years, decades, or longer.⁶ And, as the European powers sought to enter into treaties with indigenous communities, more and more Indian “tribes” with titular heads began to develop.⁷ As a general matter, it appears that the more singular the tribal leadership, the less likely the tribe would survive. In contrast, the more plural the tribal leadership, the more likely the tribe would survive. Compare King Philip with the Haudenosaunee and Three Fires Confederacies.⁸ Despite this trend, indigenous societies began to mirror European governments more and more – hence, the rise of tribal government.

B. History

Tribal government was a necessity for European governments and, later, the American government. Tribal government still remains essential into the 21st Century, but a decidedly inconvenient necessity, from the point of view of the American legal cultural

B.C. INT’L & COMP. L. REV. 55 (1997).

⁶ E.g., RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815 4-6 (1991) (cannibalism).

⁷ See Carol C. Lujan & Gordon Adams, *U.S. Colonization of Indian Justice Systems: A Brief History*, 19 WICAZO SA. REV. 9 (2004); A. L. Kroeber, *Nature of the Land-Holding Group*, 2 ETHNOHISTORY 303, 303-04 (1955).

⁸ As is well known to observers of American Indian history, Indian communities with diffuse leadership tended to survive contact with European nations better than Indian communities with a titular head, often referred to mistakenly as a “king.” Cf. generally ALVIN M. JOSEPHY, JR., THE PATRIOT CHIEFS: A CHRONICLE OF AMERICAN INDIAN RESISTANCE 32-62 (1958) (King Philip), with GEORGE L. CORNELL, *The Potawatomi*, in PEOPLE OF THE THREE FIRES: THE OTTAWA, POTAWATOMI AND OJIBWAY OF MICHIGAN 38, 65-70 (1986) (Leopold Pokagon and the Pokagon Band of Potawatomi Indians); Robert B. Porter, *A Proposal to the Haudenosaunee to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899 (1998) (Haudenosaunee).

establishment.⁹ The history of tribal government and tribal law from the time of the establishment of the American republic confirms this notion of inconvenience.

Perhaps the most famous and useful example is the murder of Spotted Tail by Crow Dog in the Dakota Territory.¹⁰ While there are alternative theories as to Crow Dog's motivation for assassinating Spotted Tail, one theory is a microcosm of the problems related to the development of tribal societies. In this theory, Spotted Tail appeared to favor executing a treaty with the United States which much of the tribe opposed. Crow Dog was the leader of an opposition faction who eventually murdered Spotted Tail.¹¹ In accordance with the tribal custom of the time, the representatives of the two families and other tribal leaders met for several days to discuss Crow Dog's punishment. The Anglo-American notion of indictment, trial by jury, and punishment was foreign to this tribal community.¹² The community decided to punish Crow Dog by requiring him to pay compensation of \$600, eight horses, and a blanket to the victim's family.¹³ Crow Dog was not executed or jailed, as he could have been under American law; rather he was punished according to Lakota custom and tradition.¹⁴ Non-Indians,

⁹ *E.g.*, Memorandum from John G. Roberts to Fred R. Fielding 1 (Nov. 30, 1983) (on file with author) (referring to a bill restoring lands to the Las Vegas Paiute tribe and asserting that "[t]his bill essentially does nothing more than take money from you, me, and everyone else and give it to 143 people in Nevada (about \$10,000 each), simply because they want it.").

¹⁰ *See* SIDNEY HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994); B.J. Jones, Director, Tribal Judicial Institute, Northern Plains Indian Law Center, University of North Dakota School of Law, Law Women's Caucus Lecture, Domestic Violence in Indian Country (Oct. 17, 2005).

¹¹ *See* CHARLES A. EASTMAN, *INDIAN HEROES AND GREAT CHIEFTAINS* 16 (Kessinger Publishing 2004) (1918).

¹² *See generally* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006); Kevin K. Washburn,

fueled by local Indian agents, were enraged by what they viewed as a lack of punishment. The local United States Attorney responded by initiating a criminal prosecution against Crow Dog that was overturned by the United States Supreme Court in *Ex parte Crow Dog*.¹⁵

Though the Court's decision in *Crow Dog* was notable for its effect of preserving the tribal community's choices of criminal law, procedure, and punishment, the Court's reasoning was undeniably racist. The Court held that the United States had no criminal jurisdiction over a crime committed by an Indian against another Indian in Indian Country.¹⁶ It appears significant that the crime took place in an American *territory* as opposed to an American *state*, but the Court did not emphasize that question. Instead, the Court opined that "civilized" American law should not apply to "savage" Indians such as Crow Dog.¹⁷ It is ironic that the Court prevented Crow Dog from being executed by the American government because he was not "civilized."

Congress' reaction, fueled once more by agitated Indian agents, was to extend, via legislation, federal criminal jurisdiction into Indian Country in the form of the Indian Major Crimes Act.¹⁸ Despite the fact that no specific provision in the Constitution appeared to authorize Congress to take this action, the Court upheld the constitutionality of the Act in *United States v. Kagama*.¹⁹ Consistent with the *Crow Dog* decision, the Court's reasoning in *Kagama* again focused on the lack of civilization in tribal communities, asserting that Indians were utterly and completely dependent on the American government for protection and education.²⁰

JUDGES' JOURNAL 35, n.18 (Winter 2004).

¹⁵ *Ex parte Kan-Gi-Shun-Ca* (otherwise known as Crow Dog), 109 U.S. 556 (1883).

¹⁶ *Id.* at 571-72.

¹⁷ *Id.* at 571.

¹⁸ 18 U.S.C. § 1153

¹⁹ *U.S. v. Kagama*, 118 U.S. 375, 385 (1886).

²⁰ *Id.* at 379.

A contemporaneous lower court case captioned *United States v. Clapox* exemplified the on-the-ground realities of tribal life, the denigration of tribal cultures and law, and the power of non-Indians in Indian communities during the late 19th Century.²¹ *Clapox* upheld the Secretary of Interior's authority to promulgate a Law and Order Code for tribal communities.²² Though the decision involved the crime by an Indian of breaking an Indian out of a federal jail,²³ the underlying Law and Order Code is a far more important question. The woman who had been jailed was there for adultery.²⁴ The Code, typical for the time, criminalized adultery, as well as tribal ceremonies, dances, religious practices, and everything else that made the tribal community distinct from American communities.²⁵ The district court's reasoning in *Clapox* again focused on the savagery of tribal peoples and relied upon a supposed need for American laws to civilize and assimilate Indians in the guise of saving them from extinction.²⁶ *Clapox* exemplifies the fact that the choices made by tribal communities for change to their legal systems and governing structures came from outside factors during this time.

The ravages of American domination of tribal communities forced tribal culture and tribal law into the underground.²⁷ Federal legislation drove federal Indian policy, dragging tribal culture and law with it. The Allotment Era²⁸ opened up reservations to non-Indian settlement,²⁹ undermining the notion of "measured

²¹ U.S. v. Clapox, 35 F. 575 (D. Or. 1888).

²² *Id.* at 576.

²³ *Id.* at 575.

²⁴ *Id.* at 576.

²⁵ The United States currently has statutory provisions enabling it to enact regulations to manage and govern all Indian affairs. See 25 U.S.C. § 2, 9.

