TRIBAL COURT JURISDICTION AND NATIVE NATION ECONOMIES: A TRIP DOWN THE RABBIT HOLE

Introduction

Lance Morgan is the chief executive officer of Ho-Chunk Inc., the economic development corporation of the Winnebago Tribe of Nebraska. In 1994 Ho-Chunk Inc. was founded using seed money from a gaming enterprise opened two years earlier in order “to provide long-term economic growth to the perpetually impoverished Indian nation.” In 2001 Ho-Chunk Inc. founded the Ho-Chunk Community Development Corporation to secure grants for housing and business on the reservation. By 2004, Ho-Chunk Inc. employed approximately 350 people and the company’s profits were close to $100 million. Mr. Morgan now travels the country administering workshops on economic development for tribal communities. He is leery, however, to meet with tribes who do not have a tribal court—simply because, without a court, economic development will not work.

Outside of a handful of lawyers and Indian law scholars, little is known about tribal justice and tribal courts. This is attributable to a number of dynamics, but chief is the general disposition among legal practitioners that “Indian law is irrelevant to their adjudication and practice.” The consequence is twofold: (1) the popular conception of tribal courts is susceptible to a history of institutionalized racial stereotypes that run rampant throughout popular reports on Indian justice, and (2) “it causes lawyers, judges, and lawmakers to act with excessive caution when interacting with tribal courts or to avoid them altogether.” Add to that the desire of businesses to obtain the rich natural resources located in Indian country—businesses willing to spend millions of dollars to keep the status quo—and you have the current state of affairs.

This article is the result of a project taken on by the author to find a “quick fix” to the current state of affairs in Indian country. What the research revealed, however, is that a number of the problems plaguing Indian country are in fact a direct result of an amalgamation of these “quick fixes.” First,
the article gives an explanation of the hypothesis going into the project. This section will speak to the current state of tribal governments, the threats of judicial jurisdiction-stripping that bring effect, in part at least, to the current tribal economic situation, and the proposed explanation for this state. Second, the article will discuss the findings in testing the proposed “quick fix,” concluding that the explanation runs deeper than meets the eye. In Section III the article will take a deep look into the history of sovereignty in federal Indian law. Section IV will discuss this history, concluding that, ultimately, tribes are trapped in a situation where they must establish courts—in order to develop economically—but cannot use those courts—because acting economically and developing institutions is not what “tribes” do, based upon the history of racism incorporated into law. In Section V the article will propose a few solutions to the problem—none of which are “quick fixes.” Section VI will offer concluding remarks.

**Background: The Indian Civil Rights Act**

Under the Indian Civil Rights Act (ICRA), no Indian tribe may, in exercising powers of self-governance, abridge a person’s right to: freedom of religion, speech, press, assembly, and petition; freedom from unreasonable searches and seizures; compensation for the taking of property; equal protection; due process; and freedom from bills of attainder or ex post facto laws. The statute also protects people against double jeopardy, self-incrimination, excessive bail, and cruel and unusual punishment. The statute provides the right to a speedy trial, information concerning charges against the accused, confrontation of witnesses, compulsory process, assistance of counsel at one’s own expense, and the right to a jury where the offense is punishable by imprisonment. Most importantly, for the purpose of this article, the statute limits tribal remedies in that tribal courts may “in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both.”

Until the US Supreme Court’s decision in *Santa Clara Pueblo v. Martinez*, the general consensus was that ICRA granted federal courts broad jurisdiction to hear all claims of ICRA violations by tribal courts, governments, and agencies. In *Santa Clara Pueblo*, however, the Court held that (1) suits against the tribe under ICRA are barred by the doctrine of sovereign immunity from suit; (2) ICRA does not impliedly authorize private actions for declaratory or injunctive relief against a tribe or its agents; (3) while ICRA is generally patterned after the Bill of Rights, tribal courts are free to interpret ICRA at their will and are not bound by federal precedent; (4) ICRA does not require that Indians and non-Indians be treated identically by tribal governments; (5) in interpreting and applying ICRA, federal courts must consider tribal customs,
tribal court jurisdiction and native nation economies

culture, and tradition; and (6) tribal remedies must first be exhausted before a dispute can be heard in federal court.19 A writ of habeas corpus20 to federal courts is the only route persons detained by tribal court order have available to obtain federal jurisdiction of alleged ICRA violations.21 Still, habeas review “must avoid undue or intrusive interference in reviewing tribal court procedures . . . and deference [must] be given to the procedures which those courts choose to follow.”22

For the purpose of this article, it is particularly important to note again that although ICRA created a substantive body of rights, based in part on the Bill of Rights, to defend the individual Indian from “the excesses of tribal authority,” it is not coextensive with the Fourteenth Amendment or the Bill of Rights.23 Tribes may therefore add to or interpret strictly ICRA provisions as they so chose, without federal intervention (save habeas review). ICRA does not provide federal jurisdiction for damages based on breach of contract, nor does it waive tribal sovereign immunity.24 As far as ICRA’s effect on tribal sovereignty, as explained by Professor Kunesh,

The Indian Civil Rights Act, like many other federal policies, reflects two sides of the political coin. One side represents the federal government’s paternalism and one of many federal mandates imposed on tribes irrespective of their status as sovereign nations with formal and customary systems of law and order. On the reverse side, though, the Indian Civil Rights Act stands out as a significant acknowledgment of the vitality and criticality of tribal governments in the contemporary American legal framework, an important point noted by the Supreme Court in Santa Clara Pueblo . . . .25

One of the most upsetting effects of ICRA has been a huge uptick in crime in Indian country.26 Indeed, one of the great ironies of the ICRA mythology is its self-fulfilling prophecy—by denying tribes the basic jurisdictional right to maintain law and order within its territorial borders (i.e. adequate punishment and jurisdiction over criminals), ICRA has created a jurisdictional law enforcement void that has led to an increase of non-Indian crime on reservations.27 Currently, largely because of a lack of funding, fewer than 3,000 tribal and federal agents cover 55 million acres of Indian country.28 The violent crime rate among Native Americans is over 2.5 times the national average, and federal prosecutors decline to file charges in more than two-thirds of the cases.29 One in three Indian women will be raped in her lifetime, most likely by a non-Indian.30 Tribes do not have jurisdiction over non-Indians in most instances. Tribal authorities have the jurisdiction to file their own charges, if an Indian perpetrator, but the threat of a mere year in jail and a $5000 fine for murder or rape is hardly an adequate deterrent.31 Again, because of a lack of tribal funding, if the federal government refuses to press charges, in most instances the perpetrator goes free. Jurisdictional issues are the principal problem.32
The *Miranda v. Nielson* Experience

The District of Arizona Annual Conference was held in March of 2009. Here, federal judges from around the US District Courts for the District of Arizona attended continuing legal education seminars updating them on new developments in federal law. One presentation, given by U.S. Attorney Diane J. Humetewa and Federal Public Defender Jon M. Sands, discussed criminal jurisdiction and the problems facing access to justice in Indian country, including the introduction of a new law (the Tribal Law and Order Act) that would limit ICRA and raise the ability of tribes to punish with up to three years imprisonment and to impose up to $15,000 in fines. The overwhelming consensus from the audience of federal judges and practitioners was that, although agreeing that something does need to be done about crime in Indian country, allowing tribes to assert punishments of over one year without guaranteeing a defense attorney was somehow “just wrong” and “unlikely to pass Constitutional muster”—it was already bad enough that tribes were attempting to circumvent federal law by “stacking”; that is, sentencing for one year per count and convicting the defendant of multiple offenses.

In *Miranda v. Nielson*, the defendant Beatrice Miranda brandished a knife and threatened to cut two people. She was convicted in a trial in Pascua Yaqui Tribal Court of eight counts alleging aggravated assault, endangerment, threatening or intimidating, and disorderly conduct against two separate victims. Ms. Miranda, who was unrepresented by counsel, was found guilty on all counts. Ms. Miranda received consecutive sentences of one year each for the aggravated assault counts, and shorter terms were imposed for each of the remaining six counts. In striking down the tribal court’s decision, Magistrate Judge Voss reasoned that,

> To hold otherwise would expose a tribal court defendant to a lengthy prison term without the protection of representation by counsel and other critical constitutional rights. The circumstances surrounding the passage of the ICRA clearly demonstrate that in return for alleviating the tribes of the burden of extending every federal constitutional right to its members, Congress intended to significantly limit the sentence that a tribal court can impose.

The court in *Miranda* made it quite clear that, unless constitutional rights similar to those granted in federal courts are guaranteed, tribal courts cannot be trusted to uphold justice.

This is true in most cases. In a survey of the major Supreme Court cases that limit tribal jurisdiction, we have seen a uniformly emphasized distrust of tribal courts—particularly with their ability to protect U.S. constitutional rights. Indeed, ICRA was enacted under the opinion that tribal courts were not adequately defending the rights of individual Indians. ICRA, however, was severely limited by *Santa Clara Pueblo*. Thus, as it stands, the ICRA/
Santa Clara Pueblo jumble has led to a presumption that tribal courts are not able to protect litigants, but there is nothing that defendants under tribal jurisdiction can do about it. The only solution has been to divest tribal courts of jurisdiction, and this is exactly what the Supreme Court has been doing despite Congress’ wishes.

Economics and Tribal Courts

Cornell, Kalt, and the Harvard Project on American Indian Economic Development have found conclusively that, after over twenty years of research in Indian country, there exists no case of sustained tribal economic development where an independent tribal court has not been established. Everything constant, there is a strong correlation between the existence of tribal courts and tribal enterprise profitability. Likewise, simply implementing an independent court system reduces unemployment by at least five percent. This may be common sense to most tribes: as they begin to enter the commercial market and to contract with nongovernmental investors, it quickly becomes evident that unless they have an established court system, investors will go elsewhere. Investors require the security offered by independent court systems, and are attracted to jurisdictions that fairly enforce stable business codes, uphold contracts, settle disputes, and “protect business from politics.” By all accounts, “contemporary economic realities make an independent court . . . all but indispensable.” However, tribes are advised to operate their courts with caution, as the Harvard Project has made clear,

A well-designed and operated court system serves a Native nation by clarifying the economic, political, and social rules of the community; protecting the rights of members and nonmembers; maintaining peace and order; and insulating the nation from attacks on its sovereignty from those who otherwise may view Indian nations as poorly governed or lawless. After being excluded from sovereignty for so long, however, Indian tribes face the “paradox of the sovereign”—convincing both internal and external actors to deal voluntarily with a sovereign that has the power to adjudicate and resolve disputes. The problem confronted by sovereigns everywhere is that credibly insuring that the power to adjudicate and resolve disputes will not be used in bad faith—that is, turned into the power to adjudicate and resolve disputes in corrupt and self-serving ways that primarily benefit the narrow self interests of the sovereign. When this paradox cannot be overcome, external and internal actors are pushed toward taking their assets, their knowledge, their engines, and themselves to jurisdictions where they feel more secure with the rules of the game.

Hypotheses

The hypothesis going into this project was twofold:

(1) If federal courts are stripping tribal courts of jurisdiction for want of constitutional protection for litigants, we should see less divestment of sovereignty as tribes remedy Santa Clara Pueblo by ensuring civil rights protections on their own accord.
If the lack of fairness in tribal courts has led to less investment, we should see a correlation between added constitutional protections and tribal domestic product.

As noted above, these are intertwined in that they feed off of each other—jurisdiction stripping because of lack of constitutional rights by the courts feeds the distrust of potential investors. If the findings show that this is the case—distrust for want of constitutional protections leads to less investment—the solution would be simple: Add U.S. Constitution-like rights and tribal domestic product will increase.

