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## Fighting the Lone Wolf Mentality: Twenty-First Century Reflections on the Paradoxical State of American Indian Law

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# **FIGHTING THE *LONE WOLF* MENTALITY: TWENTY-FIRST CENTURY REFLECTIONS ON THE PARADOXICAL STATE OF AMERICAN INDIAN LAW<sup>©</sup>**

Bryan H. Wildenthal\*

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### I. 1999: THREE CASES, THREE COURTS, THREE SOVEREIGNS

In 1999, as the turn of the twenty-first century loomed, I planned to write a reflective essay on the state of American Indian law, a field in which I have been privileged to teach (but mostly, learn) since 1996.<sup>1</sup> I thought I would use as my

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1. Not because it necessarily should matter (though things like race, nationality, gender, and sexual orientation do still matter in our society), but because people are sometimes curious about such things, I would add that I am a non-Indian by any meaningful measure: a mishmash of German, English, Scottish, Irish, and Hungarian. Yet appropriately enough, as I taught my Indian law course for the third time in the spring of 2001, one of my aunts discovered in her genealogical researches that my maternal grandfather was one-sixteenth Cherokee, meaning that I and my genetic siblings have one-sixty-fourth Cherokee blood. Teaching and writing in this field as a non-Indian has both challenges and advantages, but I'll get into that in some other article. I'm also gay, which may be the last thing anyone reading this article cares about, but I mention it because part of my fascination with Indian law and cultures has to do with the far more subtle and accepting manner in which many such cultures have

take-off point three very intriguing decisions rendered that year by courts representing each of the three sovereign types of government in the United States: federal, tribal, and state.<sup>2</sup> There seemed to be grounds for optimism for those (like me) who generally support American Indian sovereignty.

The United States Supreme Court, on March 24, 1999, strikingly reaffirmed (albeit by the narrowest of margins) Indian treaty rights and the traditionally pro-Indian canons of treaty construction, in *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>3</sup> The Navajo Nation Supreme Court, on May 11, 1999, handed down, in *Means v. Chinle District Court*,<sup>4</sup> what is probably the most important and interesting tribal court opinion ever. And the California Supreme Court, on August 23, 1999, decided *Hotel Employees and Restaurant Employees International Union v. Davis*,<sup>5</sup> which by the law of unintended consequences may have given the biggest boost of the three to Indian sovereignty.

It was a promising year for Indian nations in other ways, too. President Bill Clinton, on July 7, 1999, visited the Pine Ridge Sioux Reservation in South Dakota to promote and discuss a housing and economic empowerment initiative with tribal leaders.<sup>6</sup> He was the first United States President ever to visit Indian country on official government-to-government business. And he was the first president to set foot in Indian country for any purpose since Franklin D. Roosevelt.<sup>7</sup> This culminated the friendliest presidential administration in United States history toward the sovereign rights of Indian nations. Clinton held a 1994 summit meeting at the White House for Indian leaders from across the country<sup>8</sup> and issued several landmark orders promoting Indian rights.<sup>9</sup>

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traditionally embraced diversity in gender and sexuality. See e.g. Walter L. Williams, *The Spirit and the Flesh: Sexual Diversity in American Indian Culture* (Beacon Press 1986); Will Roscoe, *The Zuni Man-Woman* (U. N.M. Press 1991); Will Roscoe, *Changing Ones: Third and Fourth Genders in Native North America* (St. Martin's Press 1998).

2. Justice Sandra Day O'Connor, in an address to the Ninth Indian Sovereignty Symposium, noted that "[t]oday, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country." Hon. Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997) (Indian Sovereignty Symposium, Tulsa, Okla., June 4, 1996).

3. 526 U.S. 172 (1999).

4. 7 Navajo Rptr. 382 (Navajo 1999) (available at <<http://www.law.harvard.edu/news/courtrules.html>>).

5. 981 P.2d 990 (Cal. 1999).

6. Jackie Barone, *President Clinton Illuminates the Need for Investment in Native American Communities*, 24 Am. Ind. L. Rev. 503 (2000); *Remarks by President Clinton to the Pine Ridge Indian Reservation Community, July 7, 1999*, 24 Am. Ind. L. Rev. 505 (2000) [hereinafter *Remarks by President Clinton*].

7. See Barone, *supra* n. 6, at 503; *Remarks by President Clinton, supra* n. 6, at 506.

8. Ann Devroy & Tom Kenworthy, *High Council with "First Americans"; More Than 300 Leaders of Indian Tribes Gather at White House*, Washington Post A1 (Apr. 30, 1994); *President Clinton Meets with Native American Tribal Leaders, The White House South Lawn*, Fed. News Serv. (Apr. 29, 1994); *Remarks by President Clinton During Meeting With Native American Tribal Leaders, The White House South Lawn*, Fed. News Serv. (Apr. 29, 1994).

9. See Memorandum, *Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22951 (Apr. 29, 1994); Exec. Or. 13007, 61 Fed. Reg. 26771 (May 24, 1996) (protecting Indian sacred sites); Exec. Or. 13084, 63 Fed. Reg. 27655 (May 14, 1998) (promoting consultation with Indian tribal governments); *Documents of United States Indian Policy* 343-47, 357-58,

I will come back to the *Mille Lacs* and *Means* cases in Part IV of this article. They are an important part of the story of the continuing, malignant influence of what I would term the *Lone Wolf* mentality on today's United States Supreme Court led by Chief Justice William H. Rehnquist—although *Mille Lacs* and *Means* both stood in valiant opposition to that mentality. Since *Davis* is probably more obscure to most readers (even to many of my fellow Indian law specialists, at least those outside California), let me expound a bit here on why I think it is so interesting and important.<sup>10</sup>

It is not that the theory or specific holding of *Davis* were anything to cheer about. The six-to-one majority found Proposition 5—by which California voters on November 3, 1998 endorsed expanded Indian gambling—invalid on rather technical grounds under the state constitution.<sup>11</sup> But Justice Joyce L. Kennard's brilliant dissent<sup>12</sup> was a joy to read and signaled a heartening new trend: state court judges who actually know and appreciate American Indian law. Furthermore, the people of California signed on enthusiastically to her dissent less than seven months later, nullifying *Davis* by state constitutional amendment, as if to say to their high court, "What part of our sixty-three to thirty-seven percent vote on Proposition 5 didn't you understand?" The new California-Tribal Gaming Compact approved by Proposition 1A on March 7, 2000<sup>13</sup>—by a margin of sixty-five to thirty-five percent this time, thank you very much—was negotiated by the new, more Indian-friendly governor, Gray Davis, who swept into office along with Proposition 5 in 1998. Proposition 1A allows an even broader range of tribal

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361-63 (Francis Paul Prucha ed., 3d ed., U. Neb. Press 2000). Some would argue that Clinton's policies were more symbolism than substance; for example, one of his first budget decisions was to slash funding for the Indian Health Service. See e.g. Sen. John McCain (R-Ariz.), *Clinton's Address to Native Americans*, Congressional Press Releases (Apr. 29, 1994).

10. By the way, I especially hope this article will have some interest and value to lawyers and academics not well-versed (if at all) in the peculiarities of Indian law. So I would ask my colleagues specializing in the field to forgive any rehashing of basic points that will be obvious to them. Let's also get a terminology issue out of the way on which there is a surprising lack of awareness. While "Native American" is viewed as more "politically correct" by most non-Indians, "American Indian" (or just plain "Indian") is actually far more used and preferred by Indians themselves. Some Indians actually find "Native American" offensive because of what they view as its assimilationist or colonialist overtones. See generally Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 Harv. BlackLetter L.J. 107, 168 (1999). Most tend to view it with tolerant bemusement as a term probably invented by guilty liberal European-Americans. See e.g. John P. LaVelle, *Strengthening Tribal Sovereignty through Indian Participation in American Politics: A Reply to Professor Porter*, 10 Kan. J. L. & Public Policy 533, 535 (2001). I cheerfully use both terms, but mainly "Indian" (while offering these and other terminology caveats), in my forthcoming book that is nevertheless titled *Native American Sovereignty on Trial: A Handbook with Cases, Laws, and Documents* (ABC-CLIO forthcoming 2003) because of the publisher's preference and to help distinguish it from David E. Wilkins' *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (U. Tex. Press 1997). Personally, I have always found "tribe" and "tribal" much more troubling (with their somewhat condescending or pejorative implications), but they are such convenient and widely used terms (again, including by Indians themselves) that I yield to general practice, while also often using the more preferable term "nation."

11. *Davis*, 981 P.2d at 1002-09. For an excellent survey of California Indian gambling issues leading up to Proposition 5, see Guy Levy, Student Author, *Western Telcon v. California State Lottery: Will Native Americans Lose Again?*, 19 Thomas Jefferson L. Rev. 361 (1997).

12. *Davis*, 981 P.2d at 1011-19 (Kennard, J., dissenting).

13. Dan Morain & Tom Gorman, *Campaign 2000 Propositions*, L.A. Times A1 (Mar. 8, 2000).

casino gambling than Proposition 5 would have. California tribes, including those near my hometown of San Diego, are in the midst of a social and economic revolution as a result.<sup>14</sup> It's an exciting time and place to be in this field.

The problem the *Davis* majority could not get past was that in 1984, when California voters authorized the state lottery, they also amended the California Constitution to prohibit any state legislation "authoriz[ing] . . . casinos of the type currently operating in Nevada and New Jersey."<sup>15</sup> Proposition 5, as a mere statutory initiative, could not override the Lottery Amendment.<sup>16</sup> Justice Kennard brilliantly, and correctly, sidestepped that problem by arguing that Proposition 5 did not, properly understood, "authorize" Indian gambling at all as a matter of state law, in the sense prohibited by the Lottery Amendment.<sup>17</sup> Rather, Kennard framed the issue of Indian gambling in its proper historical context, as an aspect of inherent Indian sovereignty.<sup>18</sup>

Although, as Justice Kennard conceded, Proposition 5 itself purported to "authorize" the casino gambling that would have been allowed under its provisions, it was simply part of a broader framework of federal law: specifically, the Indian Gaming Regulatory Act of 1988 ("IGRA") and its recognition of the ancestral Indian power to govern Indian lands.<sup>19</sup> True, IGRA delegates to the states considerable influence to "shape the contours of the federal authorization."<sup>20</sup> But the ultimate "authorization" for any Indian gambling flows from federal law and Indian sovereignty. The Lottery Amendment can only logically and properly apply to state legislation within the state's own sovereignty and jurisdiction.

It should be noted that federal judges had already, by 1998, gutted IGRA of much of its practical force. Congress' obvious intent in IGRA was to force states to negotiate with Indian tribes over forms of gambling that the states did *not* already authorize, as long as such states did not have a categorical public policy criminalizing all high-stakes gambling. But the United States Court of Appeals for the Ninth Circuit held, in a bizarrely erroneous decision in 1995, that IGRA did "not require a state to negotiate over one form of . . . gaming activity simply

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14. See Kevin Gover, Assistant Secretary of Interior for Indian Affairs, *Notice of Approved Tribal-State Compacts*, 65 Fed. Reg. 31189 (May 16, 2000), corrected, 65 Fed. Reg. 34726 (May 31, 2000); *California-Tribal Gaming Compact* <<http://www.cfk.com/final%20compact.htm>> (accessed Nov. 8, 2002); *State Propositions*, S.F. Chronicle A26 (Nov. 5, 1998); *State Propositions*, S.F. Chronicle A8 (Mar. 9, 2000); Andrew Pollack, *Las Vegas Glitz Is Set to Go West; Tribes in California Scramble to Expand Casinos after Vote*, N.Y. Times C1 (Mar. 10, 2000); Chet Barfield, *Sycuan Band Purchases Country Club*, San Diego Union-Tribune B7 (May 26, 2001); Jack Katzanek, *Casinos Help Build Inland Work Force: Economy: American Indian Tribes Already Employ Thousands and Are Adding Jobs*, The Press-Enterprise (Riverside, Cal.) A1 (Feb. 24, 2002); James P. Sweeney, *State OKs More Slots for Indian Casinos*, San Diego Union-Tribune A1 (June 20, 2002).

15. *Davis*, 981 P.2d at 994 (quoting Cal. Const. art. IV, § 19(e)).

16. *Id.*

17. *Id.* at 1014-15.

18. See *id.* at 1012-14 (Kennard, J., dissenting).

19. *Id.* at 1015 (Kennard, J., dissenting); see *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Indian Gaming Regulatory Act*, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2000)).

