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Justice and the Outsider: Jurisdiction Over NonMembers in Tribal Legal Systems

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ABSTRACT: *Over the last quarter century, the Court has progressively limited tribal jurisdiction over both non-Indians and Indians who are not members of the tribe. This Article examines these decisions to show that they owe less to established Indian law doctrine than to two assumptions: first, that tribal courts will be unfair to outsiders, and second, that jurisdiction over outsiders has little to do with tribal self-government. It then tests these assumptions against an examination of all cases decided by the Navajo Nation appellate courts over the last thirty-five years and the history and contemporary situation of tribal legal systems.*

This investigation reveals that with respect to the first assumption, the Navajo appellate courts are remarkably balanced in hearing cases involving outsiders. Non-Navajos win 47.4 percent and lose 52.6 percent of the cases in which they appear before the courts. The decisions, moreover, appear to be qualitatively balanced, even with respect to cases and issues that might appear particularly vulnerable to bias. This latter finding is supported by a more limited review of decisions by other tribal courts.

In contrast with the second assumption, cases involving nonmembers appear to be crucial for tribal self-government. They comprise a disproportionately large number of cases before the appellate courts, and form an equally disproportionate role in maintaining judicial legitimacy and fairness. This is particularly true given the origin of tribal courts as tools both of non-Indian acculturation and control and tribal resistance, and the current struggle of tribes to thrive under radically changed circumstances without losing their cohesion as distinct communities.

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I. INTRODUCTION

In the last several years, I have gotten speeding tickets exclusively on Indian reservations. In this time, I have worked on three reservations and have driven across several more, and the long, almost empty stretches typical of reservation highways seem to call out for creative interpretation of speed limits. As one might expect, I more than once have seen flashing

lights in my rearview mirror and waited by the side of the road as a tribal police officer wrote me a ticket.

That these were tribal police officers might be surprising to students of Indian law. In 1978, in *Oliphant v. Suquamish Indian Tribe*,[1] the United States Supreme Court declared that non-Indians like me were not subject to the criminal jurisdiction of Indian tribes.[2] Since that time, the Court has progressively limited tribal criminal, civil, and regulatory jurisdiction over those that are not enrolled members of the tribe, and specifically limited civil jurisdiction on state highways running through reservations.[3]

This trend is one of the most important developments in Indian law. It is the focus of sustained attention by scholars, tribes, attorneys, and legislators.[4] In 2004, the Supreme Court affirmed the constitutional power of Congress to reverse these decisions.[5] Although the decision concerned only criminal jurisdiction over nonmember Indians, it provides support for a proposed legislative reversal of decisions limiting civil jurisdiction over non-Indians and nonmember Indians.[6] Congress, however, will need evidence that such jurisdiction is necessary and fair to act on this opportunity. At the same time, the Supreme Court and lower courts continue to decide questions of tribal jurisdiction over nonmembers, often against tribal interests.

As my driving experience shows, despite judicial restrictions, tribes continue to exercise significant jurisdiction over outsiders in ways that conform to and sometimes test the limits of the law.[7] These exercises

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1. 435 U.S. 191 (1978).

2. *Id.* at 212. A word about terminology may be helpful. This Article alternates between the nouns Indian, Native American, and American Indian, and the adjective native, but generally uses the term "Indian" to describe the descendants of the people here before European-American settlement because it is the term most commonly used by Indian people themselves, and is also the primary term used in the case law and scholarship regarding their special legal status. The term "nonmember Indians" refers to Indians whose primary political affiliation is with a tribe other than the tribe seeking jurisdiction over them. A member of the Navajo Nation, for example, would be a nonmember Indian with respect to the Oglala Lakota Nation.

3. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

4. *See generally Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America Before the S. Comm. on Indian Affairs*, S. Hrg 107-338, 107th Cong. (2002) [hereinafter *Hearing*] (statements of senators, tribal officials, and professors regarding legislation to reverse trend).

5. United States v. Lara, 541 U.S. 193, 199–206 (2004).

6. *Hearing*, *supra* note 4.

7. In the traffic example, the source of power over me was two fold. First, on many reservations, tribal and state police are cross-deputized, giving them the power to stop and issue summonses in the name of the other sovereign. Second, the tribes had found a way to enforce their laws in the shadow of judicial denials of jurisdiction. The officers informed me that I had a

sometimes result in judicial decisions, providing an opportunity to examine what jurisdiction means for both nonmembers and tribal communities. But there has been little empirical work regarding contemporary tribal legal systems,[8] and even less on cases involving nonmembers.[9] This Article begins to fill this gap. It first examines the Court's decisions to reveal the non-doctrinal suppositions about tribal legal systems that undergird them. It then tests those assumptions empirically and theoretically.

The first part of the Article shows the ways that the Supreme Court's nonmember decisions are shaped by two beliefs about justice and about those considered outsiders to Indian tribes. The first belief is that jurisdiction over nonmembers should be limited because tribes will treat outsiders unfairly. According to this assumption, tribal courts are unfamiliar places which disadvantage outsiders and are characterized by unwritten customs, traditions, and bias toward nonmembers. Subjecting outsiders to their jurisdiction, therefore, would contravene the "great solicitude" of the United States "that its citizens be protected . . . from unwarranted intrusions on their personal liberty."[10]

The second assumption is that jurisdiction over nonmembers and legal issues shaped by outside influence, such as those involving commerce with nonmembers, have little to do with tribal self-government. Since *Oliphant*, the Court has repeatedly affirmed the tribal right to self-government. Self-government, however, has been defined according to a stereotypical idea of what tribes are and what they need to survive. Because of this, jurisdiction has been limited to control over tribal members and the power to reproduce practices, such as hunting and traditional ceremonies, understood as

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choice: I could either accept tribal jurisdiction and pay my fine, or fail to pay and have the matter turned over to the state police, which would result in points going on my state drivers' license. It was not only my respect for tribal sovereignty that made me choose the former.

8. The legal studies include Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000); Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1998); and the much older SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE (1978). Interesting recent anthropological works include BRUCE G. MILLER, THE PROBLEM OF JUSTICE (2000); Justin Richland, *"What Are You Going to Do with the Village's Knowledge?": Talking Tradition, Talking Law in Hopi Court*, 39 L. & SOC. REV. 235 (2005); Larry Nesper, The Sovereign Tribal State's Reach into Seasonal Family Praxis: Hunting and Fishing Trials in an Anishinaabe Community (unpublished manuscript, on file with author).

9. There is increasing recognition in the scholarly community of this gap. Krakoff, *supra* note 8, discusses the paradox of sovereignty these federal cases create for tribes.

10. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978); Duro v. Reina, 495 U.S. 676, 692 (1990); Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

traditionally "Indian." The power to regulate new disputes and issues or to engage in the commonplace stuff of government, on the other hand, is deemed largely irrelevant.

The remainder of the Article tries to obtain the "view from the reservation" on these assumptions.[11] It first tests the assumptions against the experience of nonmembers in the Navajo Nation appellate courts. With regard to the first assumption, the Navajo Nation court system on its face might appear to be extremely vulnerable to the kinds of intrusions on personal liberty the justices fear. The Navajo Nation has no constitution, all of its judges are Navajo, and only one in six judges has a law degree. The court also aggressively seeks to incorporate Navajo customary or traditional law in its procedures and decisions. Despite these characteristics, the court is both numerically balanced in its decisions regarding nonmembers—47.4% of nonmembers win when they appear before the court, and 52.6% lose—and qualitatively balanced, even in areas, such as child custody, employment, and contract disputes, that might seem particularly prone to bias. A less comprehensive review of decisions from other tribal court systems reveals a similar effort to decide issues fairly, even where it requires ruling against tribal members or the tribe itself.

With regard to the second assumption, the Article examines the role that "outsiders" play in tribal legal systems. This role is shaped in part by the unique history of modern tribal courts, which typically came to reservations as tools of acculturation and control, rather than as means to address the needs of tribal people. In light of this historical legacy, tribes have an uphill battle both in tailoring their legal systems to the needs of tribal communities and also in overcoming the perception that they are alien and hostile to tribal traditions. Restricting tribal jurisdiction to tribal members perpetuates the perception of these courts as inferior bodies designed only for control of Indians.

Jurisdiction over nonmembers is also crucial for reasons common to all legal systems. Here, I build on the insight of law and society scholars that formal legal institutions play one of their most important roles not in resolving disputes to which community norms already provide a solution, but in addressing new conflicts that challenge community norms, and doing so in a way that commands the acceptance of the community. This is particularly true for tribes, which must find ways to deal with foreign cultural and economic pressures without losing their coherence as communities. Disputes involving outsiders and issues arising from the new

11. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS 2–3 (1995) (arguing for an "inside-out" approach to federal Indian law considering the perspective from the reservation context).

kinds of commercial and domestic relationships they bring with them, therefore, are exactly the kinds of questions that it is most important for tribal legal institutions to resolve.

Both historical and modern accounts of tribal courts confirm the disproportionate significance of cases involving relative outsiders to the community. The case load of the Navajo appellate courts replicate these accounts: despite the tiny fraction of nonmembers within the Navajo Nation, 23% of the decisions issued by the Navajo appellate courts over the last thirty-five years have involved nonmember litigants, as have 33% of the decisions issued in the last ten years. Without jurisdiction over such cases, the courts would not only be denied jurisdiction over some of the disputes most pressing to Navajo people, but would be forced to forgo their community-building role in forging distinctly tribal solutions to modern problems.

Finally, jurisdiction over nonmembers is necessary to protect the institutional incentives for tribal judges to do their jobs well. In line with work on the importance of role perception in judicial performance, I argue that the good track record of the Navajo courts is a function of its sense of importance as the institution that must resolve the full range of conflicts affecting Navajo people in a way that expresses the ideals of Navajo culture. This institutional pride leads the judges to carefully scrutinize the facts, law, and morality of the issues before them to fulfill this institutional role and resist temptations to rule based on the status of the parties or political pressure. Denying the courts jurisdiction over outsiders and the issues they raise would radically diminish both the judges' sense of self-importance and the impetus to take an objective view of Navajo practices. Despite the recent decisions of the United States Supreme Court, tribal legal systems have and will continue to have broad and often exclusive jurisdiction over many disputes arising on reservations. Preserving and enhancing these judicial incentives to fairness, therefore, is a matter of importance to both members and nonmembers of Indian tribes.

Part II of the Article discusses United States Supreme Court opinions regarding tribal jurisdiction over nonmembers, showing the assumptions about tribes and justice that undergird the decisions. Part III presents my findings regarding decisions involving nonmembers in the Navajo appellate courts, showing the balanced disposition of these cases, even in factual situations one would assume would be particularly prone to bias. Part IV discusses the role of "outsiders" in the development of tribal legal systems and legal systems generally. In conclusion, Part V argues for a reconceptualization of what tribes are, what those considered outsiders

mean for them, and their importance as the Supreme Court and Congress consider jurisdiction over nonmembers in tribal legal systems.

II. JUDICIAL DIVESTITURE IN THE UNITED STATES SUPREME COURT

Since 1978, the Supreme Court has decimated tribal jurisdiction over those that are not members of their tribes. Scholars have devoted much attention to this trend.[12] While they have reached varying conclusions about the roots of the cases, they almost uniformly agree that the decisions are not accurate reflections of established Indian law doctrine.[13]

Scholars have identified many potential justifications for these opinions. One might simply dismiss this trend as racism or hostility to tribes. More subtly, one can find convincing links between this trend and the colonial

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12. What follows is a partial listing. Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003) highlights the conflict between the Court's jurisprudence in the Indian Law arena with its trends in other areas of decreasing federal power in favor of state sovereignty, and of providing heightened protection for property rights. Similarly, in a 2001 article, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001), Sarah Krakoff points to the relationship between the Indian Law cases and the Court's espousal of a minimalist judicial philosophy. An earlier article, Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999) [hereinafter Frickey, *A Common Law*], provides an excellent exegesis of many of these cases and points to the link between these cases and the historical colonial project of the United States with respect to Indian tribes. David Getches, in reviewing all of the Rehnquist Court's Indian law cases, not just the ones concerning jurisdiction over nonmembers, explains these cases as part of the general tendency of the Court to favor state's rights, disfavor "special rights" of minorities and other isolated groups, and protect majoritarian values and expectations. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 268–69 (2001) [hereinafter Getches, *Beyond Indian Law*]. L. Scott Gould posits that these cases are evidence of a "consent paradigm," L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 814 (1996), while Frickey, in another article, argues that although this paradigm may be descriptive of the Court's rhetoric, it does not explain the normative underpinnings of the results. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1768–77 (1997). T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY (2002) contains elements all of these approaches, drawing links between the Court's Indian law cases and its other cases in which the United States defined itself as a colonial power, as well as current jurisprudence of the Court drawing lines between those considered legal citizens and those who are members of a community without possessing formal citizenship in the community.

13. *See, e.g.*, Frickey, *A Common Law*, *supra* note 12, at 8 ("What I identify is more an unreflective judicial trend rooted in apparent uneasiness with tribal authority than a paradigmatic, entrenched doctrinal shift."); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (arguing that recent Indian law decisions are results of subjective biases of justices rather than legal analysis).

project of the United States with respect to Indian nations.[14] One can also find congruence between the Court's Indian law jurisprudence and its rulings in other areas of the law.[15]

But such accounts do not fully explain why, within the same period, the Court has been relatively consistent in protecting tribes and their members from state and federal jurisdiction. Nor do they explain why the four more liberal members of the Court—Justices Breyer, Ginsburg, Souter and Stevens—have often joined and sometimes led the charge to limit tribal jurisdiction over nonmembers. These conflicting trends are best explained by justices' assumptions regarding what jurisdiction over outsiders means both for outsiders and for tribes. More specifically, the decisions are rooted in the sense that tribal courts will not be fair to nonmembers, and that jurisdiction over nonmembers, except where such jurisdiction is necessary to protect practices perceived as traditionally Indian, has little to do with the legitimacy of legal systems or tribal self-government. This section traces the emergence and development of these themes.

