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# Williams v. Lee and the Debate Over Indian Equality

Bethany Berger

*University of Connecticut School of Law*

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## WILLIAMS V. LEE AND THE DEBATE OVER INDIAN EQUALITY

Bethany R. Berger\*

*Williams v. Lee (1959) created a bridge between century-old affirmations of the immunity of Indian territories from state jurisdiction and the tribal self-determination policy of the twentieth century. It has been called the first case in the modern era of federal Indian law. Although no one has written a history of the case, it is generally assumed to be the product of a timeless and unquestioning struggle of Indian peoples for sovereignty. This Article, based on interviews with the still-living participants in the case and on examination of the congressional records, Navajo council minutes, and Supreme Court transcripts, records, and Justices' notes, reveals an unexpected complexity in both Indian and non-Indian contributions to the case and to the era in federal Indian policy in which it emerged.*

*This history shows that both Williams and the policy developments that surrounded it emerged from consensus about the need for Indian equality and equal opportunity in the twentieth century, but Indian and non-Indian debate whether equality meant full assimilation and termination of the special legal status of tribes or continued respect for the ability of Indian peoples to govern themselves. This Article makes this debate concrete through the story of the Williams family, for whom the state collection action and the resulting seizure of the family sheep herd struck at the heart of Navajo lifestyle and culture. The Article further connects Williams to the momentous debates over African-American integration generated with Brown v. Board of Education (1954) and Cooper v. Aaron (1958). Ultimately, I argue, Williams v. Lee and the*

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\* Professor of Law, University of Connecticut School of Law. Deep gratitude to Lorena Williams, Verdie Mae Lee, Dennis Lee, Bessie Yellowhair, Judge Guido Calabresi, and Judge William Canby for taking time to speak with me about this case. Sincere thanks to Lucinda Damon at the Navajo Nation Records Management Department, Jennifer O'Neill at the Archives of the National Museum of the American Indian, Janis Fusaris at the University of Connecticut School of Law Library, and Janet Katz at the Harvard Law School Library for invaluable assistance in locating records and documents. For their helpful comments and suggestions, thanks to Devon Carbado, Philip Frickey, Carole Goldberg, Kaaryn Gustafson, Lawrence Jo, Ajay Kusnoor, Sanford Levinson, Hugh McGill, Christian McMillen, Tom Morawetz, William Rice, Addie Rolnick, Ezra Rosser, Judith Royster, Christopher Schmitt, Jed Shugerman, Paul Spruhan, Katie Stewart, Steven Wilf, Jason Wu; participants at workshops at Boston University School of Law, Harvard Law School, Western New England College School of Law, UCLA School of Law, the University of Connecticut School of Law, and the University of Tulsa College of Law; and the annual conferences of the American Society for Legal History and the Law and Society Association.

*self-determination movement that followed it represent a choice by American Indians to insist that respect for tribal status was necessary to ensure Indian equality in the modern era. This history and its results provide an important lesson today as federal Indian policies are increasingly attacked as fundamentally inconsistent with fairness and equality.*

## TABLE OF CONTENTS

INTRODUCTION .....	1464
I. EQUALITIES .....	1468
II. CONTESTS OVER INDIAN EQUALITY IN THE POSTWAR YEARS .....	1471
III. NAVAJO DEBATE AND TRANSFORMATION .....	1480
A. <i>The Navajo Nation in the Wake of World War II</i> .....	1481
B. <i>1949 Debates About State Jurisdiction</i> .....	1488
C. <i>Nation Building in Navajoland</i> .....	1494
IV. <i>WILLIAMS V. LEE</i> AND THE FIGHT AGAINST STATE JURISDICTION .....	1498
A. <i>The Dispute Emerges: Traders, Sheep Herds,         and a Navajo Family</i> .....	1499
B. <i>State Court Proceedings</i> .....	1504
C. <i>Williams v. Lee in the Supreme Court</i> .....	1510
V. THE AFTERMATH OF <i>WILLIAMS V. LEE</i> .....	1519
CONCLUSION .....	1525

## INTRODUCTION

On November 20, 1958, while the Supreme Court was still reeling from the reaction to its decision in *Cooper v. Aaron*<sup>1</sup> ordering the Little Rock School District to continue the process of desegregation, the Justices heard arguments in an almost unnoticed case. *Williams v. Lee*,<sup>2</sup> an obscure collection action between a non-Indian trader and his Navajo customers on the isolated Navajo reservation, appeared to have little to do with the momentous debates over equality and integration absorbing the nation. Indeed, the claim of Paul and Lorena Williams that disputes arising on the reservation should be insulated from state jurisdiction might seem almost their antithesis, a demand that Navajos retain a separate legal status from the rest of America. But the case was the product of over a decade of debate, in the Navajo Nation and in Indian country as a whole, about the best way for American Indians to achieve equality and respect. The Williamses' victory was a product of the emerging consensus among Native people that self-

1. 358 U.S. 1 (1958).

2. 358 U.S. 217 (1959).

governing tribes had to be part of the answer. This Article reveals the crucial and complex role of Indian choices and actions in a foundational case in federal Indian law, and helps shed new light on debates about the status of Indian people today.

*Williams v. Lee* has been described as the first case in the modern era of federal Indian law.<sup>3</sup> It laid a legal foundation for the emerging tribal self-determination movement and created a core precedent for subsequent cases rebuffing state jurisdiction and protecting the integrity of tribal legal institutions.<sup>4</sup> When current tribal advocates bemoan the modern Supreme Court's departures from precedent, *Williams* is one of the cases to which they look.<sup>5</sup> But in the half century since it was decided, no one has written a history of the case.<sup>6</sup>

*Williams* is typically understood in terms of two common narratives in Indian law and policy. According to the first narrative, the case vindicates a timeless and unquestioning struggle by Native people for sovereignty. American Indians, in this narrative, have never considered whether continued separate status is the best course for their interests, but almost instinctually sought to maintain the "measured separatism"<sup>7</sup> that federal Indian law provides. The second narrative considers *Williams* to be an anomalous outlier of the Termination Policy that defined federal Indian law from the 1940s to the 1960s. This policy, aimed at ending the separate status of tribes and extending state jurisdiction over their lands, is generally seen as wholly anti-Indian and contrary to Indian wishes. How, in this period, could the Court have produced such a strong affirmation of tribal sovereignty?

The history recounted here, based on interviews with the still-living participants in the case and examination of congressional records, Navajo council minutes, and Supreme Court transcripts, records, and notes, reveals a complexity that challenges both narratives. This history shows both the era and the case itself to be the product of consensus about the need for Indian equality and equal opportunity in the twentieth century and also of debate inside and outside Indian country about what that equality would mean. It makes concrete the ways in which the state court action struck at the heart of the Navajo economy and culture, and why the *Williams* family fought so hard in this case. Finally, the history of *Williams* shows the ways in which the decision and the self-determination movement that followed it were the

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3. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 1–3 (1987).

4. See *infra* Part V.

5. See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1589–90 (1996).

6. One partial exception is a forthcoming paper by Dewi I. Ball, which focuses on the Justices' limited papers regarding the case. Dewi Ioan Ball, *Williams v. Lee (1959)—50 years later: A Re-assessment of One of the Most Important cases in the Modern-era of Federal Indian Law*, 2010 MICH. ST. L. REV. (forthcoming 2010), available at [http://works.bepress.com/dewi\\_ball/1/](http://works.bepress.com/dewi_ball/1/).

7. See WILKINSON, *supra* note 3, at 14.

product of a deliberate choice to insist that respect for tribal status was necessary to ensure equal treatment and dignity in the modern era.

*Williams* and the debates leading to it emerged from a unique moment in time. For over a century, federal Indian policy had revolved around varying strategies for acquiring tribal land, ending tribal authority, and assimilating Indian people. In the 1930s and early 1940s, however, the Roosevelt Administration briefly embarked on an attempt to strengthen tribal governments. This effort reversed after World War II. Congress moved to withdraw responsibility for a number of Indian tribes, along with its recognition of their special legal status; attempted to extend state jurisdiction over many more tribes; and ultimately sought to assimilate all Indians into the broader polity. Although the period is now called the Termination Era, at the time it was described not as "termination" but as "emancipation,"<sup>8</sup> something demanded by the inherent equality of Indian people, particularly in light of their celebrated service in the war.

There are good reasons to question whether some of these calls for Indian equality were anything more than self-serving rhetoric.<sup>9</sup> But termination measures were initially supported by a number of Indians and tribal leaders.<sup>10</sup> Veterans and defense-industry workers returned home to desperate poverty on reservations that seemed crushed more than ever by paternalistic federal bureaucracies. At least initially, many Native people wondered whether doing away with special tribal status altogether might be the only way to achieve dignity and a decent standard of living.

These tensions were fully present, even exaggerated, for the Navajo people.<sup>11</sup> In poverty and isolation as well as in military participation and pride, the Navajos equaled or surpassed any tribe in the country. Perhaps more than most tribes, the Navajo Nation had chafed under Bureau of Indian Affairs ("BIA") domination during the New Deal era. In the 1940s, moreover, Navajos were justifiably dubious that the tribal council and courts were meaningful representatives of self-government—both had been initially created by the federal government as a means of achieving federal ends, and both were still heavily influenced by federal agents.<sup>12</sup> It is perhaps understandable, therefore, that in 1949 the Navajo Tribal Council actually voted to support a federal bill that would have extended state jurisdiction over the reservation, with the bill's proponents insisting that state jurisdic-

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8. See, e.g., William McK. Chapman, *Where Now for the Navajos? Agitation to remove government trusteeship from Indian holdings alarms this unprepared tribe and its friends*, LOOK, Sept. 22, 1953, at 36.

9. Senator McCarran of Nevada, for example, who condemned federal Indian policy as lawful discrimination, was a longtime advocate of the claims of white ranchers to Pyramid Lake Paiute water and land, goals that termination would forward. DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960*, at 51 (1986).

10. See *infra* Part II.

11. See *infra* Section III.A.

12. See *infra* notes 163–164, 244–245.

tion was the best way to achieve full citizenship and equal dignity with other Americans.<sup>13</sup>

More surprising is that after the president vetoed the bill, the tribe began a process of tribal institution-building designed to strengthen the tribe against future assaults on its jurisdiction.<sup>14</sup> When *Williams* first arose in 1952, the council had no doubt that the tribe should assist the family as part of this battle.<sup>15</sup> As the case was being litigated, the council was devoting more and more tribal funds to its legal system and increasingly dictating the terms under which that system served.<sup>16</sup> In 1959, the year the Supreme Court awarded victory to Paul and Lorena Williams, the tribe formally took control of its courts from the federal government.<sup>17</sup>

Also concealed by the Court's opinion are the reasons why *Williams* struck at the heart of Navajo concerns about outside control. The central fact for the Williams family, and the chief concern of ordinary Navajos, is not mentioned in the decision: on filing the suit, Mr. Lee had part of their sheep herd seized as security against the eventual judgment.<sup>18</sup> Sheep were the economic mainstay of the Williams family and of most ordinary Navajos.<sup>19</sup> They were deeply connected to Navajo culture and domestic relations.<sup>20</sup> When the Apache County Sheriff took the sheep, it became a powerful symbol of why tribal institutions were necessary to protect the choices of the Navajo people about how to live their lives.<sup>21</sup>

The case was far less important to the Supreme Court Justices.<sup>22</sup> Much of the oral argument concerned whether the case involved personal or subject matter jurisdiction, a question to which neither the Court nor the attorneys had a good answer.<sup>23</sup> The Justices appeared surprised to learn that the Navajo tribe even had its own courts, and most had few suggestions as to the ultimate opinion.<sup>24</sup> But Justice Black, surprisingly, perceived a link between *Williams* and *Brown v. Board of Education*,<sup>25</sup> and wrote an opinion that strongly affirmed not only tribal rights but also the prerogative of the federal government to protect those rights against state intrusion.<sup>26</sup>

13. See *infra* Section III.B.

14. See *infra* Section III.C.

15. See *infra* note 329 and accompanying text.

16. See *infra* Section III.C.

17. See *infra* note 257 and accompanying text.

18. See *infra* notes 306–309, 321–329 and accompanying text.

19. See *infra* notes 318–320 and accompanying text.

20. See *infra* notes 318–320 and accompanying text.

21. See *infra* notes 321–322, 325–328 and accompanying text.

22. See *infra* notes 400–402, 433–434 and accompanying text.

23. See *infra* notes 420–425 and accompanying text.

24. See *infra* notes 429–431, 433–434 and accompanying text.

25. 347 U.S. 483 (1954).

26. See *Williams v. Lee*, 358 U.S. 217 (1959) (Black, J.); see also *infra* notes 434–440, 465–468 and accompanying text.

Although *Williams* helped create a legal foundation for tribal self-determination, its precedent has been decimated by recent cases, and tribal self-determination itself is again under attack as inconsistent with fairness and equality.<sup>27</sup> The history of *Williams* helps illustrate why this attack is misguided. Just as indigenous peoples successfully argued in securing ratification of the United Nations ("UN") Declaration on the Rights of Indigenous Peoples,<sup>28</sup> recognition of tribal rights does not reject Indian equality, but insists that meaningful equality must be achieved through recognition of Indian peoples' political status as well.

Part I is a brief note regarding the complexity of claims to equality and the ways in which equality claims may be made on both sides of contests regarding tribal rights. Part II provides the broader historical context of *Williams* within the debates over Indian policy in the postwar years. Part III discusses the way in which these debates extended to the Navajo Nation, the reasons for the Navajo Council's initial acceptance of state jurisdiction, and its eventual turn toward institutional development and independence. Part IV turns to the case itself, its impact on the Williams family, the Navajo Nation's involvement in the case, and the arguments made in the Supreme Court. Part V discusses the influence and ultimate emasculation of *Williams* by the Supreme Court, and how that process ties into mistaken concerns about equality and Indian law.

## I. EQUALITIES

It is easy to reject a characterization of the *Williams* debate as being about equality at all. Both the decision and the self-determination period that followed it might instead be seen as the sacrifice of equality for something else, whether one describes it positively as "sovereignty" or derisively as "special rights." But describing the debate swirling around *Williams* in these terms would distort the ways in which the Native participants themselves understood their claims. Words like "sovereignty" appear hardly at all in this debate, and even then largely in the mouths of non-Indian attorneys; instead, Native claims were discussed in terms of equality, democracy, freedom, and consent.<sup>29</sup> More fundamentally, calling these claims a rejection of equality relies on an assumption that equality can be reduced to identical treatment of all, and overlooks the deep claims to equality at the heart of demands for self-determination. Without attempting to be a full theoretical exegesis, this Part briefly explains this claim.<sup>30</sup>

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27. See *infra* Part V.

28. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (affirming that indigenous peoples are equal in dignity and rights to all other peoples and have a right to self-determination).

29. See *infra* text accompanying notes 107–108, 125, 136.

30. For an extended elaboration of the concept of equality in tribal claims, see Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311, 1350–66 (1993). More recently, Ninth Circuit judge and federal Indian law expert William Canby



As Douglas Rae trenchantly points out, the idea of “equality” is almost meaningless on its own: there are many equalities, and they are often in conflict.<sup>31</sup> This is necessarily the case so long as individuals have different histories, tastes, needs, endowments, or abilities.<sup>32</sup> Therefore the choice in modern debates is often not “‘Whether equality?’ but ‘Which equality?’”<sup>33</sup>

The apparently simple and almost universally embraced concept of equal opportunity is a famous iteration of this debate, one in which the conflict is between the equality of means and the equality of prospects: are individuals to be afforded equal means to achieve the same ends; or are they to be afforded an equal chance of achieving those ends?<sup>34</sup> In a world in which individuals come to the table with different initial assets and abilities, affording one necessarily means denying the other.<sup>35</sup> Despite the passion of advocates on either side of this conflict, all would reject identical allocation of either means or prospects as ridiculous. Not even the most fervent advocate of equality of means, for example, would argue that the child who is bilingual in Mandarin and English and the child who speaks only English should be taught Mandarin in the same way; no serious advocate of equality of prospects would suggest that the president of the United States should be selected by lottery.

The choice between equalities becomes more significant when differences are the product of membership in groups with different histories and different political and social standings. Prohibitions on holding government activities on the Sabbath are less meaningful if the Sabbath of your religion is different from the day held sacred by those who control the calendar.<sup>36</sup> An equal right to choose to go to school with members of your own race means something very different depending on which race dominates the institutions that make school-funding decisions and the ranks of social and economic privilege.<sup>37</sup> More blatantly, a law that provides equal voting rights to the illiterate if their grandfathers voted results in inequality if certain groups were denied the vote in generations past.<sup>38</sup>

Equality among entities with distinct political status is a particular form of group equality. Here, there is wide agreement that equality in treatment of the individual must be sacrificed for the sake of equal respect for the

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also described contemporary tribal legal claims as claims to equality. William N. Canby, *The Concept of Equality in Indian Law*, 85 WASH. L. REV. 13, 15–16 (2010).

31. DOUGLAS RAE ET AL., *EQUALITIES* 2 (1981).

32. See MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* xi–xii (1983).

33. RAE ET AL., *supra* note 31, at 19.

34. See *id.* at 64–66.

35. See *id.* at 68–69.

36. See *Stansbury v. Marks*, 2 U.S. (2 Dall.) 213 (1793) (holding that a Jewish person could be fined for refusing to appear at jury duty on Saturday).

37. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

38. See *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating such a law because of its effect of disenfranchising former slaves and their descendants).

political group with which the individual is affiliated. Thus, few would argue that Germans resident in Germany should be equally subject to U.S. laws as U.S. citizens, or that French resident in the United States should be equally subject to a U.S. draft; such equalities are rejected in favor of giving the citizens of each country an equal right to govern themselves. Which groups are entitled to this form of reciprocal respect is a contested question, as many countries and peoples have been denied self-governance on the grounds of race, religion, or culture. But that ideas of equality underlie these rights has been recognized since Franciscus di Victoria first laid the foundations for modern international and Indian law.<sup>39</sup> The founders of the American Revolution used claims of equality to justify their revolt against the British;<sup>40</sup> the UN embraced equality as a basis for self-determination in the 2007 Declaration on Indigenous People's Rights;<sup>41</sup> and foundational liberal theorists recognize and defend equality as a basis for international relations.<sup>42</sup>

The quest for a measure of equality in self-governance rights has defined indigenous people's struggle for hundreds of years.<sup>43</sup> This struggle is of course combined with demands for equalities less distinct to political entities: rights to freedom from discrimination,<sup>44</sup> for example; rights to worship and live in one's own way;<sup>45</sup> and, centrally, rights to possess and control

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39. See FRANCISCUS DE VICTORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* (1557), reprinted in *THE CLASSICS OF INTERNATIONAL LAW* 7, 139 (Ernest Nys ed., John Pawley Bate trans., 1917) (arguing that discovery of the Indians' lands alone did not confer title on the Spanish "any more than if it had been they who had discovered us"). In general, much of what made de Victoria's lectures on Indian rights so influential outside their particular subject was his effort to lay down neutral rules to equally govern peoples of different political and religious allegiances. See *id.* at 129-149 (elaborating why neither lack of Christianity nor the word of the Pope or Spanish monarch could authorize violation of indigenous property and political rights).

40. See *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (declaring that "all Men are created equal" as a justification for American formation of an independent country).

41. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 28, at 1 (affirming that "indigenous peoples are equal to all other peoples" and have a right to self-determination).

42. See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* 37, 62 (1999) (affirming the right to mutual respect and equal treatment between peoples). The UN Charter rests on this right, declaring in Article 1 that one of its fundamental purposes is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U.N. Charter art. 1, para. 2.

43. See Canby, *supra* note 30, at 13 ("[N]othing is more important to the contemporary tribal Indian than . . . an honoring of tribal government at least equally with, say, state government."); Macklem, *supra* note 30, at 1312 (asserting that Indian tribes "yearn to be recognized and respected as equals in the community of nations").

44. See, e.g., Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167 *passim* (1991) (discussing protests against limitations on rights to vote).

45. Petaleshoro, Address to President James Monroe in Washington, D.C. (Feb. 4, 1822), in *GREAT SPEECHES BY NATIVE AMERICANS* 75, 75-77 (Bob Blaisdell ed. 2000) (asking for the right to continue to live and worship in their own manner); Red Jacket (Sagoyewatha), Address in Answer to Missionary Cram (1805), in *GREAT SPEECHES BY NATIVE AMERICANS*, *supra*, at 41, 42 ("Brother, we do not wish to destroy your religion or take it from you; we only want to enjoy our own.").

one's property.<sup>46</sup> But both Native individuals and their tribes have argued (with much historical evidence to support them) that these more classically individual rights are often best realized if their groups are accorded self-governance. Indeed, assertions of the individual rights of American Indians have often been the guise for denying their communities and their members the very cultural, religious, property, and self-governance rights which equality might otherwise seem to demand.<sup>47</sup>

This is not to say that self-governance is the only or most appropriate form of equality for Native people. As the next section discusses, Native people themselves debated whether giving up a tribal existence in favor of assimilation might be the best way to achieve goals that all agreed were necessary, such as education and freedom from poverty. But after considering, and even living through, the alternatives, Indian communities unified behind continued self-governance as a necessary part of respecting themselves as equal, rights-bearing individuals and furthering their quest to improve their lives.<sup>48</sup> If we agree that a measure of choice and consent are elements of the equality our society chooses to protect, then this considered choice must be a relevant factor in debates over Indian status.

## II. CONTESTS OVER INDIAN EQUALITY IN THE POSTWAR YEARS

The 1940s and 1950s saw consensus about the need for, but contest regarding the meaning of, Indian equality. Despite debate whether equality meant ending the special status of tribal members or respecting tribal autonomy, the former idea came to dominate federal Indian policy, leading to what is now known as the Termination Era. And although termination is now seen as misguided and paternalistic at best, and hypocritical and self-serving at worst, many tribal leaders and individuals initially supported termination's core elements. By the mid-1950s, however, Indian opinion had almost uniformly repudiated termination. This Part describes this progression.

By the twentieth century, American Indians had experienced centuries of efforts to separate them from their tribes, their cultures, and their lands.

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46. See, e.g., 2 AM. ST. PAPERS INDIAN AFF. 571 (Dec. 11, 1824) ("[W]e feel an affection for the land in which we were born; we wish our bones to rest by the side of our fathers. . . . [W]e must positively decline the proposal of a removal beyond the Mississippi, or the sale of any more of our territory.").

47. See, e.g., FIXICO, *supra* note 9, at 51 (describing Senator McCarran's efforts to remove the Indian Commerce Clause from the Constitution as a means to end the enslavement of the Indian, while McCarran was working to have Paiute lands transferred to white ranchers); Henry L. Dawes, *Solving the Indian Problem*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900, at 27, 29-30 (Francis Paul Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS] (stating that policies of the forcible allotment of land away from the Indians were necessary to "treat [the Indian] as an individual" and "lift him up into citizenship and manhood"); Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in AMERICANIZING THE AMERICAN INDIANS, *supra*, at 260, 260-61 (arguing that a coercive system of boarding schools designed to "kill[] the Indian" in the race was necessary for system of "association, equality, amalgamation").