20. *Davis*, 981 P.2d at 1014 (Kennard, J., dissenting).

because it has legalized another, albeit similar form of gaming.”<sup>21</sup> The effect was to subject Indian nations to the precise scope of gambling regulation dictated by state law. Judge William C. Canby, Jr., by far the most knowledgeable judge on the federal bench when it comes to Indian law,<sup>22</sup> protested in vain that “[t]his ruling effectively frustrates IGRA’s entire plan.”<sup>23</sup> But the Supreme Court denied certiorari in this case in 1997,<sup>24</sup> having ruled five-to-four the year before that, in any event, Indian tribes could not sue states to enforce IGRA.<sup>25</sup>

As Justice Kennard stated in *Davis*, “it is utterly beyond the sovereign power of California to authorize or prohibit gambling on Indian lands within the state. California can no more authorize gambling on Indian lands than it can authorize gambling in another state.”<sup>26</sup> As she tellingly noted, California had “entered into a compact with . . . Nevada . . . regulating the number and size of gaming facilities located in Nevada within the Lake Tahoe basin.”<sup>27</sup> But no one has ever seriously suggested that this compact “authorizes” casinos in violation of the Lottery Amendment. The *Davis* majority did not really respond to, or even seem to understand, the points Kennard made.<sup>28</sup> In any event, as noted above, the ironic result of the *Davis* majority’s obtuseness was to open the door even wider to Indian gambling in California.

That was the way things looked in 1999. I got distracted by other projects and never had time to write that reflective essay. In 2002, when I was invited to contribute to this symposium issue of the *Tulsa Law Review*, marking (though decidedly not “celebrating,” I think) the centennial of the United States Supreme Court’s infamous decision in *Lone Wolf v. Hitchcock*,<sup>29</sup> things looked very different. A more accurate insight, it now seems, might be drawn from the title of a 1999 essay by Chief Justice Robert Yazzie of the Navajo (Diné) Nation: “Watch Your Six.”<sup>30</sup> We were rudely awakened, as the twenty-first century dawned, by the United States Supreme Court’s decision in *Nevada v. Hicks*,<sup>31</sup> which reminded

21. *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1258 (9th Cir. 1995), *amended on denial of reh’g*, 99 F.3d 321 (9th Cir. 1996).

22. See William C. Canby, Jr., *American Indian Law in a Nutshell* (3d ed., West 1998); Alan A. Matheson, Catherine Gage O’Grady & Judith M. Dworkin, *Judge William C. Canby, Jr.: A Tribute*, 33 *Ariz. St. L.J.* 1 (2001).

23. *Rumsey*, 64 F.3d at 1253 (Canby, J., joined by Pregerson, Reinhardt & Hawkins, JJ., dissenting from denial of en banc rehearing). Senior Judges Ferguson and Norris also agreed with Canby. *Id.* at 1255.

24. *Sycuan Band of Mission Indians v. Wilson*, 521 U.S. 1118 (1997).

25. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47 (1996).

26. *Davis*, 981 P.2d at 1014 (Kennard, J., dissenting).

27. *Id.* at 1015 (Kennard, J., dissenting).

28. See *id.* at 1003 n. 2 (responding to the central argument of Kennard’s dissent only in a brief, obtuse footnote).

29. 187 U.S. 553 (1903).

30. Robert Yazzie, “Watch Your Six”: An Indian Nation Judge’s View of 25 Years of Indian Law, *Where We Are and Where We Are Going*, 23 *Am. Ind. L. Rev.* 497 (1999). For those who are not fans of aerial dogfight movies, “watch your six” is military slang referring to the six o’clock position, i.e., directly behind you, where an unseen enemy may have you in his sights. See *id.* at 497.

31. 533 U.S. 353 (2001).

us that the *Lone Wolf* mentality is alive and well on today's Rehnquist Court. But all in due course. First, a little history.

## II. THE *LONE WOLF* MENTALITY

In seizing the reins from their temporizing leaders on the issue of Indian gambling, the people of California, in the resounding referenda of 1998 and 2000, made a moving effort to atone for the holocaust perpetrated on California Indians during the nineteenth century. That disturbing chapter of history, about which most Californians would prefer not to think, has been recounted elsewhere and should be told more widely. I cannot do it justice here. It is part of the broader story of genocide and dispossession perpetrated on American Indians during the era that produced *Lone Wolf*. The scholar C. Blue Clark has effectively summarized "how bad it really was" during those years, especially from California statehood in 1850 to the inauguration of President Franklin D. Roosevelt in 1933.<sup>32</sup>

A great deal has been written about *Lone Wolf* (and this symposium adds still more). I am not sure I have anything new to say about the case itself. The *Lone Wolf* Court not only confirmed the United States Government's so-called "plenary" power to abrogate Indian treaties and generally regulate Indian affairs,<sup>33</sup> it declined to exercise any meaningful judicial review over the treatment of the Indians.<sup>34</sup> The decision upheld the flagrant expropriation of the reservation (in what is now Oklahoma) guaranteed by an 1867 treaty to the Kiowa, Comanche, and Apache Indians.<sup>35</sup> The process by which the government "negotiated" this taking in 1892, and by which Congress legislatively decreed it in 1900, stank to high heaven. And it was all too typical of that era. The 1892 "agreement" was not endorsed by three-fourths of the adult male tribal members, as it fraudulently purported to be and as the treaty required. Those tribal members who did endorse it were misled as to its terms, which Congress altered anyway. The Senate made a half-hearted attempt to inquire into these shenanigans, but the House of Representatives buried the agreement in a bill with an unrelated title and thereby snuck it past the Senate into law.<sup>36</sup>

The *Lone Wolf* Court at least betrayed signs of a guilty conscience. Justice (future Chief Justice) Edward D. White's opinion for himself and seven of his colleagues (including the newly appointed Justice Oliver Wendell Holmes, Jr.) begged that since "Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as

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32. C. Blue Clark, *How Bad It Really Was before World War II: Sovereignty*, 23 Okla. City U. L. Rev. 175 (1998). Clark cites to the essential sources, for those desiring to further explore this chapter of our history.

33. *Lone Wolf*, 187 U.S. at 565.

34. *Id.* at 567.

35. *Id.* at 563-64, 568.

36. *Id.* at 556.

implying, . . . relief must be sought by an appeal to [Congress] . . . .”<sup>37</sup> Justice John Marshall Harlan the elder, who dissented so famously in *Plessy v. Ferguson*<sup>38</sup>—and less famously but no less angrily in an 1884 case finding even detribalized Indians racially unfit for United States citizenship<sup>39</sup>—did not do so here. But he apparently could not bear to sign White’s opinion, concurring only in the result without further explanation.<sup>40</sup>

*Lone Wolf* was not a huge departure from prior cases, though it reflected a downhill trend. Even Chief Justice John Marshall’s great opinion in *Worcester v. Georgia*,<sup>41</sup> upholding the sovereignty of the Cherokee Nation against the aggression of Georgia,<sup>42</sup> was built on the supremacy of federal congressional power over relations with the Indians.<sup>43</sup> Decisions in 1846 and 1886 upheld ever-bolder assertions of federal criminal jurisdiction over Indian nations.<sup>44</sup> *Lone Wolf* was specifically foreshadowed by the *Cherokee Tobacco*<sup>45</sup> case of 1871, which upheld Congress’ power to abrogate a treaty-based tribal tax immunity. But at least *Cherokee Tobacco* stirred a powerful dissent. Justice Joseph P. Bradley (joined by Justice David Davis) relied on the canons of construction to argue that Congress had not expressly indicated an intent to override tribal sovereignty.<sup>46</sup> Furthermore, Bradley protested that the case “depends on a solemn treaty . . . in which the good faith of the [United States] government is involved.”<sup>47</sup>

The downhill slide continued even into the otherwise progressive Court led by Chief Justice Earl Warren. In 1955, in *Tee-Hit-Ton Indians v. United States*<sup>48</sup> (less famous but more shocking than *Lone Wolf* itself), the Court brazenly endorsed one of the most outrageous and unconstitutional assertions of federal power in the history of American law. *Tee-Hit-Ton* is certainly well-known to Indian law scholars, but I have the sense that it is not nearly as well-known as it should be to legal scholars or the public generally. Even more than *Lone Wolf*, it

37. *Id.* at 568.

38. 163 U.S. 537, 552-64 (1896).

39. *Elk v. Wilkins*, 112 U.S. 94, 110-23 (1884) (Harlan, J., joined by Woods, J., dissenting). For more discussion of Harlan’s exceptional role in defending constitutional liberties on the Court during the late nineteenth and early twentieth centuries, see generally Bryan H. Wildenthal, *The Road to Twining: Reassessing the Disincorporation of the Bill of Rights*, 61 Ohio St. L.J. 1457 (2000). On his career generally, see Linda Przybyszewski, *The Republic According to John Marshall Harlan* (U. N.C. Press 1999).

40. *Lone Wolf*, 187 U.S. at 568.

41. 31 U.S. 515 (1832).

42. *Id.* at 561-62.

43. *Id.* at 559; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 202 (1984).

44. See *U.S. v. Rogers*, 45 U.S. 567 (1846); *U.S. v. Kagama*, 118 U.S. 375 (1886); Newton, *supra* n. 43, at 209-16.

45. *The Cherokee Tobacco*, 78 U.S. 616, 621-22 (1871).

46. See *id.* at 622-23 (Bradley, J., joined by Davis, J., dissenting).

47. *Id.* at 623 (Bradley, J., joined by Davis, J., dissenting). It was a fairly close, four-to-two decision, since Chief Justice Chase and Justices Nelson and Field did not participate. See *id.* at 624.

48. 348 U.S. 272 (1955).



truly ranks with *Dred Scott*,<sup>49</sup> *Plessy v. Ferguson*,<sup>50</sup> and *Korematsu v. United States*<sup>51</sup> in the Supreme Court's hall of shame.

The facts of *Tee-Hit-Ton* were quite simple. The United States Government cut and sold timber for its own benefit from lands claimed by the Tee-Hit-Ton band of Tlingit Indians in Alaska.<sup>52</sup> The Tee-Hit-Ton claimed, at a minimum, aboriginal or "Indian title" to these lands. That is, they and their "tribal predecessors ha[d] continually claimed, occupied and used the land from time immemorial; . . . when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; . . . [and] Russia while it possessed Alaska in no manner interfered with their claims to the land . . . ."<sup>53</sup> The Court conceded that if "Congress by treaty [or statute] or other agreement ha[d] declared that thereafter [the] Indians were to hold the lands permanently, compensation must be paid for subsequent taking."<sup>54</sup> But without such "recognition"<sup>55</sup> of the Indian title, *even assuming its unbroken historical roots as claimed by the Tee-Hit-Ton*,<sup>56</sup> they had merely "a right of occupancy which . . . may be terminated and such lands fully disposed of . . . without any legally enforceable obligation to compensate the Indians."<sup>57</sup> This was indeed, even more than *Lone Wolf* itself, the *Dred Scott* of Indian land rights: They had none at all that European-Americans were obliged, *ab initio*, to respect! They enjoyed only such rights as the United States Government might deign to "recognize."<sup>58</sup>

There are few constitutional rights which the Court has protected as zealously as "private property" and the right of "just compensation" whenever it is "taken" by the government "for public use."<sup>59</sup> Numerous cases before, between, and after *Lone Wolf* and *Tee-Hit-Ton* have held that even partial or temporary takings, and even some regulations that merely restrict the most profitable possible uses of property, are entitled to constitutional compensation.<sup>60</sup> But not "Indian title," according to *Tee-Hit-Ton*. Not the Indians' aboriginal rights to property that they held for uncounted generations before Europeans even arrived on the scene. This went considerably further than *Lone Wolf*, where the Court at least covered behind the fiction that the taking there was perhaps "a mere change

49. *Scott v. Sandford*, 60 U.S. 393 (1857). The *Dred Scott* Court treated slave ownership as a fundamental property right, *id.* at 459-62, and denied eligibility of even free African-Americans for United States citizenship and constitutional rights. *Id.* at 427.

50. 163 U.S. 537, 548-49 (1896) (upholding state-enforced racial segregation).

51. 323 U.S. 214, 219 (1944) (upholding race-based relocation of Japanese-American United States citizens and legal residents during World War II).

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

53. *Id.* at 277.

54. *Id.* at 277-78.

55. *Id.* at 275.

56. *Id.* at 277.

57. *Id.* at 279.

58. *Id.* at 275. *Cf. Scott*, 60 U.S. at 407 (holding that African-Americans had "no rights which the white man was bound to respect").

59. U.S. Const. amend. V.

60. See e.g. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 480-97 (14th ed., Found. Press 2001).

in the form of investment of Indian tribal property.”<sup>61</sup> And since *Lone Wolf* did involve “recognition” (by treaty) of the Indian land rights at stake there, it did not present the ultimate issue decided by *Tee-Hit-Ton*.