A. The Beginning: Tribal Resurgence and Judicial Resistance

Tribal sovereignty saw a renaissance in the latter half of the twentieth century.[16] Mobilized by efforts to terminate their existence in the 1950s, inspired by successful group action by African Americans, and aided by federal policy initiatives regarding poverty and group rights, tribes increasingly found ways to assert and exercise governmental power. After initial resistance, Congress and the Executive largely supported these efforts.[17] Together, these tribal and federal actions have created a revolution in Indian country.[18]

This revolution has included both economic and institutional development,[19] each of which has had the effect of subjecting more nonmembers to potential tribal jurisdiction. Tribes increasingly took over management of natural resources and businesses on reservations, resulting in their employing, contracting with, and leasing lands to nonmembers. At

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14. *See generally* Frickey, *A Common Law*, *supra* note 12; Singer, *supra* note 12.

15. David Getches, for example, has pointed to the extent to which the trend of ruling against Indian tribes corresponds with the Court's other tendencies of ruling to further state interests, protect majoritarian values, and undermine special minority rights. Getches, *Beyond Indian Law*, *supra* note 12, at 267.

16. *See generally* STEPHEN CORNELL, THE RETURN OF THE NATIVE (1988).

17. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 80–86 (1987).

18. *See, e.g.*, Timothy Egan, *Parallel Nations: New Prosperity Brings New Conflict to Indian Country*, N.Y. TIMES, Mar. 8 & 9, 1998, § 1, at 1.

19. *Id.*

the same time, tribes sought to develop tribal governmental capacity, increasing the sophistication of their courts and exercising broader regulatory control over their territories.

By 1978, about a third of tribal courts formally exercised jurisdiction over non-Indians and non-tribal members on their reservations.[20] At that time, there was relatively broad recourse to federal court to challenge tribal actions. The Indian Civil Rights Act of 1968 ("ICRA") made most of the federal Bill of Rights applicable to tribes,[21] and until 1978 lower courts typically interpreted it as creating a federal cause of action to challenge tribal actions that violated individual rights.[22] But relatively few individuals subject to tribal jurisdiction challenged tribal actions, suggesting relative satisfaction with its exercise.[23]

Despite this experience on the ground, many non-Indians were fearful and resentful of tribal authority. While some state and local governments welcomed tribal assistance in the expensive task of policing vast reservation areas, others joined the protests of non-Indians, both to support their citizens and because of the perceived threat posed by tribal assertions of governmental power within their borders.

In 1978, the question of tribal jurisdiction over non-Indians was placed directly before the Court in *Oliphant v. Suquamish Indian Tribe*.[24] The case concerned the efforts by the Suquamish Tribe of Washington to prosecute two non-Indian residents of the reservation: Mark Oliphant, who had attacked tribal police when they tried to break up a drunken brawl between Oliphant and some non-Indians attending the tribe's Chief Seattle Days celebration,[25] and Daniel Belgarde, who had lead the tribal police in a two-hour chase across the reservation rather than be pulled over for reckless driving.[26]

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20. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196 (1978).

21. 25 U.S.C. §§ 1301–1302 (2000).

22. *See* Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 933 n.6 (10th Cir. 1975) (collecting cases). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978), the Supreme Court held that the only federal actions permitted to challenge tribal actions under the Indian Civil Rights Act were habeas actions. Today, therefore, one may only challenge federal actions under ICRA in cases challenging tribal custody or detention or threats of custody or detention.

23. Brief for Ass'n on Am. Indian Affairs, Inc. et al. as Amici Curiae supporting Respondents, at 39, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729).

24. 435 U.S. at 191.

25. Brief for the United States as Amicus Curiae at 5–6, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (No. 76-5729). Before the celebration, in anticipation of the many people that would attend, the tribe had requested assistance in policing the event from the county and the federal Bureau of Indian Affairs, but received assistance of only one county deputy for an eight hour period over the weekend. *Id.* at 5.

26. *Id.* at 7.

In its decision the Court created something wholly new in Indian law, the principle that simply by incorporation within the United States tribes had lost inherent criminal jurisdiction over non-Indians. According to the Court, by "submitting to the overriding sovereignty of the United States, Indian tribes . . . necessarily give up their power to try" and punish non-Indian citizens without authorization of this power by the United States.[27] The Court arrived at this principle through a process that Russel Barsh and James Henderson have aptly compared to Lewis Caroll's description of the Hunting of the Snark: "they charmed it with smiles and soap."[28] By patching together bits and pieces of history and isolated quotes from nineteenth century cases, and relegating contrary evidence to footnotes or ignoring it altogether,[29] the majority created a legal basis for denying jurisdiction out of whole cloth. This conclusion was not required by legal precedent.[30] Rather, it was dictated by the Court's assumptions that tribal courts could not fairly exercise jurisdiction over outsiders and that the effort to exercise such jurisdiction was a modern upstart of little importance to tribal concerns.

The Court portrayed control over a formal court system, and particularly jurisdiction over nonmembers, as modern and inauthentic. First, courts

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

28. Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 609 (1979).

29. For example, the Court relied on a single treaty in which the Choctaw Tribe requested the right to punish white men within their limits as evidence of a commonly held assumption that no such jurisdiction existed absent delegation, leaving for the footnotes the many other treaties that acknowledged the right of tribes to punish non-Indians. *Oliphant*, 435 U.S. at 197–98. More egregiously, the Court cited an 1834 House of Representatives Report on limitations on tribal power to try federal agents and travelers in Indian country as support for its holding, conveniently eliding the fact that the Report affirmed broad tribal jurisdiction over all other non-Indians in their territory. H.R. Rep. No. 23-474, at 18 (1834), *reprinted in* 263 U.S. Serial Set, *quoted in Oliphant*, 435 U.S. at 202.

30. There were only two places in which federal case law suggested a limitation on tribal jurisdiction over non-Indians. First, in dicta from a largely dissenting opinion in *Fletcher v. Peck*, Justice Johnson wrote that "the restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring), *quoted in Oliphant*, 435 U.S. at 209. Second, Isaac Parker, the judge for the Federal District of the Western Territory of Arkansas had held that such jurisdiction was removed from the tribes by federal statute, *Ex parte* Kenyon, 14 F. Cas. 353, 355 (C.C.W.D. Ark. 1878) (No. 7,720), a conclusion the *Oliphant* court rejected. Indeed, Felix Cohen, the Blackstone of Federal Indian Law, wrote that originally a tribe "might punish aliens within its jurisdiction according to its own laws and customs," and that "[s]uch jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (U.S. Gov't Printing Office 1945) (1941) [hereinafter 1941 COHEN].

themselves were un-Indian: traditionally "[o]ffenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment."[31] Even within this un-Indian system, "[t]he effort by Indian tribal courts to exercise criminal jurisdiction over non-indians . . . is a relatively new phenomenon."[32] Both formal court systems and the attempt to exercise jurisdiction over outsiders, in other words, were creatures of the late twentieth century, with little to do with the traditional concerns of tribes.

The doubt that tribal governments could exercise jurisdiction fairly figures even more prominently in the opinion. The Court held that tribal jurisdiction over non-Indians must be denied because of the "great solicitude" of the United States "that its citizens be protected . . . from unwarranted intrusions on their personal liberty."[33] The Court suggested that tribal jurisdiction would cause such an intrusion on liberty specifically because of the cultural and racial divide between those exercising jurisdiction and those upon whom it was exercised.[34] The Court quoted an 1883 decision regarding federal criminal jurisdiction over members of the Sioux tribe to suggest that subjecting the defendant to tribal jurisdiction would extend "over aliens and strangers; over the members of a community separated by race [and] tradition . . . the restraints of an external and unknown code . . . which judges them by a standard made by others and not for them."[35] The 1883 Supreme Court did not hold that this cultural divide was an absolute bar to federal criminal jurisdiction over tribal members,[36] only that it was an additional reason not to construe a vague treaty provision to repeal a statute clearly prohibiting such jurisdiction.[37] The 1978 Court, in contrast, held that these considerations spoke "equally strongly against the . . . contention that Indian tribes . . . retain the power to try non-Indians according to their own customs and procedure."[38] What was simply a rule of

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31. *Oliphant*, 435 U.S. at 197.

32. *Id.* at 196–97.

33. *Id.* at 210.

34. *See also* Robert A. Williams, Jr., *The Alegbra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 270–71.

35. *Oliphant*, 435 U.S. at 210 (substitution in original) (quoting *Ex Parte* Crow Dog, 109 U.S. 556, 571 (1883)).

36. Indeed, three years later the Court upheld a federal statute authorizing such jurisdiction. United States v. Kagama, 118 U.S. 375, 385 (1886).

37. *See Crow Dog*, 109 U.S. at 571 (circumstances of case reinforce general rule against repeal by implication).

38. *Oliphant*, 435 U.S. at 211.

statutory construction was used to deprive tribes of jurisdiction over non-Indians in the absence of any statute or provision of law.

B. The Flip Side: Reaffirming Tribal Control over Tribal Members

These concerns were sufficient to remove all tribal criminal jurisdiction over non-Indians. But that same term the Court issued two other opinions insulating tribal actions concerning tribal members from federal control. In *United States v. Wheeler*, a companion case to *Oliphant*, the Court held that the Navajo Nation's power to criminally prosecute a member of the tribe was "part of the Navajos' primeval sovereignty . . . attributable in no way to any delegation to them of federal authority" and therefore did not trigger the Fifth Amendment prohibition on double jeopardy.[39] A few months later, in *Santa Clara Pueblo v. Martinez*, the Court held that federal courts lacked jurisdiction over a tribal member's challenge to a tribal ordinance that excluded her children from tribal membership but would grant membership to the children of a similarly situated male member.[40] With hindsight, one sees two separate tracks regarding tribal jurisdiction emerging in these opinions. Where such jurisdiction touched non-Indians, it threatened personal liberty and was not essential to tribal self-government, but when it touched tribal members, only explicit federal action was sufficient to overcome the invasion of tribal sovereignty.

This dichotomy emerged in cases regarding state jurisdiction in Indian country as well. In these cases, the Court has developed a per se rule against state taxing jurisdiction over tribes or their members in Indian country absent unmistakably clear congressional authorization.[41] But where the question involves activities of nonmembers, the trend has been towards permitting jurisdiction unless the activity conforms to a sense of what is traditionally Indian. Thus, state sales tax on cigarettes to non-Indians has been allowed even where the taxation seems to significantly burden tribal self government,[42] as have severance taxes on oil and gas extracted from tribal land,[43] and even state regulation of on-reservation liquor sales to tribal members.[44] Cases involving activities that might seem more stereotypically

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39. 435 U.S. 313, 328 (1978).

40. 436 U.S. 49, 55–70 (1978).

41. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

42. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

43. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

44. Rice v. Rehner, 463 U.S. 713 (1983). The Court in that case specifically declared that it accorded "little if any weight to any asserted interest in tribal sovereignty" because of the lack of a tribal history of regulating such sales. *Id.* at 725.

Indian, however, such as hunting and fishing[45] and timber management,[46] have done notably better in this calculus.[47]

C. The Middle Period: Conflicting Visions of Tribal Institutions

While *Oliphant* had stripped tribes of all criminal jurisdiction over non-Indians, it was unclear what the case would mean in the civil or regulatory context, or for Indians that were not enrolled members of the governing tribe. Between 1980 and 1990, the Court repeatedly considered these questions, sometimes affirming tribal jurisdiction and sometimes denying it. These cases reflect a contest between two visions of tribes and their institutions: the first, as sovereign entities needing jurisdiction to build and develop, and the second as traditional groups for whom exercise of jurisdiction over nonmembers or modern businesses would be both anomalous and unfair.

In 1980, with little discussion, the Court in *Washington v. Confederated Tribes of the Colville Indian Reservation*[48] upheld tribal taxes on non-Indians purchasing cigarettes on tribal land.[49] But in 1981 the Court held that the Crow Tribe lacked jurisdiction to regulate hunting and fishing by non-Indians on non-Indian owned land (so-called "fee land") on reservations in *Montana v. United States*.[50] The Court acknowledged that tribes retained authority to regulate the activities of nonmembers who entered into consensual relationships with tribes or whose activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[51] But the opinion seemed to define the legitimate interests of the tribe as the creature of a remembered past. The Court began its description of the facts of the case by stating that "[t]he Crow Indians originated in Canada," subtly undermining the historic

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45. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

46. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

47. In the middle period of the 1980s, there were some exceptions to this pattern, in particular *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that tribal gaming businesses were immune from state regulation. *See also* Cent. Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (holding that gross receipts tax on sale of tractors to Indian tribe was exempt from state taxation).

48. 447 U.S. 134 (1980).

49. *Id.* at 153. While parts of the *Confederated Tribes* opinion could be read to suggest that it applied only to tribal trust land, others indicate that it applies to all doing business on the reservation generally.

50. 450 U.S. 544, 566 (1981).

51. *Montana*, 450 U.S. at 566 (citations omitted).

authenticity of the tribe's claim to sovereignty over reservation land.[52] Similarly, the lack of a tradition of regulating non-Indian hunting and fishing was used to undermine the tribe's modern attempt to do so. The Court stated that "the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life."[53] More importantly, the fact that the State of Montana had traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands on the reservation, and that, until recently, the tribe had "accommodated itself" to this state regulation, was core to the Court's holding that tribal regulation did not impact the self-government of the tribe.[54] The fact that the tribe now sought jurisdiction over natural resources on the reservation as a means to revitalize its government and the reservation economy was irrelevant; all that was important was that it had not done so in the past.