²⁶ *Clapox*, 35 F. at 579.

²⁷ See POMMERSHEIM, *supra* note 5, at 21.

²⁸ See Kenneth Ha. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1560 (2001). During the Allotment Era Congress authorized the Indian reservations to be divided into individual tracts of land.

²⁹ See Bobroff, *supra* note 28, at 1570; Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13 (1995).

separatism”³⁰ useful to the maintenance, repair, and growth of tribal governance structures. Tribal governments had the chance to make few choices of their own after Congress and the Executive branch allowed non-Indians to enter into Indian Country.

The pervasive influence and power of non-Indians, particularly Indian agents and missionaries, in tribal communities in the late 19th to the mid-20th Centuries obstructed the continued development of tribal culture and tribal law.³¹ As Professor Frank Pommersheim noted, the first major treatise of American Indian law did not discuss tribal law or governance systems in any detail because they were dormant or nonexistent.³²

Many tribal governments and tribal justice systems have never recovered from these changes forced from outside. Congress attempted to restore a semblance of tribal self-governance by enacting the 1934 Indian Reorganization Act,³³ but the intent and practical operation of this reformist legislation still was to encourage Indian tribes to adopt governments and laws mirroring Anglo-American legal structures.³⁴ Moreover, the Bureau of Indian Affairs did not relinquish its powerful grip on much of Indian Country for decades³⁵ – and then only in a gradual manner.

C. The “Permissive” Modern Era

By 1970, the policymaking branches of the federal government recognized the principle of tribal self-determination.³⁶

³⁰ CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 1 (1987). “Measured separatism” is a term of art coined by Professor Wilkinson to describe the policy of the United States to keep American citizens apart from American Indian communities.

³¹ See POMMERSHEIM, *supra* note 5, at 21.

³² See *id.* at 54.

³³ Indian Reorganization Act, 25 U.S.C. §§ 461, et seq.

³⁴ See Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972).

³⁵ See Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348 (1953).

³⁶ See WILKINSON, *supra* note 30, at 57-59.

However, it was the Supreme Court that acknowledged the value of tribal self-government in *Williams v. Lee*.³⁷ The case arose on the vast Navajo Reservation in Arizona, where a non-Indian store owner sued a Navajo Indian in Arizona state court for collection of a small debt.³⁸ The Court held that the Arizona state court had no jurisdiction over such a claim.³⁹ The Court reasoned that the Navajo Nation had its own nascent court system, again mirroring the American court system, and to allow state court jurisdiction over such a claim would be a severe detriment to the development of the Navajo Nation's court system and sovereignty.⁴⁰ The tone of this opinion was a drastic change from the tone of opinions like *Crow Dog* and *Clapox*.

At the time of *Williams*, numerous Indian tribes had a local court system, but they often were not organic legal structures. These courts, frequently called Courts of Indian Offenses or "CFR Courts," were derivatives of the Law and Order Codes imposed by the Department of Interior on tribal communities.⁴¹ Like the Law and Order Codes of the late 19th and early 20th Centuries, these courts were designed to "acculturate[e] and civilize[e]" Indian people.⁴² By the time of the *Williams* decision, the impact of these courts had been felt in many tribal communities for many decades and had already done the work they had come to do. Under the auspices of the Indian Reorganization Act (IRA),⁴³ tribal communities slowly took more control over these courts, but they had lost much of their import. The Court's reference in *Williams* to the Navajo Nation's court system was no doubt a reference to the CFR Courts in operation there.⁴⁴ It is possible that these courts, due to their reputation as tools of assimilation and injustice, had little utility to tribal communities by

³⁷ *Williams v. Lee*, 358 U.S. 217 (1959).

³⁸ *Id.*

³⁹ *Id.* at 223.

⁴⁰ *Id.* at 222.

⁴¹ See VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 82-89 (1983); POMMERSHEIM, *supra* note 5, at 61-63

⁴² POMMERSHEIM, *supra* note 5, at 63.

⁴³ Indian Reorganization Act, 25 U.S.C. §461 et. seq. (2000).

⁴⁴ *Williams v. Lee*, 358 U.S. 217 at 222.

the 1950s.

Williams was followed by a series of Supreme Court decisions in the 1960s and 1970s that supported the restoration of tribal governance structures and sovereignty. In these cases, the Court limited the authority of state and local governments to tax and regulate Indians and Indian tribes in Indian Country,⁴⁵ the authority of tribes to prosecute tribal members,⁴⁶ and upheld the reserved treaty rights of Indians and Indian tribes.⁴⁷ The most important of these cases was *Santa Clara Pueblo v. Martinez*.⁴⁸ There, the Court held that Indian tribes possess immunity from suit similar to that possessed by the state and federal sovereigns in the American legal system.⁴⁹ Moreover, the Court held that no court, other than a tribe's own, had jurisdiction to hear cases arising out of a tribe's internal affairs.⁵⁰

These cases, referred to by Professor Charles Wilkinson as the beginning of the modern era of American Indian law,⁵¹ were paralleled by the increasing support of Congress and the Executive branch for tribal self-determination. Congress enacted several pieces of legislation intended to allow and encourage tribal governments to develop their internal governance structures and to improve their ability to generate governmental revenues, often through economic development activities.⁵² "[T]oday, [tribal law] is where the action is in Indian law."⁵³

⁴⁵ *E.g.*, *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Cent. Mach. Co. v. Ariz. Tax Comm'n*, 448 U.S. 160 (1980); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164 (1973); *Warren Trading Post v. Ariz. Tax Comm'n*, 380 U.S. 685 (1965).

⁴⁶ *See United States v. Wheeler*, 435 U.S. 313 (1978).

⁴⁷ *E.g.*, *Wash. v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Puyallup Tribe, Inc. v. Dept. of Game of the State of Wash.*, 433 U.S. 165 (1977).

⁴⁸ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

⁴⁹ *Id.* at 72.

⁵⁰ *Id.*

⁵¹ *See WILKINSON, supra* note 30, at 7-28.

⁵² *Id.*

⁵³ POMMERSHEIM, *supra* note 5, at 54.

D. The “Restrictive” Modern Era

The Supreme Court’s permissive modern era began to grind to a halt in the late-1970s. Though Indian tribes would continue to win a fair number of the cases reaching the Court, many of the advances made during the permissive modern era would be rolled back. In *Oliphant v. Suquamish Indian Tribe*, the Court held that Indian tribes do not retain criminal jurisdiction over non-Indians.⁵⁴ This ruling impeded the advances that tribal courts had been making in the 1960s and 1970s and created a major law enforcement jurisdictional gap in Indian Country, even in states where Congress had extended criminal jurisdiction into Indian Country. The Court’s opinion⁵⁵ reintroduced in powerful fashion the standardless and ambiguous doctrine wherein the Supreme Court can hold that certain retained, inherent powers of tribal governments can be implicitly divested if the Court finds they are inconsistent with a tribe’s dependent status.⁵⁶

Following the reasoning of *Oliphant*, the Court has chipped away at the civil regulatory jurisdiction of Indian tribes and the civil adjudicatory jurisdiction of tribal courts. Starting with *Montana v. United States*, where the Court announced a presumption that Indian tribes do not have civil jurisdiction over nonmembers absent two exceptions,⁵⁷ Indian tribes have been able to exercise governmental authority over nonmembers to the satisfaction of the Court in few cases. More often than not, the Court has held that tribal authority to regulate, tax, or adjudicate the rights of nonmembers has been implicitly divested.⁵⁸

⁵⁴ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

⁵⁵ This court opinion was a Justice Rehnquist-authored mishmash of revisionist history; selective use of federal legislative history, treaty language, and Solicitor’s Opinions, and reliance upon one federal district court opinion written by a personal hero of Justice Rehnquist.