The *Tee-Hit-Ton* Court claimed support for its holding in Chief Justice Marshall’s definition of the “Indian title” concept in *Johnson v. McIntosh*.<sup>62</sup> But that foundational 1823 case merely required deciding to whom Indians could legally convey their title.<sup>63</sup> A priority rule was needed to resolve the supposed title dispute between the *non*-Indian parties to the case. Johnson held title originating in grants by Indian tribes to private land speculators,<sup>64</sup> and McIntosh held title based on grants by the United States Government, which had in turn obtained the land from the tribes.<sup>65</sup> Marshall held that Indian tribes could convey full legal title only to the conquering European-American sovereign: the British Crown before 1776 and the United States Government afterward.<sup>66</sup> So McIntosh won.<sup>67</sup> The “Discovery Doctrine” on which Marshall relied is certainly indefensible on any ground other than “might makes right.” Marshall himself ridiculed it both in *Johnson* and nine years later in *Worcester*.<sup>68</sup> But with a regretful, positivist shrug of the shoulders, Marshall simply noted in *Johnson*: “Conquest gives a title which the courts of the conqueror cannot deny.”<sup>69</sup>

But Marshall was never forced to decide the ultimate issue resolved in *Tee-Hit-Ton*. He held that Indian nations lost full sovereignty and the power to dispose of their lands as a result of the European-American conquest. He conceded the power of the United States to extinguish Indian title. But he never held that the United States was or should be free to do so *without any legal consequences*. To the contrary, Marshall asserted that “the exclusive power to extinguish that right [of Indian occupancy], was vested in that government which might *constitutionally* exercise it.”<sup>70</sup> He added that even though “[t]he title by conquest is acquired and maintained by force[,] . . . humanity demands, and a wise policy requires, that the rights of the conquered to property should remain

61. *Lone Wolf*, 187 U.S. at 568; see Joseph William Singer, *Lone Wolf, or How to Take Property by Calling it a Mere Change in the Form of Investment*, 38 Tulsa L. Rev. 37 (2002).

62. *Tee-Hit-Ton*, 348 U.S. at 277 (citing *Johnson v. McIntosh*, 21 U.S. 543 (1823)).

63. *Johnson*, 21 U.S. at 571.

64. *Id.* at 550-54, 560.

65. *Id.* at 560.

66. *Id.* at 588-89.

67. See *id.* at 571-605. Recent scholarship has found that many of the long-assumed background facts of *Johnson v. McIntosh* are questionable, and that the underlying dispute was probably feigned. See e.g. Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1073, 1081-93 (2000).

68. See *Johnson*, 21 U.S. at 591 (noting the “extravagant . . . pretension of converting the discovery of an inhabited country into conquest,” and that this was “opposed to natural right, and to the usages of civilized nations”); *Worcester*, 31 U.S. at 543 (asking sardonically: “Did these [European] adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged . . . a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?”).

69. *Johnson*, 21 U.S. at 588.

70. *Id.* at 585 (emphasis added).

unimpaired.”<sup>71</sup> What “humanity” and “a wise policy” require of any conqueror, the *Constitution* surely requires of the United States!

A legal realist would point to footnote seventeen of the *Tee-Hit-Ton* opinion as the most important support for the holding. The Court there noted the government’s contention “that if aboriginal Indian title was compensable . . . , there were claims with estimated interest already pending . . . aggregating \$9,000,000,000.”<sup>72</sup> The Court concluded its opinion with a boldness and crudity in remarkable contrast to the embarrassed buck-passing of *Lone Wolf*. Here we see the *Lone Wolf* mentality on open display, again even more so than in *Lone Wolf* itself: “[T]he savage tribes of this continent were deprived of their ancestral ranges by force and . . . even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”<sup>73</sup> It simply would not “meet the problem of the growth of the United States” if the Court were to do something so radical as “to subject the Government to an obligation to pay” for Indian lands.<sup>74</sup>

“Our conclusion,” claimed the Court with truly nauseating arrogance and hypocrisy, “does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.”<sup>75</sup> In other words, the Indians should shut up and be grateful for whatever “gratuities” the government might afford them in exchange for the privilege of remaining on their ancestral lands, defined by the Court’s own *ipse dixit* as “Government-owned”! And darn that Bill of Rights with its inconveniently “rigid” (and costly!) principles!

It is thus the Warren Court that must take full responsibility for resolving in *Tee-Hit-Ton* the question left open by Chief Justice Marshall 132 years before. The Court could not properly hide behind him, or even behind *Lone Wolf*. That the Court decided *Tee-Hit-Ton* less than a year after it effectively overruled *Plessy*<sup>76</sup> only compounds the irony. Chief Justice Warren himself, it should be noted (along with Justice Felix Frankfurter), joined Justice William O. Douglas’ dissent in *Tee-Hit-Ton*. But the dissenters did not challenge the majority’s basic premise. They merely found that Congress had in fact “recognized” the Indians’ title, in an 1884 statute organizing the territory of Alaska.<sup>77</sup> Justice Hugo L. Black, a notable defender of Indian rights in other cases (as discussed in Part III below), joined silently with the majority. Such was the power of the *Lone Wolf* mentality.

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71. *Id.* at 589.

72. *Tee-Hit-Ton*, 348 U.S. at 285 n. 17.

73. *Id.* at 289-90.

74. *Id.* at 290.

75. *Id.* at 290-91.

76. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

77. *Tee-Hit-Ton*, 348 U.S. at 294-95 (Douglas, J., joined by Warren, C.J. & Frankfurter, J., dissenting).

III. THE HUNTING OF *LONE WOLF*

By 1959, however, it seemed that a new day was dawning on the United States Supreme Court. Justice Black wrote the unanimous opinion in *Williams v. Lee*,<sup>78</sup> strongly reaffirming the historic presumption in favor of Indian sovereignty.<sup>79</sup> This revitalization of the most pro-Indian aspects of Chief Justice Marshall's *Worcester* opinion came at a critical time. Congress and the President, in one of the many twists and turns of federal Indian policy, had turned on Indian sovereignty with a vengeance in 1953, promoting the termination of Indian governments and granting several states (including California) wide jurisdiction over Indian country.<sup>80</sup> The 1955 *Tee-Hit-Ton* decision might well have heralded judicial endorsement of this trend. Instead, over the next quarter century or so, the Court, more often than not, fought back against the *Lone Wolf* mentality.

For reasons of space, I will dwell on only one example of that post-*Williams* trend. In *United States v. Sioux Nation of Indians*,<sup>81</sup> an eight-to-one majority of the Supreme Court upheld the Sioux claim that the United States Government's 1877 seizure of the Black Hills of South Dakota violated the 1868 Treaty of Fort Laramie and triggered the constitutional right of compensation under the Fifth Amendment Takings Clause. Of greatest interest is that Justice Harry A. Blackmun's majority opinion, while not overruling *Lone Wolf*, rejected much of its reasoning. In particular, the Court held that *Lone Wolf's* extreme deference toward supposed "congressional good faith[,] . . . based in large measure on the idea that relations between this Nation and the Indian tribes are a political matter, not amenable to judicial review[,] . . . has long since been discredited. . . ."<sup>82</sup> In place of the *Lone Wolf* mentality, Blackmun declared that in analyzing a claim of governmental taking of Indian land, courts should "engage in a thoroughgoing and impartial examination of the historical record."<sup>83</sup>

But lest we make too much of *Sioux Nation*, it is well to remember that the Court was only able to hear such cases at all because Congress waived the government's sovereign immunity in the Indian Claims Commission Act of 1946,<sup>84</sup> and with regard to the Sioux claim in particular, because Congress passed a special law in 1978 allowing the merits of that claim to be reconsidered.<sup>85</sup> *Sioux Nation* did not question the *Tee-Hit-Ton* rule that "'unrecognized' or 'aboriginal' Indian title is not compensable under the Fifth Amendment."<sup>86</sup> Takings of such aboriginal land rights were potentially compensable under the 1946 law if

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78. 358 U.S. 217 (1959).

79. *Id.* at 222.

80. See H.R. Con. Res. 108 (1953) (reprinted in 67 Stat. B132 (1953)); Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified in relevant part at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)).

81. 448 U.S. 371 (1980).

82. *Id.* at 413.

83. *Id.* at 416.

84. *Id.* at 384-90; see *Indian Claims Commission Act*, 60 Stat. 1049 (1946) (formerly codified at 25 U.S.C. §§ 70-70n, 70o-70v (omitted 1978)).

85. *Sioux Nation*, 448 U.S. at 384-85; Pub. L. No. 95-243, 92 Stat. 153 (1978).

86. *Sioux Nation*, 448 U.S. at 415 n. 29 (citing *Tee-Hit-Ton*, 348 U.S. at 285).

accomplished by "unfair and dishonorable dealing," but only without interest on the value originally taken.<sup>87</sup>

#### IV. THE *LONE WOLF* MENTALITY RISES AGAIN: THE REHNQUIST ERA OF AMERICAN INDIAN LAW

While it seemed that *Sioux Nation* might be closing in for the kill, the *Lone Wolf* mentality has, unfortunately, survived and prospered. Indeed, one has only to turn to the lone dissent in *Sioux Nation*, by Justice Rehnquist,<sup>88</sup> to see an example of the mentality that has come to dominate the Supreme Court. Rehnquist would be promoted by President Reagan to lead the pack as Chief Justice six years after *Sioux Nation*, and he had already made his mark two years before, in writing the majority opinion in *Oliphant v. Suquamish Indian Tribe*<sup>89</sup> (on which more anon). *Sioux Nation* gave him a chance to vent his feelings unhindered by the need to speak for a majority.

Rehnquist disagreed quite bluntly with Blackmun's examination of the historical record in *Sioux Nation*. "There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West," Rehnquist conceded, "but the Indians did not lack their share of villainy either."<sup>90</sup> One would have to agree, of course, that theft is a "less-than-admirable tactic." As the renowned Indian scholar Vine Deloria, Jr. noted, Rehnquist's "outburst can be translated for the lay person as 'sure we stole the Black Hills. But, the Indians beat their wives and so that makes us even.'"<sup>91</sup>

Rehnquist ventured on from the weird to the paranoid, accusing the majority of basing its decision on the views of "revisionist historians" who were "writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees."<sup>92</sup> Well, Rehnquist has me there. One of my sisters is a historian,<sup>93</sup> and you know, every time I turn around she's trying to mislead some congressional committee. As Blackmun pointed out, however, the "primary sources" for the history the majority relied on were "the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but . . . only when they are clearly erroneous and unsupported by the record."<sup>94</sup> Not even the United States

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87. See *id.* at 387; Canby, *supra* n. 22, at 352-57. The 1946 law did not apply to the claim in *Tee-Hit-Ton*. See *Tee-Hit-Ton*, 348 U.S. at 273-74.

88. *Sioux Nation*, 448 U.S. at 424-37 (Rehnquist, J., dissenting).

89. 435 U.S. 191 (1978) (rejecting tribal criminal jurisdiction over non-Indians).

90. *Sioux Nation*, 448 U.S. at 435 (Rehnquist, J., dissenting).

91. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 *Ariz. L. Rev.* 203, 216 (1989).

92. *Sioux Nation*, 448 U.S. at 435 (Rehnquist, J., dissenting).

93. See e.g. Lora Wildenthal, *German Women for Empire, 1884-1945* (Duke U. Press 2001).

94. *Sioux Nation*, 448 U.S. at 421 n. 32.

Government contended that the factual findings “fail[ed] to meet that standard of review.”<sup>95</sup>

Rehnquist concluded by citing “the cultural differences” of plains Indians like the Sioux that “made conflict and brutal warfare inevitable.” The Indians, he said (quoting historian Samuel Eliot Morison), “lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.”<sup>96</sup> Well. Could “culture” alone account for such childlike, even animalistic, depravity? Did Indians really “live only for the day,” caring not about yesterday or tomorrow, about their ancestors or the future welfare of their children and grandchildren? The testimony of actual Indians casts doubt on Morison’s casual generalization, adopted by Rehnquist. Chief Joseph of the Nez Perce, speaking on behalf of his tribe in the late nineteenth century, recalled his father’s dying words:

“When I am gone, think of your country. . . . You must stop your ears whenever you are asked to sign a treaty selling your home. . . . This country holds your father’s body. Never sell the bones of your father and mother.” I pressed my father’s hand and told him I would protect his grave with my life. My father smiled and passed away to the spirit-land.

I buried him in that beautiful [Wallowa] valley of winding waters. I love that land more than all the rest of the world. A man who would not love his father’s grave is worse than a wild animal. . . .