The Supreme Court's cases over the next few years did not follow this lead, and instead protected tribal sovereignty as an evolving thing.[55] In *Merrion v. Jicarilla Apache Tribe*,[56] for example, the Court affirmed tribal authority to tax non-Indians on the oil and gas severed from lands leased from the Tribe, stating that such authority "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction."[57] It was left to the dissent written by Justice Stevens to sound the alarm about non-Indians subject to the vagaries of tribal jurisdiction.[58]

The first nonmember jurisdiction opinion of the Rehnquist Court, however, signaled the ascendance of the *Oliphant* vision of tribal governments. *Brendale v. Confederated Tribes & Bands of the Yakima*

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52. *Id.* at 547.

53. *Id.* at 556.

54. *Id.* at 564 n.13, 566–67.

55. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.") (citations omitted); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 200–01 (1985) (upholding tribal taxes on nonmembers despite lack of federal authorization of such taxes); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985) (requiring non-Indians challenging tribal court jurisdiction to first make such challenges to tribal courts); Merrion v. Jicarrilla Apache Tribe, 455 U.S. 130 (1982); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846–47 (1982) (finding state taxes on non-Indian contractor preempted in part by federal policy of encouraging self-determination).

56. 455 U.S. 130 (1982).

57. *Id.* at 137.

58. *Id.* at 170–73 (Stevens, J., dissenting).

Indian Nation[59] considered whether the Yakima Nation could impose its zoning requirements on reservation fee lands owned by two nonmembers, Stanley Wilkinson and Philip Brendale. Wilkinson's parcel was in the "open area" at the edges of the reservation, where there was significant commercial and residential development and non-Indian ownership.[60] In contrast, Brendale's parcel was in the "closed area" toward the center of the reservation,[61] which was largely uninhabited, and had maintained a "pristine, wilderness-like character."[62]

The case fractured the Court. The justices issued three opinions, none of which commanded a majority. Different majorities of five justices upheld tribal jurisdiction as to Brendale's land,[63] and rejected it as to Wilkinson's.[64] Although none of the opinions gained a majority as to their reasoning, the opinions signal the contested visions of sovereignty that figure in later cases.

Justice White, joined by Justices Kennedy and Scalia and Chief Justice Rehnquist, would not have upheld zoning jurisdiction over either parcel of land.[65] The plurality would have held that the tribe lacked any general zoning authority over fee lands within the reservation at all but simply had the right to intervene in county zoning proceedings to argue that proposed developments imperiled tribal interests.[66] This had occurred in the *Wilkinson* case, and the Court affirmed with little discussion the lower court decision that the development posed no direct threat to the tribe.[67]

Justice Stevens, joined by Justice O'Connor, concurred in the judgment on the Wilkinson parcel, and announced the opinion of the Court upholding tribal jurisdiction over the Brendale parcel.[68] The opinion centered on concern for the nonmembers subject to tribal jurisdiction, a concern that was only outweighed by the need for tribes to maintain their "traditional

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59. 492 U.S. 408 (1989).

60. *Id.* at 418; Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 752 (1985).

61. *Brendale*, 492 U.S. at 417

62. *Whiteside*, 617 F. Supp. at 752.

63. *Brendale*, 492 U.S. at 433 (Stevens, J., joined by O'Connor, J., announcing the judgment of the Court in No. 87-1622 and concurring in the judgment in Nos. 87-1697 and 87-1711); *id.* at 448 (Blackmun, J., joined by Marshall, J., and Brennan, J., concurring in the judgement in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711).

64. *Id.* at 409 (White, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., announcing the judgement of the Court in Nos. 87-1697 and 87-1711); *id.* at 433 (Stevens, J., joined by O'Connor, J., announcing the judgment of the Court in No. 87-1622 and concurring in the judgment in Nos. 87-1697 and 87-1711).

65. *Id.* at 432.

66. *Id.* at 431.

67. *Id.* at 432–33.

68. *Id.* at 447–48.

character."[69] This balance would support comprehensive tribal zoning jurisdiction over the closed area, which "remains an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of their culture.'"[70] With respect to the open area where most tribal members actually lived, however, time had "produced an integrated community that is not economically or culturally delimited by reservation boundaries" and was no longer "a unique tribal asset."[71] Because the area did not fit non-Indian images of the uniquely tribal, but instead looked much like any modern community, the tribe had no legitimate interest in regulating it.

Only Justice Blackmun's opinion, which Justices Brennan and Marshall joined, acknowledged the needs of tribes as modern governments struggling with changing circumstances. The opinion recognized the need for "long-term, active management of land use" that the White plurality would deny.[72] Justice Stevens' opinion, moreover, "betray[ed] a stereotyped and almost patronizing view of Indians and reservation life."[73] Blackmun went on, "In my view . . . it must not be the case that tribes can retain the 'essential character' of their reservations (necessary to the exercise of zoning authority) only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically 'Indian' today."[74]

In *Duro v. Reina*[75] the next year, a clear majority of the Court held that tribes had no criminal jurisdiction over Indians that were not members of the tribe.[76] Concern for fairness to nonmembers and a hackneyed vision of tribal communities lie at the heart of the opinion. First, while the Court held that tribes retained the jurisdiction over nonmembers necessary to "the maintenance of tribal integrity and self-determination,"[77] self-determination was limited to the need "to preserve their own unique customs and social order."[78] The modern realities of tribal communities, in which nonmember Indians like Albert Duro, who lived with his tribal member girlfriend and

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69. *Id.* at 434–35.

70. *Id.* at 441 (quoting Yakima Indian Nation Amended Zoning Regulations No. 1-98-72, § 23 (1972)).

71. *Id.* at 444, 447.

72. *Id.* at 460 (Blackmun, J., concurring in the judgment in No. 87-1622 and dissenting in Nos. 87-1697 and 87-1711).

73. *Id.* at 464–65.

74. *Id.* at 465 (citation omitted).

75. 495 U.S. 676 (1990).

76. *Id.* at 692.

77. *Id.* at 688.

78. *Id.* at 685–86.

worked for the tribe,[79] and his victim Biscuit Brown, also a resident of the reservation but a member of the Gila River Pima Maricopa Community, a historically related but distinct Indian tribe,[80] helped shape the texture of daily life, were excluded from this vision of tribal governments acting only to preserve unique customs untouched by time.

The Court's concerns about the justice dispensed by tribal governments complemented this narrow conception of tribal sovereignty. The Court emphasized that nonmember Indians were citizens, and, like non-Indians, were "embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'"[81] Rather than point to a legal basis for making the distinction between nonmembers and members, who were also, after all, citizens, the majority declared that the "special nature of the tribunals at issue" justified its focus on consent and citizenship.[82] Tribal courts, the Court declared, were "influenced by the unique customs, languages, and usages of the tribes they serve,"[83] were often "subordinate to the political branches of tribal governments," and their legal methods sometimes depended on "unspoken practices and norms."[84] It was also "significant that the Bill of Rights does not apply to Indian tribal governments" and that the guarantees of the ICRA were "not equivalent to their constitutional counterparts."[85]

Duro's allusions to the Bill of Rights went to the Court's policy-based uneasiness with tribal power, rather than the legal basis of the decision itself. The Court confirmed that it did not see its opinion as having a constitutional basis by inviting Congress to overrule it.[86] Congress

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79. *Id.* at 679.

80. *Id.*; FERGUS M. BORDEWICH, KILLING THE WHITE MAN'S INDIAN 94–96 (1996).

81. *Duro*, 495 U.S. at 692 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

82. *Id.* at 693. In the one piece of legal support for this distinction, the Court later pointed to dicta in *United States v. Rogers* that non-Indians by adoption into an Indian tribe could "become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages." *Id.* at 694 (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846)). But this language was in the context of stating that adoption was not enough to allow a non-Indian to be treated as an Indian with respect to federal criminal jurisdiction, and thus suggests that adoption should not make a difference with respect to federal law. *See Rogers*, 45 U.S. (4 How.) at 573 ("It can hardly be supposed that Congress intended to" treat whites "adopted" by Indians as fitting within the Indian-against-Indian exception).

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

84. *Id.* (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334–35 (The Michie Co. 1982) [hereinafter 1982 COHEN]).

85. *Id.*

86. *Id.* at 698 ("If the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress, which has the ultimate authority over Indian affairs."). The Supreme Court is the final

responded with alacrity.[87] Six months after the Court issued the decision, Congress amended the definition of tribal "powers of self-government" in the ICRA to include, "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[88] In spring of 2004, the Supreme Court upheld the *Duro* Fix against a constitutional challenge in *United States v. Lara*.[89]

D. To the Present: Consolidating the Denial of Jurisdiction but Upholding the Congressional Reprieve

Despite this congressional rebuke, post-*Duro* cases have gone even further in limiting tribal jurisdiction over nonmembers.[90] In 1997, in *Strate v. A-1 Contractors*[91] the Court unanimously held that a tribal court had no jurisdiction over a personal injury action against a non-Indian arising from an accident on a state highway running through the reservation.[92] Although the Court acknowledged that "[u]ndoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members,"[93] it held that "requiring

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authority on the meaning of the United States Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803). Where the Court rules based upon its understanding of the Constitution, therefore, Congress has no power to second guess it. Seminole Tribe v. Florida, 517 U.S. 44, 63 (1996) (where Court rules in Constitutional cases "correction through legislative action is practically impossible") (citations omitted).

87. *See* Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990); *see also* United States v. Enas, 255 F.3d 662, 669–70 (9th Cir. 2001) (describing legislative history of *Duro* Fix).

88. 25 U.S.C. § 1301(2) (2000), originally enacted at Pub. L. No. 101-511, § 8077(b)–(c), 104 Stat. 1856, 1892–93 (1990).

89. 541 U.S. 193 (2004).

90. One might think that the congressional reversal would make the Court re-evaluate whether its tribal jurisdiction opinions in fact reflect federal common law. But after *Duro* the Court lost its strongest advocates for tribal sovereignty, Justices Marshall, Brennan, and Blackmun. Recent opinions suggest that some members of the Court are becoming more familiar with Indian law and Indian tribes, and are at least grappling with precedent and the needs of modern tribes. See, in particular, the various opinions and concurrences in *United States v. Lara*, 541 U.S. 193 (2004). This aspect of the *Lara* decision is discussed in Bethany R. Berger, U.S. v. Lara *as a Story of Native Agency*, 40 TULSA L. REV. 5, 22–23 (2004) and Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. (forthcoming Dec. 2005) (unpublished manuscript, on file with the Harvard Law School Library). But in general, the new members of the Court seem to have easily accepted that tribal jurisdiction means subjection to an unfamiliar government, in which nonmembers have no voice and are at a disadvantage, and that tribal sovereignty is limited to the protection of a traditional, insular culture, and does not extend to the needs of modern, changing governments.

91. 520 U.S. 438 (1997).

92. *Id.*

93. *Id.* at 457–58.

A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'"[94] Two related ideas are embedded in this phrase. First, non-Indians are at a disadvantage in "unfamiliar" tribal courts, and so should only rarely be called before them.[95] Second, the need to exercise jurisdiction over the "commonplace" stuff of government is not properly a tribal matter. To be protected, tribal interests cannot be commonplace, but must satisfy judicial notions of what is uniquely tribal.

In 2001, the Court further reshaped Indian law to deny tribes "commonplace" governmental powers in *Atkinson Trading Co. v. Shirley*.[96] There, the Court held that the Navajo Nation had no jurisdiction to impose a hotel tax on non-Indian guests at a hotel owned by a non-Indian on fee land on the Navajo reservation.[97] Although *Merrion v. Jicarilla Apache Tribe*[98] declared that tribes had general authority to impose taxes to control economic activity within their territory and defray the cost of providing government services,[99] *Atkinson* dismissed this language as dicta.[100] The *Merrion* justification for jurisdiction was rejected because otherwise "the exception would swallow the rule: All non-Indian fee lands within a reservation benefit, to some extent, from the 'advantages of a civilized society' offered by the Indian tribe."[101] As in *Strate*, the right of tribes to act as modern sovereigns was denied in favor of the need to ensure that few, if any, non-Indians would be subject to their jurisdiction.

In the same term, in *Nevada v. Hicks*,[102] the Court pushed the presumption against tribal jurisdiction over nonmembers even further,

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94. *Id.* at 459 (quoting Montana v. United States, 450 U.S. 544, 566 (1981)) (footnote omitted).

95. The Court reinforced this idea by referring in a footnote to the rule that nonresident defendants may remove cases filed in state court to federal court, *Id.* at 459 n.13 (citing 28 U.S.C. § 1441), an allusion to the idea, now largely discredited, that local courts will be biased against non-resident defendants. Of course the result in *Strate* went beyond this removal option: the Court did not grant A-1 the right of removal, but instead denied Gisela Fredericks the option of having the case heard by the court in her place of residence altogether. Nor do the two provisions stem from the same source: federal diversity jurisdiction is based on a Congressional statute explicitly providing for such jurisdiction; limitations on inherent tribal civil jurisdiction are founded on vague judicial ideas of tribal sovereignty that often conflict with congressional policy.

96. 532 U.S. 645 (2001).

97. *Id.* at 649.

98. 455 U.S. 130 (1982).

99. *Id.* at 141.

100. 532 U.S. at 652–53.

101. *Id.* at 655 (quoting *Merrion*, 455 U.S. at 137–38).