Analysis

Although Arizona is not necessarily representative of the state of Indian law nation-wide, it does have one of the largest Native American populations in the country. Further, because much research has been conducted in Arizona, by some of the world’s leading institutions in the area of Indian law (particularly, Northern Arizona University, Arizona State University, and the University of Arizona), a large portion of the statistics needed to conduct this type of analysis are readily accessible. Here, the goal is to describe the state of affairs in Arizona, with the hope that a nation-wide analysis may be conducted in the future, hopefully using the data of the 2010 census.

There are currently twenty-two Native Nations in Arizona, all surveyed by the 2000 census for per-capita income. Many tribal constitutions within those surveyed include civil protections, while others can be found in tribal code or case law. Some tribes, like the Navajo, do not have constitutions, but expansive civil rights are found in their code or precedent.

Of those tribes surveyed in the 2000 census, half have added constitutional protections. Of the six wealthiest tribes, three have additional protections. Of the six poorest tribes, three also have additional protections. The Navajo Nation, with the most additional protections, has a below average per capita income. Although more research needs to be done, and this is by no means a comprehensive study, it appears that, in Arizona at least, using a preliminary correlation study, additional external constitutional protections do not necessarily equal economic development.

Constitutional Protections in Tribal Courts

Professor Duthu poses the question: If jurisdiction stripping is a result of distrust of tribal courts, “[i]s that distrust well founded?” Little scholarly attention has been given to the analysis of tribal law’s protection of constitutional rights, and this has likely led to federal courts’, Congress’, and other outsiders’ prejudice and misapprehensions with respect to the subject. Tribal courts are constantly under attack as being “inefficient, irresponsible, and/or
incompetent.” These allegations, however, are inappropriately based upon biased assumptions of tribal courts “drawn from extreme cases that belie generalization.”

As noted above, Miranda-like decisions are not unique. Justice Roggensack of the Wisconsin Supreme Court, for example, has recently authored a law review article calling for the rejection of the Tribal Law and Order Act because, Justice Roggensack argues, under it “non-tribal member defendants may be forced to proceed in tribal court without the constitutional rights provided to criminal defendants by the United States Constitution . . . .” Justice Roggensack also cites (1) the fact that tribal courts are not required to “separate religion, or ‘tradition’ as it is often called, from the exercise of tribal authority in tribal court,” while a “central tenet of the First Amendment of the U.S. Constitution is the prohibition of state establishment of religion”; (2) that “non-tribal members have no say in tribal governance”; and (3) “there is no power of review of tribal court decisions by way of the usual federal structure for review . . . .” Apparently, Justice Roggensack was not informed that the U.S. Constitution has definitively not applied to tribes or tribal courts since 1896. In fact, one would be hard-pressed to find an instance where the U.S. Constitution has ever applied to tribal governments.

Since the passage of ICRA in 1968, tribal courts have nonetheless increasingly endeavored to protect U.S. constitution-like rights. In 1978’s Oliphant v. Suquamish Indian Tribe, for example, Justice Rehnquist noted in dicta that Indian courts had become “increasingly sophisticated,” and that the advances eliminated many of the perceived dangers inherent with tribal court jurisdiction over non-Indians. Likewise, in Santa Clara Pueblo the Court found that “[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”

In fact, many tribes had formal courts pre-dating conquest. Although some of these courts still exist, many were extinguished in favor of “Courts of Indian Offenses” established in the Allotment era, and then replaced again with Indian Reorganization Act (IRA) courts during the Reorganization era. Many of these “IRA” courts still exist in various forms, but are now bound by tribal constitutions and statutes instead of federal mandates. Several of these courts, via tribal constitutions and statutes, offer protections that “go far beyond ICRA to apply against tribal governments the full panoply of individual rights developed in non-Indian contexts.” Indeed, a survey of constitutional rights protections in Indian country over twenty years ago revealed that at least fifty-nine tribes had constitutional provisions incorporating all U.S. Constitutional rights; six had constitutions incorporating the Ninth Amendment; twenty-two
constitutions incorporated ICRA; eighty-nine listed freedoms of religion and expression; seventy-three guaranteed equality, “usually more detailed than the equal protection clause of the ICRA and the Fifth and Fourteenth amendments to the United States Constitution”; thirty-five protected individual property rights; thirty-three guaranteed due process; a “relatively small number” provided for rights of the accused, specifically; six provided a right to examine tribal records; two provided for just compensation for taking of property; two prohibited bills of attainder; three had provisions against ex post facto laws; and only the Zuni Tribe guaranteed the “right to bear arms.”

On the other end, tribal court judges desire and attempt unequivocally to uphold the rule of law by respecting precedent and following past practices in current decisions. Often, in practice, this ends up being the U.S. idea of the rule of law. Tribal court judges are often educated not only in oral tribal customs, but of tribal constitutions and laws, state laws, and all federal laws. Indeed, since most tribal practitioners and judges are educated in U.S. law schools—where, for the most part, only state and federal law is taught—tribal courts often function under a federal or state framework even where no federal or state laws have been adopted.

In the majority of tribal court systems, tribal judges must first apply tribal law. But because many tribes still have Bureau of Indian Affairs (BIA) drafted codes, a result of the IRA system, this often means applying federal or state law. Most tribal courts use state laws as persuasive authority, while a minority has adopted state law in wholesale. Tribal courts often statutorily adopt the Federal Rules of Civil Procedure and the Federal Rules of Evidence as their own, and those that do not chose to adopt them often use the Federal Rules as their model (especially in large-stake disputes). At the tribal appellate court level, conformance with federal law is even more pervasive.

Due process is often a fundamental element of tribal custom and tradition. In *Bloomberg v. Dreamer*, for example, the Supreme Court of the Oglala Sioux Tribe held that,

> It should not be for the Congress of the United States or the Federal Court of Appeals to tell us when to give due process. Due process is a concept that has always been with us. Although it is a legal phrase and has legal meaning, due process means nothing more than being fair and honest in our dealings with each other. We are allowed to disagree . . . . What must be remembered is that we must allow the other side the opportunity to be heard.

Most tribal courts are heard and recorded in English, and officials must formulate legal concepts in English. Many court rules guarantee an unbiased jury pool. Although there are due process concerns in any court system, in tribal courts the concern is largely based upon misperceptions about fairness. A study by Professor Rosen, though, has found “no indication that tribal
courts have succumbed to the temptation to favor the insider at the expense of outsiders.”

Indian gaming has only increased a tribe’s ability to uphold the rule of law, fairness, and due process. The result is a growth in substantive and procedural tribal law in many diverse areas, an ability to better uphold the rule of law and waive sovereign immunity, and “rapidly increasing institutional competence and sophistication.” A recent example of this is the Mashantucket Pequot Tribal Court’s award of $2.3 million to an invitee injured at the tribe’s casino. Likewise, the Salish and Kootenai have recently been able to invest in their courts, resulting in “a court system that is regarded as fully competitive with counterparts among non-Indian governments.” True, many attorneys, judges, and citizens are unfamiliar with tribal courts—but when they become familiar with the practices and procedures of tribal courts, the courts “often win praise.” As noted by one tribal practitioner, “Indian tribal courts were established by the federal government and are Anglo institutions [, albeit] Indian run and . . . gradually being integrated into tribal life.” Tribal courts are, after all, required by law to obey some non-Indian legal procedures and are subject to the influence of the American legal system—“It is understandable that their codes would not appear as if the white man had never visited their shores.” This is largely a response to the environments that these courts operate in, which forces them to maintain a balance of legitimacy that federal and state courts do not have to contend with: On the one hand tribal courts must appear credible by applying Anglo-American procedures and legal concepts; but they must also retain internal integrity by not straying too far from Indian culture and tradition. Considering the prejudice that the federal and state courts to this day flagrantly display, one tribal attorney stated: “If the choice were mine, I would choose Indian tribal courts over existing rural state alternatives as more suitable, more economical, and more just . . . .”

The overwhelming consensus by persons familiar with tribal courts is that “tribes do not need ICRA because tribal legal systems already had traditions of fairness and justice equivalent to those it imposed.” Indeed, a study by the United States Commission on Human Rights found that, “ICRA was unnecessary in light of similar guarantees and traditions in tribal law . . . .” Why, then, was ICRA passed?

ICRA was put forward by its sponsors as a law designed to aid the tribes in establishing “meaningful self-determination” consistent with national policy. The primary sponsor of ICRA was Senator Sam Ervin of North Carolina, who introduced the bill after he concluded that the rights of Native Americans were being “seriously jeopardized by tribal government’s administration of justice”—which he attributed to “tribal judges’ inexperience, lack of training, and unfamiliarity with the traditions and forms of the American legal system.”

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This, over the objection of many tribal leaders who testified that tribal laws upheld fairness and due process, and that ICRA was “an unnecessary intrusion on tribal sovereignty.”

There are considerable ironies in Senator Ervin’s celebration of ICRA. When the Senator began working on ICRA in 1961, he was known as “the ‘rational’ Southern voice against integration.” Ervin was also a well-known opponent of the African American civil rights movement. He in fact used his first news conference to attack Brown v. Board of Education, where he said that the deciding Justices “wished to recreate our Government in their own images.” Although the principal drive for the hearings on civil rights in Indian country was the various grievances of discrimination and abuse by state, federal, and local officials, ICRA only reprimanded Indian tribes. In the Senate, Ervin argued that the Constitution, “‘the most precious instrument of government the earth has ever known,’ prohibited the civil rights legislation intended to make real the unfulfilled promises of the Reconstruction Amendments.” In the midst of the battle against civil rights, the Senator’s supposed “advocacy for Indians” permitted Ervin to chastise the northern liberal Senators for ignoring “the minority group most in need of having their rights protected by the national government.”

ICRA should be known for what it is: an assimilationist policy, which had been cleverly portrayed as a civil rights law to promote a racist political agenda. The unfortunate reality is that, because of the on-reservation lawlessness that results from jurisdiction-stripping, combined with ICRA, termination in “the form of Native American genocide” vis-à-vis crime in Indian Country is a real potential, unless something else is done—soon.

**Business Interests**

As shown, the addition of constitutional protections do not necessarily equate to heightened levels of tribal domestic product. Although not telling of the state of Native Nations in general, the Winnebago Supreme Court’s decision in *Winnebago v. Bigfire*, in comparison with the Navajo Supreme Court’s decision in *Help v. Silvers*, offers an example where the lack of constitutional protections does not necessarily discourage business interest.

In *Bigfire*, two men were charged with second-degree sexual assault of a thirteen-year-old girl. The men challenged the sexual assault statute as violating the equal protection provision of the Winnebago constitution, arguing that it was selectively enforced against men. The lower court dismissed any application of federal law’s equal protection test, instead opting to provide information on traditional tribal approaches to rape: violent disfigurement as punishment for a wife’s unfaithfulness and death for the rape of a female aged thirteen or below. The court then refused to hear the defendants’ arguments,
because there was “ample evidence that force or coercion was present,” and that based upon this evidence “consent was not an issue” in the case. The Winnebago Supreme Court upheld the ruling, determining that even if there was sexual discrimination, differentiations based on sex always constitute a compelling tribal interest to uphold the law. The court held that, “[i]n Ho-Chunk culture . . . gender differences or disparities in treatment do not signal hierarchy, lack of respect, or invidious discrimination,” and that “it is not accurate to attribute archaic stereotypes of the Anglo-American culture to the Winnebago Tribe’s culture.” In other words, the court indicated that culture would trump the U.S. constitution’s conception of “equal protection.”

It is important to note that by no means is Bigfire the norm in tribal courts, “most of which, in the absence of precedent from their own courts, appear to seriously consider both the parameters of the right at issue under federal law and whether it is appropriate to follow federal law in construing the right.” Most tribal courts employ the rules and interpretative framework utilized in Help. In Help, the Navajo Nation had enacted a broad-based law prohibiting governmental sex discrimination in all facets of life. Interpreting this statute, the Navajo Supreme Court made clear that any sex-based discrimination would be invalidated if it caused males or females any disproportionate harm:

The proper analysis of the Navajo Equal Rights guarantee is that there can be no legal result on account of a person’s sex, no presumption in giving benefits or disabilities gauged by a person’s sex and no legal policy which has the effect of favoring one sex or the other.