I have heard talk and talk, but nothing is done. Good words do not last long unless they amount to something. Words do not pay for my dead people. They do not pay for my country, now overrun by white men. . . . Good words will not get my people a home where they can live in peace and take care of themselves. . . .<sup>97</sup>

Rehnquist’s view of the Black Hills episode specifically (as opposed to his stereotypical slurs on Indian character generally) was not based on any historical scholarship. He failed to cite a single historian in that regard, relying instead on a 1942 Court of Claims decision. But as Blackmun noted, that court’s findings were not before the Supreme Court in 1980 and were, in any event, “based largely on [*Lone Wolf*’s] conclusive presumption of good faith [by Congress] toward the Indians. . . .”<sup>98</sup> Blackmun suggested that Rehnquist’s view amounted to “an article of faith.”<sup>99</sup> Deloria argued that it revealed his “personal emotional preference.”<sup>100</sup> In any event, it reflected the *Lone Wolf* mentality in undiluted form.

95. *Id.*

96. *Id.* at 436-37 (Rehnquist, J., dissenting) (quoting Samuel Eliot Morison, *The Oxford History of the American People* 540 (Oxford U. Press 1965)).

97. *Coyote Was Going There: Indian Literature of the Oregon Country* 38 (Jarold Ramsey ed., U. Wash. Press 1977).

98. *Sioux Nation*, 448 U.S. at 422 n. 32.

99. *Id.*

100. Deloria, *supra* n. 91, at 217.

In *Oliphant*, Rehnquist spoke for a six-to-two majority holding that Indian tribes lack criminal jurisdiction over non-Indians unless Congress expressly grants them such power.<sup>101</sup> This reversed the historic presumption of *Worcester* and *Williams* that Indian sovereign powers *survive* until and unless expressly *revoked* by Congress. Rehnquist placed great weight on a single historical instance in which an Indian tribe requested that Congress grant it such power. As he argued, this might imply by default that tribes were otherwise generally understood to lack such power.<sup>102</sup> But Rehnquist buried in a lengthy footnote a great deal of countervailing evidence, whose significance he distorted or disregarded.<sup>103</sup>

The most revealing part of Rehnquist's *Oliphant* opinion argued that inherent tribal criminal jurisdiction over non-Indians was simply inconsistent with dependent tribal status. He maintained that the tribes "necessarily g[a]ve up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."<sup>104</sup> He cited the Bill of Rights and the "great solicitude"

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101. See *Oliphant*, 435 U.S. at 195-96, 212. Cf. *id.* at 212 (Brennan, J., not participating); *id.* (Marshall, J., joined by Burger, C.J., dissenting) (disagreeing with the majority in a brief statement citing the Ninth Circuit decision that was appealed to the Court). I am, of course, far from being the first scholar to analyze *Oliphant*. Compare Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 Minn. L. Rev. 609 (1979) (strongly criticizing *Oliphant*), and Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219, 265-74 (same) with Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479 (1979) (agreeing with much of *Oliphant's* reasoning while criticizing some aspects).

102. *Oliphant*, 435 U.S. at 197-98.

103. *Id.* at 197 n. 8. For example, Rehnquist conceded that numerous early treaties with Indian tribes expressly removed from them the power to punish non-Indian wrongdoers, typically promising instead that such criminals would be "punished according to the laws of the United States." *Id.* He insisted that "these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes," but "served an important function . . . by clarifying jurisdictional limits of the Indian tribes." *Id.* But why *were* such provisions so "important" to "clarify" tribal power, if the background understanding was as Rehnquist insisted? They were certainly important if the presumed alternative was that tribes *did* have such power. Rehnquist took special note of the Treaty of Fort Pitt with the Delaware Nation of 1778 (the very first treaty ever entered into between the United States and an Indian nation), which he asserted was the only one that "ever provided for any form of tribal criminal jurisdiction over non-Indians (other than in the illegal-settler context [which Rehnquist had earlier discussed])." *Id.* Oddly, Rehnquist seemed to think this supported his overall argument. But as his own description of the relevant treaty provision made clear, it was not so much an *authorization* of tribal jurisdiction over non-Indians as a *limitation* on such jurisdiction. The treaty prohibited either the United States or the Delaware tribe from punishing the other's citizens except by a "fair and impartial trial" according to procedures "to be hereafter fixed" by the Continental Congress in consultation with the Delaware Nation. *Id.*; *Treaty of Fort Pitt with the Delaware Nation* (Sept. 17, 1778), 7 Stat. 13. This no more suggested that the Delaware tribe lacked inherent criminal jurisdiction over non-Indians than it implied the United States lacked inherent criminal jurisdiction over Indians! As Rehnquist noted, there was little or no actual historical practice of non-Indians being criminally prosecuted, in a formal sense, by Indian tribes. *Oliphant*, 435 U.S. at 196-97. But of course, there was little or no historical practice of Indian tribes formally prosecuting *anyone*, even their own citizens, until the modern development of tribal courts. See e.g. Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 111-25 (U. Tex. Press 1983). Yet Indian tribes always exercised the power to deal in some fashion with violent or antisocial acts by their own members, and history does not suggest that they were shy or reluctant to deal with violent or antisocial non-Indian intruders. See e.g. *id.* at 80-99. The treaty provisions Rehnquist himself discussed provided clear recognition of that. The particular means or methods by which a sovereign enforces its laws or social norms might well change over time, but that has little relevance to the existence or non-existence of inherent sovereign power itself.

104. *Oliphant*, 435 U.S. at 210.

the United States has always had “that its citizens be protected . . . from unwarranted intrusions on their personal liberty.”<sup>105</sup> The Court has long held that the Bill of Rights does not directly apply to tribal governments, since they were not parties to the Constitution and they and their powers predate its existence.<sup>106</sup> As Rehnquist conceded, Congress statutorily applied most of the Bill of Rights to the tribes in the Indian Civil Rights Act of 1968 (“ICRA”).<sup>107</sup> One might argue that shows Congress is sensitive to concerns about the quality of tribal justice and has already imposed the safeguards it thinks necessary to protect United States citizens. It actually supports by implication the presumption that tribes otherwise enjoy the inherent power to criminally prosecute anyone coming within their lands.<sup>108</sup>

Rehnquist, never known as a staunch defender of the rights of criminal defendants, did not explain why such concerns had any logical relevance to the issue of Indian jurisdiction—any more than concerns about the quality of justice in, say, Chinese courts have any relevance to China’s inherent and presumptive criminal jurisdiction over United States and other foreign citizens visiting there. Furthermore, to the extent concerns may exist about the personal liberties of United States citizens under tribal court jurisdiction, why should there be any greater concern for criminal defendants who happen to be non-Indian as opposed to Indian? Rehnquist ignored the fact that Indians *are* United States citizens! He implicitly conceded throughout his opinion that *Indian* citizens fall properly within tribal criminal jurisdiction, yet he suggested no concern whatsoever for *their* rights and liberties in that regard.

One might argue, of course, that Indians have chosen to maintain and submit to the ancestral sovereignty of their nations, and thus are not in a position to complain about any risks that poses to their rights and liberties. But by the same token, non-Indians who choose to enter or reside on an Indian reservation and commit crimes there also have no grounds to complain about being subjected to tribal court jurisdiction. That is the standard rule of implied consent when foreigners enter the United States, when Americans travel abroad, or when residents of one state cross state lines into another. It is the rule when Indians leave Indian country. One might argue that Indians who live on reservations deserve *greater* concern than non-Indians in this regard. Such Indians can only escape tribal criminal jurisdiction by uprooting themselves from their homelands and moving elsewhere. Non-Indians concerned about possibly unfair treatment

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105. *Id.*

106. See *Talton v. Mayes*, 163 U.S. 376 (1896); *U.S. v. Wheeler*, 435 U.S. 313 (1978).

107. *Indian Civil Rights Act*, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1341 (2000)). ICRA also imposed a cap on the criminal punishments that Indian tribes may impose even on their own members; the maximum allowed punishment for any given offense is currently one year in prison and a \$5,000 fine. 25 U.S.C. § 1302(7).

108. Rehnquist pointed in particular to a provision of Suquamish tribal law excluding non-Indians (who constituted the overwhelming majority of residents of the tribe’s Port Madison reservation) from service on tribal court juries. See *Oliphant*, 435 U.S. at 193 n. 1, 193-94. But if that provision were ever specifically litigated (which *Oliphant* made unnecessary), it would probably be struck down as a violation of ICRA’s equal protection guarantee. See 25 U.S.C. § 1302(8).



by tribal courts must merely choose not to reside in or enter Indian country in the first place.

Rehnquist's unexplained favoritism toward non-Indians and disdain for the rights and interests of Indians was dramatized most clearly by his illogical attempt to draw an analogy between his reasoning in *Oliphant* and the 1883 *Kan-Gi-Shun-Ca* (Crow Dog) case.<sup>109</sup> In *Kan-Gi-Shun-Ca*, the Supreme Court ruled that federal courts outside Indian country lacked jurisdiction over a crime committed by one Indian against another on tribal land.<sup>110</sup> Congress quickly overturned the decision by enacting the Major Crimes Act of 1885,<sup>111</sup> which the Court promptly upheld in *United States v. Kagama*.<sup>112</sup> Rehnquist claimed that *Kan-Gi-Shun-Ca* presented "almost the inverse of the issue" in *Oliphant*.<sup>113</sup> If the Suquamish Indian Tribe had reached out to prosecute a non-Indian for a crime committed against another non-Indian *outside* the Suquamish reservation, Rehnquist's analogy might have made sense. But in fact, defendant Oliphant was arrested for assaulting a tribal police officer on the reservation, and his co-defendant, another non-Indian named Belgarde, was charged with a reckless joyride along reservation roads that ended in a collision with a tribal police car.<sup>114</sup>

Twelve years after *Oliphant*, in *Duro v. Reina*,<sup>115</sup> the Court confronted the predictable follow-up issue: If tribes lack criminal jurisdiction over non-Indians, what about Indians who are not members of the prosecuting tribe? Instead of reconsidering its error in *Oliphant*, the Court dug itself in deeper. Justice Anthony M. Kennedy spoke for a seven-to-two majority that included now Chief Justice Rehnquist. Only Justice William J. Brennan, Jr., joined by Justice Thurgood Marshall, dissented.<sup>116</sup> Kennedy's *Duro* opinion betrayed an even shakier grasp of history than Rehnquist's in *Oliphant*. Kennedy claimed that the historical record on tribal jurisdiction over nonmember Indians was "less illuminating" than in *Oliphant* and "tend[ed] to support" rejection of such jurisdiction.<sup>117</sup> In fact, as Brennan pointed out in dissent, the evidence is far stronger and clearer, and plainly supports such jurisdiction.<sup>118</sup> It has been common throughout American history for Indians to settle or mingle with Indians of other tribes, often because of deliberate United States Government policies relocating different tribes together on artificially created reservations. There has never been federal jurisdiction over minor crimes between Indians in Indian country. Major crimes only came under federal jurisdiction in 1885, as noted above. Nor has state jurisdiction ever existed over any such crimes, except since 1953 in the handful of

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

110. *Id.* at 572.

111. *Major Crimes Act*, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (2000)).

112. 118 U.S. 375 (1886).

113. *Oliphant*, 435 U.S. at 210.

114. *See id.* at 194.

115. 495 U.S. 676 (1990).

116. *See id.* at 698-710 (Brennan, J., joined by Marshall, J., dissenting).

117. *Id.* at 688.

118. *See id.* at 698-706 (Brennan, J., joined by Marshall, J., dissenting).

states covered by Public Law 280.<sup>119</sup> So how did tribes handle such crimes by nonmember Indians during all those years? Kennedy didn't have a clue.

As to how such crimes would be handled in the future, given the jurisdictional void created by *Duro*, Kennedy offered several weak proposals that simply underscored his ignorance of Indian law and Indian country. His most astonishing and offensive suggestion was that state criminal jurisdiction under Public Law 280 might be expanded.<sup>120</sup> The vast majority of Indians have never been subject to Public Law 280, which has been intensely unpopular with both states and tribes (in the few states where it applies) ever since it was passed at the height of the Termination Era. States have resented the costs of criminal jurisdiction over territories and peoples not otherwise subject to state taxation, and tribes have resented the consequent loss of sovereignty and intrusion by non-Indian state authorities into their affairs. The inadequacies of Public Law 280 have led to endemic lawlessness in many parts of Indian country.<sup>121</sup> Congress, showing considerable impatience with the Court's inept meddling, almost immediately reversed *Duro* (by a statute commonly known as the *Duro* Fix Act)<sup>122</sup> and purported to restore to Indian nations their inherent sovereignty over nonmember Indians.