48. See *infra* Part V.

Anglo-American governments had acquired all but a small fraction of Indian lands,<sup>49</sup> weakened or destroyed traditional governance systems,<sup>50</sup> and undermined families by removing children to boarding schools that sought to turn children against their traditional languages and lifestyles.<sup>51</sup>

The Indian New Deal period of the 1930s and early 1940s saw a brief break from this trajectory, as federal policymakers recognized that past efforts had only impoverished the Indians and had left them ever more under arbitrary state and local control.<sup>52</sup> But both the mechanics of the Indian New Deal and the political backlash against it undermined its ability to make positive change in Indian lives.<sup>53</sup> By the 1940s, Indian people were desperately poor and were saddled with federally dominated tribal governments.<sup>54</sup> For generations, moreover, they had been the targets of messages that it was Indian culture, and not American colonialism, that created this situation.<sup>55</sup> While both Indians and their tribes articulated their own interests and messages, they had few attractive choices for improving their lives.

World War II had a powerful impact in this context. Indian people had served in the war in great numbers, with perhaps a greater participation rate than any other ethnic group in the United States.<sup>56</sup> While some Indians resisted the draft, arguing that the U.S. citizenship involuntarily thrust upon them was invalid,<sup>57</sup> most enlisted voluntarily, even enthusiastically.<sup>58</sup> Unlike African-Americans, Indians served in integrated units,<sup>59</sup> and their contributions were celebrated by military commanders, the BIA, and the national press.<sup>60</sup> The praise heaped upon Indian soldiers often depended on savage warrior stereotypes: commentators claimed, for example, that “[a] red man

49. See FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.01, at 6 (Neil Jessup Newton et al. eds., LexisNexis rev. ed. 2005) [hereinafter 2005 COHEN].

50. ROBERT T. ANDERSON, BETHANY BERGER, PHILIP FRICKEY & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY 103–05 (2d ed. 2010); STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 56–58, 88–89 (1988).

51. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 50, at 126–28.

52. *Id.* at 130–36.

53. *Id.* at 140–42.

54. See *infra* text accompanying notes 73–74, 153–155, 159–164.

55. In the Navajo Nation, for example, a sign at the entrance to the Ganado Mission School read, “Tradition is the Enemy of Progress.” PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJO 201 (2002).

56. ALISON R. BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 43 (1991) (describing a claim by the *New York Times* that Indian service “exceed[ed] the percentage participation by the male population as a whole . . .”).

57. See, e.g., *Ex parte Green*, 123 F.2d 862 (2d Cir. 1941) (rejecting challenge by an Onondaga man that the treaty prevented his draft); BERNSTEIN, *supra* note 56, at 27–36 (discussing Papago, Hopi, Zuni, and Iroquois resistance to the draft).

58. BERNSTEIN, *supra* note 56, at 42.

59. *Id.*

60. See, e.g., *American Indian Downs 2 Nazis*, N.Y. TIMES, Apr. 8, 1944, at 6 (reporting on “Hiawatha Nohawk, full-blooded American Indian flier”); *Indian Chief Leaps Ashore ‘To Return Columbus Visit’*, N.Y. TIMES, Sept. 16, 1943, at 5; *Indians Honor M’Arthur*, N.Y. TIMES, Feb. 14, 1943, at 32.

will risk his life for a white as dauntlessly as his ancestor lifted a paleface's scalp," that Indians "can smell a snake yards away," and that they benefited from a natural "enthusiasm for fighting."<sup>61</sup> But both their actual accomplishments in war and the popular appeal of having the first Americans fight on the American side generated a new sense of the capacity of Indian people and of American obligations to them.<sup>62</sup>

American engagement with international economic development and the ideological battle with Russia also informed federal Indian policy after the war.<sup>63</sup> Opponents of federal termination measures argued that respect for Indian choices and rights was part of the respect for minority groups necessary to win the struggle against communism.<sup>64</sup> Proponents used the same arguments to advocate for ending the special legal status of Indians, and condemned the previous administration's support for tribal governance as unmitigated socialism.<sup>65</sup>

For Native people as well, the postwar period was one of new activism in achieving equality. Returning veterans and defense-industry workers came home with more confidence in their ability to compete with non-Indians. At the same time, federal support for the tribal role during the Indian New Deal had energized tribal leaders in their negotiations with the federal government. Moreover, in its waning years, the New Deal administration had amplified the power of these leaders by facilitating the creation of the National Congress of American Indians ("NCAI") in 1944, the first institution representing tribes from across the country.<sup>66</sup> These developments left American Indians increasingly frustrated with the poverty still existing on their reservations and with federal paternalism and control over Indian choices.

Changes in federal institutions governing Indian affairs affected Native perceptions as well. The BIA had lost significant funding during the war even as other nonwar funding increased.<sup>67</sup> Funds for health care, education, employment, and economic development all began to dry up.<sup>68</sup> The

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61. BERNSTEIN, *supra* note 56, at 45, 54–55 (internal quotation marks omitted).

62. See, e.g., H.R. REP. NO. 78-2091, at 14 (1944) (stating that those who had fought for Uncle Sam should not be denied freedom on reservations at home).

63. See PAUL C. ROSIER, *SERVING THEIR COUNTRY: AMERICAN INDIAN POLITICS AND PATRIOTISM IN THE TWENTIETH CENTURY* 108–160 (2009). For extended treatment of the ways foreign policy and the Cold War impacted federal policy toward African Americans and civil rights, see CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR CIVIL RIGHTS: 1944–1955* (2003), and MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000).

64. See, e.g., Eleanor Roosevelt, Op-Ed., *My Day*, Oct. 5, 1949, available at [http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?\\_y=1949&\\_f=md001402](http://www.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1949&_f=md001402); ROSIER, *supra* note 63, at 158.

65. ROSIER, *supra* note 63, at 132.

66. KENNETH R. PHILP, *TERMINATION REVISITED: AMERICAN INDIANS ON THE TRAIL TO SELF-DETERMINATION, 1933–1953*, at 13–15 (1999).

67. 2 FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 1004–05* (1984).

68. *Id.*

BIA—never the most efficient of agencies—was even less able to offer meaningful assistance, and was even more than ever a source of frustrating red tape.<sup>69</sup> For many Native people, a continued relationship with the federal government seemed to offer little and take much.

The Indian “emancipation” policy was the result.<sup>70</sup> Beginning in the 1940s, Congress and the executive came to agree that equality for American Indians depended on freeing them from federal supervision. The seeds of this policy were planted as early as December 1944 when the House released a special report, “An Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Law and Regulations Affecting the American Indian.”<sup>71</sup> The report sought to address the factors that had slowed “the progress of the Indian toward the goal which this committee believes is rightfully his—to take his place in the white man’s community on the white man’s level and with the white man’s opportunity and security status.”<sup>72</sup> Invoking Indian military service, the report demanded: “Will the Indian who has recently doffed the uniform of Uncle Sam be willing to don the blanket of his forebears? This committee doubts that he will. This committee most vehemently denies that he should.”<sup>73</sup>

The report condemned many of the inequities most resented by Indian people, including the denial of the vote to Indians in several states and the pervasive federal control of tribal action.<sup>74</sup> It decried the “indescribably bad” living conditions on reservations and their impact on American claims to bring freedom and opportunity to foreign lands.<sup>75</sup> But it also endorsed ideas that would be core to the termination policy, such as transferring federal responsibilities to states and ending tax restrictions on reservation lands of Indians who were deemed ready for “full citizenship.”<sup>76</sup> Its discussion of education, moreover, suggested ending the distinct political and cultural status of Indians altogether: “The goal of Indian education should be to make the Indian child a better American rather than to equip him simply to be a better Indian” and should cease “perpetuating the Indian as a special-status individual rather than preparing him for independent citizenship.”<sup>77</sup>

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69. See, e.g., H.R. REP. NO. 78-2091, at 3 (1944) (reporting on the “charges, heard on almost every reservation, that the Indian Service is tied down by red tape and that, in particular, too many matters must be referred for decision to the central office in Chicago, or to the Secretary of the Interior in Washington”).

70. Felix S. Cohen, *Breaking Faith with Our First Americans*, INDIAN TRUTH, Mar.–Apr. 1948, at 1, 7 (“‘Emancipating the Indian’ has become the catchword . . .”).

71. H.R. REP. NO. 78-2091.

72. *Id.* at 2.

73. *Id.* at 14. Interestingly, one of the four members of the committee was Antonio Fernandez, *id.* at 19, the New Mexico congressman who would later propose extending state jurisdiction over the Navajo Reservation. See *infra* Section III.B.

74. H.R. REP. NO. 78-2091, at 3–7, 15–16.

75. *Id.* at 12.

76. See *id.* at 15–16.

77. *Id.* at 9.

Such arguments recalled the nineteenth century boarding schools designed to “[k]ill the Indian in him, and save the man.”<sup>78</sup> The report and its rhetoric captured the core beliefs behind termination.

Many termination measures were taken at the request of Native groups or with the intent of correcting inequalities. In 1946, for example, Congress enacted the Indian Claims Commission Act<sup>79</sup> in response to a central demand of the newly formed NCAI.<sup>80</sup> Prior to the act, tribes and Indians were excluded from the sovereign immunity waiver of the Tucker Act, and therefore had no ability to bring claims against the United States without the passage of a special jurisdictional act.<sup>81</sup> In 1953, Congress finally repealed federal laws prohibiting Indians from purchasing alcohol<sup>82</sup> and guns.<sup>83</sup> In 1954, Congress transferred the Indian Health Service from the Department of the Interior to the Public Health Service<sup>84</sup> to ensure that medical care for Indians would meet the standards of care provided to other Americans.<sup>85</sup>

Even from the beginning, however, some federal actions cast doubt on governmental willingness to respect Indian equality and choices in the face of conflicting demands. The aggressive public works projects of the postwar years, for example, took vast swaths of Indian land against the will or treaty rights of Native peoples.<sup>86</sup> Dillon Myer, commissioner of Indian Affairs between 1950 and 1953, generated even more fervent protests against heavy-handed government action.<sup>87</sup> He created a firestorm beginning in 1950 by issuing new restrictions on tribal contracts with attorneys and by rejecting contracts with some of the attorneys that were most passionate in opposing federal policies.<sup>88</sup> Myer went further the next year, mandating commissioner approval before a tribe could use its own tribal funds to send a delegation to Washington,<sup>89</sup> an effective means to quiet dissenting voices. His critics, noting that he had served as director of Japanese internment during the war, said he was trying to imprison the Indians as well.

Indian people, tribes, and their advocates were uniform in opposing federal land grabs and efforts to stifle tribal political and legal advocacy. Paiute opponents to the attorney contract restrictions declared them an attempt to

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78. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 47, at 261.

79. Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049.

80. See PHILP, *supra* note 66, at 20–28.

81. 2005 COHEN, *supra* note 49, at 443.

82. Act of Aug. 15, 1953, ch. 502, § 2, 67 Stat. 586.

83. *Indian Bills Hailed*, N.Y. TIMES, Aug. 7, 1953, at A5.

84. Act of Aug. 5, 1954, ch. 658, § 1, 68 Stat. 674.

85. 2005 COHEN, *supra* note 49, at 1377–78.

86. See, e.g., THOMAS CLARKIN, *FEDERAL INDIAN POLICY IN THE KENNEDY AND JOHNSON ADMINISTRATIONS, 1961–1969*, at 50–54 (2001).

87. See PHILP, *supra* note 66, at 87–88, 99, 130–39.

88. See *id.* at 111–13.

89. See *id.* at 117.

undermine "fundamental rights of political liberty and local self-government,"<sup>90</sup> while a San Ildefonso Pueblo man who had worked on the wartime atomic bomb project declared that if Indians "could be trusted to work on the war's greatest secret, they were trustworthy enough to be allowed a greater measure of self-rule."<sup>91</sup> Equality-based arguments were also used against a measure taking lands claimed by Alaska Natives, condemning the action as "enslavement"<sup>92</sup> and a product of the "feeling that Indians are not quite human, and certainly not fit to own their own homes, cut their own trees, or mine their own lands."<sup>93</sup>

At least initially, however, tribes and Indian people did not uniformly oppose general termination policies. Leading Native Americans wrote editorials advocating the end of the special federal-tribal relationship, extension of state jurisdiction over reservations, and removal of trust status from Indian land.<sup>94</sup> Even the NCAI was initially conflicted about termination measures. By the mid-1950s the NCAI would become one of the leading voices against the Termination Policy.<sup>95</sup> During the 1940s, however, some NCAI representatives, chafing under the bureaucratic domination of the BIA and working to enable the members of its constituent tribes to enjoy the general American standard of living, believed that termination and the distribution of tribal property to individuals was the best way to go.<sup>96</sup> Napoleon Bonaparte Johnson, the first president of NCAI, wrote Representative Fernandez a note praising him for his work in inserting the state jurisdiction amendment into the Navajo-Hopi bill.<sup>97</sup> In January 1953, shortly before Congress would adopt termination as its official policy,<sup>98</sup> NCAI's member tribes lobbied for the president of the Interstate Indian Council, which advocated "the earliest possible withdrawal of the Federal Government from Indian management in favor of the states," to become the next commissioner

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90. *Id.* at 119 (internal quotation marks omitted).

91. Anthony Leviero, *Indian War Whoop Marks Hearings: Sessions Opened By Chapman*, N.Y. TIMES, Jan. 3, 1952, at 9.

92. See Kimmis Hendrick, *American Indians Protest 'Enslavement' Under Paternalistic U.S. Rule: Bureaucracy Hit; Near-Famine Cited*, CHRISTIAN SCI. MONITOR, Dec. 3, 1947, § 2, at 1.

93. Cohen, *supra* note 70, at 6.

94. See, e.g., Will Rogers, Jr., *Starvation without Representation*, LOOK, Feb. 15, 1948, at 36, 42 ("As rapidly as possible, Indian tribes should be released from wardship; and as rapidly as possible, they should be turned over to state jurisdiction."); Hendrick, *supra* note 92 (discussing Tsianina Redfeather's advocacy for measures to prepare Indians to be "free citizens," including liquidation of the BIA and creating councils for each reservation composed of equal parts white and Indian members).

95. See CLARKIN, *supra* note 86, at 10–11 (discussing the NCAI's important role in fighting termination).

96. See PHILP, *supra* note 66, at 86–87, 171.

97. Letter from N.B. Johnson, President, Nat'l Cong. of Am. Indians, to Antonio M. Fernandez, Representative, U.S. House of Representatives (August 15, 1949) (on file with the National Museum of the American Indian in the NCAI Archives, Series 6, Box 113, Folder 117).

98. H.R. Con. Res. 108, 83d Cong. (1953) (enacted).



of Indian Affairs.<sup>99</sup> It was only when faced with the reality of termination, in which federal policy would be made without regard to Native voices, that tribes and the NCAI unified around continued distinctive tribal status.

Congressional hearings regarding Public Law 280, which extended state jurisdiction over reservation Indians, provide a nice lens on the diversity of opinions in Indian country during this period and the way that both sides used the rhetoric of equality. The House Subcommittee on Interior and Insular Affairs held hearings in 1952 and 1953 on a bill that initially only concerned California, but was intended to serve as a prototype for other states.<sup>100</sup> Subcommittee Chair Wesley D'Ewart opened the February 1952 hearing by reading complaints by non-Indians about drunken lawlessness on reservations and then stating, "Throughout my years in Congress I have worked toward placing our Indians on an equal basis with the white man. I firmly believe the Indians should not be discriminated against."<sup>101</sup> The attorney for the Interior Department next opposed state jurisdiction, arguing that Indians would face discrimination in unfamiliar state courts.<sup>102</sup> Similarly, Thomas Yallup of the Yakima Nation testified that his tribe opposed state jurisdiction because of the prejudice many still bore against Indians, and because it felt that federal law and order, along with the Yakimas' own tribal customs, laws, and traditions, were working for the Yakima.<sup>103</sup>

Paul Willis, in contrast, read a statement on behalf of some forty bands of California Indians, urging Congress to "either approve this bill and thus recognize California Indians as human beings entitled to equality under the law, or . . . perpetuate and make permanent the iron rule of the Indian Bureau."<sup>104</sup> There were pressing reasons to avoid that "iron rule."<sup>105</sup> A bill had recently been introduced to authorize BIA employees to carry arms, enter and search Indian homes, and make warrantless arrests to enforce BIA regulations.<sup>106</sup> This expansion of the use of force beyond trained law enforcement

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99. Gladwin Hill, *Indians Are Split on Role in Nation: Speculation on Choice of New Bureau Head Stirs West*, N.Y. TIMES, Jan. 11, 1953, at 87.

100. See *State Legal Jurisdiction in Indian Country: Hearings on H.R. 459, H.R. 3235, and H.R. 3624 Before the H. Subcomm. on Indian Affairs of the Interior and Insular Affairs Comm.*, 82d Cong. (1952) [hereinafter *Legal Jurisdiction Hearings*]; *To Amend Title 18, United States Code, Entitled "Crimes and Criminal Procedure," in Certain Respects: Hearing on H.R. 5476, H.R. 6035, H.R. 6036, and H.R. 6695 Before the H. Subcomm. No. 2 of the Comm. on the Judiciary*, 82d Cong. (1952) [hereinafter *1952 Hearings on Title 18*]; House of Representatives, *To Amend Title 18, United States Code, Entitled "Crimes and Criminal Procedure": Hearings on H.R. 1063 Before the H. Subcomm. on Indian Affairs of the Interior and Insular Affairs Comm.*, 82d Cong. (1953) (holding hearings on June 15, 1953, June 19, 1953, and July 15, 1953 to discuss the bill).

101. *Legal Jurisdiction Hearings* (Feb. 28–29, 1952), *supra* note 100, at 5–10 (statement of Wesley A. D'Ewart, H. Rep. from Mont.).

102. See *id.* at 11 (discussing letter from Dale Doty, Assistant Secretary of the Interior).

103. *Id.* at 84.

104. *Id.* at 61, 63.

105. *Id.* at 63.

106. *Legal Jurisdiction Hearings*, *supra* note 100, at 24–28 (June 13, 1952).

officers and beyond enforcement of criminal laws was opposed by all those testifying on behalf of Indians.<sup>107</sup>

Despite these disagreements, the dominant sentiment of Indian tribes and their advocates was that state jurisdiction should not be extended without tribal consent via community referendum. For Robert Yellowtail of the Crow Tribe, this "attempt to force State control of law and order without a word from the Indians themselves . . . gives the lie to all past pretenses of the rights of minority groups to exercise rights of self-determination."<sup>108</sup> Even the Daughters of the American Revolution chimed in, writing that if "laws in general are subject to the will of the people, then every American Indian tribal group is entitled to voice their opinion" on state jurisdiction.<sup>109</sup> With general reassurance that state jurisdiction would not be extended over Indian tribes without their consent,<sup>110</sup> however, tribal attention turned to the search and seizure bill and the repeal of federal liquor restrictions.

Congress unexpectedly violated the demand for meaningful consent in the summer of 1953. The subcommittee had already submitted the California bill to Congress,<sup>111</sup> but had asked Commissioner Myer to recommend other states that could be granted jurisdiction. After Minnesota, Wisconsin, and Oregon expressed willingness to accept jurisdiction, they were all added on.<sup>112</sup> The subcommittee also decided without notice and with little debate to approve a provision allowing any state to assume jurisdiction if it subsequently so chose.<sup>113</sup> Although the American Civil Liberties Union ("ACLU"), NCAI, Association on American Indian Affairs, and tribal representatives all joined in calling for a veto,<sup>114</sup> President Eisenhower signed Public Law 280 on August 15, 1953, describing it as "still another step in granting complete political equality to all Indians in our nation."<sup>115</sup>

Nor was Public Law 280 the only surprise that August. On August 1, Congress had approved House Concurrent Resolution 108, expressing "the

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107. Apparently, it was also roundly condemned in the press. On June 13, 1953, Felix Cohen read portions of editorials from the papers in Louisiana, Indiana, Texas, Mississippi, and New Mexico, referring to the measure variously as a "Gestapo Power," "like something out of Soviet, Russia [sic]," and a "bald-faced attempt by the Indian Bureau to seize dictatorial powers" and deny the "first Americans" a privilege with "deep roots in American civil rights." *1952 Hearings on Title 18*, *supra* note 100, at 25-26 (June 13, 1952).

108. *Legal Jurisdiction Hearings*, *supra* note 100, at 94 (Feb. 28, 1952).

109. *Id.* at 95.

110. *Id.* at 25.

111. 99 CONG. REC. 140 (1953).

112. See *To Amend Title 18, United States Code, Entitled "Crimes and Criminal Procedure": Hearing on H.R. 1063 Before the H. Subcomm. on Indian Affairs of the Interior and Insular Affairs Comm.*, 83d Cong. 2-3, 17 (July 15, 1953).

113. *Id.* at 3-4; see also *In Fairness to the Indian*, N.Y. TIMES, Aug. 12, 1953, at 30 (calling this "no way to pass legislation vitally affecting a minority group").

114. *In Fairness to the Indian*, *supra* note 113, at 30; *New Pleas are Filed for Indian Bill Veto*, N.Y. TIMES, Aug. 11, 1953.

115. Statement by the President Upon Signing Bill Relating to State Jurisdiction Over Cases Arising on Indian Reservations, 1953 PUB. PAPERS 564 (Aug. 15, 1953).

policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States,” and declaring the sense of Congress that all of the Indian tribes within California, Florida, New York, and Texas, along with five other tribes in various states, “should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians.”<sup>116</sup> Although the resolution itself had no independent legal effect and tribes were consulted before termination acts were passed with respect to individual tribes, the manner of consultation only underscored the lack of concern for Indian choices regarding their fate. Some tribes targeted for termination had won large judgments in the Court of Claims; the government threatened to withhold the judgment funds unless they agreed to termination.<sup>117</sup> In other tribes the clear majority of the tribe had objected to termination, but all that was reported was the support of smaller groups of tribal members.<sup>118</sup>

The result has been described as a “major shot in the supratribal arm.”<sup>119</sup> NCAI called an emergency meeting for February 25, 1954, and more than fifty tribes traveled from across the country to participate.<sup>120</sup> Although NCAI’s leaders had debated whether complete federal withdrawal was the best means to achieve Indian liberty and equality in the initial postwar period, they now saw self-determination as an equality right, querying, “Shouldn’t Indians have the same right of self-determination that our government has stated . . . is the inalienable right of peoples in far parts of the world?”<sup>121</sup> By the end of 1954, the NCAI had become such a strong advocate against termination that the House Subcommittee on Indian Affairs tried to dismiss its criticism as that of “professional Indians,” whose “high

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116. H.R. Con. Res. 108, 83d Cong. (1953) (enacted).