102. 533 U.S. 353 (2001).

holding that even on tribally owned trust land, tribal courts did not have jurisdiction over a lawsuit by a tribal member against state officials for damages allegedly committed in searching his house.[103] The majority opinion focused almost solely on the harm to state interests should tribes exercise jurisdiction over the execution of state warrants for crimes committed off the reservation.[104] With little other justification than this potential harm, the Court held that "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations."[105]

Justice Souter, joined by Justices Kennedy and Thomas, concurred to urge the Court to go further still, to hold that "at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers."[106] The concurrence declared that the "special nature of [Indian] tribunals"[107] and the "overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty'" justified this presumption.[108]

In 2004, however, the Court resisted an opportunity to enshrine its nonmember jurisdiction opinions in constitutional law. In *United States v. Lara*, the Court upheld the *Duro* Fix legislation affirming inherent tribal criminal jurisdiction over nonmember Indians.[109] Although the statute concerned jurisdiction over nonmember Indians, the Court did not restrict the scope of this power to jurisdiction over Indians.[110] Nor did it suggest that this power was limited to cases in which the Supreme Court had somehow gotten its history wrong in saying such jurisdiction did not exist.[111] While the Court pointedly did not decide whether the *Duro* Fix violated equal protection or due process rights of defendants,[112] it left room for Congress to reconsider and reject judicial abrogation of tribal jurisdiction.

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103. *Id.*

104. *Id.* at 364–65. This harm was wholly hypothetical. State officials assumed that tribal approval was needed for states to execute warrants on tribal lands, and the tribal courts readily approved the warrants. *Id.* at 356. In the case at hand, this accommodation was actually of benefit to the state; after the tribal courts approved execution of the state warrant, tribal police assisted the state wardens in their search, and later provided evidence leading to the second warrant and search. *Id.* at 356; *id.* at 397 (O'Connor, J., concurring) (noting that state and tribal officials "acted in full cooperation to investigate an off-reservation crime").

105. *Id.* at 364 (majority opinion).

106. *Id.* at 376–77 (Souter, J., concurring).

107. *Id.* at 383 (quoting Duro v. Reina, 495 U.S. 676, 693 (1990)).

108. *Id.* at 384 (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978)).

109. 541 U.S. 193 (2004).

110. Berger, *supra* note 90, at 10.

111. *Id.*

112. *Lara*, 541 U.S. 193 at 209. The Ninth Circuit, in a case arising from the Navajo Nation's exercise of jurisdiction over the Oglala Lakota Russell Means, held that the *Duro* Fix

Tribal courts also retain significant jurisdiction over nonmembers in other areas. For many nonmember plaintiffs, tribal court is the only option. Lawsuits arising on a reservation in which the defendant is a tribal member can only be heard in tribal fora.[113] Actions against tribes themselves must also be brought in tribal courts absent a waiver of tribal sovereign immunity.[114] Despite the actions of the Supreme Court, therefore, the numbers of cases in which nonmember litigants appear in tribal courts will only increase as tribes and their members become increasingly involved in commercial and other relationships with nonmembers.

Where defendants or subjects of tribal jurisdiction are nonmembers, however, much has been taken away and less is clearly protected. The Supreme Court has decided questions regarding nonmember jurisdiction on an incremental, case-by-case basis, and has established few firm rules. Rather, it has acted in accordance with its assumptions about what tribal court adjudication of nonmembers means both for those considered outsiders and those considered insiders to the tribes. The answer in both cases is the same: nothing good. Nonmembers will find themselves at a disadvantage, and tribes will not appreciably gain in self-government by the exercise. The remainder of this Article examines these assumptions.

III. THE EXPERIENCE OF OUTSIDERS IN THE NAVAJO NATION APPELLATE COURTS

The empirical part of this project examines decisions involving outsiders in the Navajo Nation appellate court. This examination reveals the court to be surprisingly balanced in hearing the rights of outsiders, even in areas that might appear particularly prone to bias.

A. Data

The study examines decisions issued by the Navajo appellate court (whose name changed from the Navajo Court of Appeals to the Navajo Supreme Court in the 1980s) between January 1969, when the court began issuing written opinions, and December 2004. The source of the decisions is

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did not violate Equal Protection or Due Process guarantees. Means v. Navajo Nation, 420 F.3d 1037 (9th Cir. 2005).

113. *See* Williams v. Lee, 358 U.S. 217, 223 (1959).

114. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998). Although tribes have immunity in their own courts as well, many have by statute or tribal court decision authorized suits against the tribe in tribal court. *See* Newton, *supra* note 8, at 311–12 n.100, 338–41 (discussing tribal waivers of sovereign immunity).

the online database available at www.versuslaw.com. Unlike the other major source of tribal court opinions, the Indian Law Reporter, VersusLaw appears to publish every decision submitted to it. And unlike many tribes, the Navajo Nation appears to submit all of its non-summary appellate opinions.[115] Over the time period, the Navajo appellate court issued 534 opinions. Potential limitations in this data source are discussed below.

1. The Navajo Nation Court System

The experience of nonmembers on the Navajo Nation is disproportionately important in evaluating the experience of nonmembers in tribal legal systems generally. With 13% of the total Indian population in the United States and about one-third of the total land base over which any tribe may exercise jurisdiction, the Navajo legal system potentially has jurisdiction over a significant proportion of disputes regarding nonmembers arising on reservations. It also expends significant resources in exercising this jurisdiction; it has, for example, four times more full time law enforcement officers than any other tribe.[116] Not surprisingly, therefore, the Navajo Nation figures prominently in the debates and litigation concerning jurisdiction and nonmembers. Many of the Supreme Court's most important jurisdictional cases—*Williams v. Lee*,[117] *Warren Trading Post Co. v. Ariz. State Tax Comm'n*,[118] *McClanahan v. State Tax Comm'n of Ariz.*,[119] *United States v. Wheeler*,[120] *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*,[121] *Kerr-McGee Corp. v. Navajo Tribe of Indians*,[122] and *Atkinson*

115. For a period in the 1970s and 1980s, the court submitted all of its orders, including, for example, decisions dismissing cases on the stipulation of the parties, pro forma orders accepting the Navajo Nation Bar Association's recommendations for bar admissions, and one paragraph decisions dismissing appeals for failure to file in a timely manner. In 1987, however, Navajo Rule of Appellate Procedure 22 became effective. The rule divides decisions into three categories: (1) opinions, (2) memorandum decisions, and (3) orders. NAVAJO R. APP. P. 22. Only "opinions" are published in the Navajo Reporter or submitted to versus law. Since that time, the court has issued approximately twelve opinions per year.

116. STEPHEN W. PERRY, U.S. DEP'T OF JUSTICE, NCJ 203097, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL SURVEY PROFILE, 1992–2002, at 26 (2004). Given the large size of its reservation, however, it still has only one officer per every 100 square miles within its jurisdiction. *Id.*

117. 358 U.S. 217 (1959).

118. 380 U.S. 685 (1965).

119. 411 U.S. 164 (1973).

120. 435 U.S. 313 (1978).

121. 458 U.S. 832 (1982).

122. 471 U.S. 195 (1985).

Trading Co. v. Shirley[123]—have arisen on the Navajo Nation, and the Nation is an important voice in current discussions on the subject.

There are disadvantages in focusing on the Navajo Nation, as there would be in focusing on any single tribe. The United States recognizes at least 562 Indian tribes and Alaska Native villages.[124] While some tribes, such as the various Sioux peoples of the Dakotas and the midwest, reflect federal divisions of single tribes,[125] most have different indigenous languages and cultures. Tribes also have vastly different physical and social circumstances. While the Cherokee Nation of Oklahoma, the most populous tribe, has over 300,000 members,[126] most tribes have fewer than 1,000 members and many have fewer than 100. Their land bases also differ widely. While the Navajo Nation is the approximate size of West Virginia, and several other reservations rival the land base of Connecticut or Rhode Island, many other reservations encompass only a few hundred acres. In addition, 226 of the 562 tribes recognized by the United States are Alaska Native Villages, most of whose land is not considered "Indian country,"[127] the territory within which most of the special jurisdictional rules of Indian law apply.[128] Generalizations are therefore dangerous.

The Supreme Court, however, has created general tests for tribal jurisdiction. While it has left open the possibility that individual treaties and laws may create different rules, in practice it has given short shrift to legal or factual differences between tribes. The failure of one tribe, particularly one of the size and significance of the Navajo Nation, to conform to its judicial assumptions should make the Court more cautious in assuming a policy-making role with respect to tribal jurisdiction.

In addition, all tribes struggle with the problem of establishing legitimate and just governmental systems in the face of a history of American colonialism. A close study of the challenges this poses to one tribal legal

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123. 532 U.S. 645 (2001).

124. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). The term "tribe" is inappropriate for the 226 Alaskan Native Entities, which prefer the term "Native Village," and is rejected by some other groups on the list, which prefer the term "nation." As a generic term, however, I generally use the term "tribe" for the sake of clarity and simplicity.

125. *See* 1982 COHEN, *supra* note 84, at 6.

126. U.S. CENSUS BUREAU, TOP 25 AMERICAN INDIAN TRIBES FOR THE UNITED STATES: 1990 AND 1980 (1995), *available at* http://www.census.gov/population/socdemo/race/indian/ailang1.txt.

127. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 526–34 (1998).

128. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987) (stating that definition of Indian country comes from 18 U.S.C. § 1151, and defines both civil and criminal jurisdiction).

system is therefore meaningful both for other tribes and for judges and policy makers considering tribal jurisdiction.

The Navajo Nation, moreover, is a paradigmatic example of the kind of tribal court system the Court is concerned about. While students of tribal courts often look to the Navajo Nation Supreme Court as a model, in some ways it seems a breeding ground for the horror stories about tribal court systems. All of the judges, at both the trial and Supreme Court levels, are Navajo.[129] One of the qualifications for judicial service is fluency in the Navajo language,[130] effectively ensuring that judges will be drawn from the more traditional portion of the population. A J.D., however, is not a requirement for a judgeship,[131] and only a minority of Supreme Court justices, and even fewer trial court judges, have been law school graduates.[132]

The court has also pioneered one of the bugaboos of opponents of tribal jurisdiction over outsiders: the incorporation of tribal customary or common law in dispute resolution.[133] Navajo customary or common law is "comprised of customs and long-used ways of doing things"[134] that gain the status of law, like the Anglo common law catalogued by Blackstone.[135] Since the judicial reforms of 1959, the Navajo Code has provided for use of Navajo customary law in legal proceedings,[136] and judicial opinions have

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129. NAVAJO NATION CODE tit. 7, § 354(1) (1985).

130. § 354(5).

131. § 354(3) (applicants must have minimum of high school education). Applicants must also have a minimum of two years experience in a law related area. § 354(4).

132. In 2002, three out of eighteen Navajo court judges were law school graduates. *Hearing*, *supra* note 4, at 97 n.16 (testimony of Robert Yazzie, Chief Justice of the Navajo Nation). One of the most influential and successful panels of justices (that of Justices Tom Tso, Homer Bluehouse, and Raymond Austin) had only one law school graduate. *See* Jim Maniaci & Diné Bereau, *Panel Extend's Justice's Probation; King-Ben Gets Year to Get Better*, GALLUP INDEPENDENT, July 3, 2003, *available at* http://www.gallupindependent.com/2003/07-03-03king-ben.html.

133. For a fine and nuanced article on the tribal common law movement, see Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (2000), http://tlj.unm.edu/articles/volume_1/zuni_cruz.

134. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 230 (1989) [hereinafter Tso, *The Process of Decision Making*].

135. *In re* Estate of Belone (Dawes v. Yazzie), 5 Navajo Rptr. 161 (1987).

136. NAVAJO NATION CODE tit. 7, § 204 (1977) provided that:

> (a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinance or customs of the Tribe, not prohibited by such Federal laws.

discussed custom since the Navajo Nation began publishing opinions in 1969.[137] In the late 1970s and early 1980s, the justices of the Navajo Nation began to place new emphasis on Navajo common law, applying it beyond the domestic relations arena in which its use had always been sanctioned, to questions of judicial review,[138] personal injury lawsuits,[139] and restrictions on freedom of speech.[140] Today, common law is the "law of preference" in the Navajo courts.[141] The tribal common law movement is, at some level, a rejection of Anglo-American standards as the best or most appropriate way to resolve disputes arising on reservations, and the use of such customary law helps to undergird the sense that tribal courts are unfamiliar, foreign places, where those not part of the traditional culture will find themselves at a disadvantage.[142]

One might also expect that because of the unique circumstances of the Navajo Nation, adjudication of the rights of nonmembers would play a relatively small role in Navajo law. In contrast to the majority of reservations, very little of this vast reservation has been "allotted" or sold by the United States to non-Indian settlers. While on heavily allotted reservations, a substantial proportion and sometimes the vast majority of residents may be non-Indian, Navajos compose over 90% percent of the reservation population.[143] Only 3.5% of the 145,843 people living on the

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> (b) Where any doubt arises as to the customs and usages of the Tribe, the court may request the advice of counselors familiar with these customs and usages.
>
> (c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie.

Ironically, this provision is in large part the product of federal influence—this language was taken essentially verbatim from the federal code of regulations for tribal courts. As part of the court reforms of 1985, the Navajo Nation reenacted this choice of law provision and modified it to make clear that it applied in all cases, not simply civil ones, and that in cases where Navajo and federal law were silent the court "may" not "shall" apply local state law. NAVAJO NATION CODE tit. 7, § 204 (1985).

137. *In re* Trust of Benally, 1 Navajo Rptr. 10, 12 (1969). *See generally* Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969–1992*, 18 AM. INDIAN L. REV. 379 (1993) (discussing development of common law in the Navajo courts).

138. Halona v. MacDonald, 1 Navajo Rptr. 189, 203–06 (1978).

139. *See* Benally v. Navajo Nation, 5 Navajo Rptr. 209 (Window Rock D. Ct. 1986).