Help, according to Professor Tweedy, illustrates that Navajo law concerning sex discrimination is likely “more stringent than U.S. law in terms of the types of distinctions the Navajo courts will uphold. In fact, . . . it appears that the Navajo Bill of Rights provision is considerably broader than the U.S. concept of equal protection in the very significant area of disparate impact.”

The Winnebago, under the auspices of Ho-Chunk Inc., are undoubtedly one of the most economically successful tribes in the nation. The Navajo, on the other hand, are consistently ranked among the poorest tribes in the US. As displayed in Bigfire, the Winnebago do not have an entirely clean record of upholding U.S. Constitutional rights. The Navajo Nation, on the other hand, is ICRA’s poster-child—the Harvard Project has in fact commended the Navajo system for its fierce application of the rule of law and the unswerving application of civil rights. This is just one example of where the theory does not match up—constitutional protections do not necessarily equal economic development in Indian country.

Conclusions

It seems that the web of jurisdiction stripping/economic development is much more complex than meets the eye. The fair conclusions are: (1) although
some sort of dispute mechanism is necessary for economic development, the extent of constitutional rights that the court employs is not indicative of successful economic development. (2) The argument that the federal and state courts most often take up in stripping tribal court jurisdiction, the protection of U.S. constitution-like rights, is not the real cause for the state of affairs in Indian country today. These findings will be discussed below.

**Sovereignty and Federal Indian Law**

Although the type and degree of organization was by no means uniform before European contact, most tribes were politically organized as independent and self-governing societies. The establishment of the United States, however, gradually disrupted this system of tribal governance by impeding the ability of tribes to exercise sovereign rights. Despite the framers’ intentions, the lack of explicit textual protections for sovereignty has harmed tribes, almost totally divesting them of their political existence.

**Judicial Establishment of Sovereignty: The Marshall Trilogy**

Three decisions, authored by Chief Justice John Marshall and known as the “Marshall trilogy” or the “Marshall model,” established the doctrinal basis for federal Indian law. Despite their seemingly damaging aspects, particularly establishing a legal system based upon blatant racism, the decisions do provide an agenda of sovereignty that is “functionally robust” when compared to the current status of Indian law. In *Johnson v. M’Intosh*, the US Supreme Court first set forth the “doctrine of discovery,” under which any European country that “discovers” Aboriginal inhabited property gains a proprietary claim to that property vis-à-vis other European nations. These rights were assumed to be diminished “because Indian sovereign, commercial, diplomatic, and real property rights were . . . limited automatically and immediately upon first discovery by Euro-Americans.” While the doctrine did not “entirely disregard” the rights of Indians, it “necessarily, to a considerable extent, impaired” their sovereign rights. As explained by the Court, “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.” Thus, while tribes had the right to occupy the land, they could not possess it. Next, in *Cherokee Nation v. Georgia*, the Court established that tribes are not states and not foreign countries, but “domestic dependent nations” that are in “a state of pupilage . . . that resembles that of a ward to his guardian.” However, under this definition, the Court also acknowledged a tribe’s status as a sovereign entity, describing a tribe as “a distinct political society, separated from others, capable of managing its own affairs and governing itself . . . .” Finally, in *Worcester v. Georgia* the Court defined the discovery doctrine narrowly as to limit its affect on tribal sovereignty, stating that, although by treaty many Indians
acknowledged themselves to be under the protection of the United States, “[p]rotection does not imply the destruction of the protected.” The decision goes on to explain that tribes have exclusive jurisdiction within their reservations, and recognizes that states cannot interfere with federal-tribal relations.

### Congressional Sovereignty Stripping

#### The Allotment Era

Congress enacted the Dawes General Allotment Act in 1887, in order to “dismantle the communally owned tribal land base by dividing or allotting the reservations into distinct parcels of land” and distributing these parcels to individual Indians. The hope was to transform the Indians from hunters to farmers, so that they would “be more readily assimilated into the mainstream of American society.” Or, as noted by one federal official, to “kill the Indian, save the man.” Indian children were removed from home “to be ‘educated’ in government and church-run boarding schools throughout the United States[,] ‘where youth were often sexually, physically, emotionally, and verbally abused . . . .’” Around that time, Supreme Court first recognized the applicability of federal law to Indians within Indian Country and took the position that “unless specifically excluded by treaty, Indian reservations were to be considered within the geographical limits of the state surrounding the reservations’ borders.” At the same time, the Court recognized (invented) the right to abrogate treaties at will. Also during this period the Court fashioned federal jurisdiction over offenses committed by non-Indians against other non-Indians within Indian Country and upheld the power of Congress to enact laws expressly aimed at assuming political control over tribes. As noted by Professor Skibine, Congress was most interested in assuming control of tribal land and natural resources. The model legislation then was the leasing statutes. These statutes reserved total control to the federal government. Some of the leasing Acts did not even require tribal consent, and the Supreme Court upheld the power of Congress to delegate plenary authority to the Secretary of the Interior in the management of tribal natural resources.

The Allotment era resulted in about two-thirds of tribal property being lost by 1934, a large amount of the remaining land being arid or semi-arid. In this era the doctrine of discovery was expanded to the limits of its logic, limiting use and occupation of property only to that deemed absolutely necessary. The lands that Indians were allotted was not available for lease without federal approval and could not be used for security for a mortgage or loan.

Today, as a result of the Allotment era policy, allotted lands are held in “trust,” meaning that individual Indians or tribes have the right to use and occupy the property, but the US government holds the underlying title to the property. Indians who were allotted lands during this era may use their rights in the property to acquire loans, but it is highly unlikely these loans will be
granted, considering that individual Indians do not own full title. Because many allotments were ceded to non-Indians (either by forced sale or by being declared “surplus lands” and sold by the federal government) much of Indian country is a “checkerboard” of property rights, resulting in a myriad of civil, criminal, regulatory, and adjudicatory jurisdictional problems. Ironically, the complete distribution of Indian country was averted by the fact that “the barren areas left to native habitation after allotment turns out to be inordinately rich in mineral resources.”

**The Reorganization Era**

In the late 1920s, government planners discovered that the federal trust responsibilities, combined with Congress’ plenary power as spelled out in the Marshall model, allowed the federal government to “control the pace and nature of resource extraction, royalty rates, and the like . . . .” Tribes were now encouraged to adopt a corporate form and to pursue economic and business opportunities, all under the exceptionally tight supervision of the BIA. As Ward Churchill explains,

> Only by retaining its “trust authority” over reservation assets would the government be in a continuing position to dictate which resources would be exploited, in what quantities, by whom, at what cost, and for what purpose, allowing the North American political economy to evolve in ways preferred by the county’s political elite. Consequentially, it was quickly perceived as necessary that both Indians and Indian country be preserved, at least to some extent, as a façade behind which the “socialistic” process of central economic planning might occur.

For the scenario to work in practice, it was vital that the reservations be made to appear “self governing” enough for them to be exempt from the usual requirements of the U.S. “free market” system whenever this might be convenient to their federal “guardians.” On the other hand, they could never become independent or autonomous enough to assume control over their own economic destinies, asserting demands that equitable royalty rates be paid for the extraction of their ores, for example, or that profiting corporations underwrite the expense of environmental clean-up once mining operations had been concluded. In effect, the idea was that many indigenous nations should be maintained as outright internal colonies of the United States rather than being liquidated out-of-hand.

In 1934, in light of the profound failure of the allotment process, Congress passed the IRA. The IRA authorized the Secretary of the Interior to acquire lands for Indian tribes, which were then put into federal trust—Indians having only the right to use and occupy such lands. Also under the IRA, tribes were encouraged to “reorganize” by adopting new boilerplate constitutions to become valid if approved by the Secretary of the Interior. The IRA model typically consisted of a strong executive office that chaired an elected council of 8-15 members. Most notably, IRA constitutions rarely provided for a system of courts and delineated no separation of powers.
The reorganization era has been dubbed a “double-edged sword” for many tribes—although ending a period where tribes were unable to exert sovereignty at all, the systems of governance that the IRA provided have proved ineffective because of their inability to take into account the wide variety of governing institutions that tribes had used to rule themselves from time immemorial. While a few tribes have managed well under the IRA model, it is often out of luck that the IRA model fit what the tribe had been previously doing. For the most part the negative effects of the IRA model have been long-lasting, as tribes continue to operate under institutions of governance out of step with traditional standards of authority and governance.\footnote{181}

Moreover, contracts “approved” by the Secretary of the Interior were particularly devastating to the tribal purse. A contract between the Navajo Nation and Peabody Coal, for example, allowed Peabody to extract tons of Navajo coal at a maximum royalty rate of 37.5 cents per ton, while “the average market price of coal of all kinds in 1963 was $4.55.”\footnote{182} Recently, as a result of much mismanagement of native funds and contracts via IRA-era policies, \textit{Cobell v. Salazar}\footnote{183} held that members of a native class-action will be entitled to equitable relief in the form of restitution, with the estimated damages of around $125 billion dollars.\footnote{184} Currently, in addition to the \textit{Cobell} litigation, there are over one hundred cases filed by tribal governments pending before various federal courts.\footnote{185}

The Termination Era

From about 1945 to 1961 the U.S. shifted its policies in Indian law from that of control to that of termination through assimilation. Under this policy the US sought to eliminate the federal-tribal relationship altogether by completely terminating the legal existence of tribal governments.\footnote{186} Even more land was lost from tribal communal ownership (reservation property was sold to non-Indians and the proceeds went to the tribe)\footnote{187} and federal responsibilities to tribes were eliminated along with treaty rights previously negotiated.\footnote{188} As noted by Professor Miller, “[t]his one-sided domination of the federal-tribal relationship by the United States demonstrates its aggressive exercise of the sovereignty aspect of [the Marshall model’s] discovery power.”\footnote{189} Although the policies of termination were shortly abandoned, the era serves as a constant reminder of the plenary power of Congress to legislate the complete destruction of a tribe’s status as a sovereign entity, as well as “a strategy for forcing the disbanding of Native communities and, with them, Native identity and culture.”\footnote{190} To many Native persons, the reservation had served as an enclave separated from the racism and discrimination of society at large, which had the result of deepening cultural resilience and self-sufficiency.\footnote{191} Ironically, loss of reservation security served only to obstruct sustainable economic development, self-sufficiency, and assimilation—the very goals that the government
has sought to attain. Over 100 tribes and bands were disbanded as a result of the termination policy, and many of those terminated tribes are still seeking federal re-recognition. Termination also resulted in annexation of over 20 million acres of prime timber and farmlands to the United States, as well as loss of federal services such as health care, education, and housing guaranteed by treaty rights—a loss valued at around $148 million, and for which tribes have never been compensated.

**Congressional Sovereignty Endowment: The Self-Determination Era**

The Civil Rights movement of the 1960s and 1970s saw the first large-scale, self-imposed policy changes in federal Indian law. In addition to addressing policy changes that were apparent in other civil rights movements at the time, the Indian civil rights movement sought reestablishment of political rights of self-rule that sought the absence of civil regulatory “protections.” In other words, the Indian civil rights movement sought recognition that “Indian peoples are nations, not minorities.”

Named by Richard Nixon when he announced that the official policy would be the “right to self-determination,” the Self-Determination era came into full swing in 1975 when Congress passed the Indian Self-Determination and Education Assistance Act (ISDEAA). The ISDEAA allowed Indians to contract with the federal government for the delivery and administration of federal services to Indians. In other words, Indians would be administering federal programs in Indian country. The Act also provided for exclusive tribal court jurisdiction over custody proceedings involving Indian children, and provided for the transfer of the proceedings from state to tribal courts.