⁵⁶ *Cf. U.S. v. Wheeler*, 435 U.S. 313, 326 (1978) (defining “implicit divestiture” as “that part of sovereignty which the Indian implicitly lost by virtue of their dependent status”).

⁵⁷ *Montana v. U.S.*, 450 U.S. 544, 565-66 (1980).

⁵⁸ See generally David Getches, *Beyond Indian Law: The Rehnquist Court’s*

II. *The Supreme Court's View of Tribal Law: A Legal Culture War?*

The Court has taken a very crabbed view of tribal sovereignty in the past two decades. The doctrine of implicit divestiture, for example, has led many scholars and judges to conclude that the Supreme Court – not Congress or the Executive branch – has the final say in federal Indian law and policy.⁵⁹ The irony of the restrictive modern era of American Indian law is that the more capacity to govern acquired by Indian tribes, the less the Court appears willing to allow the tribes to govern.⁶⁰ Given the opaque character of the Court's Indian cases, it is difficult to discern what drives the Court's jurisprudence in this area. A few themes appear to underlie the Court's view. The first is what Dean Alexander Aleinikoff refers to as the “democratic deficit” in relation to nonmember political participation in tribal government.⁶¹ Second is Justice Souter's allegation that tribal law is “unusually difficult for an outsider” to understand.⁶² Professor Philip Frickey argues that the Court has adopted an attitude of “ruthless pragmatism” as a result of these concerns when it comes to tribal-state jurisdictional disputes and tribal-nonmember jurisdictional disputes.⁶³ All three threads of

Pursuit of States' Rights, Colorblind Justice, and Mainstream Values, 86 MINN. L. REV. 267 (2001); David Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Alex Tallchief Skibine, *The Dialogic of Federalism in Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003).

⁵⁹ See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 459-60 (2005); Frank Pommersheim, *Present Moment: A Zen Reflection on Indian Law Doctrine*, 2 UCLA INDIGENOUS PEOPLES J.L. CULTURE & RESISTANCE 104, 104 (2005); Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 2 (2005).

⁶⁰ See Singer, *supra* note 59, at 1-2.

⁶¹ T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 115 (Harvard University Press) (2002).

⁶² *Nevada v. Hicks*, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

⁶³ Frickey, *supra* note 59, at 436.

Supreme Court reasoning undervalue and debilitate the development of tribal law and tribal justice systems.

A. *“Democratic Deficit”*

The American governance structure is based on the Lockean, fictional notion of the “consent of the governed.”⁶⁴ Without the consent of American citizens, American government would become invalid and cease to exist in a manner similar to how the British government became invalid during the American Revolution. The notion of the “consent of the governed” derives from that time in history. Consent is not explicit – few, if any, sign a paper saying they consent to American governance under the United States Constitution. Indian tribes, for example, “[i]n Lockean social compact terms, . . . never entered into or consented to any constitutional contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty.”⁶⁵ Consent is implicit and is inferred by status as an American citizen or even by a non-citizen’s presence in an American jurisdiction. Despite the fictitious aspects of the “consent of the governed” theory, it is a powerful political concept.

Unlike the American republic, most Indian tribes did not originate as part of a revolution. In fact, as noted above, the concept of a “tribe” is a foreign concept imposed on indigenous communities by Euro-American governments.⁶⁶ Indigenous communities that were once loose amalgamations of families and communities speaking the same language and living life in a similar manner became, over many decades, Indian tribes governed by tribal government structures. These tribal governments, more often than not, mirror American government structures. American intervention into traditional indigenous communities had the effect of importing a form of the notion of the “consent of the governed” into tribal

⁶⁴ See *U.S. v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the result).

⁶⁵ Robert Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990).

⁶⁶ See Lujan & Adams, *supra* note 7; see also Kroeber, *supra* note 7.

governance. As a result, like people who are or can become American “citizens,” individual Indians are or can become tribal “citizens” or “members.” It may be that the overarching theme of the “consent of the governed” notion may not be all that different than pre-colonial contact indigenous governance. Many Indian people might agree that the notion of government by consensus studied at great length by legal anthropologists meant that people who didn’t agree with the choices of the community leadership would leave the community, what we might now think of as “banishment” or even “disenrollment.”⁶⁷

Some Justices, particularly Justice Kennedy, have stated that despite the likelihood that tribal governments mirror American-style governments, there is no way to imply that nonmembers have consented to be governed by Indian tribes.⁶⁸ Indian tribes are outside the American constitutional structure of federal, territorial, state, and state subdivision governments. The United States Constitution did not create these tribal governments and no amendment to the Constitution incorporates them into the American constitutional family. Justice Kennedy appears concerned that nonmembers had no say in the creation and development of these justice systems and that, because of the restrictive requirements of tribal citizenship, they might never have the right to participation in the tribal political process.⁶⁹

As I have stated elsewhere, the so-called problem of the “democratic deficit” is an illusion.⁷⁰ To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though she is not a citizen there.⁷¹ The Court would focus on the possibility that she has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian who might not have that status. But at the

⁶⁷ Thanks to Sam Deloria for pointing this out.

⁶⁸ *E.g.*, Lara, 541 U.S. at 212 (Kennedy, J., concurring in the judgment).

⁶⁹ *Id.*

⁷⁰ Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 FED. LAW. March/April 2006, at 38, 40.

⁷¹ Thanks to Kristen Carpenter for suggesting this analogy.

time the Colorado citizen's loan is adjudicated, *she is not a citizen of Utah*. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, her changed status could not alter the result the Utah courts' adjudication of her loan. Professor Frickey likewise criticizes Justice Kennedy's approach as "question-begging."⁷²

B. "Unusually Difficult"

Justice Souter has articulated a related concern that tribal law is "unusually difficult for an outsider to sort out."⁷³ This line of argument appears to rest on the notion that nonmember litigants will be surprised by tribal law, an unknown commodity. Justice Souter implies that tribal court procedures differ in some respects from federal, state, and local courts, putting nonmember litigants at a disadvantage.⁷⁴ A more fundamental tenet of Justice Souter's argument appears to be that substantive tribal law is unknown and even unknowable by outsiders.⁷⁵

Like the "democratic deficit," this argument is an illusion as well. American citizens are charged with knowing the law when they travel to other jurisdictions, just as they are subject to the jurisdiction of unfamiliar state and local courts. Tribal law is sometimes difficult to find. Some courts and tribes have little or no tribal common or positive law and do not have the resources to make their law available, but that should not act as an excuse in every tribal jurisdiction. No tribal court procedure is secret and no tribal law is kept from nonmember litigants for the purpose of surprising them in an unfair manner. Any litigant conducting a reasonable amount of legal research can discover tribal law. Moreover, mainstream law libraries and bar journals are working to shine light on tribal law.⁷⁶

⁷² Frickey, *supra* note 59, at 466.