117. See, e.g., R. WARREN METCALF, *TERMINATION’S LEGACY: THE DISCARDED INDIANS OF UTAH* 87 (2002) (discussing the threats to Utes regarding the distribution of claims funds); Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 AM. INDIAN L. REV. 143, 160 (1978) (describing threat that the Menominee would not receive a per capita distribution unless they consented to termination); see also *Indians Win Victory—Persuade U.S. to Let Them Use Funds in Trusteeship*, N.Y. TIMES, Mar. 28, 1955, at 21 (describing defeat of attempt to make Fort Berthold Indians consent to termination in order to receive tribal funds).

118. See PHILP, *supra* note 66, at 159–62 (discussing responses by the Klamath Tribe and California Indians); see generally Gladwin Hill, *American Indian Flexes Muscles—Tribal Convention Reveals His Growing Social and Political Awareness*, N.Y. TIMES, Dec. 13, 1959, at 57 (discussing training sessions at NCAI conferences in which delegates were taught that “[w]ith Indians, silence is a way of expressing disapproval or disagreement[, whereas in] the white man’s world . . . if you disagree you should speak up”).

119. CORNELL, *supra* note 50, at 124.

120. See CLARKIN, *supra* note 86, at 10; *Indians Call Protest Meeting*, N.Y. TIMES, Feb. 19, 1954, at 34.

121. ROSIER, *supra* note 63, at 174.

powered propaganda machine" "almost completely drowned out" the voice of the "real Indians."<sup>122</sup>

Over the course of the 1950s, the American press continued to report termination decisions as historic measures freeing the Indians,<sup>123</sup> and their opponents as advocating "preservation of basket-weaving in the face of pauperism."<sup>124</sup> Indian people, however, were ever more unified in their resistance to such measures, seeing the measures not as paths to equality but as dictatorial attempts to acquire their property and forcibly assimilate them.<sup>125</sup> Far from emancipation, they increasingly agreed that termination was its opposite, a violation of "the national principle of majority rule" and of the "sustaining source of strength to Indian democracy."<sup>126</sup> These protests slowed the implementation of termination, and by 1970 led to the self-determination policy that continues today.<sup>127</sup>

### III. NAVAJO DEBATE AND TRANSFORMATION

The transformation of Navajo opinion between the consideration of the Fernandez Amendment and the celebration of *Williams v. Lee* forms a perfect microcosm of the tensions in Indian opinion nationally. Desperately poor and only beginning to have an effective voice in federal policy, many Navajo representatives initially accepted that full integration was the only way to achieve equality in American society. Over the course of the 1940s and 1950s, however, Navajos came to focus on tribal institution-building as the best way to improve living standards and secure meaningful control over their destinies. *Williams v. Lee* became a part of this battle to preserve the independence of tribal institutions. The Court's opinion both reflected the success of these institution-building efforts and laid the groundwork for future tribal self-determination.

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122. *Slash in U.S. Rule of Indians Urged: Group in House Would Strip Bureau of Major Functions, Assign Some to States*, N.Y. TIMES, Oct. 4, 1954, at 29.

123. See, e.g., Austin C. Wehrwein, *Wisconsin Plans an Indian County: Menominee Tribe Would End Its Federal Ties and Develop Reservation*, N.Y. TIMES, Jun. 21, 1959, at 70 (calling termination one of the Menominee tribe's "greatest victories").

124. Gladwin Hill, *Indians Gaining Citizens' Status: Interstate Council Tackles Problems of Shift From Federal 'Wardship'*, N.Y. TIMES, Oct. 9, 1955, at 60; see also *U.S. Reverses Trend, Easing Indian Curbs*, N.Y. TIMES, Aug. 22, 1954, at 63.

125. See, e.g., Donald Janson, *Indians Protest 'Meddling' By U.S.: Oklahoma Pow-Wow Assails the Relocation of Youths*, N.Y. TIMES, Nov. 3, 1957, at 119 (reporting on a unanimous resolution by sixty-two tribes gathered at an NCAI conference against termination policy).

126. Gladwin Hill, *Indian Congress Opens in Arizona: Delegates of On-Reservation Tribes Urged to Increase Political Participation*, N.Y. TIMES, Dec. 8, 1959, at 57.

127. See generally Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564 (July 8, 1970) (statement by President Richard M. Nixon declaring policy of self-determination without termination); CLARKIN, *supra* note 86, at xii, 9-11, 281 (discussing development of self-determination policy under the shadow of termination in the 1960s).

*A. The Navajo Nation in the Wake of World War II*

In the wake of World War II, the Navajo Nation was a stark example of the hardships of Indian life. Spanning portions of Arizona, New Mexico, and Utah, the Navajo reservation was the largest and one of the most isolated reservations, a place where only dirt roads traversed an area the size of West Virginia. Trachoma, tuberculosis, dysentery, and other diseases largely extinguished elsewhere in American society were common on the reservation.<sup>128</sup> Despite treaty promises of education, schools were available for just one quarter of school-age children.<sup>129</sup> Eighty-five percent of the reservation population was illiterate,<sup>130</sup> and the significant majority spoke only Navajo.

The Navajo Nation had also become one of the most visible tribes during the war years. The Navajo government enthusiastically endorsed the war, enacting several resolutions affirming Navajo loyalty, threatening punishment of any “un-American movement,”<sup>131</sup> pledging readiness to serve,<sup>132</sup> and even urging the Navajo people to cut down on traditional gatherings to “conserve food, automobile tires and gasoline for our country.”<sup>133</sup> After most Navajos seeking to enlist were rejected because they didn’t speak English, Navajo Chairman J.C. Morgan protested, “It’s discriminatory . . . Navajos are extremely patriotic and want to serve.”<sup>134</sup> Ultimately the local board created a remedial English training unit to accommodate them.<sup>135</sup> The Navajo language proved an important tool in the war when it was adapted into an unbreakable code, and as many as 400 Navajo Marines were trained as “code talkers” and assigned to units throughout the Pacific.<sup>136</sup>

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128. See, e.g., *Navajo Life Span is Put at 20 Years: U.S. Aide Tells House Unit of Average Tied to Health Hazards on Reservation*, N.Y. TIMES, Mar. 1, 1954, at 27.

129. FRANK WATERS, MASKED GODS: NAVAJO AND PUEBLO CEREMONIALISM 151 (1950).

130. *Proceedings of the Meeting of the Navajo Tribal Council*, 18, 46 (June 8–11, 1949) [hereinafter *Navajo Minutes*]. I consulted copies of the minutes at both the Navajo Nation Records Department in Window Rock, Arizona and the National Archives in Washington, D.C. in Record Group 75, Central classified files 1940–1957 (.054, Tribal Council Minutes).

131. Navajo Tribal Council, Loyalty Pledge to United States, Res. No. CJ-5-40, June 4, 1940, in NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951, at 376 (1952).

132. Navajo Tribal Council, Resolution on Patriotism, Reaffirm Allegiance to United States (Jan. 12, 1942), in NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951, *supra* note 131, at 377.

133. Navajo Tribal Council, Resolution on Patriotism, Conservation of Food (June 25, 1942), in NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951, *supra* note 131, at 379.

134. See BERNSTEIN, *supra* note 56, at 34.

135. *Id.*

136. *Id.* at 48–49. Philip Johnston, a missionaries’ son who had developed the code and supervised the code talker unit, later besieged the BIA and Congress with letters berating the government for failing to live up to its responsibilities to the Navajo. See Letter from Philip Johnston to Henry M. Jackson, Chairman, House Comm. on Indian Affairs (May 12, 1946) (on file with the National Museum of the American Indian in the NCAI Archives, Box 113); Letter from Philip Johnston to Norris Poulson, Representative, U.S. House of Representatives (Nov. 30, 1946) (on file with the National Museum of the American Indian in the NCAI Archives, Box 113); Letter from Philip Johnston to William A. Brophy, Comm’r of Indian Affairs, U.S. Dep’t of the Interior (Sept. 23, 1946) (on file with the National Museum of the American Indian in the NCAI Archives, Box 113).

The soldiers returned with a new sense of confidence in themselves and their abilities, and soon became a significant force in Navajo politics. Sergeant Abner Jackson reported arriving for duty in Scotland speaking only Navajo and a little Spanish; by the time he returned home, he had served on two continents and spoke not only English but French, Italian, and German.<sup>137</sup> Peter MacDonald, who served four terms as Chairman of the Navajo Nation beginning in 1971, frequently told a story of the impact on him when, in boot camp, an illiterate white private asked MacDonald to read a letter for him: "It really changed my attitude. I decided, hey, these guys don't have any secret endowment, as they said they do. They're not any better than I am. I felt very proud."<sup>138</sup>

But increasing confidence in dealing in the white world enhanced segmentation in Navajo society. Navajos who had attended boarding schools and could read, write, and speak English had already organized as the "Returned Students Association" to keep alive the values learned in school. Beginning in the 1930s, they had gained significant representation on the Navajo Tribal Council.<sup>139</sup> Although the non-English-speaking Navajos in tribal government represented a far greater portion of the Navajo population, they often spoke with diffidence about their ability to understand and contribute to council business.<sup>140</sup> Many Navajo veterans were impatient with existing leaders, campaigning for a thorough investigation of the tribal courts, which they claimed were "not in sympathy with the more modern thinking of the more educated members of the Navajo Indian Tribe,"<sup>141</sup> and for the lifting of trust restrictions that prevented them from mortgaging their lands.<sup>142</sup>

The Navajo people had also suffered from federal bureaucracy under the Indian New Deal. Although the New Deal had initially brought valuable Conservation Corps projects and jobs to the Navajo Reservation,<sup>143</sup> the period soon became inalterably associated with the stock reduction policy. When Commissioner Collier and the Indian New Deal reached the Navajo Nation in the 1930s, sheep were at the heart of both Navajo economy and culture. As one Navajo councilmember declared, as the "good old dollar" was the "substance of life" for white people, sheep and goats were the "substance of life" for the Navajos, both a source of prestige and the basis of

137. WATERS, *supra* note 129, at 149.

138. Sandy Tolan, *Showdown at Window Rock*, N.Y. TIMES, Nov. 26, 1989, at SM28.

139. DONALD L. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 38-39 (1976).

140. See, e.g., *Navajo Minutes*, *supra* note 130, at 15 (Jan. 5, 1953) (statement of Tohonníe Nez); *id.* at 169 (Jan. 9, 1953) (statement of Yellowman); see also Allan G. Harper, Area Dir., Bureau of Indian Affairs, Remarks to Navajo Tribal Council 3 (Feb. 25, 1954) [hereinafter Remarks of Allan G. Harper] (transcript available from the NCAI Archives in the National Museum of the American Indian Archive Center) (decrying the cleavage that had opened between the so-called educated and uneducated).

141. Navajo Tribal Council, Resolution on Law and Order, Proposed Study of System (Feb. 25, 1948), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922-1951*, *supra* note 131, at 216.

142. Paul Jones, Guest Ed., *THE AMERINDIAN*, July-Aug. 1956, at 2.

143. PARMAN, *supra* note 139, at 34-35.

survival.<sup>144</sup> Wool and lambs were traded for other goods, and wool was dyed, woven, and sold as much-celebrated Navajo rugs. Sheep were also essential to Navajo family life; children herded sheep under the supervision of the family, part of the increase of the herd was set aside for the children's patrimony on marriage, and the extended family returned to the homestead to join in moving and shearing the herd.<sup>145</sup>

By the 1930s, however, sheep, goats, cattle, and horses had desperately overgrazed the arid Navajo lands.<sup>146</sup> New Deal soil-erosion experts reported to Collier that the land could not sustain the present herds.<sup>147</sup> Beginning in 1933, the BIA began implementing stock reduction across the reservation.<sup>148</sup> Eventually, families were given grazing permits limiting them to a certain number of "sheep units," with animals that caused more erosion—goats, cows, and horses—taking multiple sheep units.<sup>149</sup> Excess stock was to be sold for a fixed amount to government agents. For families who had built their lives and their sense of themselves around their stock, this loss cut to the core. One man told the stock wranglers, "You people are indeed heartless. You have now killed me. You have cut off my arms. You have cut off my legs. You have taken my head off. There is nothing left for me."<sup>150</sup> The man soon fell ill, and died the following spring.<sup>151</sup>

Stock reduction also had a painful economic impact. Although the plan was to cut primarily from the wealthy families with vast herds, such families were politically powerful and were able to successfully pressure those with small herds to reduce stock proportionately.<sup>152</sup> Families who could no longer sustain themselves on their herds became dependent on wage labor, government welfare, and, importantly for *Williams v. Lee*, credit from local trading posts.<sup>153</sup> While wages from defense work made up for the loss during the war, this income disappeared after the war.<sup>154</sup> Hit by harsh droughts and severe blizzards beginning in 1947, Navajos froze and starved.<sup>155</sup> Traders were asked for credit for flour and other supplies that they knew their

144. *Id.* at 55.

145. *Id.* at 66.

146. Some argue, however, that water diversion from the construction of the Hoover Dam was the underlying cause. DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* 85 (rev. ed. 2003).

147. See PARMAN, *supra* note 139, at 37–38.

148. *Id.* at 48–49.

149. See *id.* at 101.

150. PETER NABOKOV, *NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492–2000*, at 330 (Penguin Books, rev. ed. 1999) (1978).

151. *Id.*

152. See PARMAN, *supra* note 139, at 63.

153. See *id.* at 91 (noting that stock reduction created a dependence on wage labor).

154. See Press Release, Office of Indian Affairs, U.S. Dep't of the Interior, Navajo Relief Need Urgent (Oct. 21, 1947).

155. WATERS, *supra* note 129, at 150.

customers would not soon be able to repay. Ralph Evans, a trader from Shiprock, testified before Congress that a woman had come into his trading post asking for a small shawl but had no money to pay for it.<sup>156</sup> Told she could not have it, she began crying; her baby had died that day, and she wanted the shawl for a shroud. "She left with the shawl," Evans said.<sup>157</sup>

The crisis of poverty of the late 1940s brought national attention to the Navajo Nation. Magazines and newspapers across America bemoaned the suffering of the Navajo people. *Life*, *Look*, and *Time* carried lengthy articles and full-page photo spreads showing hungry, sick Navajos in homes without heat, electricity, or running water.<sup>158</sup> Charitable organizations like the Red Cross and the American Friends Service Committee sent supplies and volunteers to provide relief.<sup>159</sup> Congress appropriated millions to alleviate the crisis and began planning a long-term response through the Navajo-Hopi Rehabilitation Act. The Navajo Nation became a national poster child for the failure of the federal Indian policy.

There were also good reasons for Navajo people to associate tribal institutions with federal domination. Tribal police forces and courts had been created with federal encouragement in the nineteenth century to help implement federal policies and prevent Navajos from raiding off-reservation lands.<sup>160</sup> The Navajo Tribal Council itself had been created by the federal government in 1923 to create a single voice for five largely independent sections of the reservation and thereby overcome objections by Northern Navajos to drilling for oil on their land.<sup>161</sup> The council approved each of the stock reductions, in part because of threats that proposed expansions of the Navajo Reservation would not go through without the reductions.<sup>162</sup> Tribal courts and police helped to implement the policy, punishing those who refused to comply with it.<sup>163</sup>

These institutions remained significantly controlled by the federal government. Until the 1950s, the federal superintendent for the Navajo agency of the BIA drafted the tribal council's agenda and even sat on the podium during tribal council meetings alongside the chairman and vice-chairman for

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156. *Rehabilitation of Navajo and Hopi Indians: Hearing on S. 2363 Before the S. Subcomm. of the S. Comm. on Interior and Insular Affairs*, 80th Cong. 262 (1948) [hereinafter *Hearing on Navajo-Hopi Rehabilitation*] (statement of Ralph W. Evans, Shiprock, N.M.).

157. *Id.*

158. WATERS, *supra* note 129, at 151. For an example of these photo spreads, see Rogers, *supra* note 94, at 36-42. See also Kenneth W. Bilby, *Navahos Chained to Reservation By Economic and Social Fetters: Indians' Freedom a Myth*, N.Y. HERALD TRIB., Jan. 6, 1948, at 16.

159. Office Report of Amelia Lindley, Assistant Sec'y, Indian Rights Ass'n (Dec. 31, 1947) (National Museum of the American Indian, NCAI Files, Box 113) (describing a "caravan of trucks" with seventy tons of supplies from the western states).

160. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1112 (2005).

161. See WILKINS, *supra* note 146, at 162-63.

162. See PARMAN, *supra* note 139, at 45-46, 53-54.

163. See Stephen Conn, *Mid-Passage—The Navajo Tribe and its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 333 (1978).



the tribe.<sup>164</sup> In the courts as well, federal Indian agents were often present, reading the federal Code of Indian Offenses to illiterate Navajo judges.<sup>165</sup>

Tribal courts and police were also ineffective in many cases. They were desperately underfunded—Congress rebuffed repeated Navajo pleas for funds to give a living wage to tribal judges and hire sufficient tribal police for their vast reservation.<sup>166</sup> The Navajo Tribal Council had begun putting their own funds into law enforcement in the 1930s,<sup>167</sup> but couldn't satisfy the demands for more police protection. Even worse, the tribe had been told that tribal police could not operate in the checkerboard area to the east of the reservation, which was almost wholly occupied by tribal members but was outside official reservation boundaries.<sup>168</sup> State governments had also refused to fund police for that area, which left its communities without any police enforcement at all.<sup>169</sup>

The Navajo people also faced significant obstacles in achieving individual social and legal equality. Arizona, New Mexico, and Utah, the three states that the Navajo reservation straddled, were the last states to extend the vote to Indians residing on reservations.<sup>170</sup> Although all Indians had been declared federal, and therefore also state, citizens in 1924,<sup>171</sup> each state used the special legal status of Indians to insist that they were not constitutionally entitled to vote. In 1948, in response to a suit by Mohave-Apache veterans, the Arizona Supreme Court finally overturned a previous decision that Indians, as “wards of the federal government,” were “persons under

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164. See Remarks of Allan G. Harper, *supra* note 140, at 2.

165. *Navajo Minutes*, *supra* note 130, at 49 (June 9, 1949) (statement of Norman Littell).

166. See Navajo Tribal Council, Resolution on Law and Order—Salaries of Judges and Policemen (July 1945), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 207 (noting that salaries for Navajo police officers were “so low that a white man, if he were to receive such pay, would actually starve on it in less than three months” and urging the commissioner to approve a higher pay rate); Navajo Tribal Council, Resolution on Law and Order Personnel—Policemen, Salaries of (Feb. 21, 1947), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 215 (noting that Congress had not approved the requested salary increase, and urging the commissioner to make a special effort to obtain it).

167. See Navajo Tribal Council, Resolution on Law and Order—Court Funds Authorized for Station Wagon (July 19, 1937), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 199.

168. See Navajo Minutes, *supra* note 130, at 13 (June 8, 1949); see also Navajo Tribal Council, Resolution on Law and Order—Extend jurisdiction of Tribal Court (Dec. 18, 1945) [hereinafter Tribal Court Jurisdiction], in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 210 (expanding jurisdiction of Court of Indian Offenses in response to federal regulation prohibiting exercise of that jurisdiction over land outside reservation boundaries).

169. See Tribal Court Jurisdiction, *supra* note 168 (“[T]here is a serious law and order problem amongst these Indians because of the lack of authority of the State and Federal governments to act.”).

170. See Wolfley, *supra* note 44, at 184–90 (1991) (discussing history of fights against disenfranchisement).

171. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

guardianship” and thus ineligible to vote.<sup>172</sup> That same year, a federal judge declared invalid a New Mexico law providing that “Indians not taxed” were ineligible to vote,<sup>173</sup> but the state legislature immediately passed a bill to reinstate the restriction. The governor vetoed the bill, but the legislature planned to try again in its next session.<sup>174</sup> And as late as 1956, the Utah Supreme Court held that native people residing on reservations could not vote because they were not “residents” of the state;<sup>175</sup> the Utah legislature only repealed the restriction in 1957 after the United States Supreme Court granted certiorari in the case.<sup>176</sup>

Navajos experienced discrimination in other ways. Arizona and New Mexico vigorously fought federal demands that they provide reservation Indians with support for the blind and disabled and for dependent children under the Social Security Act.<sup>177</sup> Border towns like Gallup, New Mexico were sites of some of the worst racial hostility against Indians, places where Navajos faced exclusion from hotels and eating establishments.<sup>178</sup> Faced with extreme deprivation on their reservations and struggling to secure dignity in off-reservation settings, it is not surprising that when presented with the Fernandez Amendment, some Navajos were initially willing to agree to state jurisdiction in exchange for greater incorporation.

Tribal attorney Norman Littell played an ambiguous role in this debate and the Navajo nation building that followed. Littell was an unlikely advocate of tribal sovereignty. As the assistant attorney general in charge of the Public Lands Division in the 1930s and early 1940s, Littell had primary responsibility for fighting Indian land claims against the United States.<sup>179</sup> In this role, he had terminated Justice Department support for Felix Cohen in writing the *Handbook of Federal Indian Law* when it became clear that the resulting treatise would be a valuable tool for tribes in litigating those land claims.<sup>180</sup> After the 1946 passage of the Indian Claims Commission Act, however, Littell (whom Roosevelt had fired in 1944)<sup>181</sup> used his public lands

172. Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (overturning Porter v. Hall, 271 P. 411 (Ariz. 1928)).

173. See Montoya v. Bolack, 372 P.2d 387, 390 (N.M. 1962) (describing unpublished 1948 order and 1953 repeal of voting restriction).

174. Navajo Minutes, *supra* note 130, at 38 (June 9, 1949).

175. Allen v. Merrell, 305 P.2d 490 (Utah 1956).

176. See Rothfels v. Southworth, 356 P.2d 612, 613 (Utah 1960) (discussing history of repeal).

177. See Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) (discussing the litigation); Navajo Minutes, *supra* note 130, at 59–60 (Oct. 13, 1949) (noting Arizona and New Mexico’s refusal to provide Social Security benefits).

178. See TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 78–79 (1947).

179. See CHRISTIAN W. McMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY 152–53 (2007) (discussing Littell’s representation of the United States against Indian tribes).