Aside from ISDEAA, Congress also began enacting a “slew of dynamic programs and progressive laws . . . committed to involving tribes in the development and implementation of programs and services, particularly at the community level.” It was during this time that “[t]ribal courts became the most significant expression of tribal sovereignty and tribal culture, resolving all manner of disputes, defining the contours of tribal political and legislative authority, and intertwining customary tribal law and traditions into their decisions.”

**Sovereignty Left Intact: Tribal Exhaustion and Sovereign Immunity**

**Tribal Exhaustion**

The tribal exhaustion doctrine provides that whenever parties are subject to tribal jurisdiction concurrently with federal jurisdiction, they must exhaust tribal court remedies before turning to the federal courts for relief. This doctrine exists to promote three policy concerns: (1) supporting tribal self-governance, (2) promoting “the orderly administration of justice, and
(3) obtaining the benefit of tribal expertise.”  Thus, “[w]hen the dispute is a ‘reservation affair,’ . . . there is no discretion not to defer.”

In *Montana v. U.S.* the Supreme Court held that tribes “may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Tribes also maintain jurisdiction “over 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.” Thus, it is the general rule that “[i]n actions that involve tribal sovereignty, arise on Indian reservations, or involve Indians and Indian tribal law, the courts generally require exhaustion of tribal remedies.” This is the case even where certain contractual clauses, such as forum-selection or arbitration provisions, preclude or dictate the application of the exhaustion doctrine. Further, issues validly raised, argued, and resolved in tribal courts may not be relitigated in federal courts.

**Tribal Sovereign Immunity**

Indian tribes possess the same immunity from suit traditionally enjoyed by all sovereign powers. This stems from the status of Indian tribes as autonomous political entities, retaining their original natural rights with regard to self-governance. Tribes enjoy this immunity absent a “clear and unequivocal waver” or explicit and unambiguous Congressional action. In the absence of an effective waiver of immunity, state and federal courts cannot exercise jurisdiction over, or provide remedies against, Indian tribes. As noted above, ICRA does not constitute a Congressional waiver, except for habeas claims testing the legality of one’s detainment by tribal court order. Thus, tribal immunity is not defeated by the fact that a claim is based upon a violation of the federal constitutional rights to due process and compensation for property, as federal constitutional rights are not binding upon tribes. Even when a tribe is alleged to have acted in concert with federal officials to violate federal constitutional rights, the claim is barred by sovereign immunity.

Congress has abrogated sovereign immunity only in a few limited circumstances.

Tribes also enjoy immunity from suit on contracts, “whether those contracts involve governmental or commercial activities and whether they were made on or off the reservation.” Tribal corporations “acting as an arm of the tribe” are imputed the same sovereign immunity granted to a tribe itself. In addition, this immunity extends to persons acting as agents of the tribal corporation. Previously, the general consensus was that in contracts with non-Indians, waiver would never be implied. However, that rule has been
disregarded in a few recent cases. In *Namekagon Development Co. v. Bois Forte Reservation Housing Authority* the 8th Circuit Court of Appeals held that general “organizational documents of tribal entities that empower the entity to ‘sue and be sued’ have been held to constitute a waiver of immunity.” Under *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, arbitration provisions contained in contracts with non-Indians have also been deemed to waive sovereign immunity. However, if the contract is “relative to their lands,” a waiver of sovereign immunity will only arise upon the approval of the Secretary of the Interior. In these contracts, if the statutory requirements have not been complied with, “the entire transaction will be declared null and void and all money paid may be recovered through a qui tam suit.”

**Supreme Court Sovereignty Stripping**

“The Court’s progressive divestment of tribal sovereignty has been widely documented.” In the Marshall trilogy, Chief Justice Marshall attempted to shield the Cherokee sovereignty from violence at the hand of state and federal military agents. The Court’s more recent decisions demonstrate an increasing willingness to abandon this role. In short, “instead of protecting the tribes against the cavalry . . . the Court has to some extent replaced the cavalry as the chief threat to tribal sovereignty.”

In the early 1970s, due to the fact that Indian country was so economically underdeveloped, complex civil cases in tribal cases were rare. Ironically though, as tribes gained the ability to enter into their own contracts for economic development with insiders and outsiders, the Court began stripping tribal jurisdiction to hear complaints regarding these contracts (or, for good measure, any matter). Professor Ball may have said it best when he observed, “now that Congress has, at least temporarily, laid down the role of aggressor against the tribes, the Supreme Court has taken it up.” To make things even worse, since the Court began granting certiorari to more Indian law cases in the 1970s, the Court’s views of sovereignty have waxed and waned, reflecting no internal consistency or analytical framework other than jurisdiction stripping. As Professor Duthu has explained, 1973’s *McClanahan v. Arizona State Tax Commission* was the first to start the trend. Although the *McClanahan* Court unanimously held that Arizona had no power to tax Indians on income earned in Indian country, the Court took an odd way of getting to it, stating in *dicta* that:
[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.242

Although highly protective of tribal self-government, *McClanahan*, in dicta, reversed the assumption of inherent tribal sovereignty and replaced it with a presumption analysis.

Next, *Oliphant* held that tribes do not have jurisdiction over non-Indians who commit crimes within tribal lands.243 The Court reasoned that because Congress must have believed that Indians, by becoming dependents of the federal government, did not have jurisdiction over non-Indians, it was up to the Court to make this rule explicit.244 In other words, the Court assumed that Congress must have thought the power to convict non-Indians implicitly divested, and usurped Congress’ plenary power to make it so.245 *Oliphant* effectively “paved the way for the Court’s own unprecedented divestment of tribal sovereignty.”246

Then, in *Montana v. United States*,247 the Court held that tribal regulatory authority over nonmembers on fee-owned land within the reservation has been implicitly divested except where (1) the nonmember has entered into a consensual relationship with the tribe, or (2) the nonmember’s activity has or threatens to have a “direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”248 In *Brendale v. Confederated Tribes of the Yakama Indian Nation*,249 the Court severely limited *Montana* in holding that the Yakama Nation retained the power to zone nonmember lands in one piece of its reservation, which had not been extensively developed and was still held in trust; whereas it lacked the power to zone nonmember lands in another segment of its reservation, where only a little more than half of the land was held in trust. In terms of sovereignty, this meant that (1) tribes were divested of the authority to regulate fee lands owned by non-members, even within reservations; and (2) neither *Montana* exception creates tribal authority to regulate reservation lands.250 In *Duro v. Reina*251 the Court held that tribes lacked criminal jurisdiction to convict nonmember Indians altogether.252 Next, *Strate v. A-1 Contractors*253 held that when the state or the federal government has an easement over Indian country (i.e. a road), a civil action against nonmembers on or around that property falls within state or federal regulatory and adjudicatory governance, not tribal. Again, *Strate* further limited the *Montana* exceptions.254 *Atkinson Trading Co. v. Shirley*255 yet again narrowed the applicability of both *Montana* exceptions (and expanded
the “implicit divestiture” doctrine) by holding that tribes cannot levy tax upon nonmembers on non-Indian fee land within its reservation. In that case, Chief Justice Rehnquist wrote that “Indian tribes are ‘unique aggregations possessing attributes of sovereignty over both their members and their territory,’ but their dependent status generally precludes extension of tribal civil authority beyond these limits.” In *Nevada v. Hicks*, the Court held that a tribal court may not assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation. As to *Montana*, the Court again limited the exceptions, holding that the status of land ownership (here it was an Indian asserting a claim that took place on Indian owned land in Indian country) was only “one factor” to consider in applying the test. Most disturbing, and purely in conflict with over 200 years of jurisprudence, the Court stated in dicta, “we have never held that a tribal court had jurisdiction over a nonmember defendant.” Finally, in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, the Court held that tribal courts do not have jurisdiction to hear discrimination claims against corporations located in Indian country, even if they are majority-owned by tribal members. Without citation to any authority, the Court simply noted that tribes lacked the power to prohibit discrimination. This basically rendered the *Montana* exceptions irrelevant—existing in theory, but never actually applicable. The message is clear; “the Court has little patience for tribal sovereignty whenever it threatens to inconvenience a nonmember.”

**Discussion**

Professor Pommersheim posits, “All of these cases, taken together, have fashioned an expanding anti-self-determination regime. How so? With little jurisprudential fanfare and without express constitutional authority, the Court has changed direction sharply and became increasingly inimical to tribal sovereignty, especially in regard to tribal authority over non-Indians.” The remainder of the article will attempt to answer this question by showing that (at least) two forces are in play in undermining sovereignty: institutionalized racism and the protection of non-Indian business interests. As discussed above, although shielded in the idea of protection of constitutional rights in tribal courts, this is not the case. The answer lies beneath the surface.

**Tribal Courts and Sovereignty**

In her dissent in *Plains Commerce Bank*, Justice Ginsburg found that the Lakota common law “resembled federal and state antidiscrimination measures,” and recognized that the tribal court’s authority addresses “a direct and laudable convergence of federal, state, and tribal concern.” Justice Ginsberg then asked: “Why should the Tribe lack comparable authority to shield its members against discrimination by those engaging in on-reservation commercial rela-
tionships—including land-secured lending—with them?”

Justice Ginsberg’s dissent in *Plains Commerce Bank* makes clear the actual source of the Court’s anxiety about tribal courts: *active* tribal sovereignty.

One of the greatest ways of diminishing a tribe’s ability to manage its own affairs and make meaningful decisions is to limit its ability to enforce its own rules in its own way, and the ability to make judgments concerning how those decisions will play out as applied. Concerning the tie with tribal economic development, as noted above, Cornell and Kalt and the Harvard Project have conclusively shown that courts are necessary for sustained economic success. Another part of the picture, also made clear by Cornell, Kalt, and the Harvard Project’s studies, is that the assertion of sovereignty is a critical element of success. Professor Kunesh has noted, “[i]t is the consistency of tribal sovereignty, the persistence of tribal governance through the dishonorable dealings of past and present, as practiced . . . in tribal courtrooms that will define the social, legal, and political success of tribes in the future.”

As we have seen, Congress has in the last thirty years dramatically changed its policies concerning tribal sovereignty. By diminishing the jurisdiction available to tribal courts—by assuming a Congressional policy that is outdated, didn’t work, and is based on racist assumptions and ignorance about tribal courts—the Court is actively hindering Congress’ current desire to see sustained development in Indian country.

The allotment process achieved the government’s goals of physically breaking up Indian country and making land available for white settlement. What did not work, though, was the other goal of the allotment era—“assimilation of American Indians into the dominant culture.” The IRA then replaced tribal government systems with outside-imposed governmental structures, often maintaining tight control over all decisions and deals concerning the tribe and reservation resources. Because these systems do not usually match, culturally, a “politics of spoils such as political favors combined a need for independent judiciary results in investors feeling unconfident to invest in the tribal community.” As the Ysleta del Sur Pueblo Economic Development Department has concluded,

To rectify these scenarios tribes must establish a structure by which the rules of conducting business are clear and where the appeals process is fair. All parties engaging in activities either on the reservation, or with a tribe need to be able to understand the rules, obey them, and accept the final outcomes. This requires an independent and unbiased appeals court to interpret tribal law and fairly issue a decision that best maintains the intended purpose of the law and protects the integrity in the system.

Real self-determination includes the ability to make mistakes—which in turn leads to accountability and institutional safeguards protecting the in-
stitution from its own mistakes. At the tribal level, this involves developing the capacity of tribal courts to simultaneously defend cultural integrity, assert jurisdiction, maintain intergovernmental relationships, address issues that affect its people in culturally specific ways, and to remedy these disputes by a means that are deemed fair, just, and impartial to all parties. The Supreme Court, however, has not allowed tribes to do this.