⁷³ Hicks, 533 U.S. at 385 (Souter, J., concurring).

⁷⁴ *Id.* at 384 - 385

⁷⁵ *Id.* at 385.

⁷⁶ E.g., Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law in Montana*, 28 MONT. LAW. 7, Jan. 2003; Amy Gannaway, *Researching American Indian Law Online*, 78 WIS. LAW. 20, July 2005; David

Justice Souter's concerns should have no serious import for another reason. It is unfortunate that he quoted Ada Pecos Melton's excellent and inspiring piece about the development of tribal law as if the development of a separate and culturally-sensitive tribal law was a *bad thing*,⁷⁷ rendering tribal law "unusually difficult for an outsider to sort out."⁷⁸ He noted that the U.S. Constitution and the Bill of Rights do not constrain tribal governments.⁷⁹ Justice Souter further stated that "there is a 'definite trend by tribal courts' toward the view that they 'ha[ve] leeway in interpreting' the ICRA's due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents 'jot-for-jot.'"⁸⁰ Ada Melton's piece appears in a compilation of articles *celebrating* the differences and cultural sensitivity of tribal courts side by side with important and influential scholars, policymakers, and judges, including Yale law professor Judith Resnik,⁸¹ former United States Attorney General Janet Reno,⁸² former Chief Judge of the Ninth Circuit J. Clifford Wallace,⁸³ and former Chief Justice of the Arizona Supreme Court Stanley G. Feldman.⁸⁴ These authors were cognizant of both the advantages and the concerns that arise when a "Third Sovereign," as

Selden & Monica Martens, *Basic Indian Law Research Tips – Part II: Tribal Law*, 34 COLO. LAW. 115, Aug. 2005.

⁷⁷ See Hicks, 533 U.S. at 384 (Souter, J., concurring) (quoting Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-31, Nov./Dec. 1995).

⁷⁸ *Id.* at 385 (Souter, J., concurring) (citing 25 U.S.C. § 1302).

⁷⁹ *Id.* The Indian Civil Rights Act (ICRA) (25 U.S.C. § 1302) appears to be the most significant federal statute restricting tribal governments.

⁸⁰ *Id.* (quoting Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 344 n. 238 (1998)). Nell Jessup Newton, Chancellor and Dean of University of California-Hastings College of Law, is a powerful voice for the development of tribal law.

⁸¹ See Judith Resnik, *Multiple Sovereignities: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, Nov./Dec. 1995.

⁸² See Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, Nov./Dec 1995.

⁸³ See J. Clifford Wallace, *A New Era of Federal-Tribal Cooperation*, 79 JUDICATURE 150, Nov./Dec 1995.

⁸⁴ See Stanley G. Feldman & David L. Withey, *Resolving state-tribal jurisdictional dilemmas*, 79 JUDICATURE 154, Nov./Dec 1995.

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Justice O'Connor once characterized Indian tribes,⁸⁵ exercises regulatory, prohibitory, or adjudicatory jurisdiction over American citizens.⁸⁶ Justice Souter worried that every tribe has taken a combination of traditional Indigenous law and custom and merged that with a combination of Anglo-American law and procedure.⁸⁷ With each of the 560-plus Indian tribes operating under a different permutation of their own internal jurisprudence,⁸⁸ Justice Souter seems to be saying that no outsider could know the law of a specific tribe.⁸⁹

Again, this is no different than the American "laboratory" of democracy, with Justice Brandeis famously arguing that each state is charged with trying innovative procedures^{2003 3u stnative lasy}, with

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opinion, but his separate concurrence appears to have a specific purpose: the first shot off the bow of tribal law. The result in *Hicks* could be limited to its facts – a state officer with qualified immunity being sued in tribal courts – and might not apply to nonmembers without a claim to immunity from suit.⁹² In dicta, the *Hicks* majority stated that tribal courts might have presumptive civil jurisdiction over the activities of nonmembers on Indian lands.⁹³ Unlike in criminal jurisdiction cases, where there was not much of a legal track record for the Court to follow, in civil cases, the Court has been able to identify very positive aspects of tribal courts, their connection to tribal law and the preservation of tribal culture. Justice Marshall's opinion in *Iowa Mutual Insurance Company v. LaPlante* drew upon the linkage between tribal law and tribal culture.⁹⁴ Since then, however, the Court and Indian law scholarship appears to have forgotten that linkage. The Court needs to be able to draw upon tangible evidence that there is a linkage between tribal law and tribal culture in order to see the light.

Since the presumption is dicta, the question remains open. The problem for tribal advocates is that Justice Souter has a five-year head start in the debate over the difficulty of tribal law for outsiders, a debate he has had the advantage of framing. However, even within Justice Souter's frame, there is room for Indian tribes to prove that tribal law *as it applies to nonmembers* is not difficult to sort out

⁹² *Hicks*, 533 U.S. at 358 n. 2 (“Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law.”).

⁹³ *Id.* (“In *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S. Ct. 1404, 137 L.Ed.2d 661 (1997), however, we assumed that ‘where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,’ without distinguishing between nonmember plaintiffs and nonmember defendants. *See also* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 94 L.Ed.2d 10 (1987). We leave open the question of tribal-court jurisdiction over nonmember defendants in general.”).

⁹⁴ *LaPlante*, 480 U.S. at 16-17. *See* *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (“Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.”) (citing *North Dakota ex rel. Wefald v. Kelly*, 10 Indian L. Rep. 6059 (1983); *Crow Creek Sioux Tribe v. Buom*, 10 Indian L. Rep. 6031 (1983)).

because it is not all that different from American law.

One major problem for tribal advocates is that the federal judiciary is not equipped to understand the point of view of Indian tribes. The original draft of the IRA included a proposal to create the Federal Court of Indian affairs, which would hear cases arising out of Indian Country or involving Indian tribes.⁹⁵ Similar to the Federal Court of Claims and the Federal Circuit, that court would have had expertise in Indian affairs. Congress nixed that proposal, leaving the vast majority of Indian law cases to arise in the Eighth, Ninth, and Tenth Circuits, with a few cases sprinkled around in other circuits and in state courts located in states with large amounts of Indian Country. A very small number of federal judges have expertise in Indian law and few, if any, of their law clerks have ever been exposed to American Indian law. The origin of Justice Souter's concern may rest in part in the ignorance of legal elites in federal Indian law concepts. However, difficulty in learning the law is no excuse for refusing to apply or respect it.

C. *"Ruthless Pragmatism"*

Professor Frickey identifies a more amorphous and overarching issue where the Court, frustrated with Congress's refusal to enact an omnibus solution to tribal-state-local jurisdictional questions, decides its Indian cases on an ad hoc basis underscored with a "ruthless pragmatism."⁹⁶ In the past decades, the Court often has noted its desire for more bright-line rules while deciding Indian cases on a case-by-case basis, expecting Congress to legislate future solutions.⁹⁷ Congress has not enacted omnibus legislation to resolve

⁹⁵ See POMMERSHEIM, *supra* note 5, at 64-65.

⁹⁶ Frickey, *supra* note 59, at 436. See also *id.* at 459-60.