180. See *id.*

181. See *Judiciary: This Is Inexcusable*, TIME, Dec. 11, 1944, at 25.

litigation experience to successfully market himself as a claims attorney to the Navajo Nation.<sup>182</sup>

Despite his dubious background for the task, Littell's vanity appears to have made him to throw himself into the job. He frequently made speeches to the Navajo council about the excellence of his work,<sup>183</sup> and was eager to pick fights on behalf of the tribe.<sup>184</sup> He wrote a memoir of his first decade with the Navajo, speaking with passion and fury of the paternalism of his old enemies at the BIA.<sup>185</sup> Although Littell enthusiastically praised the leadership ability and wisdom of the Navajos, he was no believer in distinctively Indian forms of government, mocking Collier's suggestion that non-Indians might learn something from the Pueblos,<sup>186</sup> and repeatedly insisting that tribal court judges be younger men with western education.<sup>187</sup> Indeed, council members' rejection of Littell's advice reveals increasing confidence in Navajo ways of doing things. Still, as the first attorney working on behalf of the Navajo tribe, he played an important and often helpful role on the path to *Williams v. Lee*.<sup>188</sup>

When in 1952 Hugh Lee brought his case against Paul and Lorena Williams, the Navajo people were in a time of turmoil and change. Although the vast majority of Navajos had little direct contact with non-Navajos or life off the reservation, the outside world increasingly impacted their lives. Stock reduction, overgrazing, and drought had undermined their economic independence. Returned veterans and boarding school students brought new ideas to the reservation, challenging traditional ways of life. Formal tribal governmental institutions seemed little connected to Navajo concerns. The

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182. See *Littell Charges Cops In Gallup Operating Racket on Navajos*, GALLUP INDEP., July 11, 1947, at 1 [hereinafter *Littell Charges Cops*].

183. See, e.g., *Navajo Minutes*, *supra* note 130, at 146 (Jan. 9, 1953) (telling the council that his work was to be "measured in the change of relationship between the Government and the Tribe; in the protection of your property rights; in the ever-increasing dignity of the Navajo" and was worth two to three times what they paid him).

184. The article announcing that he had been hired, for example, also noted that he was already bringing claims against the Gallup police department. *Littell Charges Cops*, *supra* note 182, at 1.

185. See Norman M. Littell, *Reflections of a Tribal Attorney* (1957) (unpublished manuscript) (on file at Beinecke Library).

186. *Id.* at 13–14.

187. See *Navajo Minutes*, *supra* note 130, at 248–49 (Oct. 14, 1958) (discussing proposal by the tribal attorney office to lower age of judges to 21); *id.* at 20–21 (Jan. 9, 1959) (discussing proposal to lower age of judges to 30 after council had voted to set minimum age at 35).

188. The end of Littell's career with the Navajos continued its ambiguous tone. The tribe fired him in 1963 after Raymond Nakai was elected on a platform of "Littell-Must-Go." Nakai catalyzed an Interior Department investigation showing that Littell had, in violation of his contract, inappropriately obtained an increase in his retainer within five years of the last contract, and had used the Navajo Nation's general counsel attorneys to assist him with his contingency fee work on the Navajo claims litigation. Predictably (Littell was fond of suing those who had bruised his ego), he brought a series of lawsuits unsuccessfully challenging his termination. See *Udall v. Littell*, 366 F.2d 668 (D.C. Cir. 1966) (holding that interior secretary had authority to fire Littell for cause); *Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965) (dismissing suit against Chairman Nakai for lack of federal question jurisdiction).

Navajo people were poised for a debate about whether the continued independence of those institutions had anything to offer.

### B. 1949 Debates About State Jurisdiction

In June 1949, the Fernandez Amendment presented the tribal council with the opportunity to debate the future of tribal institutions. The council was deeply conflicted over the extension of state jurisdiction and the 37–20 vote in favor of the amendment sharply diverged from the consensus demanded in the traditional Navajo political process. Four months later the decision would be overturned in an equally conflicted vote. But the debate reflects a moment in which many council members expressed doubt about the viability of tribal institutions and felt that equality demanded state jurisdiction. Although debates about tribal institutions would continue throughout this period (and indeed, continue today), within a few years the council had united against state jurisdiction.

Representative Antonio Fernandez's proposal to extend state jurisdiction over the Navajo and Hopi Reservations came at the end of a year of discussions of the Navajo-Hopi Rehabilitation Act. On May 16, 1949, the New Mexico congressman appeared at a hearing before the House Subcommittee on Public Lands to propose the measure.<sup>189</sup> Fernandez was concerned about the deficiencies of tribal law enforcement, as well as the informality of Navajo marriage and divorce.<sup>190</sup> He was particularly committed to the amendment, however, as a means to make the Navajos "good individual American citizens, just like anybody else."<sup>191</sup> "You cannot have a good American citizen of the United States," he declared, "unless you have a good citizen of the state."<sup>192</sup> Theodore Haas, chief counsel to the Indian Service, and one of the last important holdovers from the New Deal administration, objected that such a measure should not be imposed without tribal consent, and that the Navajos currently had Navajo judges who spoke the language and understood Navajo customs.<sup>193</sup> Congresswoman Bosone was worried that the amendment would only confuse the bill, while Congressman Morris argued that the law might create a perception that the federal government was giving the tribes money only to come and take them over.<sup>194</sup> But most of the representatives thanked him for his work for the Na-

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189. *Navajo and Hopi Rehabilitation: Hearings on H.R. 3476 Before a H. Subcomm. on Indian Affairs of the H. Comm. on Pub. Lands*, 81st Cong. 202–04 (1949) (statement of Antonio M. Fernandez, H. Rep. from New Mexico).

190. *Id.* at 203.

191. *Id.*

192. *Id.*

193. *Id.* at 251–54 (statement of Theodore H. Haas, Chief Counsel, Bureau of Indian Affairs).

194. *Id.* at 253.

vajos, and indeed the committee chairman had proposed a measure to allow states to assume criminal jurisdiction on all reservations the previous year.<sup>195</sup>

Although the amendment did not require tribal consent, on June 8, 1949, Commissioner of Indian Affairs John Nichols came to the Navajo Tribal Council to discuss the proposal.<sup>196</sup> (The BIA apparently made no effort to consult with the Hopi village leadership, which later strongly objected to the measure.)<sup>197</sup> Norman Littell arrived the next day to urge the tribe to approve the amendment.<sup>198</sup> Littell had discussed the proposal with Fernandez beforehand, and agreed that it was a necessary step to citizenship.<sup>199</sup> He was also dismissive of the condition of the Navajo courts, declaring that there was “no place where the chasm between the white man’s world and your world is more evident.”<sup>200</sup> The council earnestly questioned him about the amendment, and some delegates were likely influenced primarily by his support. But council members had their own reasons to support state jurisdiction, and some expressed support on the first day of the debates, before Littell had even arrived from Washington.

Three factors seemed of primary importance to the supporters. First, some hoped that law enforcement would improve as a result. The tribe was deeply concerned about increases in drinking and resulting crime on the reservation;<sup>201</sup> although it had begun devoting its own funds to hiring police officers, they were understaffed, underpaid, and undertrained. Councilman Frank Bradley, moreover, recalled past abuses by the Navajo police, saying, “I know we are getting a better deal from the outside law.”<sup>202</sup> Residents of the checkerboard area on the eastern edge of the reservation were particularly supportive of state jurisdiction. Since the BIA had declared that tribal police had no jurisdiction in the area, there had been no law enforcement there at all; the residents hoped that state police would fill the void.<sup>203</sup> This was not necessarily based on a belief that state law enforcement would be better. Billy Becenti stated that despite criticisms of the reservation police and judges, his community “missed them greatly” and felt that they had taken “good care of us.”<sup>204</sup> Still, he said, if the measure persuaded the state

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195. *Id.* at 204, 206, 252.

196. *Navajo Minutes*, *supra* note 130, at 2–5 (June 8, 1949).

197. *See* PHILP, *supra* note 66, at 62–63.

198. *Navajo Minutes*, *supra* note 130, at 38–40 (June 9, 1949).

199. *Id.* at 38–39.

200. *Id.* at 50.

201. *See* Navajo Tribal Council, Resolution on Law and Order Personnel—Creation of Navajo Police Force (March 13, 1934), in NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951, *supra* note 131, at 197 (petitioning commissioner of Indian Affairs to create a police force to address new problems of drinking, gambling, and prostitution appearing with wage work on reservation).

202. *Navajo Minutes*, *supra* note 130, at 18 (June 8, 1949).

203. *See id.* at 13–14.

204. *Id.* at 55 (statement of Billy Becenti).

police to exercise jurisdiction, it would be an improvement over the "chaotic condition now."<sup>205</sup>

Second, council members were afraid of the consequences if they did not approve jurisdiction. The amendment was, after all, part of a bill to provide almost \$90 million in much needed funds for tribal welfare, education, health, and infrastructure. The potential loss of money, however, was not the most significant consideration. Attorney Littell warned that if the Navajos did not accept state jurisdiction now, Congress might do worse in the future.<sup>206</sup> The Fernandez Amendment provided for concurrent tribal and federal jurisdiction and stated that property not otherwise taxed would not be subject to taxation; Littell reported that Congress had already considered a state jurisdiction bill without these exceptions in 1948, although the bill had died in committee.<sup>207</sup> He told the council that they could protect the Navajo Nation from future bills of this kind by agreeing to the Fernandez Amendment.<sup>208</sup> Even more important was the Navajos' fear of losing their recently won right to vote. Fernandez himself, in his letter to the Navajos, reminded the tribe that the New Mexico legislature had passed a bill to rescind that right to vote, and that the bill had only escaped enactment because the governor had vetoed it after the session had ended.<sup>209</sup> Fernandez told them that a similar bill could still pass unless the tribe was placed under state laws.<sup>210</sup> Although Littell should have recognized that any such restrictions on the vote were illegal, he repeated this argument to the council.<sup>211</sup>

The most significant argument of the proponents, however, was that state jurisdiction would mean equality. Fernandez and Littell both presented the amendment in this way, as necessary for the Navajos to "assume the full duties and responsibilities of citizenship."<sup>212</sup> Lilly Neil, the first woman to serve on the Navajo council, made an impassioned speech in support of this notion:

Mr. Chairman, friends, my people and all, citizenship is one of the nicest things there is in the world. You can feel free to say what you want and go where you want. . . . We must go forward instead of saying here, "I have no confidence in myself. I am going to stand here and say to the govern-

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205. *Id.* As the counties' objection to policing those areas was not legal but financial, this hope was not well founded. Indeed, recent studies of law enforcement in Public Law 280 states, in which state criminal jurisdiction on reservations is clear, show that unwillingness to expend funds policing reservations actually contributes to lawlessness in those areas. See Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405 (1997).

206. See *Navajo Minutes*, *supra* note 130, at 49 (June 9, 1949).

207. See *id.* at 47.

208. See *id.* at 48. Littell assured the council that the amendment prohibited any taxation; this was poor legal advice as the amendment only explicitly prohibited property taxes, and then only "until otherwise provided by Congress." *Id.* at 52.

209. *Id.* at 39 (June 8, 1949).

210. *Id.*

211. *Id.* at 55 (Oct. 13, 1949).

212. *Id.* at 39 (June 9, 1949).

ment to come and help me." . . . We are in bondage, isn't it? We are tied up as it is. Now the citizens come out and say to us "Come out and do like we do." . . . We have a chance, I think we should take it.<sup>213</sup>

As a resident of the checkerboard area denied both tribal and state law enforcement, she was dubious that the Navajos were already "full citizens."<sup>214</sup> Another council member spoke about scientific studies proving that Navajos were just as intelligent as whites and about the long denials of the right to vote. Sam Ahkeah, the chairman of the tribe, said that he believed "this amendment will just make us a little taller individuals instead of being just children as we are now."<sup>215</sup>

Opponents of the amendment had equality-based arguments of their own. Emphasizing concerns about discrimination, Howard Gorman worried about the brutality Navajos had experienced from state police.<sup>216</sup> Invoking the right to equal political power, Maxwell Yazzie argued that the amendment appeared to be the state's attempt to "give us a small portion of the citizen's right whereby they will have the upper hand over us," and suggested they already had the citizen's right with the right to vote.<sup>217</sup> Suggesting the ways in which poverty would impair equal access to justice, Vice-chairman Zhealy Tso pointed out the expenses of litigation in state court, and the fact that Navajos would have no money to appeal unfair decisions.<sup>218</sup> But even these opponents had little language to express support for independent Navajo institutions except the fear that illiterate tribal members were not prepared for state jurisdiction. Proponents reacted angrily to these suggestions, speaking with pride of their young veterans and their ability to compete in the white world.<sup>219</sup> The council voted to support the amendment 37 to 20.<sup>220</sup>

On July 28, 1949, however, the council's advisory committee declared that "after attending Navajo meetings in the past month, [we] believe that it is the con[s]ensus of opinion of the Navajo people" that the tribe should reject state jurisdiction.<sup>221</sup> They unanimously resolved that the Fernandez Amendment should be stripped from the rehabilitation bill at the next council meeting.<sup>222</sup> Chairman Ahkeah began to publicly oppose the measure.<sup>223</sup>

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213. *Id.* at 56–57.

214. *Id.* at 57.

215. *Id.* at 54.

216. *Id.* at 18–19 (June 8, 1949).

217. *Id.* at 50 (June 9, 1949).

218. *Id.*

219. *Id.* at 56–57 (June 10, 1949).

220. *Id.* at 65 (June 10, 1949).

221. Advisory Committee of the Navajo Tribal Council, Resolution on Fernandez Amendment (July 28, 1949), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 130.

222. *Id.*

223. See *Indians Oppose Control: They Also Object to \$88,000,000 Social Security Program*, N.Y. TIMES, Sept. 27, 1949, at 24.

But before the next scheduled council meeting could take place, Congress approved the bill. The ACLU lobbied President Truman for a veto, arguing that the Navajos and Hopis "are full-fledged voting citizens and deserve better at the hands of their government."<sup>224</sup> Opponents also condemned Fernandez's other amendment, which would relieve the states of most responsibility for Social Security payments to reservation Indians.<sup>225</sup> Newspaper editorials also joined the call. In particular, Eleanor Roosevelt used her "My Day" column in the *Washington Daily Times* to invoke racial justice and the Cold War in attacking both the Fernandez Amendment and the emerging trends in federal Indian policy:

One of the Soviet attacks on the democracies, particularly the United States, centers on our racial policies. In recent months the Russians have been particularly watching our attitude toward the native Indians of our country. So, the question of what we do about our Indians, important as it used to be for the sake of justice, is enhanced in importance now because it is part of the fight which we and other democracies must wage, day in and day out, in perfecting our governmental households so that it will not be vulnerable to attack by the Communists.<sup>226</sup>

Such editorials catalyzed writers from across the country to write to Truman sounding similar themes, maintaining that "improvement of our treatment of racial minorities is crucial in [the] struggle with Cominform" and declaring the amendment a "Jim Crow" rider that "affects our international goodwill."<sup>227</sup> NCAI Secretary Ruth Muskrat Bronson (who diverged from NCAI President Johnson on the question of state jurisdiction) had coordinated these lobbying efforts, but was reluctant to take a public stand without formal rejection by the Navajo government.<sup>228</sup>

On October 11, Ahkeah called an emergency council meeting to discuss the veto.<sup>229</sup> Littell urged the council to reiterate its approval of state jurisdiction, but this time the council was less sure. Many of the strongest advocates for the measure maintained their positions. But now Ahkeah, who had tentatively supported the measure, objected that Congress was imposing state jurisdiction, which the tribe had not asked for, instead of the funds for education that they had requested.<sup>230</sup> It seemed to him that Congress was saying they would "pay for the show with the \$90,000,000 and invite the State as the audience and say dance the strip tease here. . . . I think there is a finer

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224. Letter from Jay B. Nash, Chairman, Indian Civil Rights Committee, ACLU, to Phileo Nash, White House (Oct. 5, 1949).

225. See *Indians Oppose Control*, *supra* note 223 (discussing opposition to extension of state control).

226. Roosevelt, *supra* note 64.

227. ROSIER, *supra* note 63, at 136–37 (internal quotation marks omitted).

228. Telegram from Ruth Bronson to Sam Ahkeah, Chairman, Navajo Tribal Council (Oct. 5, 1949) (NCAI Archives, National Museum of the American Indian).

229. See *Navajo Minutes*, *supra* note 130, at 13 (Oct. 11, 1949).

230. See *id.* at 18 (Oct. 12, 1949).



way of helping my people, there is a finer way to do that.”<sup>231</sup> Vice-chairman Tso called the amendments a “cloudy mess that has formed around that bill which we nursed along.”<sup>232</sup> Invoking the ability of the Navajos to decide what was best for themselves, he declared that “[i]n following their own mind, the dictates of their thoughts,” the Navajos had become a big tribe, but now Fernandez had decided to “introduc[e] state control over the Indians.”<sup>233</sup>

Littell again insisted on the deficiencies of the tribal courts, saying that Fernandez had threatened that Congress wouldn’t appropriate sufficient money for them until they were part of the state system.<sup>234</sup> But now William Truswell, attorney for the Navajo Agency of the Office of Indian Affairs, told the council, “It may be that the Indian courts are not too good, but let me tell you from experience that the [state justice of the peace] courts are worse.”<sup>235</sup> He also corrected Littell’s insistence that the measure exempted additional property from taxation.<sup>236</sup> Howard Gorman told them that at NCAI meetings North Dakota Indians had told him of the discrimination that they experienced there.<sup>237</sup> Insisting on Navajo equality, he declared,

I would like for the white people to become assimilated to the Navajos instead of the Navajos becoming assimilated to the whites if that is the way it is going to be. We are just as proud as the white people. I think we are just as human as anyone else.<sup>238</sup>

Perhaps most damning to the bill, Councilman Dan Keanie linked it to the unpopular grazing regulations, declaring to applause that they had been told they could change those if they didn’t like them as well, and he would only approve the Fernandez Amendment if the grazing regulations were finally repealed.<sup>239</sup> The vote this time was even narrower, but now the opponents of state jurisdiction prevailed: 19 in favor to 26 against.<sup>240</sup>

On October 17, Truman vetoed the law. The veto message was a peculiar mix of paternalistic and equality-based arguments. He described state jurisdiction over Indians as the ultimate consequence of full participation in American society, but a step for which the Navajos were not yet “prepared” because of their lack of education and the “primitive background of their social concepts.”<sup>241</sup> But he also endorsed the idea that respect for Indian

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231. *Id.*

232. *Id.* at 41 (Oct. 13, 1949).

233. *Id.* at 40, 42.

234. *Id.* at 49.

235. *Id.* at 51.

236. *See id.* at 48.

237. *Id.* at 59.

238. *Id.* at 59–60.

239. *Id.* at 45.

240. *Id.* at 62.

241. HARRY S. TRUMAN, REHABILITATION OF THE NAVAJO AND HOPI TRIBES OF INDIANS—VETO MESSAGE, S. DOC. NO. 81-119, at 1–3 (1949).

people required respect for their choices, and that without Navajo approval, the measure would violate the "fundamental . . . principle of respect for tribal self-determination in matters of local government."<sup>242</sup> Despite the seeming consensus on state jurisdiction as an ultimate step for the Navajo people, however, the tribe would move decisively away from that goal over the following years.

### *C. Nation Building in Navajoland*

In the years that followed the debate over the Fernandez Amendment, the tribal council did not even consider state jurisdiction; instead, it sought to build strong and independent tribal institutions. This was facilitated by changed economic circumstances. Postwar development of oil, coal, and uranium on the reservation provided the tribal government with discretionary resources for the first time in its history. But the impulse toward institution building seems to have come primarily from the tribal council and the demands of the Navajo people. Increasingly, both the Navajo government and its constituents insisted that Navajo ways and Navajo institutions should govern Navajo lives, and that efforts to undermine those institutions were tantamount to denigration of Navajos themselves.

Navajo participation and interest in tribal government increased significantly in the 1950s. This was in part because of election reforms enacted in 1950, under which candidates would be selected in the various election districts, rather than by voice vote at the agency office in Window Rock.<sup>243</sup> The 1951 election saw an 82 percent increase in the number of voters over the previous election in 1946; an unheard-of 87 percent of those eligible to vote participated.<sup>244</sup>

There was also a changed attitude toward the tribal council, which had previously been accurately seen as simply a "go-between [for] themselves and Washington," and, perhaps equally accurately, as really an agent of the federal government.<sup>245</sup> In 1952, Superintendent Alan Harper moved the superintendent's seat "from the Chairman's right elbow" to a position off of the platform at council meetings, to symbolize that the "Indian Bureau must recede from its position of dictatorial monopoly."<sup>246</sup> Most important from the perspective of the people, now that Navajo representatives had funds to disperse and real authority over grazing and other regulations, Navajos turned to them to get what they wanted. In response to growing public interest, Councilman Howard Gorman broadcast a daily radio program on council

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242. *Id.* at 2.

243. News Release, Allan G. Harper, Area Director, Window Rock Area Office, The Navajo Tribal Election 2 (Jan. 3, 1951).

244. See Results of Navajo Voting at Election on March 5th and 6th, 1951, Window Rock Area Office (on file with the National Museum of the American Indian in the NCAI Archives).

245. Blake Brophy, *Shonto: Life in a Navajo Community*, ARIZ. DAYS & WAYS MAG., Sept. 27, 1959, at 38, 42.

246. Remarks of Allan G. Harper, *supra* note 140, at 2.

proceedings while the council was in session.<sup>247</sup> In an indirect sign of Navajo popular support, in 1957, the 12,000 Navajos living on the New Mexico portion of the reservation united to form a voting bloc to oppose termination, many of them registering and voting for the first time since obtaining the vote in 1948.<sup>248</sup> Although there was still much suspicion of the centralized government, it had begun to be more a government of the people than of the BIA.

The decade also saw significant development of the Navajo legal system. Beginning in 1934, the Navajo Tribal Council had petitioned for more federal funds for tribal law enforcement to handle the disruption caused by the transition to work for wages and off-reservation employment.<sup>249</sup> Increased contact with the outside world and increased participation in a wage economy had brought both more alcohol and more disorder to the reservation.<sup>250</sup> The need for additional funds only became more pressing as veterans returned from World War II struggling with the psychological impacts of war and less responsive to traditional clan-based systems of social control.<sup>251</sup> When the federal government did not respond to these requests, the tribe sought to fill the gap. Tribal funding for law enforcement went from \$8,000 per year in 1952 to \$786,000 in 1959.<sup>252</sup> The resulting system was far from perfect; indeed, the younger veterans initially appointed to the police force were soon seen as too rough, and communities sought to bring back "our uneducated old policemen," who handled the Navajos "the way they should be handled, the way [they] like to be handled."<sup>253</sup> But it was increasingly a Navajo system, however flawed.

Even police hired with Navajo funds, however, were federal employees under federal control. In a hearing on police services, Chief of Police Lorenzo Shirley said that their actions were limited by the federal Code of Indian Offenses: "We do not want to go over this book. We want to stay within this book, so it is pretty hard. I understand my own people. I am a

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247. See *Navajo Minutes*, *supra* note 130, at 136 (Jan. 8, 1953) (describing response to program); see also PARMAN, *supra* note 139, at 116 (describing effect of weekly radio broadcasts in 1938 in bringing Navajos closer to the tribal government).