And yet, there was a certain logic to Kennedy's *Duro* opinion, and I fear we have not seen the last of it. If one first accepts *Oliphant* as a given (and the Court has shown no inclination to overrule it), then the question becomes whether a distinction is justifiable between tribal criminal jurisdiction over nonmembers who are Indians of other tribes and nonmembers who are non-Indians. While Rehnquist in *Oliphant* seemed to find unimportant the fact that Indians are now United States citizens, Kennedy emphasized it. He refused to "adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them."<sup>123</sup> Would such treatment amount to racial discrimination in violation of the Equal Protection Clause? That clause does not directly apply to Indian nations, but Congress statutorily applied equal protection principles to them via ICRA. Furthermore, constitutional equal protection principles *do* apply to Congress itself,<sup>124</sup> which enacted the *Duro* Fix Act.

It is, of course, the most ludicrous of ironies to see *Oliphant* extended in the name of avoiding racial discrimination. Indian nations have never sought to "single out" anyone, either non-Indians or nonmember Indians or anyone else, for criminal jurisdiction. They have simply sought to do what all sovereign

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119. 67 Stat. 588 (codified in relevant part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360); see Canby, *supra* n. 22, at 168.

120. See *Duro*, 495 U.S. at 697.

121. See e.g. Canby, *supra* n. 22, at 217; Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. Rev. 1405 (1997).

122. *Indian Civil Rights Act Amendments*, Pub. L. No. 101-511, 104 Stat. 1856 (1990), Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2)).

123. *Duro*, 495 U.S. at 693.

124. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

governments traditionally do: apply their laws to everyone entering their jurisdictions. It was *the Court's own decisions* in *Oliphant* and *Duro* that, to borrow Kennedy's words, "singled out" certain "groups," first non-Indians and then nonmember Indians, for special immunity from inherent tribal criminal jurisdiction. While Rehnquist in *Oliphant* expressed concern for the rights of non-Indian United States citizens in tribal courts, and Kennedy in *Duro* expressed concern for nonmember Indian United States citizens, they both ignored the fact that *tribal member Indians are themselves United States citizens*. Neither explained why, if it is tolerable for *any* United States citizen to be prosecuted by a tribe, *all* United States citizens choosing to reside in or enter Indian country should not be treated equally.

But the equal protection problem raised by the *Duro* Fix Act is real, even if it is a problem of the Court's own creation. The Supreme Court has not yet ruled on it. Lower courts have so far generally upheld the fix.<sup>125</sup> But I doubt very much that the Supreme Court will indefinitely tolerate this somewhat halfhearted attempt by Congress to counteract the *Lone Wolf* mentality underlying both *Oliphant* and *Duro*. If Congress wants the fix to stick, it had better pass not just a *Duro* Fix but an *Oliphant* Fix.

The Navajo Nation Supreme Court confronted the issues raised by *Oliphant* and *Duro* in *Means v. Chinle District Court*,<sup>126</sup> which presented a fascinating collision of Indian sovereignty with one of the most colorful personalities of modern Indian activism. The question was whether the Navajo (Diné) Nation could lawfully prosecute Russell Means, a famous Indian rights activist and member of the Oglala Sioux Nation, for a crime allegedly committed within the Navajo Nation.<sup>127</sup> Means claimed that the Navajo Nation lacked criminal jurisdiction over him, and that any assertion of such jurisdiction would, in any event, violate his equal protection rights, since (under *Oliphant*) he would not be subject to Navajo jurisdiction if he were a non-Indian.<sup>128</sup> Chief Justice Yazzie's crafty opinion tried to sidestep the *Duro* issue. Disdaining any reliance on the *Duro* Fix Act, he turned first to the Navajo-United States Treaty of Fort Sumner of 1868<sup>129</sup> to support Navajo criminal jurisdiction over any nonmember Indians settling in the Navajo Nation.<sup>130</sup> And indeed, the text and historical background of the treaty strongly supported such a conclusion. Article 2 of the treaty expressly set aside the Navajo reservation "for the use and occupation of the Navajo . . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them . . . ."<sup>131</sup>

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125. See e.g. *U.S. v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 122 S. Ct. 925 (2002). *Enas*, however, did not address an Equal Protection Clause challenge to the *Duro* Fix Act, but rather a Double Jeopardy Clause issue.

126. 7 Navajo Rptr. 382 (1999) (available at <<http://www.law.harvard.edu/news/courtrules.html>>).

127. *Id.* at 384.

128. See *id.* at 383.

129. *Treaty of Fort Sumner, New Mexico with the Navajo Nation* art. 2 (June 1, 1868), 15 Stat. 667.

130. *Means*, 7 Navajo Rptr. at 388-91.

131. 15 Stat. at 668.

Yazzie further concluded that Means, by marrying a Navajo woman and settling within the Navajo Nation, had established himself as a *hadane* (in-law) under Navajo common law, thus implicitly consenting to Navajo jurisdiction. This allowed the court to sidestep Means' equal protection claim on the ground that any non-Navajo, regardless of race or ethnicity, could become a *hadane*.<sup>132</sup> As legal analysis, this was a bit of a high-wire act. The United States Supreme Court in *Duro* had rejected tribal jurisdiction over a male nonmember Indian who had lived on a reservation for three months with a "woman friend"<sup>133</sup> tribal member, and suggested that even "close ties . . . through marriage or long employment"<sup>134</sup> would not suffice to subject non-Indians or nonmember Indians to tribal jurisdiction. Yet *Duro* also seemed to acknowledge the power of tribal governments to provide for membership by adoption and intermarriage with tribal members, citing two cases from the 1800s.<sup>135</sup> This ambiguity reflects the generally confused quality of the *Duro* opinion, surely one of the worst Kennedy has ever written for the Court. Yazzie's opinion, by contrast, represents an artful effort to seize the *Lone Wolf* mentality by the ears. Whether it will work in the long run remains an open question. Means' challenge to Navajo jurisdiction is now pending before the United States Court of Appeals for the Ninth Circuit.<sup>136</sup>

The historical detail and contextual sensitivity of Chief Justice Yazzie's analysis of Navajo treaty rights in *Means* found timely support in a decision of the United States Supreme Court rendered less than two months earlier. This was *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>137</sup> Justice Sandra Day O'Connor's five-to-four majority opinion in *Mille Lacs* upheld treaty rights claimed by the Chippewa to hunt, fish, and gather plants (collectively referred to as "usufructuary" rights), on lands in Minnesota that they had ceded to the United States in the Treaty of St. Peter's of 1837.<sup>138</sup> In the process, she resoundingly reaffirmed the canons of construction supporting preservation of Indian sovereignty.<sup>139</sup> *Mille Lacs* was very much in the tradition of *Worcester* and *Williams*, and an encouraging blow to the *Lone Wolf* mentality typified by *Oliphant* and *Duro*. Not surprisingly, Chief Justice Rehnquist dissented, joined by Justice Kennedy and Justices Antonin Scalia and Clarence Thomas.<sup>140</sup>

The 1837 treaty at issue in *Mille Lacs* gave the president the power to terminate at his pleasure the Chippewa treaty rights on the lands ceded by that

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132. *Means*, 7 Navajo Rptr. at 393.

133. *Duro*, 495 U.S. at 679.

134. *Id.* at 695.

135. See *id.* at 694 (citing *U.S. v. Rogers*, 45 U.S. 567 (1846); *Nofire v. U.S.*, 164 U.S. 657 (1897)).

136. See Marley Shebala, *No Rights for Nonmember Indians, Means Says*, Navajo Times (June 13, 2002) (available at <<http://thenavajotimes.com/means2.html>>).

137. *Means*, 7 Navajo Rptr. at 389 (citing *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999)).

138. *Treaty of St. Peter's, Wisconsin Territory with the Chippewa* art. 5 (July 29, 1837), 7 Stat. 537.

139. See *Mille Lacs*, 526 U.S. at 175-208. Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer joined O'Connor's majority opinion. *Id.* at 174.

140. *Id.* at 208-20. Justice Thomas also filed a separate dissent for himself alone. *Id.* at 220-26.

treaty.<sup>141</sup> There was no dispute that the president still has that power today.<sup>142</sup> The issue was whether that presidential power had ever been effectively exercised.<sup>143</sup> The Chippewa, in a second treaty concluded in 1842,<sup>144</sup> ceded some additional lands to the United States, while continuing to live in the general area. The 1842 treaty expressly gave the president the power to actually remove the Chippewa (again, at his pleasure) from the lands covered by that treaty.<sup>145</sup> In 1850, President Zachary Taylor ordered the removal of the Chippewa from the lands covered by both the 1837 and 1842 treaties, and purported to revoke all their privileges under both treaties.<sup>146</sup> Because of Chippewa resistance, however, the removal order was never carried out, and it was abandoned when President Franklin Pierce took office in 1853.<sup>147</sup>

O'Connor concluded that the 1850 removal order was invalid with regard to the lands covered by the 1837 treaty, because that treaty only gave the president power to revoke the usufructuary rights, not to actually force the removal of the Indians.<sup>148</sup> On the other hand, as Rehnquist pointed out, the 1850 order *did* expressly revoke *all* privileges under *both* the 1837 and 1842 treaties, and there was no dispute that the president had the power to wipe out the 1837 usufructuary rights, even if he could not validly force the Chippewa to actually leave the 1837 lands. Rehnquist also argued that yet another Chippewa-United States Treaty (concluded in 1855), which ceded still more Chippewa lands to the United States, *independently* extinguished the 1837 treaty rights.<sup>149</sup> Finally, Rehnquist found the 1837 treaty rights null and void on yet a *third* ground. Because such usufructuary rights are typically "temporary and precarious" by nature, they were, he argued, implicitly abrogated by Congress' admission of Minnesota as a state in 1858. In support, Rehnquist cited a Supreme Court decision from the *Lone Wolf* era, *Ward v. Race Horse*,<sup>150</sup> that relied on the theory that Indian treaty rights are generally inconsistent with a newly admitted state's right to exercise power over all of its territory on an "equal footing" with other states.<sup>151</sup>

O'Connor meticulously shredded each of Rehnquist's arguments. Closely examining the history and context of President Taylor's botched effort to remove the Chippewa, she found that his 1850 removal order had to "stand or fall as a whole,"<sup>152</sup> and that he never would have intended to abrogate the usufructuary

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141. *Id.* at 177; 7 Stat. at 537.

142. *Mille Lacs*, 526 U.S. at 189.

143. *Id.* at 189-90.

144. *Treaty of La Pointe, Wisconsin Territory with the Chippewa of the Mississippi and Lake Superior* art. 6 (Oct. 4, 1842), 7 Stat. 591.

145. *Id.*; see *Mille Lacs*, 526 U.S. at 177.

146. *Mille Lacs*, 526 U.S. at 179.

147. *Id.* at 181.

148. *Id.* at 188-90.

149. *Id.* at 208-18 (Rehnquist, C.J., dissenting); *Treaty of Washington, D.C. with the Pillager and Lake Winnibigoshish Chippewa* (Feb. 22, 1855), 10 Stat. 1165.

150. 163 U.S. 504 (1896).

151. *Mille Lacs*, 526 U.S. at 219-20 (Rehnquist, C.J., dissenting).

152. *Id.* at 191.

rights guaranteed by the 1837 treaty if he had known the removal order was invalid and would never be carried out. Thus, the 1850 order could not properly be construed to abrogate the 1837 treaty rights.<sup>153</sup> O'Connor also strictly applied the canons of construction to the 1855 treaty. Although the treaty appeared to relinquish "all" Chippewa rights on "any" lands in Minnesota, the language was vague and general.<sup>154</sup> The focus of the 1855 treaty was on selling lands entirely separate from those covered by the 1837 treaty. There was no explicit mention of the 1837 treaty or of usufructuary rights. Nor was there any mention of separate compensation for any such abrogated rights.<sup>155</sup> "These omissions are telling," O'Connor noted, "because the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights."<sup>156</sup> She went on to again review the historical record in remarkable detail, and with meticulous sensitivity to the Indian perspective.<sup>157</sup>

As for the abrogation argument based on Minnesota statehood in 1858, O'Connor correctly found that to be completely contrary to the canons of construction.<sup>158</sup> Congress made no mention of any Indian treaty rights in the admission act. Furthermore, the relevant premise of the *Race Horse* case, on which Rehnquist relied, had been repudiated and rendered obsolete only nine years after it was decided. In *United States v. Winans*,<sup>159</sup> a surprisingly pro-Indian decision just two years after *Lone Wolf*, the Court had rejected the idea that pre-existing treaty rights are presumptively abrogated upon statehood. Relying on this familiar hornbook principle of Indian law, O'Connor concluded simply: "Treaty rights are not impliedly terminated upon statehood."<sup>160</sup> The *Mille Lacs* majority did not technically overrule *Race Horse*, because O'Connor noted it could be supported on a narrower alternative ground set forth in the 1896 opinion: that the specific treaty rights at issue there were not intended to survive the statehood of the particular state involved in that case (Wyoming).<sup>161</sup>

O'Connor's approach in *Mille Lacs* may signal a return to stricter judicial adherence to Indian treaty and related land rights. Two years later, by the exact same vote, the Court in *Idaho v. United States*<sup>162</sup> upheld the Coeur d'Alene tribe's title to a lakebed and riverbed, against the argument that Idaho had acquired such navigable waterbeds upon statehood in 1890.<sup>163</sup> Although the Coeur d'Alene reservation was not created by treaty, but rather by presidential executive order

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153. *Id.* at 188-95.