**Institutionalized Racism**

First, racism is working its way in from the bottom (the Marshall model) up. Every sovereignty-stripping case noted above contains at least one citation to the Marshall trilogy or its progeny as binding authority. As Professor Williams has noted,

First, the Marshall model is based upon a foundational set of beliefs in white racial superiority and Indian racial inferiority. Second, the model defines the scope and content of the Indian’s inferior legal and political rights by reference to the doctrine of discovery and its organizing principle of white racial supremacy . . . . Third, the model relies on a judicially validated language of Indian savagery to justify the asserted privileges. Finally, the Court’s role as a creature and instrument of these originating sources makes it impossible for the justices to do anything meaningful or lasting to protect Indian rights . . . .

The doctrine of discovery announced in the Marshall model is a very active part of federal Indian law. Despite the pretense of tribal sovereignty, at the core of all the aforementioned cases (and indeed all Indian law cases) is a historically ingrained negative mythology of cultural inferiority and “savagery.” Particularly, the Court as an institution effects and endorses this idea of racial inferiority as a constitutive part of the Court’s authoritative precedent. “By issuing a landmark decision using this type of language”—as, indeed, the Court has done on numerous cases—“the Court gives racism an authoritative, binding legal meaning in our legal system.” In other words, the sanction of law has attached so far that it has become engrained in the Court’s jurisprudence. As a result, “Indian peoples’ rights to land, sovereignty, and culture were shaped primarily by how they were viewed by the dominant society and the courts” over a hundred years ago—that is, “a dependent community who were in a state of pupilage, advancing from the condition of savage tribe.”

According to Professor Williams, *Johnson v. McIntosh* and its progeny “ranks with *Dred Scott* . . . as one of the most disturbing examples in legal history of the Supreme Court’s unconstrained and unappeasable reliance on negative racial stereotypes in its declaration of the reigning and supreme law of the land.” However, unlike *Dred Scott, McIntosh* continues to be the organizing principle of present-day Indian law. While Congress has labored to establish Self-Determination policies, the Court has taken opposite course, implementing an “unthinking and unreflective” stereotypic reaction to Indian
law issues based chiefly on the Marshall model of Indian jurisprudential inadequacy. After all, who would want to be under the jurisdiction of a court “chiefly governed according to . . . crude customs”?

Second, racial discrimination is working its way in from the side (Congressional intent). Starting with McClanahan and Oliphant, the Court, aside from relying on (and institutionalizing) observably xenophobic nineteenth-century cases, decided to look to Congressional intent to “paint a mythical picture of lawlessness,” inadequacy, and disorder in tribal courts. The Court then used this “fictitious vision of inferiority to deny present day tribes basic rights to maintain law and order within their sovereign borders.” The Court, however, has neglected the fact that Congress’ intent is currently self-determination.

From McClanahan to Plains Commerce Bank, the Court has justified its decisions on two premises: (1) “clear indications of Congressional intent” to strip jurisdiction, and (2) McClanahan’s presumption that Congress intended to strip jurisdiction unless “clear indications of Congressional intent” demonstrate otherwise. When looking to Congressional intent, because most of the laws that the Court is interpreting were passed in the Termination, Reorganization, or Allotment eras, the laws themselves are facially dismissive of tribal jurisdiction. As we have seen, this surely was the case with ICRA. Where those laws are ambiguous, the racist policies informing the laws tip the scale. Understanding congressional intent from this lens, one begins to appreciate more clearly the importance of the “discursive practice of discrimination that insinuates itself into the Court’s analysis in federal Indian law cases.” As discussed above, far from an idle exercise, imposing Congress’ racist definitions and policies upon tribes prohibits their right to self-determination. Indeed, in not one of the jurisdiction-stripping cases noted above, all decided post-1973, did the Court cite to post-Termination era Congressional policy.

Tribal Courts and Tribal Economics

The Supreme Court is confused by tribes in the marketplace, as these conceptions of Indian sovereignty—especially the “continuities with non-Indian law” necessitated by the need “to achieve justice for native nations and their people”—do not fit within their notions of what “an Indian” is. An Indian, as a business enterprise or otherwise, is certainly is not (and certainly never has been) the “savage” that Justice Marshall had envisioned. Since Native Nations no longer (and never have) fit the mold, it is hard to classify tribal governments—and the Court has made this abundantly clear in its piecemeal jurisdiction stripping cases that outwardly struggle with the notion of economically developed Indians.

Because of the doctrines of sovereign immunity and tribal exhaustion, under the Marshall model tribes get to make decisions concerning their busi-
ness investments, litigate the terms of the investment in their own terms, and have protection from lawsuits if they lose a claim. But to trust “savages” with that power? The confusion has prompted the Court to reshape the contours of Indian law by abandoning the Marshall model in favor of a competing interests model, in order to fit their new conception of what an “Indian” or a “tribe” is.  

As seen above, based upon misgivings about tribal courts, this approach often regards state and federal models of jurisprudence as constitutionally superior, “particularly in the context of tribal commercial dealings and assertions of authority over non-Indians.”

Until relatively recently, around the same time that ICRA was enacted, the dockets of tribal courts consisted chiefly of criminal cases. With the introduction of the Self-Determination policies, however, that changed. The survey of federal Indian policies compared with Supreme Court jurisdiction stripping above reveals a positive correlation between the amount of commercial sovereignty that Congress has allowed tribes to exert, and the Court’s decisions to limit tribal court jurisdiction. During the Allotment era the U.S. exercised preemption power over all Indian dealings with non-Indians, with little or no tribal consent. Scant attention was given to tribal jurisdiction in that era. During the Reorganization era, again, the federal government controlled non-Native commercial dealings. During the Termination era, tribes as entities were terminated altogether or put under state jurisdiction. Again, tribal court jurisdiction was largely left untouched. Then, during the transition from the Termination to the Self-Determination era, ICRA was introduced under the guise of protectionism, while in fact it was a political move to outwardly promote individual Indian equality and inwardly strip tribal court jurisdiction. The Supreme Court then followed suit with Oliphant and the others. Today, as Congress has painstakingly sought to implement “[r]eal self-determination, the conversion of financial success into sustainable tribal programs and diversified tribal economies,” the Court has systematically stripped jurisdiction where tribes act as commercial entities.  

Proposed Solutions

**Constitutional/Code Provisions**

“Meaningful tribal sovereignty does not mean untrammeled power, but rather power with responsible, self-imposed checks and constraints.”

As
noted above, tribes are not bound by the U.S. Constitution and may include or omit civil rights in any fashion that does not violate ICRA. Although ICRA was likely enacted under false pretenses, and it is likely that constitutional rights are not necessarily needed to secure capital, it is also the case that courts need to address the issue of boundaries and prospective abuses of power. Although sometimes it is true, as it was with ICRA, that these conversations may be masked attempts “to confine or even dismantle tribal sovereignty, if one bookend of legitimacy is reliable legal process, then the other is surely the one that both distributes tribal power within tribal government and identifies the boundaries of its existence.”

Establishing (or, in most cases, reestablishing) a rule of law does not necessarily mean codification of Western values, but making sure that the “rules of the game”—from tribal court procedures to the enforceability of business contracts—operate under a method that is legitimate in the eyes of the persons dealing in that system. Like it or not, the Westernized idea of rule of law and checks and balances are the hallmarks of the U.S. Constitution, and are often the backdrop that provides a reference point for the non-Indian commercial community. Professor Pommersheim writes, the “question in these circumstances is . . . whether there is a structure or procedure in place which guarantees the reliability and independence of the legal result.” Non-Indian banks often evoke an analysis of this type when dealing with tribes. When the answer is not one that the investor wants, “commerce often falters and mistrust holds sway.” Should they chose to do so, tribes may find benefit in adding checks and balances or rule of law provisions to their tribal constitutions or statutory scheme. Further, in order to thwart possible further judicial/constitutional attacks it may be advisable to add the right to counsel for indigent defendants, and interpretations of other ICRA provisions analogous to federal precedent.

**Waivers**

According to one study on the Navajo Nation, the jurisdictional bungle of Indian law has “create[d] a climate of awkward business negotiations with non-Indians.” One short-term solution may be “the submission of claims to outside adjudication through limited waivers of sovereign immunity . . . .” Typically, contracts with outside investors are negotiated using boilerplate language providing for arbitration or other “alternative dispute resolution” mechanisms when conflicts arise. As noted above, under the Court’s decision in *C&L Enterprises* these contracts may inadvertently waive sovereign immunity, regardless of the tribe’s wishes. However, tribes may circumvent this by choosing tribal law in the contract. This would require that tribes pass their own arbitration codes, waive sovereign immunity in limited circumstances, “and work hard to ensure that all their contracting partners understand
the realities of tribal court practice so that non-tribal vendors aren’t fearful of being ‘hometowned’ in a tribal court.”

**Education**

In the long run, education is likely key. Many Americans have little to no contact with Native persons and are not educated on tribal governments in their public school systems. Likewise, many lawyers, judges, and scholars are not familiar with tribal courts. As one representative from the National Native American Bar Association has noted, “[b]y educating people who don’t normally practice Indian law on a daily basis about at least the basics of our tribal courts, sovereignty and tribal government—they end up making better decisions for everybody.”

In their study of tribal courts, anthropologists Cooter and Fikentscher found that “[m]ost tribal judges recognize that disseminating knowledge about indigenous Indian law increases its effectiveness and vitality, thus strengthening Indian cultures.” Indeed, Judge Cavanagh has advocated for circulating Indian law materials through Bar Associations. Some states’ bar examinations—Washington State, New Mexico, and South Dakota—include a section on Indian law.

Second, adding to the confusion, many legal practitioners are perplexed by the status of tribes in the marketplace, as corporate investors, and as sovereign entities acting in the name of their people. Most recently, the Obama administration has stated its commitment to “strengthen and build on the Nation-to-Nation relationship between the United States and tribal nations.” As Professor Kunesh states,

> The potential thus exists within the current federal administration and throughout Indian country to transform the trajectory of individual lives and tribal communities by altering how we address entrenched social problems within those communities. Despite the Supreme Court’s contracting view of tribal sovereignty, particularly in the context of tribal jurisdiction over non-Indian activities occurring within the reservation, there remains strong evidence that all three branches of the federal government recognize and acknowledge the constant and enduring vitality of tribal sovereignty.

New legislation, however, will have little effect if it is interpreted using Termination era intent and racist precedent.

**Intergovernmental Relationships**

In her research at the Policy Research Center at the National Congress of American Indians, Sarah L. Hicks has found that, “intergovernmental relationships enhance tribal sovereignty. This is because the act of engaging in working relationships with other governments—including tribes, states, countries, boroughs, and cities—is a critical function of all governments.” Indeed, this has been the case with the many intertribal courts popping up all over the country. One example of an intergovernmental joint-jurisdiction
court in Leech Lake, Minnesota is telling. There, the Leech Lake Band of Ojibwe Tribal Court teamed up with Minnesota’s Ninth Judicial District’s Cass County District Court to craft a post-conviction, post-sentencing DUI Court that handles cases of Indians and non-Indians. The judges are part of a multi-disciplinary, multi-jurisdictional team, made from tribal and state judges who preside together over hearings. In the beginning, there was deep distrust between the judicial systems, governments, and tribal/state police. Being forced to work together, though, put an end to the quarrel. As one initially skeptical county sheriff stated, “‘I . . . had my doubts, but it certainly appears to be working. We’re making a difference in people’s lives.’” Because of the success of the DUI court, a similar drug court was implemented the next year. So far, the situation appears to be a win-win: tribes retain the sovereignty to use their own laws and procedures, gaining the legitimacy of tribal members, but with the added benefit of taking on the legitimacy of the state court in regard to the public at large. The experiment has actually spread far beyond its initial goals. Collaboration has cultivated formative relationships between state, tribal, and local governments.