248. *Navajos Distrust Control By State: 12,000 in New Mexico United Against Bills for Ending Federal Jurisdiction*, N.Y. TIMES, Dec. 25, 1957, at 51.

249. See Navajo Tribal Council, Resolution on Law and Order—Creation of Navajo Police Force (Mar. 13, 1934), in NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951, *supra* note 131, at 197.

250. See *id.*

251. Conn, *supra* note 163, at 339.

252. 8 NAVAJO AGENCY, U.S. DEP'T OF THE INTERIOR, NAVAJO YEARBOOK REPORT 281 (Robert W. Young ed., 1961) [hereinafter NAVAJO YEARBOOK]. In the same period, federal funding increased only modestly, from \$57,000 to \$89,000. *Id.*

253. Paul Jones, Chairman, Inaugural Speech to the Navajo Tribal Council 7 (Apr. 4, 1955) (transcript available in the National Museum of the American Indian in the NCAI Archives). Some communities were not interested in police at all, preferring "to settle transgressions by family retribution." Brophy, *supra* note 245, at 38, 42. But the demands in tribal council minutes for increased policing are so numerous that they suggest that the desire for tribal police was dominant. See, e.g., *Navajo Minutes*, *supra* note 130, *passim*.

Navajo myself.”<sup>254</sup> When asked at a later hearing who he worked for, he answered, “[C]ivil service. I am strictly a Government man I guess.”<sup>255</sup> In 1959, the tribe addressed this by formally acquiring control of the police from the BIA.<sup>256</sup>

In 1959, the tribe also assumed formal control of the court system, which had gone through a similar process over the same decade.<sup>257</sup> Most disputes were still settled in communities by clans and families,<sup>258</sup> but to secure veteran's, pension, and social security benefits, family members needed formal proof of marriage.<sup>259</sup> Police, moreover, needed courts to process arrestees. Again, conflict arose over whether judges should be younger, literate men or older ones who were uneducated but were more familiar with community ways. In 1951, the tribe returned to a system of elected judges to give community members more control, but qualifications were still an issue. Although Littell insisted that judges needed to be educated, community members objected, asking whether they had “accepted only what the white people have accepted . . . the white man's way that is constantly put in our faces?”<sup>260</sup> In 1958, the council resisted efforts by their non-Navajo attorneys to lower the age of judges from 35 to 21 in order to attract more educated, English-speaking judges to the position.<sup>261</sup> When their non-Indian attorneys revived this debate in 1959, Billy Becenti, who had supported the Fernandez Amendment ten years earlier, protested:

Are we going to change the language of the Navajos altogether? . . . We would like to still use the Navajo way of thinking, the Navajo manner of doing things, and use the Navajo customs at this time yet. The idea that we are going to have to change all Navajo thinking, I don't believe stands well for the Tribe.<sup>262</sup>

In the debate over the Fernandez Amendment, a council member had spoken with concern about a Navajo judge who wore a traditional headband;<sup>263</sup> now the council was opposing its attorneys' attempts to make the courts less Navajo. Although the debate over whether Navajo judicial institutions should be more Anglo or more Navajo remained far from resolved, its resolution had become a matter of Navajo choice.

254. *Navajo Minutes*, *supra* note 130, at 87 (Jan. 7, 1953).

255. *Id.* at 538.

256. *Id.* at 15–16, 23 (Jan. 6, 1959).

257. Robert Yazzie, “*Life Comes From It*”: *Navajo Justice Concepts*, 24 N.M. L. REV. 175, 177 n.17 (1994).

258. *See supra* note 250 (discussing familial disorder on the reservation).

259. Navajo Tribal Council, Resolution on Marriage—Conditions Regarding (Nov. 5, 1947), in *NAVAJO TRIBAL COUNCIL RESOLUTIONS, 1922–1951*, *supra* note 131, at 89.

260. *Navajo Minutes*, *supra* note 130, at 96 (statement of Anna Wauneka, Councilwoman, relating general community sentiment).

261. *Id.* at 249–51, 253–62 (Oct. 14–15, 1958).

262. *Id.* at 628–29 (June 10, 1959).

263. *Id.* at 43 (June 9, 1949).

The most revealing debate of the period concerned the adoption of a Navajo Constitution in 1953. Littell had drafted the document himself and presented it with great pride.<sup>264</sup> The preamble revealed Littell's limited vision of the role of tribal government, declaring that the Navajos adopted the constitution for distinctly federal reasons:

[I]n order to exercise more fully our privileges and duties as American citizens and promote the general welfare of our people, to cooperate more fully with the government of the United States in developing the resources of the Navajo Reservation for our benefit, and to establish a self-supporting economy offering education and opportunity for all . . . .<sup>265</sup>

His proposed method of adoption was also telling: he wanted the document adopted by a simple two-thirds vote of the tribal council, rather than the popular election that federal law required for adoption of a Bureau of Indian Affairs constitution.<sup>266</sup> The substantive discussion in the tribal council rejected this idea of governmental fiat and focused less on the language of the document itself than on what adoption of a constitution would mean.

The debate began with both fear and excitement at the idea of any constitution. The Navajos had resisted federal pressure to adopt a constitution in 1937 and still recalled it as a part of the federal domination that led to stock reduction; some council members had to be reassured that the constitution would not facilitate federal control.<sup>267</sup> Others called the constitution a "sacred document" and saw it as part of the broader progress toward self-government.<sup>268</sup> But all were concerned that both the council and the Navajo people needed to understand the broader implications of the constitution.<sup>269</sup> This concern increased when, after Councilman Gorman broadcast a report of the proposed constitution, constituents began expressing confusion and fear about what the council was doing.<sup>270</sup>

The council decided that much more community debate was needed before they could adopt a constitution. As one member stated, "[I]t is not now a sacred document," and, "[I]t will become sacred only when it is genuinely understood and supported by the whole Navajo Tribe. It will never become sacred if it contains only the thinking of a small group of people."<sup>271</sup> Kee McCabe, one of the oldest council members, took this opportunity to address the council for the first time in the two years since he had been

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264. See *id.* at 131 (Jan. 8, 1953); *id.* at 146 (Jan. 9, 1953).

265. *Id.* at 116 (Jan. 8, 1953).

266. *Hearing on Navajo-Hopi Rehabilitation*, *supra* note 156, at 386 (statement of Norman M. Littell, General Counsel for the Navajos).

267. See *Navajo Minutes*, *supra* note 130, at 130–31 (Jan. 8, 1953); *id.* at 136 (Jan. 9, 1953).

268. *Id.* at 170 (Jan. 9, 1953).

269. *Id.* at 168–73.

270. *Id.* at 136.

271. *Id.* at 188 (Jan. 12, 1953).

elected.<sup>272</sup> He drew an analogy to the sacred Navajo ceremonies, saying that they had long operated under an unwritten constitution of their own, directing the proper order and manner of performance.<sup>273</sup> He then encouraged the council to recognize their own ability to govern:

[Y]ou, as leaders among us to have ceremonials, have all of these things in your head, but you hesitate to bring them out—the planning or origin of planning for your people. Then, in the Navajo ceremonials, there is a place where these things take place. . . . That is the plan here.<sup>274</sup>

Littell had told the council that the constitution had been handed down to them through history through the suffering of Anglo-Americans.<sup>275</sup> In discussing it, however, council members began asserting their own history and governance traditions.

In other ways, the council began insisting on Navajo solutions to Navajo problems during the decade. They questioned the wisdom of the relocation policy that sent Navajos off reservation for menial jobs,<sup>276</sup> and secured the right to revise the grazing regulations on the reservation.<sup>277</sup> From federal domination to debate over integration and equality, the tribe had increasingly moved towards self-determination.

#### IV. *WILLIAMS V. LEE* AND THE FIGHT AGAINST STATE JURISDICTION

Many Navajo institution building moves were designed to evade state jurisdiction. Although the council had once approved the Fernandez Amendment, now tribal council members invoked the amendment as a danger narrowly avoided. When Congress passed Public Law 280, Ahkeah urged President Eisenhower to veto the law, condemning it as “oppressive and unjust.”<sup>278</sup> Although in 1949 council members had argued that citizenship required accepting state jurisdiction, now Councilwoman Annie Wauneka invoked citizenship as a tool to revoke Public Law 280, reminding the council that “we are citizens of these United States and every citizen enjoys the privilege of voting for Congress.”<sup>279</sup> *Williams v. Lee* was part of this broader campaign to ward off state jurisdiction and insist that Navajos had the ability and the right to control reservation affairs.

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272. *Id.* at 193.

273. *Id.*

274. *Id.* at 194.

275. *Id.* at 133 (Jan. 8, 1953).

276. *Id.* at 14, 29–30 (Nov. 2, 1953); *id.* at 58–66 (Nov. 4, 1953).

277. *Id.* at 196 (Jan. 12, 1953).

278. *New Pleas Are Filed for Indian Bill Veto*, N.Y. TIMES, Aug. 11, 1953, at 18 (internal quotation marks omitted).

279. *Navajo Minutes*, *supra* note 130, at 19 (Feb. 8, 1954).

*A. The Dispute Emerges: Traders, Sheep Herds,  
and a Navajo Family*

*Williams* involved two institutions at the heart of Navajo popular concern about tribal sovereignty: federal Indian traders and sheep herds. On the vast Navajo reservation, federally licensed traders were virtually the Navajos' sole connection with the outside world. Under federal laws first enacted in 1790, all those who wanted to trade with the Indians had to obtain federal licenses to do so.<sup>280</sup> With the exception of federal employees and missionaries, traders were essentially the only non-Indians living in Navajo country, and their reach extended much deeper, since they and their families moved into areas far from the few paved roads and population centers.<sup>281</sup>

Navajo people were highly dependent on the traders. The traders were both the Navajos' only source of flour, vegetables, and manufactured goods and the only accessible market for Navajo products like wool, rugs, and jewelry.<sup>282</sup> In addition, in largely illiterate communities without mailing addresses, they were vital intermediaries, writing and reading letters communicating with government agencies and faraway relatives, and receiving and cashing checks from railroad employers and pension boards.<sup>283</sup> The trading post was so central to Navajo life that when the tribe organized its central government, the seventy-two constituencies electing representatives to the tribal council were based on the trade areas they had established.<sup>284</sup>

Although traders performed a necessary service and were justifiably proud of their contributions to Navajo life, their monopoly power also led to abuse. A number of traders only paid for goods or cashed checks with tin money stamped with the traders' mark that could be exchanged only at that trading post.<sup>285</sup> Others put only letters, not prices, on their goods, so that only the trader would know the price.<sup>286</sup> The hard economic times, moreover, squeezed traders and their customers, and placed significant strain on the barter and credit system under which most did business. In 1948, the Navajo Council took one of its first independent steps by enacting elaborate regulations replacing the old system of leases of trading posts with a share of gross sales profits and by limiting the mark-ups that traders could impose on

280. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137 (current version codified at 25 U.S.C. § 261 (2006)).

281. ALBERT HUGH LEE ET AL., *GAAMALIITSOH, INDIAN TRADER: AN AUTOBIOGRAPHY OF ALBERT HUGH LEE, 1897-1976*, at 60 (1982) [hereinafter *GAAMALIITSOH*] (describing isolation of early trading post).

282. *Rockbridge v. Lincoln*, 499 F.2d 567, 568-69 (9th Cir. 1971) (describing role of trading post); MORIS S. BURGE, U.S. DEP'T OF THE INTERIOR, REPORT TO COMMISSIONER OF INDIAN AFFAIRS ON NAVAJO TRADING 7, 11 (1949).

283. See *Hearing on Navajo-Hopi Rehabilitation*, *supra* note 156, at 266-67 (statement of Howard Wilson); *Navajo Minutes*, *supra* note 130, at 82-85 (Jan. 7, 1953) (discussing problem with withholding checks); WATERS, *supra* note 129, at 94.

284. Brophy, *supra* note 245, at 38.

285. *Navajo Minutes*, *supra* note 130, at 269-72 (Jan. 14, 1953).

286. *Id.* at 271.

goods.<sup>287</sup> The traders bitterly resented these measures and sent a delegation of the United Indian Traders Association to Congress to successfully prevent federal approval of the law.<sup>288</sup>

The effort to collect on debts for goods in state court was also a product of changing conditions among the Navajo people. In the 1940s and 1950s, the BIA sought to address poverty on reservations by encouraging Indians to leave their reservations in search of work elsewhere.<sup>289</sup> Although Navajos and their council representatives initially welcomed these efforts, by the early 1950s they began to debate the wisdom of sending non-English-speaking Navajos to cities or farm camps without meaningful training or assistance.<sup>290</sup> The statement of one council member reflected the grim realities: "We have trouble all the time as to who is responsible for the return of the dead bodies from these different locations. We get letters all the time asking as to who is to pay for the return of these bodies."<sup>291</sup> The returning relocatees also introduced the Navajo people to a modern staple of Indian country: the "Indian car"<sup>292</sup> and the repo man that came with it. Young Navajos would come back home with "old, delapidated [sic] cars" that they had bought on credit; when they didn't keep up their payments, agents of the car dealers would come on the reservation and repossess them.<sup>293</sup> According to Norman Littell, the traders were "very jealous" of this remedy against delinquent Navajo buyers<sup>294</sup> and wanted to try it themselves.

Trader Hugh Lee was the first to try it. Like many traders on the Navajo Nation, Hugh Lee was part of an old trading family.<sup>295</sup> His great-great-grandfather John D. Lee had come to the southwest in the 1840s as an original follower of Brigham Young and the Mormon Church, and his great-

287. Navajo Tribal Council, *Resolution on Traders Regulations*, in Navajo Resolutions, *supra* note 131, at 496 (March 20, 1948).

288. See *Hearing on Navajo-Hopi Rehabilitation*, *supra* note 156, at 273–85; BURGE, *supra* note 282, at 1–3.

289. 2005 COHEN, *supra* note 49, at 92–93.

290. See *Navajo Minutes*, *supra* note 130, at 58–66 (Nov. 4, 1953); *id.* at 29–30 (Nov. 2, 1953).

291. *Id.* at 62 (Nov. 4, 1953).

292. Keith Secola's popular song *NDN KRZ '49 (Indian Cars)* memorialized the kinds of cars often sold to Indian people:

My car is dented, the radiator steams  
One headlight don't work, the radio can scream  
I got a sticker says "Indian Power"  
I stuck it on my bumper  
It's what holds my car together  
We're on a circuit of an Indian dream  
We don't get old, we just get younger  
When we're flying down the highway  
Riding in our Indian Car

KEITH SECOLA, *NDN KRZ '49, on NATIVE AMERICANA* (AKINA Records 2005).

293. *Navajo Minutes*, *supra* note 130, at 155 (Jan. 9, 1953).

294. *Id.* at 155, 158 (Jan. 9, 1953).

295. LEE ET AL., *supra* note 281, at 20, 41.



grandfather had established one of the first trading posts in the western part of the Navajo Nation.<sup>296</sup> His father took over his first trading post shortly after Hugh was born, and by the 1930s owned seven trading posts across the Navajo Nation.<sup>297</sup> Hugh spoke Navajo fluently, and Navajo children were his only playmates until he was four years old.<sup>298</sup>

Hugh Lee first managed his father's store at Black Mountain, and then took over Ganado Trading Post from his father in 1945.<sup>299</sup> By 1948, he had been elected president of the United Indian Traders Association.<sup>300</sup> In April 1948, he led a delegation to Congress to testify against the Navajo plan to impose rent and price restrictions on the traders.<sup>301</sup> He declared the plan contrary to the principle of free enterprise that America was built on, but urged Congress to do something to help the Navajos, declaring that the traders were eager to help them become a "solid, sound, well-trained and well-educated group of citizens."<sup>302</sup> Like most traders, Lee appears to have been deeply convinced that he was acting in the best interests of the Navajos, but he was also committed to protecting the prerogatives of the trader.

It appears that most of the debt Lee claimed against the Williamses had accumulated during the hard times of the late 1940s. According to the accounts Lee provided to the court, the couple owed him \$533.49 as of January 16, 1950.<sup>303</sup> The records show that they made regular payments of \$40 (likely representing the sale of individual sheep) toward the debt after that date, but because of their continuing purchases the total debt varied little.<sup>304</sup> The couple made a large payment of sheep and cash totaling \$151.50 on August 3, 1952, but when Lee filed for a writ of attachment in October 1952, they still had a debt of \$361.22.<sup>305</sup>

Pursuant to the writ, on October 21, 1952, Sheriff John Crosby of Apache County, Arizona, drove to the Ganado Trading Post, picked up assistant manager Wendell Harris, and went looking for the Williamses' sheep herd.<sup>306</sup> Harris directed Crosby over the dirt roads that led to Paul and Lorena's home in Steamboat. Although Lee's complaint stated that the couple was served with the writ of attachment and summons, Mrs. Williams and her daughter, Verdie Mae Lee, recalled that Verdie Mae, eighteen years old

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296. *Id.* at 28, 164–65.

297. *Id.* at 42, 128.

298. *Id.* at 148.

299. *Id.* at 128, 185.

300. *Hearing on Navajo-Hopi Rehabilitation*, *supra* note 156, at 282.

301. *Id.*

302. *Id.* at 284.

303. Transcript of Record at 35, *Williams v. Lee*, 358 U.S. 217 (1959) (No. 39) [hereinafter Transcript of Record].

304. *Id.* at 35–37.

305. *Id.*

306. *Id.* at 14.

and a new bride, was the only adult at home at the time.<sup>307</sup> Too frightened to stop them, she just watched as the sheriff loaded twenty-eight sheep and four goats into the truck.<sup>308</sup> Decades later, Lorena Williams would recall, “They didn’t tell us what they were going to do . . . . Our sheep were gone and we didn’t know why.”<sup>309</sup>

The sheriff did not hold the sheep he seized but instead brought them back to the Ganado Trading Post to be held there.<sup>310</sup> On October 23, Paul and Lorena paid Hugh an additional \$280, bringing their total debt down to \$81,<sup>311</sup> but he did not release the remaining sheep. They refused to accept this result.

Paul and Lorena Williams were in many ways a typical Navajo couple. They lived in Steamboat on the same plot of land surrounded by sandstone walls where Lorena had grown up and where, following Navajo custom, Paul joined her when they married.<sup>312</sup> In their forties when the case began, they had raised a family of eight on the land.<sup>313</sup> Their oldest daughter, Verdie Mae, had recently brought her husband Ralph Lee (no relation to the trader) to live in the compound as well.<sup>314</sup> Although one of their daughters was away at boarding school when the case began, most of the children were still living at home.<sup>315</sup> The family lived off the sheep herd, buying goods on credit from Ganado Trading Post twenty-five miles away and paying their bills by selling lambs in the fall and wool in the spring.<sup>316</sup> They rarely had cash. Asked in 2007 whether anyone in the family had a paying job in 1952, Lorena Williams “smiled and answered ‘Ádin’—nothing.”<sup>317</sup>

Fifty years later, Lorena Williams recalled the quality of her sheep with pride; although the average price per lamb was \$40, hers were so fat and healthy they often sold for \$60 or \$70 a lamb.<sup>318</sup> The sheep were also a part of the family’s life and culture. Following the tradition that children would be given some lambs to raise as their own, a number of the sheep seized belonged to their daughters.<sup>319</sup> When it became necessary to slaughter the sheep, Mrs. Williams’s elderly mother would come to the compound and put

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307. Interview with Verdie Mae Lee, in Steamboat, Navajo Nation (Mar. 23, 2009).

308. See Transcript of Record, *supra* note 303, at 14–15, 19.

309. Jason Begay, *Sovereignty Case Began With Missing Sheep*, NAVAJO TIMES, Apr. 19, 2007, at A3, available at 2007 WLNR 9021854 (Westlaw).

310. Transcript of Record, *supra* note 303, at 14.

311. *Id.* at 37.

312. Interview with Lorena Williams, in Steamboat, Navajo Nation (Mar. 24, 2009).

313. *Id.*

314. Interview with Verdie Mae Lee, *supra* note 307.

315. Interview with Lorena Williams, *supra* note 312.

316. Begay, *supra* note 309.

317. *Id.*

318. Interview with Lorena Williams, *supra* note 312.

319. Transcript of Record, *supra* note 303, at 7–8.

sacred corn pollen on the brow and tongue of a selected sheep to sanctify the butchering.<sup>320</sup>

For Mrs. Williams, the seizure of the sheep was incomprehensible, a theft, a violation of all ethical norms.<sup>321</sup> The sheriff had cut through the herd indiscriminately, taking ewes from their lambs and lambs from their mothers.<sup>322</sup> Mrs. Williams cried many times to think of the sheep that she had cared for corralled in a pen at Ganado, eating hay rather than the natural vegetation she had raised them on.<sup>323</sup> At ninety-eight years of age, she recalled it as the thing that had hurt her most deeply in her life, a violation from which she had never fully recovered.<sup>324</sup>

In seizing the sheep, the state courts had struck at the core of Navajo concerns about self-government.<sup>325</sup> Forcible BIA stock reduction was the cause of the bitterest Navajo resentment of the federal government.<sup>326</sup> As historian Donald Parman writes, "The entire episode revived old but still vivid memories of Carson's campaign and the horrors of Bosque Redondo,"<sup>327</sup> where Navajos had been confined away from their homeland, a confinement that ended only after the Treaty of 1868. "Like these earlier traumas, the second herd reduction bred a fear and anguish which lasted for decades."<sup>328</sup> By attaching the herd, the state court had aligned itself with outside oppression rather than the freedom that Fernandez had promised. The couple consulted with Howard Gorman, their representative on the council, and the tribe soon arranged for Holbrook attorney William E. Ferguson to represent them.<sup>329</sup>

Although the tribe paid for the attorney, the family spent much money and time prosecuting the lawsuit. Their son-in-law Ralph Lee was the only one in the family with a car; they spent many hours and dollars on gas driving to Window Rock, Holbrook, and Saint Johns to pursue the litigation.<sup>330</sup> They held several expensive ceremonies to secure success in the lawsuit over the years. Paul Williams's father and brother, both traditional medicine men, conducted Navajo Beauty Way ceremonies on their behalf; another medicine man came from Tuba City to conduct one as well.<sup>331</sup> Ralph Lee

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320. Interview with Bessie Yellowhair-Simpson, in Steamboat, Navajo Nation (Mar. 24, 2009).

321. Interview with Lorena Williams, *supra* note 312.

322. *Id.*

323. *Id.*

324. *Id.*

325. See John J. Wood et al., "Sheep is Life": An Assessment of Livestock Reduction in the Former Navajo-Hopi Joint Use Area 25-26 (N. Ariz. Univ. Anthropological Paper No. 1, 1982).

326. See Parman, *supra* note 139, at 65-66, 77.

327. *Id.* at 62.