140. Navajo Nation v. Crockett, 7 Navajo Rptr. 237, 240–43 (1996).

141. Navajo Nation v. Platero, 6 Navajo Rptr. 422, 424 (1991).

142. Duro v. Reina, 495 U.S. 676, 693 (1990); Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

143. NAVAJO NATION, DIV. OF CMTY. DEV., 1990 CENSUS POPULATION AND HOUSING CHARACTERISTICS OF THE NAVAJO NATION, tbl.NN04 (1993).

reservation are non-Indian, and only 6.5% are nonmember Indians.[144] And although Native Americans in general are the most exogamous of American ethnic groups, a fairly small proportion of the on-reservation Navajo population marries outside the tribe.[145]

Navajo custom and tradition also remain deeply embedded in daily life. The appropriate way to introduce oneself, for example, is to give not only one's name, but the clans of one's mother, father, and grandparents, acknowledging not only one's individuality, but one's traditional heritage and relationships.[146] While ensuring the vitality of the Navajo language among younger members is a concern for the tribe, as it is for most tribes with living languages, as of 1990 Navajo was spoken at home by 142,886 members of the Navajo Nation,[147] and it is still the only language of many Navajo elders.

The Navajo Nation is almost unique in its degree of social and geographic independence from non-Navajo society. Interactions with outsiders might seem to compose little of the work of the courts and to be relatively unimportant to Navajo self-government. The Navajo Nation thus provides an excellent opportunity to test the accuracy of the Supreme Court's vision of tribes as largely isolated from nonmembers and needing only to preserve customs and culture unrelated to the outside world.

2. Appellate Decisions

There are also disadvantages in focusing on appellate decisions. Written appellate decisions are not necessarily representative of disputes in a particular society. Individuals transform only a small fraction of disputes into articulated grievances and a smaller fraction of those into legal actions; an even smaller fraction of those result in litigated legal decisions and a yet

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144. *Id.*

145. During my time working with parents and children on the Navajo Nation, I more than once heard of Navajo children mocking children with mixed Navajo/white parentage as "half-breeds," a phenomenon that would be unheard of on most reservations outside the Southwest because of the high rates of intermarriage.

146. *See, e.g.*, Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21, 21 (2002). In beginning her remarks, Bates Arthur provided her clan (which is her mother's clan), and the clans of her father and her grandparents, saying, "[t]hat is who I really am." *Id.* The importance of these traditional ties is also reflected in the saying to condemn the behavior of an individual, "[h]e acts like he has no relatives." Ariz. Pub. Serv. Co. v. Office of Navajo Labor Relations, 6 Navajo Rptr. 246, 264 (1990).

147. U.S. CENSUS BUREAU, CHARACTERISTICS OF AMERICAN INDIANS BY TRIBE AND LANGUAGE: 1990 CENSUS OF POPULATION 874 tbl.18 (1994).

smaller fraction result in appellate decisions.[148] Although there is an intuitive sense that reported decisions reflect the underlying activity in society, the relationship between activity, litigation, and decisions is not so direct.[149] Not all injuries are sensed as wrongs, and even fewer as legal wrongs. Disputes litigated to decision are more likely than others to involve "hard cases," those in which both parties predict relatively equal chances of success.[150] In addition, as discussed further below, litigation disproportionately reflects situations in which there is no common agreement on the way disputes should be resolved, or in which the parties do not have common social ground, resulting in a turn to formal legal institutions for resolution.[151]

This lack of representativeness, however, is not a significant problem for the study. While many disputes do not even come before the courts, it is tribal formal legal institutions that have come under the scrutiny and criticism of the United States Supreme Court. More important, it is perhaps more relevant in determining the relative bias of the courts to see what they do in adjudicating hard cases rather than easy ones. The indirect relationship between disputes and litigated claims, moreover, only increases the likelihood that disputes that are litigated reflect the friction points in society, the areas in which parties feel themselves particularly aggrieved and need to turn to a hopefully objective third party for resolution.

In addition, to the extent one can tell from the published trial court decisions and discussions of the decisions below in the appellate court

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148. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11–36 (1983) (discussing the "dispute pyramid" of grievances to litigation). This is certainly true for the Navajo court system. Although 70,338 cases were filed in the Navajo courts in the 2001–2002 fiscal year, only 65 cases were filed in the Navajo Supreme Court, and the court issued only 14 published decisions. JUDICIAL BRANCH OF THE NAVAJO NATION, ANNUAL REPORT ON FISCAL YEAR 2002, 22 (2003).

149. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1981) (discussing factors in transformation of disputes into litigation).

150. The seminal article articulating this theory is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

151. *See infra* Part IV.A; *see also* LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 144 (1975); David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551 (1987), *reprinted in* THE LAW & SOCIETY READER 13, 21–22, 32–33 (Richard L. Abel ed., 1995) (stating that plaintiffs in personal injury lawsuits were outsiders to rural Illinois community; insiders either chose not to litigate or were able to quickly settle their disputes); Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 LAW & SOC'Y REV. 891 (1979), *reprinted in* THE LAW & SOCIETY READER 36, 38–40 (Richard L. Abel ed., 1995) (suggesting that reliance on court in urban housing project reflected different ethnic groups with little social common ground).

decisions, the primary differences between trial and appellate level decisions are not the degrees of bias against nonmembers. Like lower courts anywhere, the trial level courts are more concerned with resolving disputes and avoiding reversal than the appellate court.[152] And although in a few instances decisions against nonmembers below seem to violate legal principles accepted by the Navajo courts,[153] the differences between the trial and appellate courts appear to reflect different visions of the role of the court rather than greater or lesser bias against nonmembers. Thus, while the appellate court has reversed decisions that the Navajo courts lacked jurisdiction over claims against non-Indians, these decisions appear motivated by the belief that the court has and should have broad jurisdiction over all actions arising on the reservation rather than bias against the nonmember.[154] Similarly, the appellate court appears to have a greater preference for the application of Navajo common law and has remanded decisions in favor of non-Indians where it held that state law rather than common law inappropriately formed the rule of decision.[155]

B. Who Wins When Nonmembers Go Before the Courts?

To determine who won and lost when nonmembers appeared before the Navajo appellate courts, the online opinions were reviewed first to eliminate the few published district court opinions and the duplicate opinions. Each of the remaining opinions was reviewed to determine which involved parties that could be identified as involving nonmembers of the tribe, whether because the opinion identifies them as such, because of the names of the parties, because of knowledge of the parties, or because of the status and location of the parties.[156] Where the identity of the litigants could not be

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152. Email from James W. Zion, former Navajo Nation Solicitor (May 10, 2005, 16:17 EST) (on file with author).

153. See, for example, Deal v. Blatchford, 3 Navajo Rptr. 159, 162–63 (1982), in which the appellate court reversed the trial court for granting punitive damages of $250 and compensatory damages against a non-Indian found liable for a car accident without evidence that the act was willful or malicious or evidence of the financial damages other than the plaintiffs' testimony. (The decision as to liability seems straightforward—the non-Indian hit the plaintiff's car with her motorcycle while the plaintiff was stopped at a red light.)

154. *See, e.g.*, *In re* A.O., 5 Navajo Rptr. 121 (1987) (reversing dismissal of custody case for lack of jurisdiction and remanding for more facts).

155. *See, e.g.*, Nez v. Peabody W. Coal Co., 7 Navajo Rptr. 416, 420–21 (1999).

156. In doing this, I assumed that litigants with common Navajo names such as Kee, Yazzie, or Begay were Navajo, absent other evidence to the contrary, and that off-reservation businesses, such as Babbitt Ford, were non-Indian. In more difficult cases, I did research regarding the party before determining whether they were Navajo. For example, where Edker Wilson, a provider of livestock for rodeos, was sued for injuries caused by one of his bulls at the

determined to a reasonable degree of certainty, the case was assumed to involve only Navajos.

Through this method, 122 cases involving non-Navajo litigants were identified. Ten of these cases involve Indians that are not members of the Navajo Nation, and the rest, 91.8% of the total, involve non-Indians. The cases were read and categorized as to who won or lost the case and the subject matter of the case. The cases run the gamut in subject matter; they include, for example, cases regarding contracts, torts, child custody, employment law, practice of law, trusts and estates, and taxation. The majority of cases involve non-Indian companies, whether as employers, vendors, alleged tortfeasors, taxpayers, or insurers. In the vast majority, both sides had representation drawn from the same pool of local attorneys and advocates.

Out of these cases, in sixteen, no contested issues were decided or the results were too mixed to say one party won or lost.[157] In five, non-Navajos were on both sides, and in six, non-Navajos and Navajos were on the same side. The remaining 95 cases were almost equally divided: in 45 cases, or 47.4% of the total, the non-Navajo party won, and in 50, or 52.6% of the total, the non-Navajo party lost. Until the last few years, when non-Indians, encouraged by recent federal decisions restricting tribal civil jurisdiction, have repeatedly challenged Navajo jurisdiction and the court has repeatedly rejected these challenges,[158] the win-loss rate was 50-50. The results are shown in Table I.

Northern Navajo Fair, see Wilson v. Begay, 6 Navajo Rptr. 1 (1988), I found an article profiling him before categorizing him as a nonmember. Similarly, for on-reservation businesses such as Dilcon Westerner Stores, I found a speech describing the owner, Michael Nelson, as a Navajo businessman before categorizing him.

157. These included, for example, cases in which the decision simply reported that the matter had been dismissed by stipulation of the parties, cases responding to requests for opinions on certified questions, and cases in which the Supreme Court simply certified the presentation of candidates for admission to the bar. They also, however, included a few substantive cases such as *Manygoats v. Cameron Trading Post*, No. SC-CV-50-98, 2000 NANN 0000003, ¶ 63 (Navajo Jan. 14, 2000) (VersusLaw), in which the court affirmed that the tribe had jurisdiction over a non-Indian employer and that the employer had failed to create an atmosphere free from harassment, but reversed the damages, civil penalty, and the award of attorney fees because it agreed with the employer that requiring it to prove substantial justification for firing the employee by clear and convincing evidence violated due process and that the civil penalty was improper.

158. In the last five years, for example, the Navajo Supreme Court rejected at least three non-Indian or nonmember Indian challenges to its jurisdiction. *See* Nelson v. Pfizer, Inc., No. SC-CV-01-02, 2003 NANN 0000002, ¶ 35 (Navajo Nov. 17, 2003) (VersusLaw); Office of Navajo Labor Relations *ex rel.* Jones v. Central Consol. Sch. Dist. No. 22, No. SC-CV-13-98, 2003 NANN 0000007, ¶ 28 (Navajo June 5, 2003) (VersusLaw); Means v. Dist. Court of the Chinle Judicial Dist., No. SC-CV-61-98, 1999 NANN 0000013, ¶¶ 68, 82 (Navajo May 11,

Table I: Win-Loss Rate of Nonmembers								
	1969-74[159]	1974-79	1979-84	1984-89	1989-94	1994-99	1999-04	Total
Nonmember wins	2	8	12	7	3	6	7	5
Nonmember loses	2	2	11	6	10	9	10	50
No win/loss or results substantially mixed		2	7	2	2	1	2	16
Nonmembers both sides			1		1	1	2	5
Nonmember & Navajo same side			2	2	1	1		6
Total cases	4	12	33	17	17	18	21	122

This balance is consistent across the various kinds of disputes. Whether the issue is child custody, torts, contracts, or employment, Navajo litigants win some, and non-Navajo litigants win some. This is true whether the court is deciding on procedural or substantive grounds, whether the decision affirms or reverses the district court, even whether the opposing party is the Navajo Nation or not.

According to an influential and controversial theory developed by George Priest and Benjamin Klein, this balanced win-loss rate is what one would expect from litigated decisions.[160] Assuming that parties have relatively accurate information regarding their chances of success, they will settle or fail to pursue cases in which they agree that one party is significantly more likely to win.[161] It is only where the likely outcome is subject to a large degree of uncertainty, and each party appears to have a relatively equal ability to win, that cases will be litigated. Other factors being equal,[162] therefore, one would expect the results to approach a 50-50

1999) (VersusLaw). Without the losses on the jurisdictional appeals in those cases, nonmembers would have won the same number of cases as they lost during that period.

159. Dates are calculated between January 1 of the initial year and January 1 of the concluding year.

160. Priest & Klein, *supra* note 150, at 51–52.

161. The theory was developed and has been tested in the context of plaintiffs and defendants. There is no reason, however, that it should not work with any two sets of parties. If nonmembers and Navajos each are making equally good estimates of their chances of success, absent some distorting factor such as bias, the rates of success when they litigate against each other should be 50–50. In fact, the rates of success of some randomly chosen group, say red-headed people, should more consistently approach the 50 percent figure because there should be fewer factors relevant to litigation behavior consistent across red-headed people than there might be for the group of plaintiffs as a whole.

162. Differing stakes between the parties, for example, will shift their interest in litigation, and therefore may shift the proportion of cases won by any party. Priest & Klein, *supra* note 150, at 26. Repeat players in litigation systems, moreover, should have greater flexibility in

win-loss rate for any set of parties.[163] Recent scholarship suggests that much of the divergence from the 50-50 rate in practice can be explained by asymmetric information between the parties.[164] In other words, a party who is better able to calculate her chances of success or failure than her opponent will be better able to litigate only when she will win.

Following this theory, this relatively balanced win-loss rate tends to suggest that non-Navajo parties are at least as good at predicting their chances of success as are Navajo parties. This, in turn, undermines the assertion that nonmembers should not be subject to the jurisdiction of the non-Indian courts because they are "unfamiliar" places[165] whose laws are "unusually difficult for an outsider to sort out."[166] It also tends to undermine the assumption that the courts are unfair to these outsiders. Where judges are influenced by legally irrelevant factors such as bias against a particular kind of party or claim, it skews the results. Parties that make an accurate assessment of the law and facts in their favor will nevertheless lose disproportionate numbers of cases. While Priest and Klein predicted that parties would adjust their litigation decisions to account for bias, thus maintaining the balanced win-loss rate, subsequent studies do not confirm their thesis.[167] Parties, even when aware of bias, appear to over rely

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choosing not to litigate cases in which the facts may lead to negative outcomes, and therefore may be expected to win a greater proportion of cases litigated. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–104 (1974). Empirical studies have shown significant deviation from the 50% rule in a number of areas. *See* Daniel Kessler, Thomas Meites & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 242 (1996) (summarizing studies). Kessler et al., however, argue that their data provides support for the 50% rule when these factors are taken into account. *Id.* at 237–59.