154. *See id.* at 217 (Rehnquist, C.J., dissenting) (quoting 10 Stat. 1165).

155. *Id.* at 195; 10 Stat. 1165.

156. *Mille Lacs*, 526 U.S. at 195.

157. *See id.* at 195-202.

158. *See id.* at 202-08.

159. 198 U.S. 371 (1905).

160. *Mille Lacs*, 526 U.S. at 207; *see Canby, supra* n. 22, at 422-24.

161. *See Mille Lacs*, 526 U.S. at 206.

162. 533 U.S. 262 (2001) (opinion of the Court by Souter, J., joined by Stevens, O'Connor, Ginsburg & Breyer, JJ.); *id.* at 281-88 (Rehnquist, C.J., joined by Scalia, Kennedy & Thomas, JJ., dissenting).

163. *Id.* at 279-80.

and an agreement ratified by Congress,<sup>164</sup> the *Idaho* majority employed the same sensitive canons of construction and historical review that marked *Mille Lacs*.<sup>165</sup>

But the five-to-four margin in both the *Mille Lacs* and *Idaho* cases is a reminder of the razor's edge on which Indian rights rest in today's Court. A careful reading of Rehnquist's *Mille Lacs* dissent only underscores how dangerously powerful the *Lone Wolf* mentality has become. It is astonishing enough that Rehnquist sought to revive and convert into a general rule of Indian treaty interpretation an obsolete, century-old decision from the *Lone Wolf* era. Rehnquist was taking a position so extreme that it was rejected two years after *Lone Wolf* by most of the same Justices who decided *Lone Wolf* itself! If he was not beating a dead *Race Horse*, he was certainly trying to raise it from the dead. In Rehnquist's hands, it would seem, any Indian treaty rights are by definition "temporary and precarious"!

Even more startling is how Rehnquist went out of his way to construe President Taylor's 1850 executive order as properly terminating the Chippewa treaty rights. He found the rights-terminating and removal portions of the order severable, so that even if the removal portion was invalid, the treaty rights would still be nullified.<sup>166</sup> In the process, he rejected the majority's application of the pro-Indian canons of construction to the executive order. He claimed the canons applied only to treaty interpretation, and were designed strictly and only to remedy the unequal bargaining positions of the United States Government and the tribes.<sup>167</sup>

Rehnquist cited no authority for this claim, which is simply false. Hornbook Indian law is expressly to the contrary.<sup>168</sup> Unequal bargaining power is certainly *one* primary justification for the canons, and they certainly originated in the context of treaty interpretation. But the canons have long been applied, perhaps most famously and importantly, in the context of federal legislation that might or might not be construed to *abrogate* treaty rights.<sup>169</sup> Indian tribes do not "bargain" with Congress over such legislation. Thus, the fact that the Chippewa did not bargain with President Taylor over his 1850 executive order is utterly irrelevant to whether the canons should be applied to it.

But wait, there's more! Rehnquist failed to follow the canons of construction even with regard to the Chippewa *treaties*, where even *he* conceded the canons should apply. He found that President Taylor was legally empowered to remove the Chippewa from the lands ceded in 1837, based merely on alleged *implications* in the 1837 treaty itself.<sup>170</sup> That treaty, as noted above, only ceded *ownership* of the land, while *preserving* (subject to possible future presidential termination) special Chippewa rights to hunt, fish, and gather on it. As Justice

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164. *Id.* at 262.

165. *See id.* at 265-81.

166. *See Mille Lacs*, 526 U.S. at 215-17 (Rehnquist, C.J., dissenting).

167. *Id.* at 214 n. 1 (Rehnquist, C.J., dissenting); *see id.* at 210-17 (Rehnquist, C.J., dissenting).

168. *See Canby, supra* n. 22, at 103-04.

169. *See id.* at 100-10.

170. *See Mille Lacs*, 526 U.S. at 213-14 (Rehnquist, C.J., dissenting).

O'Connor noted for the majority, "the revocation of [the 1837 Treaty] rights would not have prevented the Chippewa from hunting, fishing, and gathering on the ceded territory; . . . [it] would merely have subjected Chippewa hunters, fishers, and gatherers to territorial, and later, state regulation."<sup>171</sup> Rehnquist, by contrast, assumed that simply because tribal property rights were ceded, and special treaty usufructuary privileges were revoked (if indeed they were), the Indians properly became subject to forcible relocation to a distant territory. Yet there are innumerable examples throughout American history where Indians ceded tribal property rights and gave up (or never had) special treaty rights, without becoming automatically subject to removal.

Pause for a moment to reflect on all this. *Mille Lacs* was far more than just another twist in the long and winding road of Indian treaty litigation. It presented, at the threshold of the twenty-first century, a truly stunning spectacle: the Chief Justice of the United States—and one less than a majority of the United States Supreme Court—*straining* to interpret the language of an Indian treaty to provide legal authority for Indian removal. Indian removal was, of course, a hallmark of nineteenth-century America and one of the most horrific and genocidal policies in United States history, apart from racial slavery. Not only that, the Chief Justice and his majority-less-one *strained* to uphold the legal validity and effectiveness of an 1850 presidential Indian removal order that was abandoned by that president's successor within three years, precisely because of the practical problems, hardships, and injustices typical of Indian removal generally.

#### V. 2001: TWO CASES, ONE COURT, NO JUSTICE

Chief Justice Yazzie's warning to Indian sovereignty advocates to "watch your six"<sup>172</sup> was never more apt than in May and June of 2001. In a quick one-two punch, the Rehnquist Court got the *Lone Wolf* mentality off to a triumphal start in the new millennium. First was *Atkinson Trading Company v. Shirley*,<sup>173</sup> decided on May 29, 2001. *Atkinson*, written by the Grand Rehnquisitor himself,<sup>174</sup> was sort of like the TNT trigger for the A-bomb of *Nevada v. Hicks*,<sup>175</sup> decided on June 25, 2001. Both cases involved the extent of tribal civil (rather than criminal) jurisdiction over non-Indians engaged in activities within a reservation.

The issue in *Atkinson* was whether the Navajo Nation could impose a hotel occupancy tax on nonmember guests at a hotel operated by a nonmember-owned company on nonmember-owned land within the reservation.<sup>176</sup> The ownership status of land within an Indian reservation had become especially critical (or so it

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171. *Id.* at 192.

172. See Yazzie, *supra* n. 30.

173. 532 U.S. 645 (2001).

174. Rehnquist reportedly "thought it funny that there was a Rehnquist Club at Harvard Law School in which the leader was called the 'Grand Rehnquisitor,' and a weekly discussion . . . the 'Rehnquisition.'" Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 412 (Simon & Schuster 1979).

175. 533 U.S. 353 (2001).

176. *Atkinson*, 532 U.S. at 647-48.



seemed) because of the Court's 1981 decision in *Montana v. United States*.<sup>177</sup> *Montana* involved the hunting and fishing rights of non-Indians within the Crow Reservation, on land owned both by such non-Indians and by the tribe. To avert any primal screams of confusion at this point from non-specialists in Indian law, it may briefly be noted that a substantial amount of land within many Indian reservations is now owned in fee simple by non-Indian residents of such reservations. This is a product of the "allotment era" that started in 1887 and lasted until the 1920s, during which large tracts of tribal land were "allotted" into small parcels deeded to individual Indians, which eventually (in many cases) passed to non-Indian ownership. Large amounts of "surplus" tribal land were also opened to non-Indian settlement, resulting in the loss of about two-thirds of the total tribal land base in the lower forty-eight states.<sup>178</sup>

*Montana* seemed to set forth two different rules regarding inherent tribal civil jurisdiction over non-Indians (or nonmembers of the tribe). First, in the introduction to Part III of its opinion, the *Montana* Court "readily agree[d]" that the tribe could regulate non-Indian hunting and fishing on tribally-owned land.<sup>179</sup> "What remains," the Court then stated, "is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers . . . ."<sup>180</sup> Six pages later, in Part III.B, the *Montana* Court discussed whether the tribe retained inherent "power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation . . . ."<sup>181</sup> Relying in part on *Oliphant's* rejection of tribal criminal jurisdiction over non-Indians, the Court stated a "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>182</sup>

It has been hotly debated ever since whether this "general proposition"—known to Indian law aficionados as the "*Montana* rule"—was meant to be "general" as to all nonmembers, or only as to nonmembers when on nonmember-owned land. The explicit language quoted above, and the repeated references to nonmember-owned "fee" land in the remainder of Section III.B of the opinion, support the latter view.<sup>183</sup> In any event, however broad the *Montana* rule was, is, or should be, it is clear that—like *Oliphant* itself—it reversed the time-honored presumption in favor of inherent Indian sovereignty. *Montana* marked the infection of the tribal civil jurisdiction field with the *Lone Wolf* mentality. As we shall see, the infection may yet prove fatal.

However, the *Montana* Court hastened to make clear that the *Montana* rule—unlike the *Oliphant* rule—is not absolute. Rather, there are two broad exceptions to the general presumption against inherent tribal civil jurisdiction over

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177. 450 U.S. 544 (1981).

178. See generally Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995).

179. *Mont.*, 450 U.S. at 557.

180. *Id.*

181. *Id.* at 563.

182. *Id.* at 565. It is important to note that this "*Montana* rule" was never meant to apply to tribal treaty-based powers, which were also at issue in *Montana*. See *id.* at 557-63.

183. See *id.* at 563-67.

nonmembers. Or at least they sound broad. The first *Montana* exception is that a tribe may “regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”<sup>184</sup> The second *Montana* exception is that a tribe may regulate “the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”<sup>185</sup>

*Montana* itself suggested how narrowly the exceptions to the *Montana* rule would be construed. One might think that a nonmember engages in a “consensual” relationship with a tribe simply by choosing to own and reside on land within an Indian reservation. And almost any kind of land use by such property owners arguably has some potential impact on the economy or environment of the tribe. That is the general basis on which most local governments exercise zoning and other regulatory powers. But the Court in *Montana* itself rejected the Crow Tribe’s power to regulate hunting and fishing by non-Indians on land they owned within the reservation.<sup>186</sup> Yet, since wildlife crosses property lines all the time, hunting and fishing anywhere within an Indian reservation could easily affect the environmental health of the entire reservation.

Anyway, getting back to our story in 2001: The *Atkinson* Court applied the *Montana* rule and unanimously struck down the Navajo tax.<sup>187</sup> And although *Atkinson* itself involved nonmember-owned land, it contained a foreboding portent. Justice David H. Souter, joined by Justices Kennedy and Thomas, wrote a concurring opinion declaring that the *Montana* rule should apply “regardless of whether the land at issue is [nonmember-owned] fee land, or land owned by or held in trust for an Indian tribe.”<sup>188</sup>

Souter’s concurrence turned out to be an early warning tremor. The “Big One” hit less than a month later when *Hicks* was decided. Justice Scalia, one of Rehnquist’s acolytes in *Mille Lacs*, wrote the majority opinion, joined in full by Rehnquist, Kennedy, Souter, Thomas, and (most disappointingly) Justice Ruth Bader Ginsburg.<sup>189</sup> Justice O’Connor, joined by Justices John Paul Stevens and

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184. *Id.* at 565.

185. *Id.* at 566.

186. *See id.* at 566-67.

187. *Atkinson*, 532 U.S. at 649-59. *Atkinson* is the latest in a string of cases expanding the *Montana* rule, and narrowing the *Montana* exceptions, with regard to reservation lands owned or controlled by nonmembers. *See e.g. Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (rejecting tribal power to zone most nonmember-owned property within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (rejecting tribal-court jurisdiction over civil lawsuit against non-Indian arising on state highway within reservation but not subject to tribal control). *Atkinson* also improperly limited the inherent taxing power of Indian tribes upheld in an important post-*Montana* case. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

188. *Atkinson*, 532 U.S. at 660 (Souter, J., joined by Kennedy & Thomas, JJ., concurring).