In fact, in 2008 the Itasca County Board of Commissioners passed a resolution acknowledging “‘the importance of enlisting diverse inter-governmental and inter-judicial involvement in solving problems and delivering services.’” It is likely that in the upcoming year, tribal courts will be handling some of the state caseload. As one tribal council chairman stated, “‘the timing is right for us to assert our [s]overeignty because we can help reduce the overburdened and underfunded [s]tate [c]ourts by reducing their case-loads.’” This model is one that should be considered by other jurisdictions—tribal, state, and federal.

**Conclusion**

Tribal Self-Determination must be viewed in light of the complexities that the Supreme Court, Congress, and the prejudices of the discovery doctrine have levied upon Native Nations. Likewise, the status of the United States as one of the world’s strongest economic powers must be viewed in light of these same intricacies. Both the United States and tribal governments must recognize the fragility of tribal institutions, and the generations of dependency, oppression, and dissonance that have utterly destroyed the character of tribal governments. The conflict is entrenched in the chaotic history of federal Indian policy, from the Marshall trilogy to *Plains Commerce Bank*, and thus must be positioned in proper perspective with the history of the United States as a nation. On paper, dated legal models such as “dual sovereignty” and the “federal trust responsibility” may be attractive, but the underpinnings of these doctrines are not as virtuous as they may appear to an uneducated judge or lawyer—and it is unfortunate that these judges and lawyers operate at the pinnacle of United States law.
At the risk of sounding defeated, it is likely that the Supreme Court will continue its foray into tribal sovereignty until it is able to catch up with Congress’ intent—an intent that is at odds with over 200 years of precedent and federal policy. The racist doctrine of discovery is so thoroughly engrained in federal precedent that some Justices view Indian law cases as “boring,” and having no “impact on constitutional rights or other ‘interesting’ areas of law.” The only hope is that through education and policymaking, if continued at a static pace with a fixed strategy, change in Supreme Court jurisprudence will be achieved—but this will take time. As Justice Thurgood Marshall understood, minority races in America are up against the weight of bad court decisions over a century. Hell, we’re fighting Chief Justice Roger Taney, who said for seven members of the Court in 1857 that a Negro was not a citizen of the United States, and had “no rights that a white man is bound to respect.” The problem that we’ve got to overcome is that millions of white people still believe what Taney wrote.

Justice Thurgood Marshall’s term on the Supreme Court from 1967 to 1991 corresponds with the increase in Indian law cases decided by the Court. One can only hope that Congress maintains course under Self-Determination policies, and that the next generation of Supreme Court Justices realize the weight on their shoulders as Justice Marshall did. Rather than being boring jurisdictional cases, as many current judges and law practitioners view them, Indian law jurisprudence, particularly jurisdiction cases, hold the fate of entire nations. Proceed with caution.

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NOTES
2 Id. In 2003 the Community Development Corporation broke ground on a $20 million development on the reservation, “to be a mixture of houses, government buildings, and businesses, replacing the derelict and dilapidated structures that had been all the reservation had to offer earlier.” Id.
7 Wahwassuck, Smith, & Hawkinson, supra note 5, at 880.
8 Since 1790 Congress has referred to land subject to federal and tribal law, but not to state law, as “Indian country.” See Indian Trade and Intercourse Act, 1 Stat. 137 (1790). The term has remained relatively unchanged and today refers to lands within Indian reservations, all “dependent sovereign” Indian communities, and all allotments to which Indian title has not been extinguished. See U.S. v. McGowan, 302 U.S. 535 (1938) (defining the term “Indian country”).

For the most part, the project was mere scholarly conjecture—a starting point for dialogue. The author is not as naïve as to think that there actually exists such a “quick fix.”

The statute applies to both Indians and non-Indians. R.J. Williams Co. v. Fort Belknap Housing Authority, 509 F. Supp. 933 (D. Mont. 1981). However, there is a circuit-split as to whether a non-Indian may sue the tribe for ICRA violations where no tribal remedy exists and the plaintiff has sought to obtain one. See Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984); Williams v. Pyramid Lake Paiute Tribe of Pyramid Lake Reservation, 625 F. Supp. 1457 (D. Nav. 1986).


Id.


During the ten-year period from the date of the passage of the Indian Civil Rights Act in 1968 to the Martinez Decision in 1978, federal courts heard approximately 80 cases involving the application of the Indian Civil Rights Act. These cases covered many subjects including tribal election disputes, reappointment of voting districts on Indian reservations (“one man, one vote”), tribal government employee rights; land use regulations and condemnation procedures; criminal and civil proceedings in tribal courts; tribal membership and voting; tribal police activities, conduct of tribal council members and council meetings, and standards for enforcing due process of law and equal protection of the laws in tribal settings.


Santa Clara Pueblo, 436 U.S. at 58-59; see also Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) (holding that ICRA does not create a federal right of action against the tribe).

“A writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal . . . .” BLACK’S LAW DICTIONARY (8th ed. 2004). The writ is most often “used to test the legality of an arrest or commitment, . . . the regularity of the extradition process, . . . the right to or amount of bail, or . . . the jurisdiction of a court that has imposed a criminal sentence.” Id.


Smith v. Confederated Tribes of Warm Springs Reservation of Oregon, 783 F.2d 1409 (9th Cir. 1986). Under this mandate, “where the tribal court procedures under scrutiny differ significantly from those ‘commonly employed in Anglo-Saxon society,’ . . . courts weigh ‘the individual right to fair treatment’ against ‘the magnitude of the tribal interest [in employing those procedures]’ to determine whether the procedures pass muster under [ICRA].” Randall v. Yakima Nation Tribal Court, 841 F.2d 897 (9th Cir. 1988) (internal citations omitted). However, “[w]here the tribal court procedures parallel those found ‘in Anglo-Saxon society,’ . . . courts need not engage in this complex weighing of interests. . . . Where the rights are the same under either legal system, federal constitutional standards are employed in determining whether the challenged procedure violates the Act.” Id. (internal citations omitted).


Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (recognizing that there was an increase of non-Indian crime being committed on reservations, but concluding that it was for Congress to decide how to remedy this problem); Handler, *supra* note 26, at 274-75 (noting that ICRA “took away one of the most important pieces of tribal sovereignty that Indians still retained: The ability to punish according to tribal law.”).


The jurisdictional limit was recently raised by the Tribal Law and Order Act. See infra note 34 and accompanying text.

Marie Quasius, Note, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 Minn. L. Rev. 1902, 1904 (citing Amnesty Int’l., Maze of Injustice: The Failure to Protect Indigenous Women From Sexual Violence in the USA 27 (2007) (describing jurisdictional difficulties in two reported rapes where blindfolding victims could not identify whether or not the crime occurred on tribal land)).


See Tribal Law and Order Act, S. 3320, 110th Cong. §§ 1, 304(3) (2008). One of the more significant wins in Indian Country this century, the Act was signed into law on July 29, 2010. See Tribal Law and Order Act of 2010, H.R. 725, 111th Cong. (2010).

Personal observations of author, who was in attendance at the Conference. See also e.g. Patience Drake Roggensack, *Plains Commerce Bank’s Potential Collusion With the Expansion of Tribal Court Jurisdiction by Senate Bill 3320*, 38 U. Balt. L. Rev. 29, 38-39 (“There is good reasons for the limits on tribal jurisdiction of tribal courts . . . [t]he absence of the Bill of Rights from tribal courts is . . . a disadvantage for tribal members that has been recognized by Congress.”) (citing 25 U.S.C. §1302 (2000)).

But see Ramos v. Pyramid Tribal Court, Bureau of Indian Affairs, 621 F. Supp. 967 (D. Nev. 1985). In Ramos, the U.S. District Court for the District of Nevada held that the “stacking” of convictions does not violate the “cruel and unusual punishment” provision of ICRA. *Id.* at 970. In that case the defendant argued that “the over two year sentence imposed by the Pyramid Lake Tribal Court constituted cruel and unusual punishment.” *Id.* However, the court found that “ICRA provides that an Indian tribe may not inflict cruel and unusual punishment . . . Ramos was convicted of seven offenses. None of the imposed sentences violated the prohibition of more than [twelve] months imprisonment for any one offense.” *Id.* The court cited “no cases holding that the imposition of consecutive sentences constitutes cruel and unusual punishment” and ultimately held that “the
imposition of consecutive sentences for numerous offenses is a common and frequently exercised power of judges. . . . and, thus, no habeas relief lies.” Id.


38 Id. at *5 (internal quotations and citations omitted); but see generally, Philip J. Frickey, A Common Law for our Age of Constitutionalism: The Judicial Divestiture of Indian Tribal Sovereignty Over Nonmembers, 109 YALE L.J. 1 (1999).

39 A companion case has recently come down, issued by a different federal magistrate. See Bustamante v. Valenzuela, No. 09-8192, 2010 WL 1337131 (D. Ariz. Feb. 4, 2010). In that case, however, a public defender appeared on behalf of the defendant. Nonetheless, the magistrate still found for the plaintiff. Id. at *8. In another win for Indian Country, the magistrate’s R&R was rejected by the district court. See Bustamante v. Valenzuela, No. 09-8192, 2010 WL 1338125 (D. Ariz. Apr. 1, 2010). The district court concluded, correctly, that “[t]he most sensible reading of ICRA’s language is that Indian tribes may impose a one-year term of imprisonment for each criminal violation. ICRA’s one-year limitation has no impact when, as here, an individual was sentenced to eighteen months based on multiple criminal violations.” Id. at *7.

40 See infra notes 252-86 and accompanying text.


42 See id. (noting that Santa Clara Pueblo “had the unintended effect of fueling both prejudice against tribal courts and future judicial incursions on tribal sovereignty.”).

43 See Sarah Krakoff, A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 OR. L. REV. 1109, 1133 (2004) (“[T]he Santa Clara Court did tribes a disservice in the long run by finding no private right of action in the ICRA, because of the non-reviewability of tribal decisions has led to the piecemeal divestment of tribal jurisdiction over non-Indians.”).

44 See infra notes 216-24 and accompanying text.


48 HARVARD PROJECT, supra note 45, at 128.


51 HARVARD PROJECT, supra note 45, at 130; see also Economic Development Hearing Before the Comm. on Indian Affairs, 105th Cong. (1998) (prepared statement by Donald R. Wharton & Jill E. Shibles, National American Indian Court Judges Association) (stating that “strong, competent, and impartial tribal courts are integral to the development of business friendly environments in Indian country.”); Hearing on the Supreme Court and on State and Local Law Enforcement, 106th Cong. (2000) (testimony of Mary T. Wynne, National American Indian Court Judges Association) (stating that tribal courts “are the keystone to tribal economic development and self-sufficiency . . . .”); Janet Reno, U.S. Attorney General, Address to Tribal Court Symposium with Northeastern Tribal Nations in

52 HARVARD PROJECT, supra note 45, at 44.


55 See Tweedy, supra note 41, at 405-06.

56 See SHARON O’BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 92 (1989).

57 Moreover, the fact that a tribe does not outwardly exhibit U.S. constitution-like protections by way of constitution, code, or precedent, does not necessarily mean that they do not exist. On the contrary, the fact that they are not litigated may mean that they are enforced with no problem. For the purpose of this initial study, though, this is inconsequential because we are looking specifically at the outward appearance of the tribal court, through the eyes of potential investors.


61 Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 AM. INDIAN L. REV. 285, 285-87 (1998) (describing the incorrect general mistrust of tribal justice systems by the public and the Federal Government); see also Matthew L.M. Fletcher, The Supreme Court’s Legal Culture War Against Tribal Law, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 106 (2006) (describing Justice Souter’s concern that tribal law is “‘unusually difficult for an outsider to sort out’” and his implicit belief that “substantive tribal law is unknown and even unknowable by outsiders.”) (quoting Hicks, 553 U.S. at 384-85 (Souter, J., concurring)).