328. *Id.*

329. See *Navajo Minutes*, *supra* note 130, at 268-69 (July 20, 1953).

330. Interview with Verdie Mae Lee, *supra* note 307.

331. Interview with Lorena Williams, *supra* note 312.

was a follower of the Native American Church, and church leaders came from Oklahoma to hold prayer meetings for them.<sup>332</sup> All of these ceremonies required housing, feeding, and support for the holy men and the participants. The Williams family had to pawn their jewelry and rugs and butcher part of their remaining sheep herd to pay for these expenses.<sup>333</sup> Despite the added hardship, they were determined to do what they had to in order to win.

### B. State Court Proceedings

The legal arguments in *Williams v. Lee* were not shaped by the Navajo people, but reflect the same tension between integration and self-determination that was seen in the debates of the Navajo council. Both sides understood the contest as one between the rights of tribes as independent political communities and the status of tribal members as citizens of the states.

On November 7, 1952, Ferguson filed a motion to dismiss in the Apache County Superior Court in St. Johns.<sup>334</sup> The motion asserted two basic grounds for dismissal: first, that Navajo Indians were not subject to the general jurisdiction of the state courts; and second, that the three-year state statute of limitations had run since all goods comprising the debt had been purchased prior to June 10, 1949.<sup>335</sup> The motion also asserted a counterclaim for damages of \$1,496: \$960 for the value of the stock, \$500 for the time and expense in fighting the claim, and \$36 in transportation costs.<sup>336</sup> The couple also protested that a number of the sheep seized in fact belonged to two of their daughters,<sup>337</sup> as suggested by the fact that many of the sheep were branded with a "V" or an "R," rather than with a "W" like the Williamses' sheep. Of course, Lee's response rejected these contentions.<sup>338</sup>

The motion to dismiss sat in the superior court for two years, and Lee quickly got tired of taking care of the sheep. On February 2, 1953, he filed a petition for permission to sell the sheep, pleading that the expense of feeding them would soon exceed their value.<sup>339</sup> Over the Williamses' objections, the superior court ordered Sheriff Crosby to hold a public auction at the Ganado Trading Post.<sup>340</sup> On March 26, Crosby auctioned off eleven ewes, two rams, and four goats, returning the remainder of the flock to the couple.<sup>341</sup> Although the \$274 netted during the sale more than compensated for

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332. Interview with Verdie Mae Lee, *supra* note 307.

333. Interview with Lorena Williams, *supra* note 312.

334. Transcript of Record, *supra* note 303, at 4-5.

335. *Id.* at 6-7.

336. *Id.* at 7-8.

337. *Id.* at 7-8, 9-10.

338. *Id.* at 9.

339. *Id.* at 9-10.

340. *Id.* at 22-24.

341. *Id.* at 31-33.

the remaining \$81 debt to Lee, the sheriff claimed \$247 for the costs of serving the summons, hiring an interpreter, attaching and transporting the sheep, advertising the sale, and returning the remaining sheep to the Williams home.<sup>342</sup> In other words, before any adjudication of jurisdiction or the underlying collection claim, their sheep had been seized and held, many had been sold, and, if the Williamses lost the dispute, the couple would be even more deeply in debt than when the case began.

It was not until December 3, 1954 that the superior court finally decided the motion to dismiss.<sup>343</sup> The court decisively rejected the motion, relying heavily on the citizenship of the Navajo Indians and the right to vote recently acknowledged by the Arizona Supreme Court:

On the one hand the Court has extended to them all of the rights . . . as citizens of the United States and the State of Arizona. On the other hand the Supreme Court has upheld their inherent limited powers of self-government and generally speaking not subject to State law. To my mind these two conceptions of the status of Indians cannot be harmonized. No man can serve two masters, nor bear allegiance to two independent nations or communities. As citizens of Arizona they have the right and do participate in making the laws and it is axiomatic that those who make the laws must obey them in a democracy . . . . It is my opinion that the grant of citizenship by the Government to the Navajo Indians and accepted by the State of Arizona has emancipated the Navajo Indians in all respects not expressly excluded by the Congress of the United States.<sup>344</sup>

The holding that citizenship emancipated the Navajos and undermined their special legal status was contrary to federal law. After some initial ambiguity, the United States Supreme Court had repeatedly held that citizenship did not undermine federal power with respect to Indians,<sup>345</sup> and the Arizona Supreme Court had recognized this in its 1948 decision that Indians had the right to vote.<sup>346</sup> But the decision conformed to the rhetoric of the termination policy, which called for emancipation of the Indians and freedom from all that set them apart from other citizens of the United States.

Six months later, on June 1, 1955, the parties filed a stipulated statement of facts, waiving their right to present further evidence and agreeing that the defendants owed the plaintiff \$81.22, reflecting the \$361.22 owed when the action was filed, less the \$280 the defendants had paid on October 23.<sup>347</sup> On June 13, Laurence Davis, a Phoenix attorney contracted to work half-time for the Navajo Nation, joined the case as co-counsel.<sup>348</sup> On June 20, the

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342. *See id.*

343. *Id.* at 38.

344. *Id.* at 40–42.

345. *See* *United States v. Waller*, 243 U.S. 452, 459–60 (1917); *United States v. Nice*, 241 U.S. 591, 596, 601 (1916); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 311–16 (1911).

346. *Harrison v. Laveen*, 196 P.2d 456, 459, 463 (Ariz. 1948).

347. Transcript of Record, *supra* note 303, at 37, 42.

348. *See id.* at 42.

superior court dismissed the defendants' counterclaim, and ordered them to pay the plaintiff \$82.22.<sup>349</sup> Neither the tribe nor the Williamses were ready to accept the trial court's ruling. On August 17, the defendants filed a notice of appeal to the Arizona Supreme Court.<sup>350</sup>

It was in the Arizona Supreme Court that the legal issues were most fully engaged. Neither party had the law clearly on their side. *Worcester v. Georgia*<sup>351</sup> provided the central precedent for the defendants. In the foundational 1832 decision, the Supreme Court had held that Georgia's assertion of jurisdiction over a non-Indian missionary on the Cherokee Reservation was "repugnant to the constitution, laws, and treaties of the United States," and that "the laws of Georgia can have no force" on the Cherokee Nation.<sup>352</sup> In subsequent decisions, the Court had affirmed that states lacked taxing jurisdiction<sup>353</sup> and criminal jurisdiction<sup>354</sup> over tribal members on their lands. But much had happened since 1832. Indians had become citizens,<sup>355</sup> their lands had been allotted, their people integrated with non-Indian communities,<sup>356</sup> and Congress had declared that it would no longer enter into treaties with Indian nations.<sup>357</sup> Since the late-nineteenth century, the Court had held that states could exercise taxing<sup>358</sup> and criminal jurisdiction<sup>359</sup> over non-Indians acting on Indian lands, and it was accepted that tribal members could sue non-Indians in state court, even about matters as close to tribal sovereignty as deprivation of land.<sup>360</sup> And unlike cases concerning criminal jurisdiction or property taxation, there was no history of federal legislation regarding civil jurisdiction. Could *Worcester's* broad exclusion from state jurisdiction still be valid?

Lower court authority suggested that it was not. It is true that in 1950 the Arizona Supreme Court held in *Begay v. Miller* that state courts lacked jurisdiction to divorce a Navajo couple who had already been divorced in tribal court, but the court made clear that its decision did not rest on a general lack of subject matter jurisdiction but instead the distinctive domestic

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349. *Id.* at 44–45. There is no explanation why the court added a dollar to the debt to which the parties had stipulated; it was likely a factual error made in addition to the court's legal errors.

350. *Id.* at 45.

351. 31 U.S. (6 Pet.) 515 (1832).

352. *Worcester*, 31 U.S. at 561.

353. *See The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

354. *See United States v. Kagama*, 118 U.S. 375 (1886).

355. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (declaring all Indians born within the United States to be citizens).

356. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (providing for the allotment of lands in severalty to Indians on reservations).

357. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (declaring that hereafter tribes were not powers with which the United States could make treaties).

358. *See Utah & N. Ry. v. Fisher*, 116 U.S. 28 (1885) (upholding taxation of railroad lands within an Indian reservation by the Territory of Idaho).

359. *See United States v. McBratney*, 104 U.S. 621 (1881).

360. *Felix v. Patrick*, 145 U.S. 317, 332 (1892).

relations context and comity for the tribal court decree.<sup>361</sup> More on point, several other state courts had upheld jurisdiction over civil actions by non-Indians against Indians,<sup>362</sup> at least two doing so in suits to collect on goods sold to Indians on their reservations.<sup>363</sup>

Secondary authority was also of little help to the defendants. *Corpus Juris Secundum* stated bluntly that “an Indian may be sued in the state courts in any matter over which the United States has not expressly retained jurisdiction.”<sup>364</sup> A 1930 *Yale Law Journal* article, *The Indian Problem and the Law*, similarly stated that aside from domestic relations, property, and other matters restricted by federal law, Indians were fully subject to state civil jurisdiction.<sup>365</sup> Although Felix Cohen’s 1941 *Handbook of Federal Indian Law* stated powerfully that “state laws have no force within the territory of an Indian tribe in matters affecting Indians,”<sup>366</sup> it substantially qualified this statement by declaring that “[i]n matters, not affecting either the Federal Government or the tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen.”<sup>367</sup> The *Handbook* even cited one of the state cases upholding jurisdiction over a collection suit against an Indian to illustrate this proposition.<sup>368</sup> Although the *Handbook* noted that no state jurisdiction at all existed in states like Arizona whose enabling acts disclaimed such jurisdiction,<sup>369</sup> this was a slim reed to bear the weight of the case alone.

361. Begay v. Miller, 222 P.2d 624, 629–30 (Ariz. 1950).

362. See, e.g., Plummer v. Hubbard, 201 N.Y.S. 747, 749 (N.Y. App. Div. 1923) (citing Stacy v. La Belle, 75 N.W. 60 (Wis. 1898)) (“In the absence of federal statute or existing treaty, or state statute, a state court has jurisdiction of an action on contract in favor of a white man against an Indian belonging to a tribe and a particular reservation.”); Red Hawk v. Joines, 278 P. 572, 575 (Or. 1929) (“[A]n Indian may sue and be sued in the state courts in any matter over which Congress has not expressly retained jurisdiction in the United States. Especially is this true where the Indian is a citizen.”); Stacy v. La Belle, 75 N.W. 60, 62 (Wis. 1898) (“In the absence of any federal statute or treaty to the contrary, and upon the principles stated, we must hold that a state court may take jurisdiction of an action on contract in favor of a white man, and against an Indian belonging to a tribe and a particular reservation.”).

363. See Stevenson v. Christie, 42 S.W. 418 (Ark. 1897) (holding that state court had jurisdiction over action by white man who had become a citizen of the Cherokee Nation to collect a debt against a Cherokee man for goods sold on the Cherokee Nation); Stacy, 75 N.W. 60 (holding that state court had jurisdiction over suit by federal Indian trader to collect for goods sold to Menominee Indian on Menominee Reservation); see also Tinker v. Midland Valley Mercantile Co., 105 P. 333 (Okla. 1909) (enforcing promissory note against Osage man for goods sold on credit without considering jurisdictional question), *rev’d on other grounds*, 231 U.S. 681 (1914) (holding that merchant should have born burden of proof on question of statutory exemption).

364. Williams v. Lee, 319 P.2d 998, 1001 (Ariz. 1958) (citing 42 C.J.S. *Indians* § 8(b) (1944)), *rev’d*, 358 U.S. 217 (1959).

365. Ray A. Brown, *The Indian Problem and the Law*, 39 YALE L.J. 307, 314–15 (1930).

366. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 116 (1941) (footnote omitted).

367. *Id.* at 379.

368. *Id.* at 379 n.177 (citing Stacy, 75 N.W. 60, among other authorities).

369. See *id.* at 382.

Ironically, the strongest support for the continuing vitality of *Worcester* came from Public Law 280,<sup>370</sup> which Congress enacted while the case was pending in superior court. In what was almost an afterthought in a statute largely directed at criminal jurisdiction, Congress had included civil jurisdiction in the grant of jurisdiction to the states.<sup>371</sup> The statute, along with the abortive 1949 attempt to extend state "civil and criminal laws and court jurisdiction" over the Navajo Reservation, was perhaps the best evidence that states lacked civil jurisdiction absent explicit congressional action. Still, neither alone suggested that states lacked jurisdiction in commercial disputes with non-Indians, which most lower courts assumed existed absent congressional authorization. In fact, Congressman Fernandez's primary target in the 1949 amendment was jurisdiction over Navajo marriage and divorce, an area in which authorities agreed that tribal jurisdiction was exclusive.<sup>372</sup>

In the Arizona Supreme Court, Lee's attorneys adopted the position of the superior court, presenting the question as "[w]hether Appellants, as citizens of the United States and residents of Arizona, may avoid their contractual obligations by virtue of their being members of the Navajo Tribe and residing on that Reservation."<sup>373</sup> They claimed that the effect of the defendants' argument that Indians possessed state voting rights but freedom from state jurisdiction was to make Indians "a special class of citizens, a thing foreign to our concept of democracy."<sup>374</sup> Invoking the arguments of termination, they contended that Indian exemptions from state jurisdiction were the product of treating Indians as a "conquered race" that was "not considered to have equal rights."<sup>375</sup> "Present trends and thinking," they declared, had "outmoded what is presently an antiquated approach."<sup>376</sup>

The defendants, in contrast, emphasized the rights of Indian tribes to self-government, derived from their inherent sovereignty, protected by treaties, and recognized in *Worcester v. Georgia* over a century earlier.<sup>377</sup> They used both Truman's veto of the extension of state jurisdiction through the Rehabilitation Act and the congressional provision of a means to assume state jurisdiction through Public Law 280 to bolster their claims that there was no such jurisdiction in the absence of federal law.<sup>378</sup> They rejected the

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370. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326).

371. See 28 U.S.C. § 1360 (2006).

372. *Navajo and Hopi Rehabilitation: Hearing on H.R. 3476, Before the Subcomm. on Indian Affairs of the H. Comm. on Pub. Lands*, 81st Cong. 203 (1949) (statement of Hon. Antonio N. Fernandez, Rep. of New Mexico).

373. Appellee's Answering Brief at 4, *Williams v. Lee*, 319 P.2d 998 (Ariz. 1958) (No. 6172).

374. *Id.* at 17.

375. *Id.* at 19.

376. *Id.* at 22.

377. Appellants' Opening Brief at 6-9, *Williams*, 319 P.2d 998 (No. 6172).

378. *Id.* at 11-12, 15-17.



contention that citizenship or equality required state jurisdiction: the Navajos were not asking for a special status but rather for the same status any member of a polity had within her own territory.<sup>379</sup> When Navajos left the reservation they were fully subject to state law, but their activities within their own territories were subject only to the jurisdiction of those territories.<sup>380</sup>

On January 7, 1958, the Supreme Court of Arizona rejected these arguments, quoting *Corpus Juris Secundum*.<sup>381</sup> The court nevertheless reversed the lower court, holding that a federal regulation of traders providing that “the buying of livestock and livestock products . . . shall be covered by special permits issued by the superintendent”<sup>382</sup> preempted the attachment sale of the livestock.<sup>383</sup> The State of Arizona had followed the case closely and rejoiced at the result. The Arizona attorney general issued a celebratory press release before the tribal attorneys had even received the opinion.<sup>384</sup> The state quickly sent officials to the Navajo government, demanding to review Navajo records.<sup>385</sup> Although they were rebuffed, it was clear that they were coming back.

On January 16, Norman Littell met with the Advisory Committee of the Navajo Council to request permission to seek certiorari and retain a Supreme Court specialist to assist with the case. For Littell and Paul Jones, the assimilationist chairman of the tribe, the case was all about the threat of taxation posed by the decision.<sup>386</sup> But other council members saw a broader threat to the Navajo people. Roger Davis, who in 1949 had been indifferent to the extension of state jurisdiction, declared that,

[T]his case has been hanging fire for a long, long time in the Arizona court, and many of the Navajos have wanted to know what happened to it, and now that the case has been decided—what will the Navajos say? And I think it is the best thing that it should go on.<sup>387</sup>

Similarly council member Howard Sorrell emphasized “the necessity for us to act at this time . . . . [W]e wish to block anything like this coming on to our Reservation while the people are not prepared to cope with it.”<sup>388</sup> The

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379. Reply Brief of Appellants at 15–20, *Williams*, 319 P.2d 998 (No. 6172).

380. *Id.*

381. *Williams*, 319 P.2d at 1001.

382. *Id.* at 1003 (quoting 25 C.F.R. § 277.13 (1957)).

383. *Id.* The defendants had made this argument but had not relied on it. According to Larry Davis, “We threw that thing in the brief just thinking it was probably the weakest thing in the whole brief, and it is the one point that the court seized upon.” *Navajo Minutes, supra* note 130, at 250 (Jan. 16, 1958).

384. *Navajo Minutes, supra* note 130, at 243 (Jan. 16, 1958).

385. *Id.*

386. *Id.* at 243–246.

387. *Id.* at 248

388. *Id.*

committee unanimously voted to provide funding for the Supreme Court petition.<sup>389</sup>

### C. *Williams v. Lee in the Supreme Court*

*Williams* came to a Supreme Court facing one of its greatest showdowns over state sovereignty. The much-delayed implementation of its 1954 decision in *Brown v. Board of Education* had met with both massive popular resistance in the South and academic attack from progressive scholars.<sup>390</sup> In the fall of 1958, the Court was forced to issue its opinion in *Cooper v. Aaron* to affirm the states' obligation to implement the Court's opinions.<sup>391</sup> Under these circumstances, the Williamses' demand to be exempt from state jurisdiction in a contract dispute might at best appear irrelevant and at worst seem to affirm separatism over equality. But Justice Black saw the importance of the opinion and its counterintuitive link to *Brown*.

Norman Littell filed the petition for certiorari in *Williams* on February 26, 1958.<sup>392</sup> A week earlier, on February 20, the Little Rock School Board had filed its request for a stay of federal desegregation orders.<sup>393</sup> The previous fall, Governor Faubus had ordered the Arkansas National Guard to Little Rock to prevent nine black school children from entering the Little Rock High School.<sup>394</sup> The students only entered three weeks later, after President Eisenhower ordered the guard to stand down and sent Army troops to the high school.<sup>395</sup> Throughout the school year, first Army soldiers and then federalized National Guard troops patrolled the school to prevent violence.<sup>396</sup> In June 1958, the Arkansas district court in *Aaron v. Cooper* found that the situation caused irreparable harm to education and stayed implementation of desegregation until the 1960–1961 school year.<sup>397</sup> The Eighth Circuit reversed, and in September 1958 the Court held an emergency session to hear the case before school resumed.<sup>398</sup> Two weeks later, the Court issued the unanimous opinion in *Cooper v. Aaron*, forcefully affirming federal supremacy in constitutional law.<sup>399</sup>

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389. *Id.* at 249.

390. See David A. Strauss, *Little Rock and the Legacy of Brown*, 52 St. Louis U. L.J. 1065, 1070–75, 1076–78 (2008).

391. *Cooper v. Aaron*, 358 U.S. 1 (1958).

392. Transcript of Record, *supra* note 303.

393. *Cooper*, 358 U.S. at 12.

394. *Aaron v. Cooper*, 257 F.2d 33, 36 (8th Cir. 1958).

395. Strauss, *supra* note 390, at 1078.

396. *Id.*

397. *Aaron v. Cooper*, 163 F. Supp. 13, 26, 28 (E.D. Ark. 1958).

398. *Cooper*, 358 U.S. at 4–5.

399. 358 U.S. 1.

It is not clear why the Supreme Court accepted certiorari in *Williams*, since the lower court had in fact reversed the writ of attachment.<sup>400</sup> Neither the petitioners nor the federal government thought the issue important enough to submit a brief regarding the petition for review. In fact, the clerk who summarized the certiorari petition for Justice Douglas tentatively suggested that the Court deny review:

Petitioners contend that this is the most important Indian case in ma[n]y years. I frankly do not know. I do not feel any alarm at requiring Indians to submit to state court jurisdiction in civil suits until Congress decrees otherwise. Deny (?)<sup>401</sup>

Chief Justice Warren's clerk, in contrast, called this an "important area of federal administration" and recommended that certiorari be granted "upon the belief that this problem could be common to any Indian reservation."<sup>402</sup>

It is more surprising that the Court issued the strong statement of inherent tribal sovereignty that it did. Although Davis and Ferguson's briefs to the Arizona Supreme Court dwelt on the rights of the Navajo people as an "independent political community," which had since "time immemorial . . . exercised political and governmental jurisdiction over its members,"<sup>403</sup> Littell's Supreme Court briefs drained the blood from these arguments. They focused instead on Congress's absolute power to abrogate tribal immunity from state jurisdiction and the alleged preemptive power of federal laws extending state jurisdiction in other contexts.<sup>404</sup>

The U.S. Solicitor General, invited by the Court to submit a brief in the case,<sup>405</sup> did even less to make an argument for inherent sovereignty.<sup>406</sup> This was not surprising. A few months before, the Office of the Solicitor of the Interior Department had issued the 1958 revision of the *Handbook of*

400. *Williams v. Lee*, 319 P.2d 998, 1003 (Ariz. 1958).

401. Summary of *Williams v. Lee* Cert. Petition (No. 39) (Apr. 8, 1958), in William O. Douglas Papers, Library of Congress, Box 1201, Folder 2.

402. Undated Memorandum from DMC at 3, in Earl Warren Papers, Library of Congress, Box 188.

403. Appellants' Opening Brief at 7–8, *Williams v. Lee*, 319 P.2d 998 (Ariz. 1958) (No. 6172).

404. Brief for Petitioner at 11–15, 19–21, *Williams*, 358 U.S. 217 (No. 39). The brief also revealed Littell's personal biases regarding state jurisdiction by declaring that Congress had extended state jurisdiction when it "considers that a particular tribe of Indians have so far advanced in adaptability as to be able to assume all of the duties of citizenship." *Id.* at 11.

405. Brief for the United States as Amicus Curiae Supporting Petitioners at 1, *Williams*, 358 U.S. 217 (No. 39).

406. Interestingly, J. Lee Rankin, famous for his championship of civil rights in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the solicitor general named on this brief dismissing the rights of Indians. But the arguments in the brief were likely more the work of the two attorneys from the Department of Justice Lands Division on the brief, Perry L. Morton and Roger Marquis, who had written a brief in *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), opining that "all authority over Indian lands not necessary to the proper exercise of federal jurisdiction is reserved to the state within which the land lies." Brief for the United States as Amicus Curiae Supporting Petitioner, *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946) at 6.