⁹⁷ See Frickey, *supra* note 59, at 459-60 ("Instead, it seems plain that the trend has been motivated by a judicial sense that Congress has failed to step in and fix a myriad of festering local problems by eliminating tribal authority. The Court has become colonialism's handyman, jerry-rigging a ruthlessly pragmatic blend of federal Indian law with general American law. Without any apparent sense of its normative and practical importance, the most commonly invoked protection of tribal interests under American law—narrow interpretation of existing positive

these disputes, nor is Congress even considering that kind of legislation. Professor Frickey suggests that the Court is frustrated by Congress's inaction.⁹⁸ Further, he argues that the Court is frustrated that Congress has not resolved these inter-sovereign disputes in favor of the states and local governments.⁹⁹

The Court of the last two decades, confronted with taxation and regulatory disputes between sovereigns or with challenges to tribal regulatory and adjudicatory jurisdiction, tends to resolve those disputes in favor of non-Indian governments and nonmembers.¹⁰⁰ Scholars charge that the Court is making its own federal Indian policy in a perceived Congressional and Executive branch policy void.¹⁰¹ Given that the Constitution does not incorporate Indian tribes into the federal system, some scholars even charge that the Court views itself as the *final* arbiter of federal Indian law, a sort of judicial plenary power over Indian affairs.¹⁰² Dean David Getches suggested that the Court, painting on what it views as an empty or out-of-date canvas of federal Indian law and policy, decides its Indian cases in a manner that betrays its Membership's general conservatism, ideological bent in favor of states' rights, and

law, thereby ordinarily putting the burden of congressional inertia upon tribal opponents—is being displaced by a newfound willingness of Justices to engage in case-by-case adjudication that almost always dismisses tribal prerogatives as inconsistent with the broader legal landscape.”).

⁹⁸ Frickey, *supra* note 59, at 436.

⁹⁹ *Id.*

¹⁰⁰ *E.g.*, *Wagon v. Prairie Band Potawatomi Nation* 126 S. Ct. 676 (2005); *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2004); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1999); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

¹⁰¹ *See* Frickey, *supra* note 59, at 459-60.

¹⁰² *See id.* at 436 (“Frustration with the intractability of the issues has recently led several Justices to propose that the Court should have not only the first say on sensitive issues, but the final say as well.”). *See also id.* at 460 (“Concerns about the exceptionalism of Indian law have even led some Justices to suggest that the Court, not Congress, should have the final say about some matters. That they would embrace this notion indicates their impatience with the field and their sense that they should not just take on the frontline responsibility of harmonizing it with the broader general law, but have ultimate control over it as well. This shift of authority would be a remarkable inversion of the longstanding approach of congressional plenary power and judicial deference.”).

suspicion of minority rights.¹⁰³

The decisions of the restrictive modern era have worked to eviscerate tribal law enforcement and public safety capabilities, reduce control over the reservation environment, denigrate tribal and individual Indian rights, curb tribal economic development, and limit tribal government revenue streams. The Court's decisions have worked to stunt the development and growth of tribal justice systems. However, these decisions evidence a greater concern from the Justices that perhaps Indian tribes, tribal self-government, and tribal law do not fit within the legal culture of the United States.¹⁰⁴

Given that the federal policy toward Indian affairs since 1934, with its flaws and inconsistencies, has tended toward an outright rejection of total assimilation of tribal cultures into the American mainstream, the Court's application of these values is in direct conflict with the preservation and development of tribal self-government. To the most cynical, the Court's decisions point to an endgame where the Court devalues and erodes tribal self-government and tribal law sufficient to solve this entire "Indian problem." The result is another name for assimilation.

A drive toward assimilation is present in civil rights cases, for example, as well. Professor Kenji Yoshino identified the trend of the federal judiciary toward this form of assimilation.¹⁰⁵ Justice Scalia

¹⁰³ See Getches, *supra* note 58; Skibine, *supra* note 58.

¹⁰⁴ See Frickey, *supra* note 59, at 467 ("Justice Kennedy's line of reasoning exemplifies the root problem in federal Indian law. The place of federal Indian law in American public law can be understood by imagining layers of law, with American constitutionalism built on top of American colonialism. Above the colonial line, America has what amounts to a civil religion of constitutionalism. Justice Kennedy is one of many believers who have in the Constitution a 'faith [that] is the substance of things hoped for, the evidence of things not seen.' This constitutional faith may be crushed when the eye drifts below the colonial line, which is presumably one reason why most eyes never venture that far. I say 'may be' rather than 'is' because a true believer like Justice Kennedy might respond to the problem not by a loss of faith, but by a call to missionary work. For in both *Duro* and his separate opinion in *Lara*, Justice Kennedy has sought to bring our civil religion to Indian country.") (quoting *Hebrews* 11:1 (King James)).

¹⁰⁵ See Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006, § 6 at 2. See also KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL

identified a concern that “politically powerful minorities” would upset the fundamental balance of individual and government interests the Court has been crafting during the Rehnquist Court. In *Romer v. Evans*,¹⁰⁶ the Court struck down Amendment 2 to the Colorado Constitution,¹⁰⁷ an amendment that had “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians.”¹⁰⁸ In the dissent, Justice Scalia argued that Amendment 2 was “rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a *politically powerful minority* to revise those mores through use of the laws.”¹⁰⁹ For Justice Scalia, the majority in *Romer* (“lawyer class”¹¹⁰) had committed a damnable sin: “tak[ing] sides in [a] culture war.”¹¹¹ In *Romer*, it appeared that Justice Scalia equated “homosexual persons or gays and lesbians” as “a politically powerful minority.”¹¹² Perhaps Justice Scalia sought to invoke the threat of the “factions” of the Federalist Papers.¹¹³ Does the Supreme Court view Indian tribes as similar to these “factions”?

In some quarters, mainstream American society views Indian tribes as “politically powerful minorities” who trample on the individual rights of nonmembers and members alike. One article, discussing a sex harassment claim brought against a tribal casino dismissed on sovereign immunity grounds, stated

And the entire case lifts the curtain on the increasingly controversial relationship between U.S. citizens employed by Indian casinos – most of them non-Indian – and the sovereignty of Native American governments, which are immune from many state and federal laws. The women

RIGHTS (2006).

¹⁰⁶ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁰⁷ *Id.* at 635.

¹⁰⁸ *Id.* at 624.

¹⁰⁹ *Id.* at 636 (Scalia, J., dissenting) (emphasis added).

¹¹⁰ *Id.* (Scalia, J., dissenting).

¹¹¹ *Id.* at 652 (Scalia, J., dissenting).

¹¹² *Id.* at 620.

¹¹³ See FEDERALIST PAPERS Nos. 9-10.

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involved in the lawsuit had no idea that when they went to work at Thunder Valley, they signed away many of the protections other working people in this country take for granted.¹¹⁴

Members of some tribes, many of them sorting out membership criteria after decades of federal meddling and just beginning to institute difficult disenrollment proceedings, complain of the power of Indian tribes as well.¹¹⁵

There may always be a fundamental conflict between mainstream values of the melting pot and the measured separatism of Indian tribes, but assimilating Indian tribes into the American legal culture may be a significant step toward destroying tribal cultures within the United States. Perhaps at some level, the Court appears to recognize that tribal law is necessary to protect tribal culture. Professor Joseph Singer suggests that the Court is “not equipped” to bring the final axe down on tribal law,¹¹⁶ but little in the Constitution prevents that result. In fact, Professor Philip Frickey worries that a minority of Justices have every intention of bringing the American legal culture into Indian Country as a replacement for what is developing there in the form of tribal law.¹¹⁷ It appears that the Court walks a fine line between final termination of tribal law and culture with its incorporation of the American legal culture into Indian Country.