63 Kalt & Singer supra note 62, at 32.

64 See e.g. Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009) (“We are sympathetic to Plaintiff’s concerns about defending her actions in an unfamiliar court system.”).

65 Roggensack, supra note 35, at 41.

66 Id. at 40-41.

67 See Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that Indian tribes are not subject to the US Constitution).
See Erik M. Jensen, *The Continuing Validity of Tribal Sovereignty Under the Constitution*, 60 Mont. L. Rev. 3, 16 (1999) (describing the position that the U.S. Constitution has ever applied to tribes as “dead wrong”).


Id. at 212.

Santa Clara Pueblo, 436 U.S. at 65.


Cooter & Fikentscher, *supra* note 73, at 302.


Since then, tribes have added more constitutional protections. *See infra* notes 115-125 and accompanying text. Indeed, this is an area of research that needs to be taken up again—and widely distributed throughout the legal community.


Rusco, *supra* note 77, at 280-89.

Cooter & Fikentscher, *supra* note 73, at 327; *see also* Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 Ariz. St. L.J. 1047, 1052, 1115-18 ([I]nstitutional pride leads judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role and resist temptations to rule based on the status of the parties or political pressure.”).

Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Tail of Decolonizing and Americanizing the White Man’s Jurisprudence*, 1986 Wis. L. Rev. 219, 274, 288 (1986); *see also* Quasius, *supra* note 33, at 1920 (“Tribal judicial systems, however, increasingly incorporate aspects of the Anglo-American system.”). Some courts, like the Navajo, have separate traditional courts used to settle disputes between members that non-Indians are not subject to (unless they agree to be). *See also id.* at 1931.


Newton, *infra*note85, at n.139.


Newton, *supra* note 85, at 1038.


89 Cooter & Fikentscher, supra note 73, at 325. Even where these rules are not adopted or used as a model, “outside legal counsel has no difficulties in submitting to” relaxed rules of civil procedure and evidence, “and welcomes the advance information.” Id.

90 Newton, supra note 853, at 1038.


93 Id. at 5-6.

94 Cooter & Fikentscher, supra note 73, at 312.

95 Eid, supra note 69, at 42.


99 Kunesh, supra note 25, at n.152.

100 Kalt & Singer, supra note 62, at 32.


103 In fact, Lance Morgan “traced his desire to become a lawyer to watching television shows such as L.A. Law.” Ho-Chunk Inc.—Company History, supra note 1.


105 Wahwassuck, Smith, & Hawkinson, supra note 5, at 882.


107 Wahwassuck, Smith, & Hawkinson, supra note 5, at 882.


109 UNITED STATES COMMISSION ON HUMAN RIGHTS, INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 8 (1991); see also Douglas B.L. Endreson, The Challenges Facing Tribal Courts Today, 79 JUDICATURE 142, 146 (1995) (noting that tribal courts “show a careful consideration of the claims presented on the merits, and no reluctance to rule against the tribal government.”).


113 Bethany R. Berger, Red: Racism and the American Indian, 56 UCLA L. REV. 591, 598, 642-43 (2009). Ervin was also known as “Jim Crow’s most talented legal defender,” and “a
man whom ‘southern apologists praised . . . as one of the nation’s preeminent constitutional scholars.’” Id. at 643; see also generally Karl E. Campbell, Senator Sam Ervin and School Prayer: Faith, Politics, and the Constitution, 45 J. CHURCH & STATE 443 (2003).


Berger, supra note 113, at 643 (internal quotations omitted). Senator Ervin was also the principal advocate of Termination Era legislation, which stripped all tribal jurisdiction as a method to assimilate Native people. See infra notes 204-15 and accompanying text.


Berger, supra note 113, at 643 (quoting Campbell, supra note 131, at 444).

Id. at 575


Bigfire, 25 Indian L. Rptr. at 6229.

Id. at 6239.

Id. at 6231-39; Rosen, supra note 96, at 541-44.

Bigfire, 25 Indian L. Rptr. at 6232. One of the judges, a woman from a related tribe, explained that she had “no . . . feeling of inequality” as a result of tribal discrimination in sex roles. Id. at 6233.

Rosen, supra note 96, at 543-44.

Tweedy, supra note 41, at n.64.

See generally McCarthy, supra note 112 (surveying tribal courts’ interpretations of the ICRA provisions).


Help, No. A-CV-01-82 at 32.

Tweedy, supra note 41, at 422.


See e.g. Angela A. A. Willett, Navajo Culture and Family Influences on Academic Success: Traditionalism is not a Significant Predictor of Achievements Among Young Navajos, 38 J. AM. INDIAN EDUC. 1, 22 (1999) (noting that “Navajos are one of the poorest subpopulations in society . . . .”)


HARVARD PROJECT, supra note 45, at 46.


COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §4.01[1][a], at 204 (Nell Jessup Newton et al. eds., 2005)

See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 823 (2007) (noting that the intent of the framers of the Constitution was to leave intact Indian nations as separate sovereigns).


See generally ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) (arguing that Indian rights will never be protected as long as the Supreme Court continues to talk about Indians as if they are “lawless savages,” as established by the Marshall trilogy).


21 U.S. 543 (1823).

Id. at 572-73, 592.

M’Intosh, 21 U.S. 574.

Id. at 590.

30 U.S. 1 (1831).

Id. at 17.

Id. at 16.

31 U.S. 515 (1832).

Id. at 544, 552. This also introduced the Indian canons of construction to the law. See Ann Tweedy, *The Liberal Forces Driving the Supreme Court’s Divestment and Debasement of Tribal Sovereignty*, 18 BUFF. PUB. INT. L.J. 147, 183 (2000) (noting that “the canons stand for the proposition that [t]reaties are to be construed as they were understood by the tribal representatives who participated in their negotiation and should be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians,” and further explaining that “[t]he canons of construction were originally limited to treaty construction but were subsequently expanded to statutory construction as well”) (internal quotation omitted).


Id.


Skibine, supra note 156, at 31 (quoting Langford v. Monteith, 102 U.S. 145 (1880)).

See Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (“Plenary authority over tribal relations of the Indians has been recognized by Congress from the beginning . . . . When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress . . . .”).
162 E.g. The Major Crimes Act, 18 U.S.C. 1153 (1994); see also Richard W. Garnett, Once More Into the Maze: United States v. Lopez, Tribal Self-Determination, and Federal Conspiracy Jurisdiction in Indian Country, 72 N.D. L. REV. 433, 446 (1993) (noting that the Major Crimes Act “was passed in response to the Supreme Court’s unpopular decision in Ex Parte Crow Dog, which held that the federal courts had no jurisdiction over a notorious and politically controversial intra-Indian murder in Indian Country.”) (citing Ex Parte Crow Dog, 109 U.S. 556, 572 (1883)).


164 Skibine, supra note 156, at 32 (internal citations omitted).

165 MILLER, supra note 137, at 170. Ironic, isn’t it, that tribes, with “little or no experience with farming, nor . . . means of putting the land to productive use” failed at farming on arid land? Kunesh, supra note 25, at 17.

166 See Benjamin Cardozo, The Nature of Judicial Process 51 (1921) (noting “the tendency of a principle to expand itself to the limits of its logic.”).

167 MILLER, supra note 137, at 170. This approach was later used by the apartheid government of South Africa in mounting its “racial homeland” system of territorial apportionment. Ward Churchill, Since the Predator Came: Notes from the Struggle for American Indian Liberation 31 (2005).

168 Kunesh, supra note 25, at 17.


170 See Ken B. Cryee, Keith Harvey, & Michael Melton, Bank Lending to Native American Applicants: An Investigation of Mortgage Flows and Government Guarantee Programs on Native American Lands, 26 J. Fin. Services Res. 29, 30 (2004) (finding that Native Americans “are significantly more likely to be denied mortgage credit in total versus similarly situated White borrowers.”).

171 MILLER, supra note 137, at 171.

172 Churchill, supra note 167, at 32.

173 Id.

174 Kunesh, supra note 25, at 19.

175 Churchill, supra note 167, at 181. Although Professor Churchill’s work has recently been criticized for plagiarism, the author is confident that this passage is a proper explanation of the state of Indian Country during the Reorganization Era.


178 Id.

179 Harvard Project, supra note 45, at 19.

180 Id. (“Perhaps like trying to impose a monarchy on the United States today, foreign systems of government in Indian country have generally lacked legitimacy and support—and therefore effectiveness.”).

181 Id. (“The lesson is quite general across Indian country . . . . Foreign systems of government that do not fit with a people’s own standards as to how they should self-rule are prime causes for nations in trouble.”). As noted by one tribal leader, “[t]ribes or bands were created by the people basically as survival units, and the Indian policy makers saw them as the greatest impediment to assimilating and ‘civilizing’ the Indians. In the minds of the policy makers, the tribes had to be destroyed.” Charles Trimble, Fiction and Myth Surrounding the IRA, INDIANZ.COM, Mar. 8, 2010, available at http://64.38.12.138/News/2010/018696.asp.

183 573 F.3d 808 (D.C. Cir. 2009).

184 *See* Bill Lee, *Time to Get Settlement Funds to Indians*, YAKIMA HERALD-REPUBLIC, July 28, 2006, available at http://64.38.12.138/News/2006/015181.asp (noting that the current settlement is “nowhere near the $100 billion they said they were owed . . . .”); MEIZHU LUI, ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 51 (noting that “nearly $137.2 billion might have been stolen, lost, or misallocated since the passage of the General Allotment Act). The class has recently settled for far under that amount. *See* Cobell v. Salazar, http://www.cobellsettlement.com (last visited Mar. 10, 2010) (Under the terms of the Settlement, the federal government will create a $1.4 billion Accounting/Trust Administration Fund and a $2 billion Trust Land Consolidation Fund. The Settlement also creates an Indian Education Scholarship fund of up to $60 million to improve access to higher education for Indians.”).


186 MILLER, supra note 137, at 171.


188 MILLER, supra note 137, at 171.

189 *Id.*

190 HARVARD PROJECT, supra note 45, at 18.

191 Kunesh, supra note 25, at 23.

192 *Id.* at 23-24.

193 HARVARD PROJECT, supra note 45, at 4.


195 LUI, ET AL., supra note 184, at 60.

196 *See* HARVARD PROJECT, supra note 45, at 5 (“The watchwords became self-determination and tribal sovereignty.”).


198 Message From the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. No.91-363, (1970).


200 MILLER, supra note 137, at 171.


202 Skibine, supra note 156, at 33.

203 Kunesh, supra note 25, at 28.

204 *Id.*


206 Tribal exhaustion does “not deprive the federal courts of subject-matter jurisdiction,” but, “as a matter of comity,” federal courts should decline to hear a case when “strong federal policy concerns” favor such a resolution. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987); *see also* Ninigret Development Corp. v. Narragansett Indian Wetumuck Housing Authority, 207 F.3d 21 (1st Cir. 2000) (holding that even where federal courts acknowledge jurisdiction, they must defer to tribal courts).
See generally Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993) (summarizing the tribal exhaustion doctrine).

Crawford v. Genuine Parts Co., 947 F.2d 1405, 1408 (9th Cir. 1991). “When the dispute involves non-Indian activity occurring outside the reservation, however, the policies behind the tribal exhaustion rule are not so obviously served.” Texaco, Inc., 5 F.3d at 1378.

Id. at 1378.

When the dispute involves non-Indian activity occurring outside the reservation, however, the policies behind the tribal exhaustion rule are not so obviously served. Texaco, Inc., 5 F.3d at 1378.

Id. at 1378.

Id. at 1378.

See generally Texaco, Inc. v. Zah, 5 F.3d 1374 (10th Cir. 1993) (summarizing the tribal exhaustion doctrine).