163. Priest and Klein developed their hypothesis regarding the win-loss rate between plaintiffs and defendants at the trial level; significant evidence suggests that it does not hold up between appellants and appellees, as appellants must convince the court of an error below. Kessler, Meites & Miller, *supra* note 162, at 242.

164. *See* Keith N. Hylton, *An Asymetric-Information Model of Litigation*, 22 INT'L REV. L. & ECON. 153, 154, 167 (2002).

165. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).

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

167. Kimberly A. Moore's study of patent litigation by foreigners provides a nice example of this. Foreign patent holders were far less likely than domestic patent holders to litigate patent claims, suggesting that they were litigating only their strongest claims both because of perceived antiforeigner bias and the presumably higher litigation costs they faced in litigating in a foreign country. Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1505 (2003). Nevertheless, foreign patent holders won only 38% of their jury claims against domestic infringers, while domestic patent holders won 82% of claims against foreign infringers. *Id.* at 1509. When claims were tried before judges, however, the domestic and foreign patentees' success rates were almost identical, 35% versus 31%. *Id.* at 1509–10. The foreign patent holders thus attempted to adjust their litigation behavior to reflect their concerns about bias, but still were unable to accommodate the degree of bias they experienced. *See also*

on their assessments that the law and facts are in their favor, and only very slowly, if at all, effectively strategize to avoid a court biased against them.

Indian law cases decided by the U.S. Supreme Court provide a nice example of this. David Getches has calculated the win-loss rate of tribes in Indian law cases decided by the United States Supreme Court.[168] He found that while the win-loss rates in the Burger Court were relatively balanced (with tribes winning 58% of the cases and losing 42%), tribal interests have lost 77% of the Indian law cases decided by the Rehnquist court.[169] It is only now, after almost twenty years of this clear, extremely high-profile trend, that tribes are actively seeking to avoid the United States Supreme Court, and still find themselves often unable to do so as opposing parties refuse to settle.[170] Bias in lower level courts should be even more difficult to detect and address through litigation behavior.

Examining the win-loss rates according to whether the nonmembers were appellants or appellees provides a fuller picture. Nonmembers were somewhat more likely to be in the role of appellants, being in this position about 58% of the time in cases in which there was a winner or loser. Other studies have shown that appellant success rates are significantly less than 50%,[171] which one might expect given that the appellant must prove error by the lower court. Nonmember appellants won only about 26.5% of the time; nonmember appellees lost 34% of the time.[172] Both of these figures are similar to the 25 to 35% appellant win rates generally found in studies of appellate litigation,[173] contributing to the suggestion that the Navajo

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Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1096–100 (1992) (plaintiffs disproportionately lost employment discrimination cases in which defendants alleged a lack of interest defense); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (plaintiffs disproportionately lost products liability cases).

168. Getches, *supra* note 12, at 280.

169. *Id.*

170. *See* Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695, 696 (2003).

171. *See, e.g.*, Kessler, Meites & Miller, *supra* note 162, at 242 (summarizing studies regarding appellant success rates).

172. It is possible that the difference in these figures is explained in part by the recent appeals by nonmembers of lower court decisions finding jurisdiction over them.

173. Kessler, Meites & Miller, *supra* note 162, at 252 (finding appellant success rates of 27.3%); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1174–75 (1991) (finding success of appellants in 26, 27, 33, 35, 38, and 40% of appeals in various kinds of constitutional torts). Vicki Schultz and Stephen Petterson recorded a remarkable divergence from this trend in race and sex discrimination cases alleging a lack of interest defense, in which appellate courts reversed findings of no discrimination because the plaintiff group was uninterested in employment or promotion in 57.1% of sex discrimination cases and 75% of race discrimination

appellate court functions similarly to other appellate courts with respect to cases involving nonmembers.

To summarize, the Navajo appellate courts are almost as likely to rule in favor of nonmembers as they are to rule in favor of members, a figure particularly striking given the fact that nonmembers are slightly more likely to act as appellants in these cases. This figure suggests that parties are able to make a relatively accurate assessment of their chances of winning before the court, and that legally irrelevant factors do not significantly influence the court's decisions in ways that disadvantage nonmembers. Indeed, a non-Navajo going before the Navajo Supreme Court can be much more confident of winning than can a tribe going before the highest court in the land. While not conclusive as to the "fairness" of the courts, these statistics should at least provide some reassurance to those concerned about bias.

C. Closer Analysis of Cases Vulnerable to Bias

Closer reading of the cases supplements the suggestion that the court is acting in a relatively balanced manner. While not everyone would agree with the reasoning or method of the court in every case (indeed almost by definition each decision will disappoint a litigant who thought that he or she should win) the cases appear uniformly governed by thoughtful attempts to determine the relevant law, policies, and facts. There are some decisions in which the court reaches questionable legal results, but the source of the errors does not appear to be bias against the parties, nor do the errors disproportionately disadvantage nonmembers. While I do discuss one troubling custody case below, it appears that the basis of the decision was Anglo common law. In other cases, the status of the litigant appears to have made the court particularly careful to ensure fairness.[174]

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cases, a figure they attributed to the bias of the lower courts, and the relative zeal in the appellate courts in addressing it in race and gender cases. Schultz & Petterson, *supra* note 167, at 1133.

174. *In re* Practice of Battles, 3 Navajo Rptr. 92, 92–93 (1982), for example, considered a challenge made by William Battles to a new rule that required membership in a state bar for non-Navajos seeking to practice in the Navajo courts. (The rule is intended to ensure that the courts will benefit from Navajo practitioners that either are educated in Navajo legal traditions or can complement their lack of knowledge of such traditions with knowledge of Anglo law and a legal education that enables them to familiarize themselves with unfamiliar laws.) *Id.* at 93. Battles had practiced in the Navajo courts for several years and had passed the newly instated Navajo bar exam two years before the rule was promulgated. *Id.* at 92. When Battles sought to represent an individual challenging an extradition agreement between the Navajo Nation and the State of Arizona, however, the Navajo prosecutor sought to disqualify him based on his ineligibility to practice under the rule. *Id.* The court of appeals rejected this challenge. In the words of the court:

To supplement the above numbers, this section provides a closer examination of decisions in three areas that one might expect to be tainted by the biases or unfamiliarity of the courts: decisions involving Navajo common law, decisions involving commercial relations, and custody disputes involving custody of children with Navajo heritage.

1. Nonmember Decisions Involving Navajo Common Law

The United States Supreme Court has repeatedly cited the use of indigenous common law as a justification for denying tribal courts jurisdiction over nonmembers.[175] At the same time, it might seem that such concepts would be relevant only to disputes that closely resemble those the tribe engaged in pre-contact.[176] An examination of the use of one prominent Navajo common law concept, that of *nalyeeh*, debunks the notion that

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> Mr. Battles is a rather controversial figure. He passed the first bar examination administered by the Navajo Courts, along with 79 other individuals. The following year Battles filed a $12.2 million lawsuit in our courts against Raymond Tso, the prosecutor in this case. Later participation in controversial suits, proceedings and disputes has made Battles a figure disliked by some, but neither the decisions of the District Court nor this court are based upon Mr. Battles' notoriety.

Id. at 92–93 (citations omitted). The court held that Battles' long practice in the Navajo Nation courts gave him an equitable right to continue to practice there despite the new rule. *Id.* at 97. (During my time on the Navajo Nation over a decade later, Mr. Battles continued to prosecute in the Navajo courts, and was even a Domestic Violence Commissioner in the court system. He was also a presenter in the mandatory course on Navajo Common Law for new bar members, where he regaled students with stories of his $12.2 million lawsuit against the Navajo Nation.)

175. Duro v. Reina, 495 U.S. 676, 693 (1990) (nonmember Indians should not be subject to courts "influenced by the unique customs, languages, and usages of the tribes they serve"); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210–11 (1978) (stating that non-Indians should not be subject to a tribal court that "tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception" (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883))); Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring); *see also* Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (non-Indian should not have to defend case in "unfamiliar court").

176. Some tribes deliberately segregate the use of indigenous justice ways to more "traditional" disputes. The Mohegan Tribe, for example, has two court systems, a Gaming Disputes Court that hears cases arising from its successful casino and whose procedural and substantive law closely mirror state and federal law, and a Mohegan Tribal Court, which hears disputes concerning tribal members and which has more freedom to apply Mohegan common law. *See* Newton, *supra* note 8, at 292 n.31. The Navajo Nation does something similar with its Peacemaker Court, which hears primarily family disputes and whose procedures, hearkening to traditional dispute resolution methods, involve an attempt to obtain consensus through talking through of the problem with the mediation of an elder. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 80 (1997).

indigenous common law need not and cannot be fairly applied to contemporary disputes involving non-Indians. Indeed, in this example, the use of common law adds to the fairness of the courts by creating legal guarantees of justice in situations in which tribal codes have not yet created them.

Nalyeeh is the traditional concept of making restitution for wrongs.[177] The concept includes not only the compensation itself, but the proper process for negotiating and making compensation.[178] The focus is distinctly equitable:[179] the concern is not with the amount of damages, but on what kind and manner of restitution is "fair," so as to "fix the victim's mind."[180] Although the concept has long been part of traditional law practice on the Navajo Nation,[181] *nalyeeh* apparently first appeared in a written opinion in 1986.[182] *Benally v. Najajo Nation*[183] involved a wrongful death action against the Navajo Nation by the mother of a Navajo child who died after being hit by a truck driven by a tribal employee.[184] The Navajo Nation argued that that under Anglo common law there was no action for the negligent death of a human being, so the right to bring such an action must be provided by statute.[185] Although most states have enacted wrongful death statutes, the Navajo Nation had not. But the district court held that the common law concept of *nalyeeh*, under which Navajos could seek compensation for the death of a relative, allowed the action to go forward.[186] In addition, although traditionally *nalyeeh* damages were paid in livestock and goods, the court recognized that "[m]ore Navajos work for money today" and "[p]ayment in material goods is no longer adequate."[187]

Since 1986, the Navajo courts have used *nalyeeh* to resolve a range of distinctly modern disputes, including election of remedies in worker's

177. *See* Singer v. Nez, No. SC-CV-04-99, 2001 NANN 0000001 (Navajo July 16, 2001) (VersusLaw); Benally v. Navajo Nation, 5 Navajo Rptr. 209 (Window Rock D. Ct. 1986).

178. Benalli v. First Nat'l Ins. Co. of Am., 7 Navajo Rptr. 329, 338 n.3 (1998).

179. *See id.* (comparing concept of *nalyeeh* to English concept of equity).

180. *Benally*, 5 Navajo Rptr. at 212.

181. The efforts of parties and the Navajo police to resolve a rape case by negotiated compensation rather than imprisonment almost led to a rebellion by the Navajo people in 1905, AUBREY W. WILLIAMS, JR., THE NAVAJO POLITICAL PROCESS 14 (1970), and informants spoke of current use of resolution according to *nalyeeh* in the early 1970s. DAN VICENTI, LEONARD B. JIMSON, STEPHEN CONN, & M. J. L. KELLOGG, THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ'ÁANII, A BICULTURAL APPROACH TO LEGAL EDUCATION FOR NAVAJO STUDENTS 121, 159, 198 (Ramah Navajo High School Press 1972).

182. *Benally*, 5 Navajo Rptr. at 212.

183. 5 Navajo Rptr. 209.

184. *Id.* at 209.

185. *Id.* at 210.

186. *Id.*

187. *Id.* at 213.

compensation cases,[188] "stacking" of uninsured motorist insurance coverage,[189] and requests for prejudgment interest in tort cases.[190] Seven out of the eleven cases concerning *nalyeeh* now online involve non-Indians, mostly as defendants. In three of the seven, the non-Indian party lost. In *Benalli v. First National Insurance Co.*,[191] the court used the concept of *nalyeeh* as an aid in reading an insurance contract to find, against the arguments of the non-Indian insurance company, that the insured driver of a car in an accident with an uninsured motorist was entitled to stack the uninsured motorist coverage provided in the policies of each of the insured's cars in order to receive full compensation for her injuries. In *Jensen v. Giant Industries, Arizona, Inc.*,[192] the court reversed a grant of summary judgment in favor of a non-Indian gas station chain that was sued after the plaintiff (who may also have been non-Indian) was injured by a third party in the parking lot of one of its stations. While Giant had argued successfully below that *nalyeeh* prohibited recovery from third parties, the court held that a single affidavit by a medicine man was not enough to establish a common law prohibition on such recovery.[193] The court remanded for more evidence.[194]

A non-Indian company also lost in *Nez v. Peabody Western Coal Co., Inc.*,[195] in which the court reversed the dismissal of a suit by a Navajo who sued his employer in tort after accepting worker's compensation for his injuries. Federal law provides that state worker compensation schemes apply to individuals working for private companies on federal lands,[196] and courts have interpreted this provision to extend state compensation laws to

188. Benally v. Broken Hill Property Ltd., No. SC-CV-79-98, 2001 NANN 0000015, ¶¶ 18–20 (Navajo Sept. 21, 2001) (VersusLaw).

189. *See* Benalli v. First Nat'l Ins. Co. of Am., 7 Navajo Rptr. 329 (1998).

190. Singer v. Nez, No. SC-CV-04-99, 2001 NANN 0000001, ¶ 38 (Navajo July 16, 2001) (VersusLaw).

191. *Benalli*, 7 Navajo Rptr. at 329.