¹¹⁴ Peter Byrne, *Taking on a Nation*, Salon.com, available at http://www.salon.com/news/feature/2006/01/13/thunder_valley/index_np.html.

¹¹⁵ See, e.g., Jon Velie, *Should the United States Be Fighting for Jim Crow's Survival By Its Complicity in Denying Voting Rights to the Cherokee Freedmen?*, 54 FED. LAW. 43 (2007),

¹¹⁶ Singer, *supra* note 59, at 2 (“Yet the Supreme Court cannot live without them either; much as the Court would like to limit tribal sovereignty, it is neither equipped nor inclined to erase tribal sovereignty entirely. Indian nations are not only mentioned in the Constitution, but are also subject of an entire Title of the United States Code. Writing Indians out of the Constitution and deleting Title 25 of the U.S. Code would appear to be beyond the legitimate powers of the Court.”).

¹¹⁷ See Frickey, *supra* note 59, at 467.

III. The False Threat Posed by Tribal Law

The opaque, underlying reasons the Supreme Court has chosen to restrict tribal government authority and stunt tribal court development are illusions. While scholars suggest that the Court's implied legal and policy concerns described in Part II are derived from the inherent racism of the Court as an institution,¹¹⁸ or ignorance of America's indigenous peoples and governments, or the Court's ideology of Our Federalism,¹¹⁹ it is beyond the scope of this Article to explain the deeper psychological, political, and personal foundation of this recent development in American Indian Law. This Part aims to respond to the apparent legal and policy concerns the Court relies upon when deciding its cases. These concerns, based in part on the Court's assumptions about Indian people and tribal governments, should be allayed by shedding light on the actual operations of tribal courts and the actual application of tribal law.

This Part argues that the Court's concern about the "democratic deficit" in tribal political systems is a red herring. First, this Part will analyze the empirical research of Professor Bethany Berger to show that tribal courts do not decide cases to the detriment of nonmembers or "outsiders."¹²⁰ Professor Berger's work is persuasive in showing that the Navajo Nation's tribal courts have little or no bias against outsiders and that outsiders win trial court cases as often as Navajo Nation members.¹²¹ Given the insularity of the Navajo community, the fact that the tribal court does not prejudice outsiders is significant.

The remaining two subparts provide a theoretical explanation for these results. The second subpart will show that tribal law's "difficulty" to outsiders exists in a continuum. The more arcane and obscure the particular elements of tribal law, the less likely that law will apply in a case where a nonmember is a party. Tribal court cases involving nonmembers frequently tend to be routine, with their

¹¹⁸ See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

¹¹⁹ See Getches, *supra* note 58; Skibine, *supra* note 58.

¹²⁰ Berger, *supra* note 5, at 1067-97.

¹²¹ See *id.*

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outcomes dependent upon tribal law that mirrors Anglo-American rules. The third subpart will show that there exists a similar continuum between the substantive fairness of tribal law and the procedural fairness of tribal government exercises of authority and tribal court adjudication. Tgoveilar LE:11(15(2)BT2/TT1 1 Tf-0.0003 Tc 1.4088 Tc 7T.54391.165

nonmembers as visitors entitled to highest level of dignity, respect, and generosity.¹²³ Nonmember litigants including nonmember counsel for member parties that bring their own inherent biases and assumptions into tribal court proceedings tend to generate the allegations of bias and incompetence against tribal courts and judges. For example, a nonmember attorney who does not prepare in advance of appearing before a tribal court is less likely to achieve a favorable outcome for his or her client.¹²⁴ Many nonmember attorneys, for whatever reason, do not take the time to review tribal court procedures or even read the applicable law before appearing in court. These unprepared attorneys who do not achieve their desired outcomes in tribal courts tend to allege bias and incompetence.¹²⁵ And the sad fact is that other nonmember attorneys, policymaker, and individuals are prone to believing those allegations.¹²⁶ These allegations against tribal courts are as false as they are in state or local courts. Other nonmember litigants seeking to limit tribal court jurisdiction over them do so because they wish to avoid liability for

employee appeal of employment termination) (Grand Traverse Band Tribal Ct. Oct. 21, 2002) (on file with author).

¹²³ See POMMERSHEIM, *supra* note 5, at 10.

¹²⁴ Many nonmembers challenge tribal court jurisdiction only after losing before the tribal court. A recent decision from the Ninth Circuit exemplifies this point. See *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129-30 (9th Cir. 2006) (“Following the unfavorable verdict, Smith argued for the first time that the tribal court did not have subject matter jurisdiction. He first sought post-judgment relief in tribal court. At the same time, he filed an appeal of the judgment with the tribal appeals court, which remanded to the tribal trial court to determine jurisdiction. The tribal court determined that it had jurisdiction, and Smith again filed an appeal with the tribal appeals court. While his second tribal-court appeal was pending, Smith filed a motion for an injunction in federal district court on the ground of lack of jurisdiction, and sought to file his cross-claim as an original complaint in that court.”).

¹²⁵ As an attorney representing Indian tribes in several tribal courts around the United States, the author often has heard allegations of tribal court bias or incompetence from opposing counsel. The per curiam opinion in *Bank of Hoven v. Long Family Land and Cattle Co., Inc.*, described how counsel for non-Indian interests in a tribal court contracts claim asserted that non-Indian banks and lenders “were watching this case,” a veiled accusation of bias and incompetence. 32 Indian L. Rep. 6001, 6006 (Cheyenne River Sioux Tribal Court of Appeals 2004).

¹²⁶ See POMMERSHEIM, *supra* note 5, at 12.

gruesome or reprehensible acts, not because of some vague political fairness notion.¹²⁷

Professor Bethany Berger's excellent study, *Justice and the Outsider*, provides some of the first empirical scholarship on the outcomes for nonmembers in tribal court cases.¹²⁸ Professor Berger analyzed the decisions of the Navajo Nation's tribal courts where a nonmember (she uses the term "outsider") is a party.¹²⁹ In ninety-five Navajo Nation Supreme Court opinions where a non-Navajo party opposed a Navajo party, the non-Navajo party won half of the cases.¹³⁰ Relying upon a theory that parties with accurate information "will settle or fail to pursue cases in which they agree that one party is significantly more likely to win,"¹³¹ Berger concludes that "non-Navajo parties are at least as good at predicting their chances of success as are Navajo parties."¹³² The result "tends to undermine the assumption that the courts are unfair to these outsiders."¹³³ If tribal courts do not provide a significant local advantage to tribal members over nonmembers, why is this so?

B. Custom and Traditional Law and Outsiders

Tribal custom and traditional law may be difficult for nonmembers to understand, but tribal custom and tradition tends to have little or no application in cases involving nonmembers. The modern tribal court cases that rely upon tribal custom and tradition as

¹²⁷ E.g., *Burlington Northern R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999) (railroad accident involving death of tribal members); *Ford Motor Co. v. Todocheene*, 248 F. Supp. 2d 1038 (D. Ariz. 2002) (automobile accident involving tribal members).