189. *See Hicks*, 533 U.S. at 354; *see id.* at 375-86 (Souter, J., joined by Kennedy & Thomas, JJ., concurring); *id.* at 386 (Ginsburg, J., concurring). Ginsburg’s decision to join Scalia’s opinion in full was not that surprising, given that she wrote the unanimous opinion in *Strate*, *see supra* n. 187. But it remains puzzling and bitterly disappointing that Ginsburg, generally regarded as the most progressive member of the current Court (especially on issues affecting disadvantaged social groups), and probably the most progressive Supreme Court appointee since President Lyndon B. Johnson chose Justice

Stephen G. Breyer, wrote a “concurring” opinion that actually disagreed strongly with much of Scalia’s reasoning and on how the case should be handled on the remand that all agreed was necessary.<sup>190</sup> Indian law scholars will be debating *Hicks* for generations. Some excellent commentary has already appeared.<sup>191</sup> Following are some of my preliminary thoughts.

*Hicks* held that a tribal court lacked jurisdiction over a civil lawsuit against several Nevada state game wardens brought by Floyd Hicks, a member of the Fallon Paiute-Shoshone Tribes.<sup>192</sup> Hicks claimed the state officers violated his rights while searching his home on tribal land within the Fallon reservation. He was suspected of having killed a bighorn sheep off the reservation, in violation of Nevada state law. The search was conducted jointly by state and tribal officers, based on search warrants obtained from both a state court judge and a judge of the Fallon Tribal Court.<sup>193</sup> Scalia claimed in a footnote that “[o]ur holding . . . is limited to the question of tribal-court jurisdiction over state officers enforcing state law,” leaving “open the question of tribal-court jurisdiction over nonmember defendants in general.”<sup>194</sup> But he applied the *Montana* rule, despite the fact that *Hicks* arose on tribally owned land, thus adopting the radical expansion of *Montana* proposed by Souter in *Atkinson*.<sup>195</sup> Even more importantly, Scalia and the *Hicks* majority endorsed sweeping, “inherent” state power to enter Indian reservations without tribal permission or regulation, whenever deemed necessary by state officials to investigate or enforce state law.<sup>196</sup>

Strictly speaking, *Hicks* only involved the “adjudicative jurisdiction” of a tribal court to hail a nonmember before it to face a civil lawsuit and potential personal liability. That is among the most aggressive possible assertions of

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Marshall in 1967, has been so insensitive to Indian claims. True, she provided one of the critical five majority votes in *Mille Lacs*, but *Hicks* and other cases situate her (within Indian law) well to the right of Reagan appointee O'Connor, Ford appointee Stevens, and Bush appointee Souter. For example, in *Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450 (1995), Ginsburg wrote the five-to-four majority opinion (joined by Rehnquist, Scalia, Kennedy, and Thomas) upholding state power to tax a tribal member's tribal income where the tribal member resided off the reservation, over the dissent of her fellow Clinton appointee, Breyer (joined by Stevens, O'Connor, and Souter).

190. See *Hicks*, 533 U.S. at 387-401 (O'Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment). Stevens also filed a separate opinion disagreeing with the majority's conclusion that tribal courts lack jurisdiction to hear federal civil rights lawsuits under 42 U.S.C. § 1983 (2000). See *Hicks*, 533 U.S. at 401-04 (Stevens, J., joined by Breyer, J., concurring in the judgment).

191. See e.g. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 Minn. L. Rev. 267, 329-35 (2001); Alex Tallchief Skibine, *Making Sense Out of Nevada v. Hicks: A Reinterpretation*, 14 St. Thomas L. Rev. 347 (2001).

192. *Hicks*, 533 U.S. at 369.

193. *Id.* at 355-57.

194. *Id.* at 358 n. 2.

195. See *id.* at 357-65. The *Atkinson* Souter trio elaborated on their views in *Hicks*. See *id.* at 375-86 (Souter, J., joined by Kennedy & Thomas, JJ., concurring). But see *id.* at 386 (Ginsburg, J., concurring) (despite joining Scalia's opinion, claiming to “understand” that it did “not reach out definitively to answer” whether *Montana* should be extended beyond the context presented in *Hicks* of nonmembers who are also state officials). One can only describe Ginsburg as being in denial. And one of the most sharply disappointing aspects of *Hicks* was Souter's unabashed embrace—even amplification—of the offensive and illogical rationale of *Oliphant* and *Duro*. See *id.* at 383-85 (Souter, J., joined by Kennedy & Thomas, JJ., concurring).

196. *Id.* at 360-66.

governmental authority, short of criminal prosecution. The Supreme Court has never upheld a civil judgment in an Indian tribal court against an unconsenting nonmember defendant. Most tribal civil jurisdiction cases have involved "regulatory jurisdiction" over matters like taxation, zoning, hunting, and fishing. It has long been thought possible that tribal adjudicative jurisdiction may not reach as far as tribal regulatory jurisdiction. Scalia noted that the Court could avoid resolving in *Hicks* the issue whether tribal adjudicative jurisdiction is equivalent to tribal regulatory jurisdiction, "if we determine that the Tribes in any event lack legislative [*i.e.*, regulatory] jurisdiction in this case."<sup>197</sup>

Scalia thus tried to make it sound as if he were cautiously deciding *Hicks* on the narrowest ground possible. In fact, he was doing the exact opposite. By framing the question that way, he positioned the Court to completely reject, as it did, tribal adjudicative *and* regulatory jurisdiction over state officers purportedly enforcing state law on the reservation. Scalia could just as easily have avoided the issue whether tribal adjudicative jurisdiction equals tribal regulatory jurisdiction by simply limiting his opinion to the precise and narrower issue actually presented by *Hicks*. There was no need whatsoever for him to resolve the broader question whether *any* tribal regulatory limits *at all* exist on state law enforcement conduct within Indian country, as O'Connor pointed out.<sup>198</sup>

It would have been perfectly possible in *Hicks* to hold that the tribe lacked *adjudicative* jurisdiction over the state officers, while maintaining (or at least leaving open the possibility of) some tribal *regulatory* limits on state authority within Indian country. It also would have been perfectly consistent with the Court's own reasoning in *Kiowa Tribe v. Manufacturing Technologies, Inc.*<sup>199</sup> At first blush, of course, it may seem incongruous to suggest that regulatory power could exist without the backup enforcement mechanism of adjudicative power. And indeed, it would be a bothersome handicap. But a similar problem already exists with regard to tribal regulatory and criminal jurisdiction. Most governments back up their regulatory authority with the threat of criminal sanctions. Taxation, for example, may be civilly enforced for the most part, but criminal penalties for tax evasion are typically available if needed. Hunting regulations may be primarily civil in nature, but hunting without a license might also be a criminal misdemeanor. But ever since *Oliphant*, Indian tribes have had to implement

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197. *Id.* at 358.

198. *See id.* at 397 (O'Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment).

199. 523 U.S. 751 (1998) (reaffirming tribal sovereign immunity, even with regard to off-reservation commercial ventures). Interestingly, some of the Justices who have fallen prey most readily to the *Lone Wolf* mentality were in the six-to-three majority in *Kiowa*. Kennedy wrote the majority opinion, joined by Rehnquist, O'Connor, Scalia, Souter, and Breyer. *Id.* at 753-60. Stevens, joined by Thomas and Ginsburg, dissented. *Id.* at 760-66. The explanation appears to be the Justices' overriding concern with the separate but related issue of state sovereign immunity. Four of the six Justices in the *Kiowa* majority (all but Souter and Breyer) were in the five-to-four majority in *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47-76 (1996), which found states constitutionally immune from lawsuits by tribes. Two of the three *Kiowa* dissenters (Stevens and Ginsburg) also dissented in the *Seminole Tribe* case. *See id.* at 76-100 (Stevens, J., dissenting); *id.* at 100-85 (Souter, J., joined by Ginsburg & Breyer, JJ., dissenting).

whatever civil authority they have over non-Indians without the fallback of criminal sanctions.

The *Kiowa* Court noted that tribal sovereign immunity with regard to off-reservation commercial ventures was entirely consistent with the fact “that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit.”<sup>200</sup> The Court noted that it has upheld state power to tax on-reservation tribal cigarette sales to nonmembers, while denying states the power to bring a lawsuit against the tribe to collect unpaid taxes.<sup>201</sup> By the same token, it would be perfectly possible to hold, for example, that state officials must obtain some form of permission from tribal officials before executing a search on the reservation, without necessarily also allowing a tribal-court lawsuit against the state officials if they do not comply. Other remedies, such as federal-court litigation, might be available (or fashioned by Congress) to deal with conduct by state officials within Indian country violating either tribal sovereignty or individual rights or both.

Some sort of compromise along these lines might have resolved many of the concerns shared by all the Justices regarding state officers subjected to tribal-court lawsuits. Such officers are, of course, ordinarily entitled to qualified immunity for actions taken in the course of their official duties, if they acted in the good faith belief that their conduct was lawful. As O'Connor noted, the Fallon Tribal Courts failed to promptly address the officers' immunity claims. She argued that on remand, instead of just dismissing the lawsuit as required under the majority's reasoning, the lower federal court should itself address the immunity issue.<sup>202</sup> Scalia scored some palpable hits in criticizing this part of O'Connor's opinion. O'Connor was suggesting, in effect, that tribal courts could be denied jurisdiction as a sort of punishment for not adequately addressing the immunity issue. But federal courts must normally make an all-or-nothing decision as to whether tribal courts have jurisdiction. If tribal courts *do* have jurisdiction, *they* would seem to have authority to decide the immunity issue under tribal law. That could, in theory, place state officials at the mercy of tribal courts.<sup>203</sup>

Indeed, a general problem highlighted by *Hicks*, as noted by Justice Souter, is that “there is no effective review mechanism in place” over tribal court decisions.<sup>204</sup> Tribal court judgments cannot be formally removed or appealed to any state or federal court. The only (rather cumbersome) recourse for a tribal-court defendant is to bring a separate lawsuit in federal court, seeking either a writ of habeas corpus or a declaratory judgment that the tribal court lacks jurisdiction. But Scalia and the *Hicks* majority pretermitted any compromise that might have

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200. *Kiowa*, 523 U.S. at 755 (citations omitted).

201. *See id.*

202. *See Hicks*, 533 U.S. at 397-401 (O'Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment).

203. *See id.* at 373-74.

204. *Id.* at 385 (Souter, J., joined by Kennedy & Thomas, JJ., concurring).

addressed such issues. They cheerfully threw out the tribal-sovereignty baby with the adjudicative-jurisdiction bathwater.

Scalia conceded that it was “not entirely clear” from the Court’s past decisions whether states had the legal authority “to enter a reservation . . . for [state law] enforcement purposes” without either tribal or federal permission.<sup>205</sup> That was certainly an understatement. In fact, the prevailing assumption had long been that state officials generally have little more authority within an Indian reservation than they do outside their own state lines.<sup>206</sup> Of course, law enforcement officials have traditionally cooperated in cases reaching across jurisdictional lines. And state authorities have long exercised some law enforcement powers within Indian country.<sup>207</sup>

It appears likely that the Nevada state game wardens sought (and obtained with no apparent difficulty) tribal-court approval and tribal-police cooperation for the raid on Hicks’ home, for the same reasons they would have sought the approval and cooperation of California courts and police if Hicks had resided in California. But under Scalia’s reasoning, Nevada need never have bothered with a tribal-court warrant, and need not have given tribal police the courtesy of so much as a phone call to let them know a state raid would be carried out on the reservation. As O’Connor pointed out, *Hicks* presented a model scenario of state-tribal law enforcement cooperation.<sup>208</sup> It was thus puzzling, at best, why Scalia and the majority went out of their way to encourage states to unilaterally project their power within Indian country. And it was nothing less than a gratuitous insult to Indian nation law enforcement for Scalia to suggest that such state power was necessary “to ‘prevent [such areas] from becoming an asylum for fugitives from justice.’”<sup>209</sup>

In any event, Scalia totally missed (or chose to ignore) the deeper issue of Indian sovereignty. His claim that federal law might provide some redress for state violations of *individual* Indian rights<sup>210</sup> completely failed to address the undermining of tribal *governmental* authority inherent in the unilateral assertion of state power within tribal territory, against tribal members, on tribally owned land. The only way in which federal law might protect tribal integrity in that sense would be to maintain the very kind of rule that the Court rejected in *Hicks*: a rule of respect for tribal sovereignty requiring some form of tribal permission or

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205. *Id.* at 363.