192. No. SC-CV-51-99, 2002 NANN 0000003, ¶¶ 33–34 (Navajo Jan. 22, 2002) (VersusLaw).

193. In *Jensen*, the district court had granted summary judgment in the defendant's favor, in part because the plaintiff had not presented evidence to rebut the evidence of the medicine man. *Id.* at ¶¶ 20–21. The court found that to accept such evidence as binding on the court, particularly without the court satisfying itself as to the expertise of the affiant, would contravene the proper role of evidence regarding Navajo common law as a guide, rather than an adversarial tool which must be rebutted. *Id.* at ¶ 23.

194. *Id.*

195. 7 Navajo Rptr. 416 (1999).

196. 40 U.S.C. § 3172 (2000).

private employers in Indian country.[197] The Navajo Supreme Court agreed with this interpretation, but held that just as the worker's compensation remedies of one state did not automatically deprive another state of jurisdiction over a common law tort based on the claims,[198] so the extension of state workers compensation law did not deprive the Navajo Nation of jurisdiction over claims for remedies that were "substantially different" than the state scheme provided.[199] The court vacated the dismissal and remanded to the lower court. It suggested that Navajo law would bar the action if the plaintiff had waived the right to seek further recovery, the action was barred by collateral estoppel, or the action would unduly prejudice the defendant.[200] The court also left open for the district court the question whether Navajo common law itself barred plaintiffs from seeking damages twice for the same injuries.[201]

While the decision created significant concern regarding potential impact on reservation employers,[202] when the issue subsequently came before the

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197. *See* Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1319 (9th Cir. 1982) (holding that § 290, now § 3172, allows state workers' compensation laws to apply to employees of private employers on Indian reservations).

198. Nez v. W. Peabody Coal, 7 Navajo Rptr. at 419 (citing Carroll v. Lanza, 349 U.S. 408 (1955)) (holding that full faith and credit clause does not compel one state to enforce the exclusive remedy provision of another state's workers' compensation law); *id.* (citing Garcia v. American Airlines, Inc., 12 F.3d 308, 312–14 (1st Cir. 1993)) (holding that the forum state had jurisdiction over an employee's common law tort suit even after the employee had received benefits under another state's workers' compensation program).

199. *Id.* at 420.

200. *Id.* at 420–21.

201. *Id.* at 421.

202. This concern was significant enough that the Navajo Nation Council, four months after the decision, enacted the following resolution:

> 1. The Navajo Nation Insurance Services Program Workers Compensation Program is directed to begin development of a comprehensive workers compensation statute to cover all employers operating within the territorial jurisdiction of the Navajo Nation.
>
> 2. Until such time as the Navajo Nation develops a comprehensive workers compensation law covering all employers within the jurisdiction of the Navajo Nation, the Navajo Nation Council recognizes existing workers compensation coverage, whether under a state statutory scheme or under Navajo statutory law to be the exclusive remedy for covered injuries to employees occurring in the work place.

Navajo Nation Council Res. CJA-18-00 (2000) (enacted).

The court rejected this apparent restriction on its institutional authority, holding that given the presumption against ex post facto deprivations of remedies in existing cases and as the resolution did not take the prescribed form legislative enactments, the resolution should be interpreted as a statement of policy rather than a rule to be applied to pending cases. *In re* Certified Question from the U.S. Dist. Court for the Dist. of Ariz., No. SC-CV-49-2000, 2001 NANN 0000011, ¶¶ 25 (Navajo July 18, 2001) (VersusLaw); *see* Benally v. Big A Well

court, it held that *nalyeeh* did not permit additional recovery.[203] In *Benally v. Big A Well Service Co.*,[204] the first such case, the court emphasized that *nalyeeh* had:

> a deeper meaning of a demand to "make right" for an injury and an invitation to negotiate what it will take so that an injured party will have "no hard feelings" . . . . In most instances where an employee receives a workers' compensation award, the *nalyeeh* principle should be satisfied, because there is a method of determining the nature of the injury and the monetary needs of the worker.
>
> . . . [S]uch benefits may not be the same as an award in a personal injury action, but at the same time, workers have a prompt remedy, they do not have to face the defenses of contributory or fellow worker negligence, and costs in terms of money and time are minimal.[205]

In a subsequent case, the court elaborated on this reasoning, declaring that while *nalyeeh* was similar to Anglo-American concepts of compensation:

> [*Nalyeeh*] is not simply a legal equitable doctrine to be applied by a court as an impartial decision-maker, but a relationship value. . .
> .
>
> . . . We have said that Navajo common law requires people to keep their word and honor their promises. In this particular situation, the appellants' decedent went to work at a coal mine understanding that if he was injured, the mining company would pay for the injury under a workers' compensation program. The appellants sought and received death benefits under that program, and the company kept its word by paying them, as agreed. The wrongful death suit attempted to reject the agreement the parties reached and thus broke it. Accordingly, the district court was correct in dismissing the wrongful death suit on equitable principles as a matter of Navajo common law.[206]

Service, Co., No. SC-CV-27-99, 2000 NANN 0000002, ¶ 16 & n.1 (Navajo Aug. 28, 2000) (VersusLaw).

203. Benally v. Broken Hill Proprietary Ltd., No. SC-CV-79-98, 2001 NANN 0000015, ¶ 20 (Navajo Sept. 21, 2001) (VersusLaw); *Big A Well Service, Co.*, No. SC-CV-27-99, 2000 NANN 0000002, at ¶¶ 20–21.

204. *Big A Well Service, Co.*, No. SC-CV-27-99, 2000 NANN 0000002.

205. *Id.* at ¶¶ 22–23 (citations omitted).

206. *Broken Hill Proprietary Ltd.*, No. SC-CV-79-98, 2001 NANN 0000015, at ¶¶ 20–21 (citations omitted).

Thus, Navajo common law, far from a trap for the unwary in tribal courts, became a tool to ensure comparable protections to those in state courts, even in situations where tribal codes had not yet provided protection. But by finding these guarantees in Navajo traditions, they become part of the general code of conduct appropriate for the Navajo people rather than foreign restrictions on action imposed because of a need to model non-Indian courts.

2. Cases Arising from Business Relationships

The cases involving outsiders largely arise from business relationships,[207] the most common situation in which non-Indians find themselves in Navajo courts. Sixty-five of the 122 cases involving non-Navajos, or approximately 53% of the total cases, arise from employment, contract, and worker's compensation disputes alone. In most of these cases, non-Indians appear as powerful institutions, employers, sellers, or lenders, while Navajos typically appear in their individual status. The Navajo Nation has a significant interest in protecting its members from predatory practices by such institutions, and indeed has passed several laws, including a law prohibiting self-help repossession without judicial approval[208] and the Navajo Preference in Employment Act,[209] which prohibits termination of employees without just cause, in order to protect Navajo individuals in their business relationships. One might fear that this concern would result in bias against such institutions when they appear in court. At least one litigant, the Atkinson Trading Company, current owner of the Cameron Trading Post, sought (unsuccessfully) to avoid exhausting a claim in tribal court by arguing that the court was biased against it.[210]

Review of the decisions regarding such cases reveals that the court is balanced in hearing cases against non-Indian businesses. As reflected in the chart below, after subtracting cases in which non-Navajos were on both sides and there was no clear winner, non-Indian businesses won 31 of the cases and lost 27. If the win/loss numbers are adjusted to include the two cases in which Hopi employees were involved in disputes with non-Indian businesses, both of which the Hopi litigants won, non-Indian businesses lost 29 of the cases.

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207. For an article focusing on resolution of contract disputes on the Navajo Nation, see Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1 (1993).

208. NAVAJO NATION CODE tit. 7, § 621 (2005).

209. *See id.* tit. 15, §§ 601–619.

210. Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1250–52 (10th Cir. 2000).

Table II: Disputes Arising from Commercial Relationships with Non-Indians					
	Non-Navajo Won	Non-Navajo Lost	Non-Navajos on both sides	Results mixed/ no win or loss	Total
Contract-consumer goods & services	12	10	1	1	24
Contract—with Navajo Nation	3	5			8
Contract-other	1	2			3
Employment	12	9/11[211]	4	1	26
Worker's compensation	3	1			4
Total	31	27/29[212]	5	2	65

Comparison of the likely results in state and federal courts provides further evidence that non-Indian businesses are not overly disadvantaged in the Navajo courts. Several of the cases regarding contracts for consumer goods involve either federal or state consumer protection laws.[213] These cases provide an opportunity to examine what other courts did with similar claims. In *Smoak Chevrolet Co. v. Barton*,[214] for example, the Navajo appellate court considered whether provisions for acceleration of installment payments were "charges" that needed to be disclosed on the face of contracts for consumer goods under the federal Truth in Lending Act.[215] The court held that while an acceleration clause that simply accelerated the rate of payment need not be disclosed, one that provided the seller with an unearned benefit by allowing the seller to keep unearned interest or other

211. The number before the slash includes only cases between Navajos and non-Navajos; the number after the slash includes both cases between Navajos and non-Navajos and those between Hopis and non-Indians.

212. Again, the number before the slash includes only cases of Navajos opposing non-Navajos; the number after the slash includes cases in which Hopis sued non-Indian companies.

213. In interpreting federal statutes, the court takes a stance similar to that of state or federal court. It accepts decisions of the U.S. Supreme Court regarding federal laws as binding, but accepts lower court decisions only as guidance, and considers itself to have the same power to interpret such laws as would a state or lower federal court. *See* Manygoats v. Gen. Motors Acceptance Corp., 4 Navajo Rptr. 94, 96–97 (1983). With respect to state law, the court relies on state courts to determine the proper interpretation of state statutes, but in the absence of such interpretations makes its own attempt to determine the intent of the legislature. *See* Gen. Electric Credit Corp. v. Becenti, 4 Navajo Rptr. 34, 34–36 (1983).

214. 1 Navajo Rptr. 153 (1977).

215. 15 U.S.C. §§ 1638–1639 (2000).

finance charges was the equivalent of a charge, and therefore required disclosure.[216]

In so holding, the court declined to follow decisions by the Third, Fifth, and Tenth Circuits that such provisions need not be disclosed. While at first glance this result might seem to suggest a less favorable climate for non-Indian businessmen, further examination counters this suggestion. First, the Third Circuit in its decision relied on a state statute providing that unearned finance charges and interest could never be retained in the face of acceleration, so that sellers could never obtain the unearned benefit that the Navajo court required the seller to disclose.[217] Second, the Fifth Circuit subsequently met *en banc* and reversed its prior decision, reaching essentially the same decision as the Navajo court had.[218] The Ninth Circuit subsequently reached a more radical position than the Navajo Court, (one previously adopted by several district courts) holding that acceleration clauses must always be disclosed to inform the consumer of their effect on unearned finance charges.[219] Finally, the Federal Reserve Board, the agency charged with administering the Truth in Lending Act, itself interpreted the Act as the Navajo Nation had, an interpretation implicitly adopted by the U.S. Supreme Court when it overruled the Ninth Circuit.[220] Thus the Navajo Nation, rather than adopting an unusually pro-consumer stance, instead struck a middle ground ultimately consistent with the holdings of the majority of circuits as well as the administering agency.

In other cases, the Navajo courts reached positions more favorable to businesses than those of surrounding courts. The Navajo Court of Appeals held, for example, that counterclaims under the Truth in Lending Act were barred by the Act's one-year statute of limitations,[221] although a slight majority of state courts, including the New Mexico Supreme Court, had reached the opposite conclusion.[222] In 1980, Congress amended the statute to permit such counterclaims after the expiration of the statute of limitations; only then did the Navajo court reverse its prior position.[223]

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216. *Smoak Chevrolet Co.*, 1 Navajo Rptr. at 159.

217. Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 268–69 (3d Cir. 1975).

218. McDaniel v. Fulton Nat'l Bank of Atlanta, 571 F.2d 948, 950–51 (5th Cir. 1978) (en banc) (holding that an acceleration clause alone is not a charge but a provision permitting retention of unearned interest charge requiring disclosure).

219. St. Germain v. Bank of Haw., 573 F.2d 572, 576–77 (9th Cir. 1977).

220. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 563 n.8, 569–70 (1980) (discussing Federal Reserve Board interpretations).

221. *Smoak Chevrolet Co.*, 1 Navajo Rptr. at 160–61.

222. A-1 Mobile Homes, Inc. v. Becenti, 2 Navajo Rptr. 72, 75–77 (Navajo D. Ct. 1979).

223. Manygoats v. Gen. Motors Acceptance Corp., 4 Navajo Rptr. 94, 97–98 (1983) (discussing Pub. L. No. 96-221, 94 Stat. 180, 7 U.S.C. § 615).

And while very few of the businesses that find themselves before the court are run by Navajos, the court appears very aware that an anti-business climate will not serve the Navajo people. In one employment case, for example, the court rejected an interpretation of the Navajo Preference in Employment Act that would require companies to grant preference to "potentially qualified" applicants, and thereby require the employer to delay hiring until potentially qualified Navajo applicants had been given a mandatory welding test.[224] The court found that such a requirement would discourage businesses from locating on the Navajo Nation, reduce employment opportunities, and thereby defeat the ultimate intent of the law.[225] In another case, the court upheld the Navajo Nation's claim of sovereign immunity, but encouraged the Navajo Nation Council to waive sovereign immunity in its contracts to encourage economic development on the Navajo Nation.[226] In developing its judicial system, the Navajo Nation seeks both to protect Navajo individuals and to encourage non-Indian business to invest and participate in economic development. The court appears to be aware that the best way to accomplish both goals is to provide a forum that merits the trust of all parties.

3. Child Custody Cases

Another area in which one might fear bias is in cases involving child custody. The Navajo Nation, like many Indian nations, sees maintaining a connection with Navajo children as necessary to safeguard its future. The Navajo Nation Court has declared that "[t]he most precious resource of the Navajo Nation is indeed its children," and interprets the Navajo Nation Children's Code as designed "to protect this vital resource of the Navajo Nation."[227] It would not be surprising if this concern resulted in a bias against non-Navajo parents when they seek custody of children born in relationships with Navajos, or in favor of the jurisdiction of Navajo courts over custody determinations.