¹²⁸ Professor Berger identifies a few previous empirical analyses of tribal court decisions such as Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004); Newton, *supra* note 4; Rosen, *supra* note 5.

¹²⁹ See Berger, *supra* note 5.

¹³⁰ See Berger, *supra* note 5, at 1075.

¹³¹ Berger, *supra* note 5, at 1076 (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEG. STUD. 1 (1984)).

¹³² Berger, *supra* note 5, at 1077.

¹³³ Berger, *supra* note 5, at 1077.

a form of common law precedent tend to involve tribal lands and internal tribal political matters – in other words, disputes between members or the tribe. On the other hand, tribal courts involving nonmembers tend to rely upon either federal or state common law or tribal laws that mirror federal and state law. Some tribes divert cases arising out traditional or customary law to “traditional” or “quasi-modern” tribal courts.¹³⁴

A review of recent tribal court opinions suggests that the cases can be grouped into several major classifications. First, there are the civil rights cases brought by members or nonmembers against a tribe, tribal entity, or tribal officers. In the last decade or more, these cases tend to arise out of employment relationships gone awry.¹³⁵ Second, there are tort cases brought by both members and nonmembers. Third, there are the internal political cases regarding elections, membership and disenrollment, alleged corruption, and law reform. Fourth, there are criminal cases. And fifth, there are family law cases. Members are the exclusive parties in the large majority of cases under the last three categories, while both members and nonmembers tend to be parties in the first two categories. Each of these classifications will be analyzed in turn.

First, the civil rights cases, by definition, arise out of the American legal notion that individuals should have certain rights and privileges against the actions of government.¹³⁶ These cases are brought under the Indian Civil Rights Act or tribal statutory or common law recognizing individual rights.¹³⁷ The Anglo-American conception of due process is at the heart of these claims.¹³⁸ The government structures and relationships to individuals at issue –

¹³⁴ See Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130 (Nov.-Dec. 1995).

¹³⁵ See Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REF. 273 (2005).

¹³⁶ See generally Alvin J. 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, 3-8 (1975).

¹³⁷ Fletcher, *supra* note 59.

¹³⁸ *Id.*

often administrative and business entities making decisions about employment and other economic interests of individuals – derive from American models.¹³⁹ The entire background of these cases derives from Anglo-American law and relationships.¹⁴⁰ Often tribes did not choose these models; tribes exist in a world where these models constitute the entire range of choice, forcing tribes to enter these arenas.¹⁴¹ And tribes have done so in a manner that, for many tribes, they make or alter with some of their own traditions and culture.¹⁴² Here is the rub, according to Justice Souter, because tribal courts hearing cases arising out of these Anglo-American structures do not interpret or apply due process “jot-for-jot” with state and federal courts.¹⁴³

The easy answer is that tribal courts’ interpretation is well within the parameters of due process that state and federal courts apply. Due process is one of the more subjective legal doctrines in the law. State and federal courts tend to apply a balancing test, reaching results that differ from other courts in often dramatic ways.¹⁴⁴

A California resident and citizen, where the notion of “substantive due process” is incorporated into the state’s constitutional law,¹⁴⁵ might be subject to a United States Supreme Court still cringing from its own substantive due process jurisprudence.¹⁴⁶ Due process as envisioned by the framers of the Constitution might be nothing like the due process the Court now applies.¹⁴⁷ Why should Justice Souter hold Indian tribes to a “jot-for-

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Hicks, 353 U.S. at 383.

¹⁴⁴ See Mathews v. Eldridge, 424 U.S. 319 (1976).

¹⁴⁵ E.g., In re Santos Y., 112 Cal. Rptr. 2d 692, 725-26 (Cal. Ct. App. 2001).

¹⁴⁶ E.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 690-91 (1999).

¹⁴⁷ See generally STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15-38 (2005); John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 15 (1992).

jot” standard when state and federal courts cannot do the same? While the Oglala Sioux tribal court might not apply due process the same way as the Little Traverse Bay Bands of Odawa Indians tribal court, they might apply the doctrine the same as Idaho, South Dakota, or Michigan courts. Nonmembers need not worry.

A review of published tribal court civil rights cases indicates that tribal courts define “due process” within American constitutional parameters. Employment cases, because there are so many, provide an excellent data set supporting the notion that tribal courts apply either American common law or tribal law that mirrors American common law in all important and relevant ways. Tribal courts adjudicate employment claims brought by individuals, both members and nonmembers, against a tribe, tribal entity, or tribal official following American law or tribal law mirroring American law.¹⁴⁸ As an aside, most tribal business operations catering to nonmember customers and clients adopt and incorporate state and local law into tribal codes and ordinances, a necessary cost of doing business.¹⁴⁹ Most tribal business operations also waive sovereign immunity for the same reason.¹⁵⁰ While some cases of apparent unfairness reach the news when a nonmember’s claim is dismissed, most of the time that claimant’s attorney failed to follow the procedures contained in the limited waivers of immunity required by the tribal business or government.¹⁵¹ Moreover, even tribal courts applying common law tend to adopt the tort law of state and local courts when adjudicating the merits of the tort claims involving nonmembers.¹⁵² Nonmembers

¹⁴⁸ See Fletcher, *supra* note 135, at 289-93.

¹⁴⁹ See Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 16 KAN. J.L. & PUB. POL’Y 357 (2006).

¹⁵⁰ See David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors From Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 194-95 (2004).

¹⁵¹ E.g., *Chapo v. Navajo Nation*, No. SC-CV-68-00 (Navajo Nation Supreme Court 2004); *Jenkins v. Mashantucket Pequot Gaming Enterprise*, 1 Mash. 7 (Mashantucket Pequot Tribal Court 1993), available at <http://www.tribal-institute.org/opinions/1993.NAMP.0000001.htm>.

¹⁵² See Venus McGhee Prince, *Making the Gaming Business a “Safe Bet” for Indian Tribes*, 9 GAMING L. REV. 314 (2005).

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suffer no more prejudice in tribal courts than they would in any state or local court.

In contrast, cases involving reservation land disputes between members may be resolved through the application of tribal customary and traditional law.¹⁵³ Dean Newton's discussion of tribal courts that do not follow Supreme Court precedent "jot-for-jot" included a case where the tribal court provided more expansive due process protections than American law, not less.

Hall v. Tribal Business Council is illustrative. In *Hall*, the Fort Berthold District Court noted that in the context of Indian land, tribal member applicants for grazing unit leases have a due process right "to be treated culturally and legally with dignity and appropriate fairness," traditions that "are central to the history of the Three Affiliated Tribes." The *Hall* court held that this tradition created a property interest triggering the fair procedures required by the due process clause because these traditions create a legitimate expectation for all tribal members that they will be eligible for grazing leases.¹⁵⁴ Since these cases almost never involve nonmembers as parties, the application of law that would confuse nonmembers is not a concern.¹⁵⁵

There is another category of tribal court cases that is insignificant now, but will become more important in the coming years – business and contract cases.¹⁵⁶ It is worth mentioning here because of the increasing capacity and willingness of Indian tribes to conduct business with nonmembers. Of these developing relationships, the critical example is private financing of tribal

¹⁵³ *Id.*

¹⁵⁴ Newton, *supra* note 5, at 344 (quoting *Hall v. Tribal Bus. Council*, 23 Indian L. Rep. 6039 (Fort Berthold Dist. Ct. 1996)).