206. See Canby, *supra* n. 22, at 165, 173, 247, 269.

207. The Court has long recognized state power to investigate and prosecute state-law crimes committed within Indian country by non-Indians against other non-Indians, although that too was a regrettable and ill-thought-out product of the *Lone Wolf* era. See e.g. *U.S. v. McBratney*, 104 U.S. 621 (1882).

208. See *Hicks*, 533 U.S. at 397 (O’Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment).

209. *Id.* at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)).

210. See *id.* at 374.

consultation before state authorities reach the long arm of state law enforcement into Indian country.<sup>211</sup>

The bottom line is that Scalia and the *Hicks* majority do not view tribal sovereignty as entitled to any dignity or respect even remotely similar to that accorded to state sovereignty. The single most shocking statement in Scalia's *Hicks* opinion is that state enforcement of state law within Indian tribal boundaries "no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."<sup>212</sup> This statement is willfully hostile to the entire history, structure, and logic of American Indian law. Federal enforcement of federal law obviously must take place almost entirely within the boundaries of the states, since (with a few exceptions like the District of Columbia and overseas territories) the states *constitute* the United States. Of course federal law enforcement does not improperly "impair" state sovereignty, because the states are constitutionally subordinate to federal law under the Supremacy Clause.<sup>213</sup> The states are mere components of the United States.

The Indian nations, by contrast, are most emphatically *not* mere components of the states, nor are they legally subordinate to the states. Or at least, they were not prior to *Hicks*. According to the "plenary power" doctrine, of course, the tribes *are* mere components of the United States, and are, like the states, fully subject to federal enforcement of federal law. That doctrine, as applied to Indian nations, actually has a far more dubious historical and constitutional basis than the explicit text of the Supremacy Clause applicable to the states.<sup>214</sup> Scalia's statement implied a mythical Supremacy Clause of his own invention, under which tribal law is somehow trumped by state law. And to think that Scalia calls himself a "textualist"!<sup>215</sup> In fact, of course, as established by *Worcester* 170 years ago and almost unquestioned by the Court until *Hicks* itself, *Indian* sovereignty—as rooted and recognized in federal law—is *superior to and trumps state power* under the Supremacy Clause!

While Scalia's *Hicks* opinion bluntly dissed Indian sovereignty, O'Connor's dissenting "concurrence" offered only the palest defense of it. While she criticized some of the more obvious flaws in Scalia's opinion, she too (joined by Stevens and

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211. Scalia argued that tribal "self-government" and "internal relations" were not implicated because *Hicks* was, after all, accused of violating state law while off the reservation. *Id.* at 364; *see id.* at 361-66, 371. The state officers, he implied, would only have violated tribal sovereignty if they had sought to investigate or punish Indian conduct originating on the reservation itself, and thus totally beyond the reach of state law. But under this reasoning, Nevada state officials would be perfectly free to roam about California carrying out raids and searches, and arresting criminal suspects, without even consulting or seeking permission from California authorities, as long as the suspects being pursued were accused of committing some crime in Nevada. According to Scalia's logic, this would not pose any threat whatsoever to California's political integrity as a state or the security or welfare of its citizens.

212. *Id.* at 364.

213. U.S. Const. art. VI, cl. 2.

214. *See e.g.* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113 (2002).

215. *See e.g.* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed., Princeton U. Press 1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cin. L. Rev.* 849, 862 (1989).

Breyer) agreed that the *Montana* rule should be expanded to cover all tribal land, and she offered far less in the way of justification.<sup>216</sup> The Justices now appear to unanimously agree that tribal land ownership is at most a mere “factor” to be considered in applying the *Montana* rule. O’Connor’s main protest was that the majority did not treat it as a sufficiently “important factor.”<sup>217</sup> But given how narrowly all the Justices (including O’Connor, Stevens, and Breyer) have construed the *Montana* exceptions, that offered very little protection for Indian sovereignty, even (now) on tribally owned lands.

One hardly knows whether to laugh or cry at seeing *Montana* described by the Souter trio in *Atkinson* and then the O’Connor trio in *Hicks* as the only hope for “coherence” in American Indian law.<sup>218</sup> If that’s true, then we are truly beyond hope. Souter argued that expanding the *Montana* rule “serves sound policy . . . [b]ecause land on Indian reservations constantly changes hands (from tribes to nonmembers, from nonmembers to tribal members, and so on),” thus rendering the original *Montana* rule “extraordinarily difficult to administer.”<sup>219</sup> In the first place, Souter didn’t know what he was talking about. Property does *not*, in fact, frequently change ownership in this fashion in Indian country. Non-Indian-owned parcels do indeed form something of a “checkerboard” or “crazy quilt” on some reservations.<sup>220</sup> But it was *Montana* itself that set us on the road to “incoherence” by needlessly tying tribal power to the occasional crazy quilt of land ownership in Indian country, and by expanding *Oliphant*’s reversal of the long-established presumption in favor of inherent Indian sovereignty.

A far wiser trio of Justices said all that needed to be said about *Montana* some years ago in *Brendale v. Yakima Indian Nation*.<sup>221</sup> “I find it evident,” said Justice Blackmun in *Brendale* (joined by Justices Brennan and Marshall), “that the [*Montana*] Court simply missed its usual way. . . . [I]t contains language flatly inconsistent with . . . prior decisions defining the scope of inherent tribal jurisdiction.”<sup>222</sup> Unfortunately, Blackmun, Brennan, and Marshall joined silently in the relevant (unanimous) portion of the *Montana* opinion when it was issued. Their dissent in *Brendale* came eight years too late. In the wake of *Hicks*, it is all too clear that the Court has, indeed, lost its way.

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216. See *Hicks*, 533 U.S. at 388 (O’Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment).

217. *Id.* at 389 (O’Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment) (emphasis added).

218. See *Atkinson*, 532 U.S. at 659 (Souter, J., joined by Kennedy & Thomas, JJ., concurring); *Hicks*, 533 U.S. at 388 (O’Connor, J., joined by Stevens & Breyer, JJ., concurring in part and concurring in the judgment).

219. *Hicks*, 533 U.S. at 383 (Souter, J., joined by Kennedy & Thomas, JJ., concurring).

220. See e.g. Janet McDonnell, *The Dispossession of the American Indian, 1887-1934*, at 121 (Ind. U. Press 1991).

221. 492 U.S. 408 (1989).

222. *Id.* at 455 (Blackmun, J., joined by Brennan & Marshall, JJ., concurring in the judgment in part and dissenting in part).



## VI. WHERE DO WE GO FROM HERE?

The judicial outlook for American Indian law is bleak. With occasional exceptions like *Mille Lacs*, and despite a handful of dissenters like Judge Canby on the Ninth Circuit or Justice Kennard on the California Supreme Court, most judges are no longer defending Indian sovereignty. There are often *no* dissenters any more on the United States Supreme Court. Most judges seem intent on tearing down the 170-year-old edifice crafted by the likes of Chief Justice Marshall in *Worcester*, Justice Black in *Williams*, and Justice Blackmun in *Sioux Nation*.<sup>223</sup>

Indian nation judges like Chief Justice Yazzie of the Navajo Nation Supreme Court struggle against this trend, but their most powerful allies, strangely enough, are now the *political* branches of the federal and even some state governments. Congress, after all, passed the Indian Gaming Regulatory Act in 1988, which despite its flaws has opened the door to widespread Indian economic development.<sup>224</sup> Congress has also passed legislation like the Indian Child Welfare Act of 1978 (which state judges have often undermined),<sup>225</sup> the American Indian Religious Freedom Act of 1978 (declared toothless by the United States Supreme Court in 1988),<sup>226</sup> the Native American Graves Protection and Repatriation Act of 1990<sup>227</sup> (mercifully free so far from interpretation by the United States Supreme Court), the *Duro* Fix Act of 1990,<sup>228</sup> and the American Indian Religious Freedom Act Amendments of 1994 (overturning the United States Supreme Court's refusal to protect Indian religious use of peyote).<sup>229</sup>

Modern United States Presidents from both major political parties, from Nixon to Clinton, have generally supported maintaining, and even expanding, Indian sovereignty.<sup>230</sup> Even President Reagan followed the general trend. Reagan's Environmental Protection Agency, in 1984, became the first federal agency in modern times to adopt a formal policy promoting government-to-government dealings with Indian tribes, leading to the delegation of important environmental enforcement powers to some tribes.<sup>231</sup> The jury is still out on President George W. Bush. It is not reassuring that Secretary of the Interior Gale

223. See e.g. *supra* pt. V (discussing *Atkinson* and *Hicks*).

224. See *supra* pt. I and n. 19.

225. *Indian Child Welfare Act*, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963 (2000)) ("ICWA"); see e.g. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 1996) (following judicially invented "existing Indian family" exception to ICWA).

226. *American Indian Religious Freedom Act*, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified in relevant part at 42 U.S.C. § 1996 (2000)) ("AIRFA"); see *Lyng v. N.W. Indian Cemetery Protective Assn.*, 485 U.S. 439, 454-55 (1988) (holding that AIRFA created no judicially enforceable right or cause of action).

227. *Native American Graves Protection and Repatriation Act*, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (2000)).

228. See *supra* n. 122.

229. *American Indian Religious Freedom Act Amendments*, Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a); see *Or. Dept. of Human Resources v. Smith*, 494 U.S. 872, 882 (1990) (rejecting constitutional right to use peyote in Native American Church ceremony).

230. See e.g. David E. Wilkins, *American Indian Politics and the American Political System* 115-18 (Rowman & Littlefield 2002).

231. See Janet K. Baker, *Tribal Water Quality Standards: Are There Any Limits?*, 7 Duke Envtl. L. & Policy Forum 367, 369-70, 374-84, 387-91 (1997).

Norton and former Assistant Secretary of the Interior for Indian Affairs Neal McCaleb have been held in contempt of court for continued mismanagement of Indian trust accounts (as were, to be fair, Clinton's Secretaries of the Interior and the Treasury and Assistant Secretary for Indian Affairs).<sup>232</sup>

State and local governments, and non-Indian people at the state and local level, have historically been viewed with great trepidation by Indians. It has long been a bitterly accurate cliché that "the people of the states where [Indians] are found are often their deadliest enemies."<sup>233</sup> This dates back most famously to the expulsion of the Cherokee Nation by the state and people of Georgia in the 1830s.<sup>234</sup> And it is still true to some extent. But the California state legislature, in recent years, has actually tried to correct decisions by California state judges undermining the pro-Indian-sovereignty thrust of Congress' Indian Child Welfare Act.<sup>235</sup> And, as discussed in Part I, the overwhelmingly non-Indian people of California have forged ahead where their leaders feared to tread, emphatically endorsing the economic independence of California Indian tribes in a historic act of atonement for the wrongs of the past.

A revival of government-to-government methods of addressing Indian concerns, as advocated by many scholars,<sup>236</sup> seems clearly preferable to judicial litigation. But renewed treaty-making or its equivalent will not be enough, and Indians are wise not to rely on that approach alone. At the same time, and despite the view of some that the two approaches are inconsistent,<sup>237</sup> Indians have also sought with increasing success to promote tribal sovereignty through the American political process, as voters and campaigners.<sup>238</sup> The Rehnquist Court may have ushered in the twenty-first century by judicially reaffirming, in *Atkinson* and *Hicks*, the *Lone Wolf* mentality that ushered in the twentieth century. But the ultimate repudiation of *Lone Wolf* may depend upon the wisdom of the American people, both Indian and non-Indian, and their elected governments, both tribal and non-tribal.

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232. See *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (*affg and remanding Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999)), *on remand*, 2002 WL 31060187 (D.D.C. Sept. 17, 2002) (holding Bush officials in civil contempt); *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (same as to Clinton officials). McCaleb recently resigned after less than two years on the job, apparently frustrated over the administration's handling of Indian affairs. See Jim Adams, *Departure of BIA Head Could Leave Indians at Disadvantage*, Indian Country Today (Dec. 2, 2002).

233. *U.S. v. Kagame*, 118 U.S. 375, 384 (1886).

234. See e.g. Samuel Carter III, *Cherokee Sunset: A Nation Betrayed* (Doubleday 1976); John Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (Doubleday 1988).

235. See 1999 Cal. Stats. 275 (A.B. 65) (codified at Cal. Welf. & Inst. Code § 360.6).

236. See e.g. Clinton, *supra* n. 214; Porter, *supra* n. 10; Charles Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 Wash. L. Rev. 1063 (1997).

237. See e.g. Porter, *supra* n. 10.

238. See e.g. LaVelle, *supra* n. 10; David E. Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 Kan. J.L. & Pub. Policy 732 (2000).