*Federal Indian Law.* Where Cohen's chapter on state jurisdiction had opened by declaring that "state laws have no force within the territory of an Indian tribe in matters affecting Indians,"<sup>407</sup> the new opening statement was that "[f]ederal power has been interposed so that State laws generally have had little force within the territory of an Indian tribe in matters affecting Indians."<sup>408</sup> The *Handbook* forthrightly admitted that the shift in federal policy was behind this diluted language:

Present Federal policy calls for the termination of Federal supervision of affairs of Indian tribes desiring such termination, to the extent practicable and as soon as termination is feasible. Any discussion of the scope of State power over Indian affairs must take that policy, and measures taken to effectuate it, into consideration.<sup>409</sup>

The 1958 *Handbook* nevertheless proclaimed that "[s]tate law does not apply to Indian affairs except so far as, and to the extent that, the United States gives or has given its consent."<sup>410</sup> The solicitor general's brief in the Supreme Court did not admit to even this much. The solicitor general rejected the petitioners' basic argument, declaring that "[w]e do not agree that reservation Indians are beyond the reach of *all* state law until Congress specifically provides otherwise."<sup>411</sup> It quoted recent cases establishing the right of Indians to vote and receive social security benefits as "examples of application of state laws to reservation Indians."<sup>412</sup> The brief also opined that the president's veto of the Fernandez Amendment and Congress's passage of Public Law 280 did not diminish the "reserved jurisdiction which the states already possessed."<sup>413</sup>

The solicitor general did agree that the court below should be reversed, but only on the narrowest of grounds. It argued that the federal regulation that extension of credit "will be at the trader's own risk" divested state courts of jurisdiction.<sup>414</sup> (Although the appellants had made this argument in the state courts and cited it in their petition for certiorari, they had since withdrawn from this position, saying newly discovered history of the regulation did not support it.)<sup>415</sup> The tribe's attorneys replied in an effort to repair

407. COHEN, *supra* note 366, at 116.

408. OFFICE OF THE SOLICITOR, U.S. DEP'T OF THE INTERIOR, *FEDERAL INDIAN LAW* 502 (1958) (footnote omitted).

409. *Id.* at 501 (footnote omitted).

410. *Id.*

411. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 408, at 5.

412. *Id.* at 6.

413. *Id.* at 7 n.4.

414. *Id.* at 2 (citing 25 C.F.R. § 252.17 (1957)).

415. A bench memo to Chief Justice Warren questioned this position, saying:

I can't understand the reason for this concession except that the petr's brief seems more concerned with making law than with winning the particular case before the Court—which involves \$82. The petr is determined to win on the broad ground that there is no jurisdiction at all in the state courts in any case involving Indians on a reservation.

the damage, noting that “inasmuch as the solicitor general appears here on behalf of the United States, petitioners’ guardian, we can only conclude by regretfully repeating the classic query, *Quis custodiet ipsos custodes*—who shall guard the guardians themselves?”<sup>416</sup>

The respondent’s brief challenged the existence of any Navajo sovereignty at all. The brief argued that invocation of *Worcester v. Georgia* was inappropriate because, unlike the Cherokee Nation, when the “the Navajos became a part of the United States there was no such thing as a Navajo Tribe in the political sense.”<sup>417</sup> Treaties were made with “headmen” lacking any coercive powers, who were replaced by “puppet headmen” should they fail to accomplish the federal will.<sup>418</sup> Citing the federal government’s 1923 organization of the Navajo council, the state declared that “[t]he political entity known as the Navajo Tribe was an artificial creature of the federal government, not a recognized nation as was the Cherokee.”<sup>419</sup> (This assertion was particularly ironic coming as it did in the midst of a resurgence of Navajo exercise of sovereignty.)

Much of the November 20th argument in the case was consumed with procedural questions.<sup>420</sup> Justice Whittaker was particularly concerned with whether the defendants had waived immunity from jurisdiction by participating in the state court action and even filing a counterclaim.<sup>421</sup> This led to a more important question: Did the petitioners argue that the state court lacked subject-matter jurisdiction over the dispute or personal jurisdiction over the defendants?<sup>422</sup> Littell could not quite answer this question: sometimes he said they lacked personal jurisdiction, sometimes subject-matter jurisdiction, and when challenged he ultimately asked to throw himself on the mercy of the Supreme Court and have this question resolved in chambers.<sup>423</sup> Still, Littell was comfortable and confident, presenting a coherent argument about the effect of *Worcester* and Public Law 280.<sup>424</sup>

William Stevenson for the respondent was less poised, pausing to shuffle through his papers for the reasoning of *Worcester*, stumbling over the effect of Public Law 280, and occasionally reciting principles that in fact helped

Undated Bench Memo, in Earl Warren Papers, Library of Congress, Box 188, MAF.

416. Petitioners’ Reply Brief at 9, *Williams v. Lee*, 358 U.S. 217 (1959) (No. 39).

417. Brief for the Respondent at 7, *Williams*, 358 U.S. 217 (No. 39) (quoting NAVAJO AGENCY, U.S. DEP’T OF THE INTERIOR, THE NAVAJO YEARBOOK OF PLANNING IN ACTION 112 (Robert W. Young ed., Report No. V 1955)).

418. *Id.* at 8 (quoting NAVAJO AGENCY, U.S. DEP’T OF THE INTERIOR, THE NAVAJO YEARBOOK OF PLANNING IN ACTION 112 (Robert W. Young ed., Report No. V 1955)) (internal quotation marks omitted).

419. *Id.*

420. Oral Argument, *Williams*, 358 U.S. 217 (No. 39), available at National Archives, RG 267 (transcribed from audio recording by author).

421. *Id.*

422. *Id.*

423. *Id.*

424. *See id.*

his opponent.<sup>425</sup> He sought to build his case on the way things had changed since *Worcester* was decided, and particularly on Navajos' greater assumption of state rights.<sup>426</sup> The Navajo had "insisted on his right to vote," and Navajos could and indeed had run for positions on the Board of Supervisors for Apache County, which included part of the Navajo Nation.<sup>427</sup> This was a dangerous argument for a Court that had just ruled for federal supremacy in *Cooper v. Aaron*, and one justice responded by asking whether "these changes haven't affected the broad constitutional relationship between the federal government and the states, vis-a-vis Indians have they?"<sup>428</sup>

Another potential key turning point in the argument may have come from Littell's last minute effort to rebut the solicitor general's suggestion that the regulation placing extension of credit at the trader's own risk divested *any* court of jurisdiction over collection of resulting debts. In order to show that tribal courts could and in fact did exercise jurisdiction over such actions, Littell presented a list of 215 cases traders had filed in the Navajo courts in the last few months.<sup>429</sup> The list drew great interest, and some confusion, from the bench. Chief Justice Warren initially assumed it was a list of 215 state court cases, and was surprised to be corrected.<sup>430</sup> Justice Hugo Black, who would author the opinion, asked detailed questions about the legal foundation for tribal courts.<sup>431</sup> Others asked whether their decisions were final, how the judges were selected, and whether they applied tribal custom. Although Littell could not discuss the courts without mentioning their "very marked limitations,"<sup>432</sup> he may have helped his case in ways he could not have imagined by discussing the tribe's efforts to improve them.

Meeting in conference to discuss the case, all but one Justice voted to reverse the opinion below, but some favored doing so on narrow statutory grounds.<sup>433</sup> For most of the Justices, *Williams* was likely a "nothing case,"<sup>434</sup> far removed from the momentous questions raised by the implementation of *Brown*. But Justice Hugo Black, who wrote the opinion for the Court, saw a paradoxical link between the two cases. Justice Black was perhaps the Justice who had thought most deeply about his commitment to civil rights. Black was from Alabama, the heart of the segregated South, and had even briefly become a member of the Ku Klux Klan to gain political support in

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425. *See id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *See* William J. Brennan Papers, Library of Congress, Part I, Box 15, Folder 4.

434. Interview with Judge Guido Calabresi, in New Haven, Conn. (Dec. 29, 2008). Indeed, Judge William Canby, now the leading federal jurist in Indian law, but then a clerk for Justice Whittaker, could not recall a single conversation among the other law clerks or with his Justice regarding the case. Telephone interview with Judge William Canby (Apr. 6, 2011).

his campaign for the Senate in the 1920s.<sup>435</sup> Firmly behind *Brown v. Board of Education*<sup>436</sup> and a key member of the liberal Warren court, Black had taken much fire for his support of integration. In 1959, the Alabama Senate actually passed a resolution declaring it to be their sense that his remains should not be mingled with the Alabama soil.<sup>437</sup>

Nor was Black insensible to the apparent incongruence between desegregation for African-Americans and separate institutions for Indians. During oral argument in *Brown v. Board of Education* he had asked what a decision abolishing the doctrine of separate-but-equal would mean for separate Indian schools.<sup>438</sup> Showing the confusion of the Justices and civil rights attorneys on the status of the Indian, when Justice Jackson continued this line of questioning, future Justice Thurgood Marshall declared that he thought those schools' policy would be overturned, but that "the Indians . . . just have not had the judgment or the wherewithal to bring lawsuits."<sup>439</sup>

In considering *Williams v. Lee*, Justice Black was forced to consider whether integration was necessarily the way to respect the rights of all oppressed racial groups. According to Judge Guido Calabresi, who was Justice Black's clerk when *Williams* was decided, the case made Black realize that there were some minority groups that really wanted to be "separate and independent and themselves."<sup>440</sup> Although the appellants' briefs in the U.S. Supreme Court barely mentioned tribal self-government, Justice Black saw in the case the insistence on tribal independence that the Court had recognized in *Worcester v. Georgia*, that the United States had promised to the Navajos in the Treaty of 1868, and that was now being reflected in the development of the Navajo courts.

Justice Black's opinion for the Court drew some language directly from the briefs to the Arizona Supreme Court, but also developed arguments and facts that appeared nowhere in the record. The opinion had the structure and some of the spirit of *Worcester v. Georgia*.<sup>441</sup> As in *Worcester*, the starting point was the initial independent sovereignty of Indian tribes: "Originally the Indian tribes were separate nations within what is now the United States."<sup>442</sup> Although the tribes had been forced to give up "complete independence" in exchange for a measure of self-government and land, they had retained their freedom from state jurisdiction.<sup>443</sup> Calling *Worcester* one of

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435. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 91–93 (Fordham Univ. Press, 2d ed. 1997) (1994).

436. *Id.* at 431–32.

437. *Id.* at 443.

438. See BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 29 (Leon Friedman ed., 2004).

439. *Id.* at 50.

440. Interview with Judge Guido Calabresi, *supra* note 434.

441. 31 U.S. (6 Pet.) 515 (1832).

442. *Williams v. Lee*, 358 U.S. 217, 218 (1959).

443. *Id.*

Chief Justice Marshall's "most courageous and eloquent opinions," the Court stated that "[d]espite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law."<sup>444</sup> Although state law was no longer absolutely excluded, "the basic policy of *Worcester* has remained."<sup>445</sup> Thus state jurisdiction was barred except "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," such as suits by Indians against non-Indians in state courts and criminal jurisdiction over crimes between non-Indians.<sup>446</sup> But where state law would undermine the rights of Indians or the authority of their government, the basic policy of *Worcester* remained in force. "Essentially," the Court declared, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."<sup>447</sup> Although later courts have interpreted the phrase narrowly,<sup>448</sup> the context suggests that the state was excluded from all jurisdiction over Indian affairs.<sup>449</sup>

In light of these principles, federal statutes were not the source of the exclusion of state law but rather evidence of "the assumption that the States have no power to regulate the affairs of Indians on a reservation."<sup>450</sup> The opinion was careful not to limit Congress's power with respect to Indian tribes. Justice Black, after all, had been a senator and core supporter of expansive federal powers under the New Deal.<sup>451</sup> But the opinion emphasized the New Deal policies of encouraging "tribal governments and courts to become stronger and more highly organized" even as it also sanctioned the termination "policy calculated eventually to make all Indians full-fledged

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444. *Id.* at 219 (footnote omitted).

445. *Id.*

446. *Id.*

447. *Id.* at 220.

448. See *Nevada v. Hicks*, 533 U.S. 353, 360–61 (2001); *McClanahan v. Arizona*, 484 P.2d 221, 223–24 (Ariz. Ct. App. 1971).

449. This conclusion is supported by the case cited to support the statement, a *cf.* citation to *Utah & Northern Railway Co. v. Fisher*, 116 U.S. 28 (1885), in which the Court held that the Idaho territory could tax the property of a railroad on a right of way granted it by the federal government on an Indian reservation. The Court specified that the tax did not interfere with any rights of the Indians, and the terms of the federal acquisition of the taxed property from the tribe effectively withdrew the land from the reservation. *Id.* at 32. *Utah & Northern Railway* thus stands for the proposition that the state may have jurisdiction when no rights or interests of reservation Indians are affected. Professor Richard Pomp, in his exhaustive and penetrating examination of the caselaw on state jurisdiction in Indian country, severely criticizes *Williams* for stating the test in this fashion, when the rest of the opinion endorses a far broader exclusion of the state from Indian affairs. Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 *Tax Law.* 897, 998–1004 (2010). As he points out, the language sanctioned courts in exercising discretion to determine whether there was state jurisdiction in Indian country without explicit congressional approval. *Id.* at 1000–02. While acknowledging the force of his critique, I would argue that a proper reading of *Williams* would find state jurisdiction excluded in all areas impacting tribal institutions and individuals; the fault this lies more with later courts than the opinion itself.

450. *Williams*, 358 U.S. at 220.

451. NEWMAN, *supra* note 435, at 228.



participants in American society” as soon as Indians could assume this status without disadvantage.<sup>452</sup> But all of the Termination Era statutes extending state jurisdiction over reservations, which the Court might have cited as evidence for a general federal support for state jurisdiction, instead demonstrated that when Congress desired that states exercise this power “it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied.”<sup>453</sup>

The Court found that the relationship between the Navajos and the United States showed “no departure” from these general principles, developing the importance of the Treaty of 1868 in this regard.<sup>454</sup> The treaty was indeed sacred to the Navajo people; its signing marked the release of the tribe from their confinement at Fort Sumter in Bosque Redondo, New Mexico, and the guarantee that they would never again be forced from their homeland.<sup>455</sup> Although the petitioners’ briefs had cited the treaty in support of the concept of exclusion of state law, Justice Black’s opinion was the first to set forth the history of the treaty, which was signed when the Navajos were an “exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man.”<sup>456</sup> This history and the struggle it symbolized contributed to the Court’s broad reading of the treaty language that simply “set apart” the reservation for the Navajos’ “permanent home” and prohibited all but government officials from entering.<sup>457</sup> These terms, the Court found, included an “understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.”<sup>458</sup>

Federal efforts to strengthen the Navajo government and courts under the Navajo-Hopi Rehabilitation Act demonstrated continuing support for this promise.<sup>459</sup> President Truman’s veto of the rehabilitation bill that would have imposed state jurisdiction did so as well.<sup>460</sup> The Court also emphasized the efforts of the Navajo tribe in recent years to develop its court system.<sup>461</sup> In the last decade of Navajo action, the tribal government had considered and almost approved state jurisdiction, rejected it in light of the opposition of the Navajo people, and then dedicated its own funds to its legal system in

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452. *Williams*, 358 U.S. at 220.

453. *Id.* at 221.

454. *Id.*

455. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1127 (2004).

456. *Williams*, 358 U.S. at 221.

457. Treaty with the Navajo Indians, arts. 2 & 13, June 1, 1868, 15 Stat. 667.

458. *Williams*, 358 U.S. at 221–22.

459. *Id.* at 222.

460. *Id.* at 222 n.9.

461. *Id.* at 222.

part to ward off state jurisdiction, which all contributed to the tribe's ultimate success in *Williams*.

Most interestingly, the opinion emphasized the link between the case and the viability of tribal institutions. After all, if self-government was narrowly understood, one might doubt that jurisdiction over this wholly private contract dispute would interfere with it. The parties had not argued that any Navajo law conflicted with Arizona law regarding the contract. In fact, in 1956 the Navajo Council had enacted a law permitting attachment of all but the first seventy-five sheep to collect on a debt.<sup>462</sup> But the Court, perhaps recognizing the challenges of developing a functioning tribal legal system, found that the very fact of concurrent jurisdiction would undermine tribal institutions: "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."<sup>463</sup> This simple contract case, in other words, involved not just the rights of the plaintiff and the defendants, or even the rights of state and federal governments, but also the social and political fabric of the tribe. That being the case, the Court declared as follows:

It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.<sup>464</sup>

The other Justices unanimously approved the opinion. Several noted that it was a "fine" or "interesting" opinion, but did not otherwise comment. Justice Frankfurter, however, wrote Black, "I agree with every word, especially your essay on *Brown v. Board of Education*."<sup>465</sup> Black was gleeful that Frankfurter had caught his hidden meaning: "There," he told his clerk, "that's why I say Felix is the brightest man on the Court."<sup>466</sup> Black had seen in the initial bitter resistance to *Worcester v. Georgia* and its acceptance as a principle of law over a century later a vindication of the Court's actions in *Brown*.<sup>467</sup> He had a deep faith in the law—not as a matter of pure text or precedent, but its underlying logic and justice—and saw in both *Worcester*

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462. *Navajo Minutes*, *supra* note 130, at 130, 143 (July 19, 1956).

463. *Williams*, 358 U.S. at 223.

464. *Id.* (citations omitted).

465. Interview with Judge Guido Calabresi, *supra* note 434; accord NEWMAN, *supra* note 435, at 483 (quoting remark but not identifying the context).

466. NEWMAN, *supra* note 435, at 483.

467. See Interview with Judge Guido Calabresi, *supra* note 434. More recently, Justice Breyer also linked *Worcester* and *Brown* as defining moments in the Court's exercise of judicial review in the face of popular opposition. STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 1–2 (2010).

and *Brown* an essential rightness on the law that would be vindicated by time.<sup>468</sup>

#### V. THE AFTERMATH OF *WILLIAMS V. LEE*

At the end of World War II, both Indian and non-Indian communities had embraced the idea of Indian equality with a new passion. The question was what Indian equality would mean and whether it could co-exist with the notion of the Indian tribe. By 1961, Native opinion was clear on this point: equality meant not only equal treatment of Indian people when they participated in off-reservation society but also respect for tribes, for their rights, and for their status as self-determining governments within the American system. By 1970, this consensus would become the basis of a new federal Indian policy. *Williams* provided a legal foundation for these tribal and federal efforts, supporting further rejections of state jurisdiction and affirming the independence of tribal institutions. But now, both in the Court and in popular debate, the self-governance principle is once again under attack on the grounds that it is special, unfair, and inconsistent with equality and democracy in the United States. This section discusses the impact of and challenges to the legacy of *Williams v. Lee*.

On June 3, 1961, 800 Indians, including 467 delegates from 90 tribes, gathered for the American Indian Chicago Conference.<sup>469</sup> The resulting Declaration of Indian Purpose called termination a “program of destroying Indian resources, of denying Indian aspirations, and arbitrarily relieving the Federal government of responsibility for specific tribes or in specific areas of interest” and called on the government to abandon the policy in favor of one based on a “broad educational process as the procedure best calculated to remove the disabilities which have prevented Indians from making full use of their resources.”<sup>470</sup>

In 1970, President Nixon embraced these goals, calling for a policy of “self-determination without termination.”<sup>471</sup> His announcement made clear that this new policy was a matter of basic equality, describing Indians as “the most deprived and most isolated minority group in our nation,” whose current state was “the heritage of centuries of injustice” in which “American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.”<sup>472</sup> The response to this injustice had to be a “new era in which the Indian future is determined by Indian acts and Indian decisions.”<sup>473</sup> The result was the Self-Determination

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468. *Id.*

469. CLARKIN, *supra* note 86, at 1.

470. *Id.* at 18.

471. Special Message to the Congress on Indian Affairs, *supra* note 127, at 365.

472. *Id.* at 364.

473. *Id.* at 365.

Era, which continues to guide congressional and executive Indian decision making today.<sup>474</sup>

*Williams v. Lee* helped provide the legal foundation for this policy, in both Congress<sup>475</sup> and the Court. It immediately provided important support for two further Navajo fights for immunity from state jurisdiction. Even as *Williams* was pending, the Navajo council and its attorneys had begun discussing the dispute that would become *Warren Trading Post Co. v. Arizona State Tax Commission*.<sup>476</sup> Still frustrated with its inability to tax the Navajo people or tribe directly, the state started to tax the gross sales of non-Indian traders on the reservation.<sup>477</sup> In August of 1958, after certiorari had been granted in *Williams*, Warren Trading Post challenged the tax.<sup>478</sup> In 1965, in another opinion by Justice Black, the Court invalidated the tax.<sup>479</sup> Although the opinion is often understood as turning on "comprehensive federal regulation" of traders, the existing regulations—licensing traders and authorizing an unexercised power to set prices<sup>480</sup>—were not clearly inconsistent with state taxation. This was a far cry from the kind of "occupation of the field" the Court has demanded outside the Indian context to find state preemption.<sup>481</sup> One can only understand the opinion if the burden was on the state to establish that its laws "clearly do not interfere with federal policies concerning the reservations."<sup>482</sup> Under this standard, the broad federal regulatory power over trading with Indians, combined with the general exclusion of state law from reservations, meant that the state taxes violated federal law.

Eight years later, the continuing struggle with Arizona over jurisdiction produced *McClanahan v. Arizona State Tax Commission*.<sup>483</sup> Rosalind McClanahan, then an eighteen-year-old teller at a bank on the reservation, began the lawsuit when she wondered whether the state could really claim \$16.20 of her yearly income. DNA-People's Legal Services represented her in the Supreme Court and ultimately won a decision that the state could not tax an Indian for her income earned in Indian country.<sup>484</sup> As in *Warren Trad-*

474. See, e.g., ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 50, at 155.

475. See, e.g., P.L. 106-179, Indian Tribal Economic Development and Contract Encouragement Act, S. Rep. No. 106-150 at 11-12 (1999); P.L. 102-137, Making Permanent the Legislative Reinstatement, Following the Decision of Duro against Reina (58 U.S.L.W. 4643, May 29, 1990), of the Power of Indian Tribes to Exercise Jurisdiction over Indians, S. REP. No. 102-153 at 32, 43-44; P.L. 95-608, Indian Child Welfare Act of 1978, H.R. REP. NO. 95-1386 at 15 (1978).

476. 380 U.S. 685 (1965).

477. *Navajo Minutes*, *supra* note 130, at 71 (Feb. 5, 1958).

478. Petition for Writ of Certiorari at 2, *Warren Trading Post*, 380 U.S. 685 (No. 115).

479. See *Warren Trading Post*, 380 U.S. 685.

480. See *id.* at 688-90.

481. See, e.g., *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (holding that state law charging higher fees to commercial insurers than government insurers was not preempted by ERISA, a law comprehensively regulating employee benefits and expressly preempting any state law "relating to" employee benefit plans).

482. *Warren Trading Post*, 380 U.S. at 687 n.3.

483. 411 U.S. 164 (1973).