¹⁵⁵ E.g., Justin B. Richland, "What Are You Going to do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC'Y REV. 235 (2005).

¹⁵⁶ E.g., *Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. 6148 (Confederated Tribes of Grand Ronde Community of Oregon Tribal Ct. 2005); *Bank of Hoeven v. Long Family Land and Cattle Co., Inc.*, 32 Indian L. Rep. 6001 (Cheyenne River Sioux Ct. App. 2004).

business enterprises.¹⁵⁷ Like the employment cases involving nonmembers, these cases will involve American law on an exclusive basis.¹⁵⁸ While Indian tribes tend to require that disputes over these business relationships be adjudicated in tribal courts in exchange for waivers of sovereign immunity, lenders tend to require Indian tribes to adopt tribal codes and rules that mirror American law.¹⁵⁹ Tribal courts will be adjudicating disputes over these business relationships with nonmembers applying American law once again.

The lesson of this section is that tribal courts tend to apply tribal law analogous to state and federal law in cases involving nonmembers. Tribal courts apply tribal custom and tradition, if ever, where the parties are tribal members or tribal entities. Justice Souter's allegation that tribal law is "unusually difficult for an outsider to sort out" overstates the claim.¹⁶⁰

C. Tribal Substantive Law & Tribal Court Procedures

While the application of the different types of tribal substantive law depends, for the most part, on whether the parties are members or nonmembers, tribal court procedures tend to apply to all parties. There is an exception to this rule for certain kinds of tribal court proceedings, such as Peacemaker Courts, but those proceedings tend to involve members and are voluntary.¹⁶¹

Tribal courts follow court rules and procedures that mirror, in most important ways, American court rules and procedures. Many tribal courts have incorporated, as their own, federal or state rules of civil and criminal procedure with few or minor modifications.¹⁶² The

¹⁵⁷ See Townsend Hyatt, Perry E. Israel & Alan Benjamin, *An Introduction to Indian Tribal Finance* (2005), available at <http://www.orrick.com/fileupload/246.pdf#search=%22An%20Introduction%20to%20Indian%20Tribal%20Finance%22>.

¹⁵⁸ *Id.*

¹⁵⁹ See Singel, *supra* note 149, at 360.

¹⁶⁰ Hicks, 533 U.S. at 385 (Souter, J., concurring).

¹⁶¹ E.g., Nancy A. Costello, *Walking Together in a Good Way: Indian Peacemaker Courts in Michigan*, 76 U. DET. MERCY L. REV. 875 (1999).

¹⁶² See

same is true for rules of evidence and general court rules. Like the interpretation of due process, the application of these rules is well within the parameters of difference between the various federal district courts and state and local courts.¹⁶³ In fact, most tribal courts tend to adopt a more liberal interpretation of these rules with a disapproving eye toward dismissing or prejudicing claims for technical rules violations.¹⁶⁴ Unlike Anglo-American legal systems, which evolved from courts where lawyers and judges spoke a language of rigorous procedure tending to exclude non-experts, tribal courts evolved from courts where non-law-trained advocates and judges spoke more toward the merits instead of technical rules.¹⁶⁵

Once again, the realities on the ground of tribal court adjudication tend to dispel the notion that tribal law is prejudicial to outsiders. Most Members of the Court are ignorant of these on-the-ground realities, compelling them to be suspicious of tribal law and procedure.

IV. Toward Preserving Tribal Law's Jurisgenerative Value

This Article proposes that the Court should affirm the *National Farmers Union* presumption. In addition, this Article proposes that the Court modify the federal common law rule that federal courts have jurisdiction to determine whether a tribal court has civil jurisdiction over nonmembers to allow for a review of the tribal court procedures on the merits. The Court could adopt a rule that, if the tribal court followed procedures within the parameters of

Tribal Courts, 17 FED. SENT'G REP. 209, 209-20 (2005).

¹⁶³ See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998).

¹⁶⁴ E.g., *Mathiason v. Gate City Bank*, No. TMAC 04-2002, at 4 (Turtle Mountain Band Ct. App. 2005), available at <http://www.turtle-mountain.cc.nd.us/cases.htm> (last visited January 15, 2006).

¹⁶⁵ In the experience of the author, tribal court judges tend to overlook technical violations of court rules where no party can show prejudice. See, e.g., Matthew L.M. Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians*, 7 TRIBAL L. J. (forthcoming 2007) (manuscript at §§ 21.04[B]; 21.04(I)), available at <http://www.law.msu.edu/indigenous/papers/2007-02.pdf>.

the American notion of due process, then the tribal court decision will stand.

A. Presuming Tribal Court Jurisdiction

Absent the recognition that tribal traditions and customs tend not to apply to nonmembers, the Court may very well follow Justice Souter's suggestion that nonmembers should not be subject to tribal law. Tribal advocates should educate the Court that tribal law that applies to nonmembers is not difficult for nonmembers. That education will go a long way toward convincing the Court to adopt the *National Farmers Union* presumption, but it might need additional support.

B. A Limited Federal Court Review of Tribal Court Procedures

A limited federal court review of tribal court procedures, modification of the Court's current tribal court exhaustion doctrine, offers a concession to the Court and serves to allay the Justices' concerns that application of tribal law subjects nonmembers to unfairness in tribal courts. Under the current doctrine, the federal courts will review whether a tribal court has jurisdiction over a nonmember in cases arising on tribal lands after that nonmember has exhausted his or her tribal court remedies.¹⁶⁶ In other words, the doctrine is both a benefit and a detriment to tribal court development, forcing nonmembers to litigate in tribal courts before seeking federal relief, but also tending to waste court and litigant resources and time.

consistent with American due process. Federal courts would review whether the tribal court followed its own procedures. The presumption that tribal courts have civil jurisdiction over nonmembers eliminates the often wasteful need for nonmember litigants to exhaust tribal court remedies.

Substantive tribal law would remain outside the scope of federal court review. The substantive tribal law that applies to nonmembers already mirrors American law and should not be a problem for nonmembers. But to ensure that federal courts do not trample on the substantive law choices of Indian tribes, this area is off limits.

As far as fairness is concerned, nonmembers and the Court should be satisfied with federal court review of tribal court procedures.

V. Conclusion: Tribal Sovereignty is Tribal Law

None of these proposals will work unless the Court's concerns about the alleged "democratic deficit" in tribal politics and the "unusual difficulty" of tribal law are solved. Educating the federal judiciary about this subject that few federal judges, few elite law schools, professors, and law journals, and few lawyers care about is difficult.

What this education should focus on is the fact that *tribal law is tribal culture*. Without the development of tribal law – and a law different and unique to tribal people and communities – tribal culture is doomed to a slow decline into assimilation. Perhaps the notion of tribal sovereignty that served as a rallying cry for Indian people and advocates through the end of the Termination Era and into the Self-Determination Era should be retired. As many tribal court judges have recognized, the notion of sovereignty and sovereign immunity derives from the Anglo-American notion that the King can do no wrong.

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way toward reversing the trend of the Court to limiting the jurisdiction of tribal courts.