228 Id. at § 7:131 (quoting Namekagon Development Co., 517 F.2d 508).


231 Bruner & O’Connor, supra note 227 at § 7:131.

232 Tweedy, supra note 153, at n.103 (internal citations omitted).


236 Collins, supra note 102, at 810.


238 The Supreme Court decided twelve Indian law cases in the 1960s, thirty-five in the 1970s, and 45 during the 1980s. Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy 1 (1987). This was likely a direct result of the addition of Justice Thurgood Marshall to the bench. See Duthu, supra note 59, at 65 (1996) (noting that “Justice Marshall’s tenure on the Supreme Court, from 1967 to 1991, coincided with the upsurge in Indian law cases decided by the high Court. Justice Marshall himself authored more Indian law opinions than any other single justice.”).

239 Duthu, supra note 59, at 107; see also Tweedy, supra note 162, at 676 (noting that the “trend of divestment of tribal sovereignty has continued, in one way or another, with nearly every Indian law case decided by the Court.”).

240 Duthu, supra note 59, at 107.


242 Id. at 172.

243 Since Oliphant, law enforcement and victim advocates have seen a “substantial increase in the number of non-Indian criminals who exploit the gap in jurisdiction and commit jurisdiction on reservations.” Quasius, supra note 32, at 1906 (citing Sarah Deer, Toward an Indigenous Jurisprudence of Rape, 14 Kan. J. L. & Pub. Pol’y 121, 126 (2004)).

244 Oliphant, 435 U.S. at 210.


246 Tweedy, supra note 153, at 154.


248 Id. at 566.


250 Tweedy, supra note 153, at 161. Specifically, the Court found that “the fact that the exception is prefaced by the word ‘may’ indicates that a tribe’s authority need not extend to all conduct having the specified effects, but, instead, depends on the circumstances.” Brendale, 492 U.S. at 410.

This is the one instance where Congress stepped in to voice its concerns about its actual expectations in Indian matters. See Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 62 (1995) (noting that the Court continues to attribute to Congress the repudiated rationales of the Allotment era, despite contemporary Self-Determination legislation). Congress effectively overruled the *Duro* with ICRA, “confirming” tribal criminal jurisdiction over all Indians in Indian country—member or nonmember. See supra notes 12-33 and accompanying text. This amendment to ICRA was later upheld in *United States v. Lara*, 541 U.S. 193 (2004), affirming Congress’ plenary power to restore judicially-stripped sovereignty. See Tweedy, supra note 153, at 695-700 (discussing the *Lara* holding generally). Jurisdiction does not, however, extend to non-Indians. See Eid, supra note 69, at 45-46 (noting that if non-Indians were subject to criminal tribal jurisdiction, they would have a far greater stake in the economic development of Indian country).


Id. at n.2. Of course, this is true, but only because the Court was too busy in the previous thirty years proclaiming where tribal courts did not have jurisdiction. In fact, the Court has never actually articulated where tribes do have jurisdiction, save the Marshall trilogy. Other cases during this period have also stripped sovereignty, in sometimes quite imaginative ways, but for the sake of saving space I have only included the most well-known and cited cases. See Tweedy, supra note 153, at n.117 (citing *Carcieri v. Salazar*, 129 S. Ct. 1059 (Feb. 24, 2009); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 119-31 (2005) (Ginsburg, J., dissenting); *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203-08, 215-16, 219 (2005); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154-59 (1980)); see also *South Dakota v. Bourland* 508 U.S. 679, 687 (1993) (holding that congressional intent was required to find that the Indians could not regulate nonmember hunting and fishing in an area within the reservation but open to the public); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 254-255 (1992) (holding that The Indian General Allotment Act of 1887 permitted Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act and owned by reservation Indians or the Yakima Indian Nation itself).


Indeed, the bulk of the majority opinion reads as if the Court had difficulty seeing that the tribal members existed at all, an ironic twist on the concept of color-blindness that the Court has extolled in recent years.” Tweedy, supra note 153, at 680-80 (internal citations omitted).

Pommersheim, supra note 98, at 64.

See id. at 682 (stating that “the Court seems willing to work hard to construct rationales to avoid the reach of the *Montana* exceptions.”); see also generally Paul A. Banker & Christopher Grgrurich, *The Plains Commerce Bank Decision and its Further Narrowing of the Montana Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants*, 36 WM. MITCHELL L. Rev. 565 (2010).

Tweedy, supra note 153, at 682.
Pommersheim, supra note 99, at 50.

Plains Commerce has deceived at least one Wisconsin Supreme Court Justice into believing that “the unavailability of those constitutional rights that a defendant has in federal court . . . was the lens through which the Court examined the Long’s and the Bank’s contentions relative to subject matter jurisdiction.” Roggensack, supra note 35, at 35.

128 S. Ct. at 2732, n.3.

Id. at 2731.

Cornell & Kalt, supra note 47, at 21 (noting that “the move to practical sovereignty -- turns out to be a key to sustainable development . . . .”).

Kunesh, supra note 25, at 16 (also stating that “[t]he underpinning of tribal resilience and the hope for all tribes and Indian people is the promise of tribal sovereignty—the dynamic force that for more than two and a half centuries has fostered self-determination and protected cultural patrimony.”); see also Pommersheim, supra note 99, at n.67 (“Tribal sovereignty is a necessary, but not sufficient, condition for tribes and individual tribal members to flourish.”).


Kunesh, supra note 25, at 16. Allotment proceeds were also mismanaged. According to House Reports, “the legal allotment ownership records of the Bureau are inconsistent with the records the BIA’s Office of Trust Fund Management uses to calculate distributions of income.” Misplaced Trust, supra note 176, at 26.

Elizabeth A. Segal & Keith Michael Kilty, Pressing Issues of Inequality and American Indian Communities 69 (1998).


Id.


McClanahan, 411 U.S. at 168; Oliphant, 435 U.S. at 207; Montana, 450 U.S. at 549; Brendale, 492 U.S. at 426; Duro, 495 U.S. at 696; Strate, 530 U.S. at 445; Atkinson Trading Co., 532 U.S. at 647; Hicks, 533 U.S. at 361; Plains Commerce Bank, 128 S.Ct. at 2713.

Williams, supra note 142, at 70.

Id. at 6. The doctrine has been traced as far back as medieval times. MILLER, supra note 137, at 12. The Church became involved in the 1400s, when they gave the rights of Teutonic Knights to control non-Christian infidels’ lands by declaring that, because they were not Christians, the infidels lacked property rights but retained occupational rights. Id. This doctrine was then used by Spain’s acquiescence of Atlantic islands, and later became one of the first customary international laws. Id. at 17. The doctrine was then taken up by Marshall in M’Intosh, “influence[ing] all subsequent thinking in federal Indian law.” Id. at 163 (internal quotations omitted).

Williams, supra note 142, at xvii.

Id.  

Ex Parte Crow Dog, 109 U.S. 556, 569 (1883).

Williams, supra note 142, at 56.

See e.g. City of Sherrill, N.Y. v. Oneida Indian Nation of New York, 544 U.S. 197, 204 (2005).

Williams, supra note 142, at 129.


Graham, supra note 283, at 110.

Id.


Williams, supra note 82, at 286.


The indeterminacy of kind, not knowing where the Court will land in its next Indian law case, may in itself deter economic development. See Wilkins, supra note 201, at 224 (noting that the indeterminate relationship “deprives aboriginal peoples . . . of a clear and consistent understanding [of] the powers and rights they may be capable of exercising, thereby contributing to the ongoing tension that frequently clouds the relationship between tribes and other political or corporate entities).

See Alex Tallechief Skibine, Formalism and Judicial Supremacy in Federal Indian Law, 32 AM. INDIAN L. REV. 391, 394 (2008) (describing the shift in the Court’s Indian law cases, from formalism which employs “the methodical use of much older cases as precedents supporting a general rule” to functionalism, which has forced “the Court to explain why its holdings are congruent with current Congressional policies, and if not, why not.”).

Kunesh, supra note 25, at 40.

Newton, supra note 85, at 1036.

See Pommersheim, supra note 110, at16 (“Almost all of this [sovereignty-stripping] litigation involves commerce and some individual or cooperate non-Indian protagonists.”).

Miller, supra note 137, at 170 (noting further that “Congress radically altered the policies of the treaties and the Reservation era and breached the limits of its alleged Discovery power over Indian property by unilaterally altering the nature of tribal real-property rights . . . .”).


Berger, supra note 113, at 641-42.

Kunesh, supra note 25, at 36; see also Kiowa Tribe of Okla v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998) (Stevens, J., dissenting) (“There are reasons to doubt the wisdom of perpetuating the doctrines [of sovereign immunity] beyond what is needed to safeguard tribal self governance. This is evident when tribes take part in the Nation’s commerce.”). The Court has left alone jurisdiction over “inwardly focused” sovereignty, such as delivering programs and services or making membership or leadership decisions. Kunesh, supra note 25, at 30.

Williams, supra note 83, at 274.

Id.

Pommersheim, supra note 98, at 61.

Cooter & Fikentscher, supra note 73, at 302.

Tribes are also advised to adopt some sort of business code. *See Indian Tribal Development Consolidation Funding Act, Hearing Before the Comm. on Indian Affairs*, 107th Cong. 33 (2002) (testimony of James DeLaCruz, Council Member, Quinault Indian Nation). (“All too often, tribes enter into negotiations to allow outside vendors to bring their businesses to reservations, yet they are unaware of the need to have a tool in place such as the tribal business code to educate the outside parties about the Indian culture.”).

*Harvard Project, supra* note 45, at 27.

*Id.* note 98, at 60.

*Id.* note 99, at 60.

*See Harvard Project, supra* note 49, at 26 (“For many tribes, the turnaround begins with constitutional reform.”); *but see* Kunesh, *supra* note 25, at n.149 (noting the difficulty of tribal constitutional reform).

*Tweedy, supra* note 153, at 711-12.

*Krakoff, supra* note 43, at 1179.


*McClatchey, supra* note 320 at 7.

*Id.* at 18; *see also* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. Rev. 311, (2000) (discussing preference in state court as to avoid difficulties in having tribal courts enforce judgments against non-Indians); *but see* Krakoff, *supra* note 43, at 1179 (noting that “businesses are more likely to object to these clauses because they may believe that non-Indians can successfully resist tribal jurisdiction.”)

*Kalt & Singer, supra* note 62, at 19.

*See Austin, supra* note 83 (noting that “[t]ribal courts, their judges and appellate court justices are often misunderstood. . . . Practitioners are often unprepared when they run into Indian law, and it is this lack of knowledge that has led to a number of bad decisions affecting all of Indian country.”).

*Cooter & Fikentscher, supra* note 73, at 311.


*Kunesh, supra* note 25, at 36.

tribal court jurisdiction and native nation economies


332 See Wahwassuck, Smith, & Hawkinson, supra note 5, at 868 (noting that when they began the project of implementing a multi-jurisdictional court, “collaboration of this nature was truly unprecedented . . . .”).

333 Id. at 869.

334 Id. at 861-72.

335 Id. at 873.

336 Id. at 872-73.

337 See also Wilkinson, supra note 238, at 112 (suggesting that tribes self-divest appellate jurisdiction to federal courts). If a tribal-federal court, an Article III court may be preferable to an Article I court. See Tweedy, supra note 153, at 716 (noting that Article III courts help to foster neutrality amongst judges).

338 See Miller, supra note 137, at 6 (noting that “it is time for the United States to try and undo more than 200 years of the application of ethnocentrically, racially, and religiously inspired Doctrine of Discovery to American Indians and nations.”).

339 But see David Williams, Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law, 80 Va. L. REV. 403, 497-99 (1994) (proposing a special federal Court of Indian Statutory Interpretation to achieve uniformity and protect tribal self-determination in ICRA, other statutes, and treaties).