484. See *McClanahan*, 411 U.S. at 164.

ing Post, the Court discussed self-government but ostensibly rested its decision on federal preemption. Justice Marshall's opinion for the Court even declared (without citing a supporting case) that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."<sup>485</sup> Still, the decision makes little sense without the *Williams* assumption that state law is generally excluded from reservation affairs. No statute, treaty, or policy spoke specifically to taxation of income; only the Court's broad reading of the 1868 treaty and the Arizona enabling act as preserving Navajo independence from state jurisdiction could lead to this result.<sup>486</sup> Thus, the opinion, while understood to provide a separate test for the exclusion of state jurisdiction, in fact builds on *Williams*'s distinctive assumptions and reading of the relevant law.

In 1976, *Williams* served as a central precedent in *Fisher v. District Court*, in which the Court held that a state could not exercise jurisdiction over a custody dispute between Blackfeet Indians domiciled on the Blackfeet reservation.<sup>487</sup> *Fisher* provided legal grounding for the Indian Child Welfare Act of 1978,<sup>488</sup> which secured and broadened tribal court jurisdiction over foster care, adoption, and other placement disputes involving Indian children.<sup>489</sup> But 1976 also saw a significant blow to the force of *Williams* in disputes over state jurisdiction where the subject of jurisdiction was not a tribal member. In that year, *Moe v. Confederated Salish & Kootenai Tribes* dismissed the relevance of the *Williams* protection of tribal self-government to a tribal member's challenge to state taxation of his cigarette sales to non-Indians.<sup>490</sup> In 1980, in *Washington v. Confederated Tribes*, the Court built on *Moe* to hold that even when tribes themselves managed cigarette sales, and even when the income from sales and taxation of those cigarettes was the main support for the tribal government, neither the principle of self-government nor the existence of federal laws encouraging the business in question prohibited the tax.<sup>491</sup> *Williams*, however, may have influenced *Washington*'s suggestion that tribal businesses will sometimes be immune from state law if on-reservation efforts by tribes or their members significantly contribute to the value they sell,<sup>492</sup> and *Williams* clearly

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485. *Id.* at 172.

486. *See id.* at 173–76.

487. *See* 424 U.S. 382 (1976) (per curiam).

488. Pub. L. 95-608, 93 Stat. 3069 (codified in scattered sections throughout 25 U.S.C.).

489. *See* 25 U.S.C. §§ 1911–23 (2006).

490. 425 U.S. 463, 483 (1976). *Moe* was apparently the product of the Court's traditional disregard for Indian law cases and Justice Rehnquist's disregard for the current state of Indian law. Then a relatively junior member of the Court, Justice Rehnquist was assigned the case as punishment for a skit that displeased Chief Justice Burger. An Arizona native with "nothing but contempt for Indian cases," he used the opinion to reverse the decades of earlier trends on the Court. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 500 (rev. ed. 2005).

491. 447 U.S. 134 (1980).

492. *See Washington*, 447 U.S. at 156–57. This value-added test has since been incorporated as part of the preemption test, *see California v. Cabazon Band of Mission Indians*, 480 U.S.

influenced the broader principle that federal laws need not expressly prohibit state jurisdiction to exclude it.<sup>493</sup> Together, these principles have led to decisions prohibiting imposition of state laws on non-Indians hunting tribally-managed game,<sup>494</sup> state taxation of non-Indians contracting with tribal timber industries and schools,<sup>495</sup> and even state regulation of tribal gaming.<sup>496</sup> Still, the parsimonious interpretation of self-government in more recent cases has greatly limited the relevance of *Williams* in such disputes.<sup>497</sup>

Similarly, *Williams* has played a significant but not insurmountable role in the protection of tribal court authority. In 1978, the Court in *Santa Clara Pueblo v. Martinez* used *Williams* to hold that there was no non-habeas federal cause of action to review Indian Civil Rights Act claims against tribes, and that tribal institutions were appropriate fora to hear such claims.<sup>498</sup> That same year, *United States v. Wheeler* relied in part on *Williams* to hold that the Navajo judicial power was an exercise of its inherent sovereignty, and therefore was not limited by the Double Jeopardy Clause of the Fifth Amendment.<sup>499</sup> But that year the Court also decided *Oliphant v. Suquamish Indian Tribe*, holding that although no federal law or treaty removed tribal criminal jurisdiction over non-Indians, tribes nevertheless lacked such jurisdiction because it was "inconsistent with their status" as Indian tribes.<sup>500</sup>

Subsequent cases regarding civil jurisdiction over nonmembers have not wholly denied such jurisdiction but have severely limited it. In *Williams*, the Court declared the fact that Hugh Lee was non-Indian to be "immaterial" and held that, to avoid undermining tribal court authority over reservation affairs, tribal court jurisdiction over an action involving tribal members and arising on the reservation was not only present but exclusive;<sup>501</sup> this holding

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202, 219 (1987), but its lack of relation to anything having to do with congressional intent or statutory language, and the fact that the *Williams* test is cited at the beginning of the paragraph establishing the test, suggests that the test is an expression of the *Williams* self-government principle rather than of preemption.

493. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 150–51 (1980).

494. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

495. See *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe*, 448 U.S. 136.

496. See *Cabazon Band*, 480 U.S. 202.

497. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (holding that the state could tax oil and gas revenues from lessees of tribal lands although the tax was on tribally owned resources and oil and gas development was almost exclusively managed by the federal and tribal governments).

498. 436 U.S. 49 (1978).

499. 435 U.S. 313, 324 (1978) ("[I]mplicit [in the Navajo Treaty] was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." (quoting *Williams v. Lee*, 358 U.S. 217, 221–22 (1959))).

500. 435 U.S. 201, 208–11 (1978). The Ninth Circuit, in contrast, had noted that *Williams* stated in dicta that "if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive," *Oliphant v. Schlie*, 544 F.2d 1007, 1010 (9th Cir. 1976) (quoting *Williams*, 358 U.S. at 220), and upheld jurisdiction based on the principle, also relied on in *Williams*, that tribes retained their rights of self-government until expressly divested of those rights by Congress. See *Oliphant*, 544 F.2d at 1009 n.1.

501. *Williams*, 358 U.S. at 220, 223 (1959).

would seem to prevent limitations on such jurisdiction. Indeed, two cases in the 1980s relied on *Williams* to hold that civil court jurisdiction over non-Indians was broader than criminal jurisdiction<sup>502</sup> and that protecting tribal court jurisdiction was an important part of the federal policy of supporting tribal self-government.<sup>503</sup>

Most other cases, however, have ignored the Court's actual rationale in *Williams* and held that it stands for nothing more than the principle that Indian tribes have jurisdiction over non-Indians who have entered into consensual relationships with tribes or their members.<sup>504</sup> The first case limiting civil jurisdiction did rely on *Williams* in finding that tribes have jurisdiction over nonmembers where necessary to protect their rights to make their own laws and to be ruled by those laws, and also where non-member actions would have a direct effect on the tribe or its members.<sup>505</sup> But the Supreme Court has understood what actually affects tribal self-government so narrowly that it has never found jurisdiction on this ground—not when non-Indians driving on reservations caused serious injuries,<sup>506</sup> not when non-Indian officers searched and damaged property in a tribal home,<sup>507</sup> and not when a non-Indian bank foreclosed on reservation land after offering the owners less favorable terms because of their concerns about dealing with an Indian business.<sup>508</sup> Indeed, these cases have inverted *Williams*'s admonition that tribal courts have *exclusive* jurisdiction over matters that infringe on tribal self-government into a rule that tribal jurisdiction will *only* exist where the case seriously infringes on self-government.<sup>509</sup>

The cases emasculating *Williams* have been marked by discomfort with the very idea that *Williams* reaffirmed: that tribes have the right to govern their territories, even when nonmembers might be affected as a result. The opinions portray this right as special, unequal, and unfair. One sees this already in Justice Rehnquist's comments in the conference on *McClanahan*, arguing that the income tax should be permitted because "Indians should not get a free ride."<sup>510</sup> Suggestions of unfairness played a more dispositive role in subsequent cases. Thus, although states and cities lower tax rates as an incentive to encourage non-resident shopping, when tribes do so it is condemned as unfairly "market[ing] an exemption from state taxation."<sup>511</sup> And

502. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855 (1985).

503. See *Iowa Mut. Ins.*, 480 U.S. at 14; *Nat'l Farmers Union*, 471 U.S. at 856.

504. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997).

505. See *Montana v. United States*, 450 U.S. 544, 564–66 (1981).

506. See *Strate*, 520 U.S. at 457–58.

507. See *Nevada v. Hicks*, 533 U.S. 353 (2001).

508. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

509. See *Plains Commerce Bank*, 554 U.S. at 331–32; *Strate*, 520 U.S. at 459.

510. Conference Notes for *McClanahan v. Arizona* (Dec. 15, 1972), in William O. Douglas Papers, Library of Congress, Box 1574.

511. *Washington v. Confederated Tribes*, 447 U.S. 134, 155 (1980).

while all other governments punish non-citizens who commit crimes in their territory, when tribes seek to do so their action is portrayed as an “unwarranted intrusion[] on [the non-Indians’] personal liberty.”<sup>512</sup> And when a tribal court seeks to hear a personal injury action against a driver who seriously injured a reservation resident while working on the reservation, the Supreme Court declares that the non-Indian defendant should not be forced to defend against a “commonplace state highway accident claim in an unfamiliar court.”<sup>513</sup> Tribal self-governance rights are different, narrow, and necessarily limited to those areas the Court considers uniquely tribal.

The notion that there is something just unfair about the idea of tribes as governments with separate rights from other citizens is expressed more starkly outside the Court. In challenging tribal land claims in northern New York, Upstate Citizens for Equality dots the roads with signs proclaiming “No Sovereign Nation, No Reservation,”<sup>514</sup> and insists that the extension of citizenship to Indians means that federal Indian policy constitutes unconstitutional discrimination.<sup>515</sup> Similarly, in protesting against treaty fishing rights in Wisconsin, Stop Treaty Abuse created a promotional beer can showing a walleye being speared from below with the slogan “Land Claims, Fishing Rights, Hunting Rights, Water Rights, Equal Rights?”<sup>516</sup> Nor is this the province of isolated protesters. On December 17, 2009, a Wall Street Journal editorial blasted the Akaka bill that would restore a measure of sovereignty to the descendants of the illegally-annexed Kingdom of Hawaii as a redistribution of wealth based on race.<sup>517</sup>

Current Chief Justice Roberts expressed similar sentiments in 1983 as an associate counsel to the president. In a memo on the proposed repeal of the 1953 resolution that declared termination the official congressional policy, Roberts wrote that to him the resolution read like “motherhood and apple pie,” noting disdainfully that the Indians opposed it because they preferred “their ‘special status’” to equal rights.<sup>518</sup> Since he became Chief Justice, the Court has sped up its attack on tribal interests, granting certiorari in four

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512. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

513. *Strate*, 520 U.S. at 459.

514. Photographs: Signs along highways on Cayuga Lake, taken by Bethany Berger (June 9, 2009) [hereinafter *Cayuga Lake Signs*] (on file with author).

515. UPSTATE CITIZENS FOR EQUALITY, <http://www.upstate-citizens.org> (last visited Mar. 13, 2011).

516. See Michelle Aguilar-Wells & Barbara Leigh Smith, *Confronting Racism: Treaty Beer Comes to Washington State*, available at [www.evergreen.edu/tribal/docs/SmithAguilarTreatyBeer12910.doc](http://www.evergreen.edu/tribal/docs/SmithAguilarTreatyBeer12910.doc) (depicting and discussing the Treaty Beer cans sold in Wisconsin).

517. Editorial, *Aloha Segregation: The Akaka Bill Would Create a Race-Based State in Hawaii*, WALL ST. J., Dec. 17, 2009, at A26 [hereinafter *Aloha Segregation*].

518. Memorandum from John G. Roberts, Assoc. Counsel, to Fred F. Fielding, White House Counsel (Jan. 18, 1983). This and other memoranda are further discussed in Richard A. Guest, “Motherhood and Apple Pie”: *Judicial Termination and the Roberts Court*, FED. LAW., Mar./Apr. 2009, at 52.



Indian law cases (in three of which there was no split in the courts below) and ruling against the tribes in each one.<sup>519</sup>

Thus the same ideas that led to the termination era—that tribal rights are unequal and unfair—are fueling a contemporary backlash against tribes. Although *Williams* and its progeny have created an accepted legal space for tribal self-government, wherever an issue creates a margin for distinguishing prior cases, the Court limits such precedents to their facts. And while tribes remain unified behind the consensus that emerged in the 1950s, attacks on the equality of self-government policies are powerful rallying cries outside Indian communities. The history of *Williams*, in which these same arguments were considered and rejected by Indian tribes in favor of another understanding of equal participation in the American polity, provides an instructive lesson in evaluating contemporary claims.

### CONCLUSION

On April 27, 2008, forty-nine years after the Court issued its decision, the Navajo Nation recognized Lorena Williams for her contribution to the Navajo people. Paul Williams had died in 1979, and Lorena was ninety-seven years old. Surrounded by generations of her descendants, Navajo Nation President Joe Shirley and former Chief Justice Robert Yazzie of the Navajo Nation Supreme Court presented Lorena Williams with an embroidered blanket to honor her. “We want to say thank you for saying they’re not going to walk all over our sovereignty,” President Shirley told Mrs. Williams<sup>520</sup>:

If they walk all over our sovereignty, they walk all over us, and our children, and our children’s children. We’re not going to allow that. So we’re going to fight for our sovereignty, and I’m sure glad that they did. We can’t say thank you enough.<sup>521</sup>

Although sovereignty has become the mantra of Navajo politicians, it is not a meaningful word for many Navajos. During my interview with Verdie Mae Lee, her son asked me what the concept meant. For ordinary Navajo people, *Williams v. Lee* represents not an abstract right like sovereignty but instead the daily experience of living decently in their own way, with greater acculturation a choice rather than a necessity. Indeed, Mrs. Williams embodies this idea: at ninety-nine years old, she still lives on the land on which she and her mother before her were raised, aided by her many children, grandchildren, and great-grandchildren, and supported by a health care system increasingly administered and staffed by Navajos. One could call this

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519. See *United States v. Navajo Nation*, 129 S. Ct. 1547 (2009); *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009); *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

520. Press Release, The Navajo Nation Office of the President & Vice President, Navajo President Joe Shirley, Jr., commemorates Williams family for persistence that led to U.S. Supreme Court sovereignty ruling (Apr. 27, 2008) (on file with author).

521. *Id.*

sovereignty, or one could call it equality: the equal right to have a decent life and yet maintain one's culture, choose one's government, and have treaties made on one's behalf observed.

Today, that right is threatened by the same argument made in the 1940s and 1950s: that equality demands the end or severe restriction of tribal rights. The precedent of *Williams v. Lee*, in which Justice Black recognized that Indians had initially possessed and been promised the right to retain their ability to be "separate and independent and themselves,"<sup>522</sup> has been narrowed almost out of existence.<sup>523</sup> On roadside billboards,<sup>524</sup> in the halls of Congress,<sup>525</sup> and in the mainstream press,<sup>526</sup> the laws that preserve a "measured separatism"<sup>527</sup> for tribes are attacked as unequal and unfair. Of course, just as proponents of termination trumpeted individual Indian equality while denigrating the self-governance capacity of Indian people, efforts by tribes to govern themselves are often greeted with disdain. See, for example, the response of one online commenter to the Blackfeet Tribe's plan to re-write its 1935 BIA-composed constitution: "First they gotta find some one [sic] sober enough to write."<sup>528</sup>

In this atmosphere, the story of *Williams v. Lee* and the debates of which it was part provide a valuable reminder. *Williams* emerges from a period in which the attacks on the supposed inequality wrought by Indian policy became the policy of the land. Many American Indians initially supported this policy, seeing in the end of legal separatism the only way to end the crushing poverty and federal domination under which they suffered.<sup>529</sup> But "emancipating the Indians" in practice meant less equality, not more. Terminated tribes like the Menominee, which prior to termination had used its resources to provide health care and full employment to its members, saw their property and institutions lost and their communities plunged into welfare dependence.<sup>530</sup> Tribes rejecting state jurisdiction found their protests ignored<sup>531</sup> and even silenced as the federal government denied them tribal funds to travel to Washington.<sup>532</sup> And in the Navajo Nation, Paul and Lorena

522. Interview with Judge Guido Calabresi, *supra* note 434.

523. See *supra* Part V.

524. See Cayuga Lake Signs, *supra* note 514.

525. See, e.g., Jerry Reynolds, *Racially Motivated Native Hawaiian Housing Amendment Fails in Committee*, INDIAN COUNTRY TODAY, Feb. 21, 2007 (describing attacks on Indian Health Care Improvement Act and Native Hawaiian Housing Reauthorization Bill as "race-based" legislation).

526. See *Aloha Segregation*, *supra* note 517.

527. WILKINSON, *supra* note 3, at 14.

528. Grizzman, Posting in response to Travis Coleman, *Blackfeet Members Meet in Hopes of Writing New Constitution*, (Jan. 26, 2010) greatfalltribune.com.

529. See *supra* Part III.

530. See Herzberg, *supra* note 117; see also H.R. REP. NO. 95-623, at 3 (1977), reprinted in 1977 U.S.C.A.N. 3700, 3701 (describing loss of tribal cemetery, unemployment, and inadequate health care of Siletz tribe under termination).

531. Cf. *In Fairness to the Indian*, *supra* note 113.

532. PHILP, *supra* note 66, at 117.

Williams saw the sheep that were the center of their livelihood and culture seized and sold without prior notice or an opportunity to be heard, by order of a faraway court that conducted its proceedings in a foreign language.

Faced with the realities of this form of equality, tribes came to reject it, insisting instead on equal rights to govern themselves and their territories, to be consulted on measures that would deprive them of existing rights, and to have a decent standard of living without giving up their communities or identities. By the time Mr. and Mrs. Williams went to their tribal government for assistance, the tribe didn't doubt that it should represent them. Over the next decade, the tribe would put more energy into developing its tribal institutions, and increasingly insist on structuring these institutions according to its own preferences. The results are far from perfect, but the Navajo courts are today a national model<sup>533</sup> and have helped the Navajo Nation weather political turmoil.<sup>534</sup> Moreover, the Navajo population, while still very poor, has tripled in size since *Williams*<sup>535</sup> and made significant strides in health, education, and welfare.<sup>536</sup>

Indian communities across the nation have made similar choices, with similar results. Although they still lag far behind the general population, Native people are slowly closing gaps in education, employment, and standards of living.<sup>537</sup> Equally important, they are gaining meaningful control over their communities, which are far less subject to federal domination or

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533. See Daniel L. Lowery, *Developing a Common Law Jurisprudence: The Navajo Experience*, 18 AM. INDIAN L. REV. 379, 382 n.3 (1993) ("[N]o other tribal court system is as sophisticated in structure and resources, and more widely viewed as a model of successful tribal judicial self-reliance, than the Navajo courts."). There are many other scholarly examinations of the Navajo courts and government generally. See, e.g., RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004); Yazzie, *supra* note 257.

534. See *Navajo Nation v. MacDonald* (*In re Certified Questions II*), N.L.R. Supp. 68 (Nav. Sup. Ct. 1989) (ruling in lawsuit to remove Navajo Nation Chairman).

535. Compare NAVAJO YEARBOOK, *supra* note 252, at 321–25 (estimating Navajo population to be 81,000 to 97,000 in 1961), with BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, TABLE: NATIONAL TOTALS: SERVICE POPULATION: ON-OR-NEAR RESERVATION (2003) (showing Navajo enrollment to be 264,066).

536. Compare NAVAJO YEARBOOK, *supra* note 252, at 77, 98 (reporting infant mortality rate in 1957–1959 to be 2.5 times that of the general population), and *Navajo Life Span Is Put at 20 Years—U.S. Aide Tells House Unit of Average Tied to Health Hazards on Reservation*, N.Y. TIMES, Mar. 1, 1954, at 27 (reporting Navajo life span to be 20 years compared to 68 for the general population), with INDIAN HEALTH SERV., DEP'T OF HEALTH AND HUMAN SERV., REGIONAL DIFFERENCES IN INDIAN HEALTH 2000–2001, at 32 fig. 3.2, 41 fig. 3.11 (showing low birth weight and infant mortality to be very similar for Navajos and all races, and overall death rate to be 31 percent higher).

537. While poverty and unemployment remain two to three times higher for Indian reservations than for the U.S. population as a whole, both gaming and nongaming communities have made significant strides in closing this gap, as well as the gaps in education, health, and standards of living. See JONATHAN B. TAYLOR & JOSEPH P. KALT, CABAZON, THE INDIAN GAMING REGULATORY ACT, AND THE SOCIOECONOMIC CONSEQUENCES OF AMERICAN INDIAN GOVERNMENTAL GAMING, A TEN YEAR REVIEW at xi, 8, 29 (Harvard Project on Am. Indian Econ. Dev. 2005).

state discrimination.<sup>538</sup> And as others abandon the Plains states for coastal cities, Indians are moving back to revitalized reservations.<sup>539</sup> No longer must reservation Indians choose, as Chairman Ahkeah suggested in 1949, to accept state control or leave tribal communities in order to become "little taller individuals instead of being just children as we are now."<sup>540</sup>

*Williams v. Lee* is part of what made these changes possible. It affirmed the continuing vitality of century-old promises of self-governance at a time when tribes and their members were newly organized to demand that those promises be fulfilled. It allowed tribes and Indians to choose what equality meant for them: individual assimilation or respect for their communities. Empowered to make this choice, Native people insisted that their rights, their humanity, and their basic equality could not be respected without respecting their chosen governments. *Williams* and the Self-Determination Era were the result. This history must be remembered as the status of Indians and their tribes is debated, challenged, and championed today.

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538. Since the 1950s, tribes have taken over half of the services formerly administered by the federal government. 2005 COHEN, *supra* note 49, at 1346. They run not only casinos but also companies manufacturing greeting cards, auto electronics, ski resorts, and timber businesses. See Dennis Hevesi, *Philip Martin, Who Led His Tribe to Wealth, is Dead at 83*, N.Y. TIMES, Feb. 15, 2003 (greeting cards and auto electronics); Stephen Cornell, *Sovereignty, Policy, and Prosperity in Indian Country Today, Community Reinvestment*, FED. RES. BK. KS. CITY (Winter 1997) (ski resorts and timber) (on file with author). Although anti-Indian discrimination is still a fact of life in many border communities, tribes and states today frequently work together to collect and distribute taxes, Amicus Brief of Intertribal Tax Alliance as Amici Curiae Supporting Respondent, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (No. 04-631), police their communities, and manage shared natural resources. ANDERSON, BERGER, FRICKEY & KRAKOFF, *supra* note 50, at 319, 685-86.

539. Timothy Egan, *As Others Abandon Plains, Indians and Bison Come Back*, N.Y. TIMES, May 27, 2001, at A1.

540. *Navajo Minutes*, *supra* note 130, at 54 (June 10, 1949).