The federal Indian Child Welfare Act ("ICWA") [228] provides the Navajo courts with broad, controversial jurisdiction over certain custody disputes.

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224. Largo v. Gregory & Cook, Inc., 7 Navajo Rptr. 111, 116–17 (1995).

225. *Id.* at 114–15.

226. TBI Contractors, Inc. v. Navajo Tribe of Indians, 6 Navajo Rptr. 57, 59–62 (1988).

227. *In re* A.O., 5 Navajo Rptr. 121, 124 (Navajo D. Ct. 1987); *see also In re* Custody of S.R.T., 6 Navajo Rptr. 407, 411 (1991) ("There is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently, we have a special duty to ensure their protection and well-being.").

228. 25 U.S.C. §§ 1901–1931 (2000).

Congress enacted ICWA in 1978 to address the startling and disproportionate rates at which Indian children were being removed from their homes and placed with non-Indian families.[229] One of the central means through which the Act tried to curb this trend was to increase tribal court jurisdiction over custody decisions[230] involving Indian children.[231] The Act provides tribes with exclusive jurisdiction over such cases where the children are domiciled on reservations or are wards of the tribal court, and presumptive jurisdiction where the children are domiciled off reservation.[232] Concern that tribal courts given jurisdiction will favor tribal retention of Indian children over the children's best interests or the rights of the parent involved appears to motivate much ICWA litigation in state courts.[233]

The Navajo Nation has one of the most active Indian Child Welfare offices in the country and in the 1980s obtained a landmark decision from the Utah Supreme Court affirming its jurisdiction over a Navajo child that had lived since he was three with a non-Indian adoptive family.[234] Its aggressive enforcement of the Act surely brings children with connections to non-Indian guardians and relatives into the Navajo courts. Despite this, not one of the 534 Navajo appellate cases online arises under ICWA.[235] This alone suggests that when the Navajo Nation trial courts exercise jurisdiction in custody cases involving nonmembers, parties do not perceive the results as stark violations of the law.[236]

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229. *See id.* § 1901(4).

230. The definition of child custody cases excludes both those arising from disputes between parents and those arising from criminal acts by minors. *Id.* § 1903(1).

231. An "Indian child" is one that is either an enrolled member of a federally recognized tribe, or a biological child of an enrolled member who is herself eligible for enrollment in the tribe. *Id.* § 1903(4).

232. *Id.* § 1911(a)–(b). Under section 1911(b), even where a case arises in state court, the court must notify the relevant tribe, and, upon a request by the tribe or the child's parent or guardian, must transfer the case to tribal court absence an objection by one of the child's parents or "good cause" to the contrary.

233. For a thoughtful discussion of this concern, see Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 624–67 (2002).

234. *In re* Adoption of Halloway, 732 P.2d 962 (Utah 1986). The U.S. Supreme Court quoted extensively from the Halloway case in reaching the same holding. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52–54 (1989).

235. Four cases, including three district court cases, mention the Act, but only to use its findings as guidance or to say that the cases are not brought under the Act. While none of the district court cases online arise under the Act either, given the limited publishing of district court decisions one should not draw significant conclusions from this statistic.

236. It should be remembered that ICWA cases do not include cases in which parents are fighting over custody of a child, 25 U.S.C. § 1903(1) (2000), and so exclude many of the most bitter custody disputes.

Additional evidence comes from the custody cases the appellate courts have decided. Custody disputes arising between parents are not governed by ICWA, and the Navajo courts have decided several of these. Of the six online appellate decisions involving custody of children of both Navajo and non-Navajo parents, non-Navajos won four. The earliest of these is *In re Chewiwi*,[237] a 1977 case concerning custody of the daughter of an Isleta Pueblo man and a Navajo woman.[238] During their marriage, the couple lived on the Isleta Pueblo, and enrolled their daughter, Catherine Chewiwi, with the Pueblo.[239] When Catherine was five, both her parents were killed in an auto accident and the Isleta Pueblo court appointed her paternal uncle, a member of the Pueblo, as her guardian.[240] A few months later, while Catherine was visiting her Navajo maternal relatives on the Navajo Nation, they filed a petition for guardianship with the Navajo courts.[241] The trial court granted them temporary guardianship, and the Chewiwis appealed.[242]

The Navajo Court of Appeals vacated the order.[243] The court held that although it had jurisdiction over any Navajo child properly on the reservation, and the child was on the reservation with the consent of her legal guardian, "[t]he mere fact that the child visited relatives within the Navajo Nation cannot by itself confer on a Navajo court the subject matter jurisdiction to determine this child's status."[244] As to the Isleta Pueblo order, the court held that although the Navajo Nation was not a party to the U.S. Constitution, and therefore not bound to grant full faith and credit to foreign orders, the order would be recognized as a matter of comity.[245]

Subsequent decisions also recognize the rights of non-Navajo relatives in child custody disputes. In 1982, in *Lente v. Notah*,[246] the court vacated a district court order granting a Navajo father custody of his child with a Comanche woman.[247] Although the parents had agreed to a divorce decree stipulating that Ms. Lente would have custody, two years later Mr. Notah filed for custody claiming that she had given him the child saying she did not want her anymore.[248] The trial court granted temporary custody without

237. 1 Navajo Rptr. 120 (1977).
238. *Id.* at 120.
239. *Id.* at 124.
240. *Id.* at 120–21.
241. *Id.* at 121.
242. *Id.*
243. *Id.* at 124.
244. *Id.*
245. *Id.* at 126.
246. 3 Navajo Rptr. 72 (1982).
247. *Id.* at 81.
248. *Id.* at 72.

granting the mother proper notice, an order the court found denied her "basic rights guaranteed by the Navajo Bill of Rights and common sense."[249] Although Ms. Lente had later been given notice and participated in the hearings leading to the final custody order, she had preserved her right to object to jurisdiction and the appellate court held that the subsequent hearings were not enough to cure the initial improper order.[250] The appellate court vacated the order, but held that because the child likely formed psychological bonds with her father in the four years she had lived with him, she should not be removed while the trial court considered the matter.[251] The court ordered that upon rehearing the lower court should obtain expert evaluations of the best interests of the child, and listed thirty-four factors it should consider in making its decision.[252]

The next case, *Yazzie v. Yazzie*[253] concerned an action filed by a Navajo father for divorce of his Comanche wife and custody of his four children. At the time of the filing, his wife and their children had not resided on the reservation for some time.[254] After initially filing a motion challenging jurisdiction, the mother did not further participate in the proceedings.[255] The judge, therefore, granted the divorce and decided as to the division of property and custody of the children by default.[256] The appellate court reversed. It held that while the trial court had jurisdiction over the marriage as the father resided on the Navajo Nation, it did not have custody over the children or property off the reservation.[257] While affirming the divorce, the court vacated the remainder of the order for lack of jurisdiction.[258]

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249. *Id.* at 75.

250. *Id.* at 74.

251. *Id.* at 77–78 (stating that custody would be granted only until an investigation was completed).

252. *Id.* at 78–79. While the mother argued that the Navajo custom of matrilocality should determine the case in her favor, the court held that this was a decision for the trial court, which had the power to determine whether it was appropriate to follow common law under the circumstances. *Id.* at 81. In *In re Chewiwi*, the court had recognized an order placing a child with her non-Navajo paternal relatives, an order that would go against this customary tradition. 1 Navajo Rptr. 120, 127 (1977). Common law, however, does not appear to have been raised in that case. In a subsequent custody dispute between Navajo parents, the court held that following the common law presumption of custody in favor of the mother would violate the Navajo Equal Rights Amendment. Help v. Silvers, 4 Navajo Rptr. 46, 48 (1983).

253. 5 Navajo Rptr. 66 (1985).

254. *Id.* at 67.

255. *Id.*

256. *Id.*

257. *Id.* at 70–71.

258. *Id.*

The court has also made substantive custody determinations that favored non-Navajo parents. In *Pavenyouma v. Goldtooth*,[259] the lower court found both the Hopi mother and Navajo father to be suitable parents,[260] but after the parents could not agree on a plan for joint custody of their five children ordered that the mother would have custody of two of the children and the father would have custody of the other three.[261] The appeals court reversed, finding that while it was preferable for parents to agree on arrangements for joint custody, it was the obligation of the court to step in if they could not.[262] The court ordered that the mother would have custody of all children during the school year, while the father would have custody during the summer, and ordered the father to pay child support while the children were with their mother.[263]

The one case that seems troubling from a fairness perspective is *In re Custody of S.R.T.*,[264] in which the court upheld a default order granting a Navajo mother custody over her child against the claims of a non-Indian who claimed to be the father. Although the child was an enrolled member of the Navajo Nation, he was living in Texas with the sister of the alleged father at the time the petition for custody was filed.[265] The non-Indian father had received notice of the petition and had retained local counsel before the hearing.[266] Neither the father nor his attorney, however, showed up for the hearing.[267] The attorney had mailed a motion for continuance to the court on the day before the hearing, and it was not received until the day after the hearing.[268] On appeal, the court found that the father had proper notice of the hearing and no excuse for failing to appear.[269]

Despite this, the Navajo Supreme Court did examine the limited evidence of paternity presented on appeal. The mother's name alone was on the birth certificate, the child had the mother's last name, and the couple had only lived together briefly before the appellant began living with another woman.[270] The only written evidence of any family relation with the appellant was a letter authorizing his sister to consent to medical care for

259. 5 Navajo Rptr. 17 (1984).
260. Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 224 (Navajo D. Ct. 1982).
261. *Pavenyouma*, 5 Navajo Rptr. at 17.
262. *Id.* at 18–19.
263. *Id.* at 20–21.
264. 6 Navajo Rptr. 407 (1991).
265. *Id.* at 407.
266. *Id.* at 408.
267. *Id.*
268. *Id.*
269. *Id.* at 412.
270. *Id.* at 410.

the child, and the court found this was not enough to establish paternity.[271] As to jurisdiction, the court found that as the child was born out of wedlock, because the father had made no efforts to establish paternity, the child's domicile for jurisdictional purposes was the same as that of his mother.[272] While the jurisdictional decision seems unfair to the off-reservation father, the principle that domicile of an illegitimate child is that of his mother regardless of his physical location of the child derives from Anglo-American law.[273]

The appellate court has decided one additional custody case, *In re A.O.*,[274] in a way unfavorable to a non-Navajo parent, but this was an intermediate decision. In the case, the court reversed a lower court's dismissal of a petition for custody and remanded for more facts as to jurisdiction.[275] On remand, the district court affirmed the denial of jurisdiction.[276] The child in *A.O.* had been made the ward of the court based on a petition alleging abuse,[277] a fact that would ordinarily grant the court jurisdiction. The district court found, however, that the order of wardship was based on a fraud on the court, as the petitioners had not notified the court that there was a pending New Mexico court custody case.[278] Under these facts, the court ceded to the concurrent jurisdiction of the New Mexico courts.[279] Two other district court cases involving non-Navajo parents have also been published, and both reveal the same reluctance to accept questionable jurisdiction.[280]

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271. *Id.*

272. *Id.* at 409–11.

273. The U.S. Supreme Court affirmed this as a principle of federal common law in *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989), holding that illegitimate children were domiciled on the reservation where the mother lived although they had never been there. *See also In re* Pima County Juvenile Action No. S-903, 635 P.2d 187, 191–92 (Ariz. Ct. App. 1981); 25 AM. JUR. 2D *Domicil* § 41 (2004).

274. 5 Navajo Rptr. 121 (1987).

275. *Id.* at 123–24.

276. *In re* A.O., 5 Navajo Rptr. 285, 291–92 (Navajo D. Ct. 1987).

277. *Id.* at 287–88.

278. *Id.* at 290–91.

279. *Id.* at 291.

280. *In re Custody of B.N.P.*, 4 Navajo Rptr. 155 (Navajo D. Ct. 1983), for example, involved a custody dispute between a Mescalero Apache mother and a Navajo father. The couple obtained a divorce decree in Mescalero Apache court, and originally stipulated to custody in the father. *Id.* at 155. Two years later, however, while the children were on the Mescalero Apache reservation visiting their mother, the mother returned to the Mescalero court and, under the pretext of the presence of the children, had the decree modified. *Id.* Some months later, when the children were visiting the father, he went to the Navajo Nation court for custody using the same pretext. *Id.* The court recognized the delicacy of the dispute, stating:

> [T]his court is called upon to make a decision on which of the two Indian governments should exercise the power and duty to protect children under

In sum, therefore, even in the vital issue of custody of children with Navajo heritage, the court appears to have been equitable to non-Navajo parents and not to have asserted a broad jurisdiction that would deprive parents of their rights.

D. Conclusion and Comparison with Other Tribal Courts

The data regarding the experience of nonmembers in the Navajo courts do not support the assumption of the United States Supreme Court that nonmembers will be at a disadvantage in tribal courts. Nonmembers win just under half of the time they appear before the courts, and the decisions reveal few troubling assessments of law or fact. Instead, the court often establishes precedent or urges the legislature to amend tribal statutes to address perceived inequities. This is true even in cases involving matters that would seem particularly vulnerable to bias.

A less comprehensive review of decisions by other tribal court systems suggests a similar phenomenon there.[281] The Mashantucket Pequot Tribal Court of Connecticut, for example, hears numerous cases involving nonmembers arising from its massive gaming industry. In these cases, it has expanded the legal remedies for non-Indian employees, by finding a property right in continued employment and invalidating the procedures for

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> their care. The foremost consideration for this court must be the best interests of the children who come before it, and after that considerations of governmental relations come into play.

Id. It declared that it was uncomfortable with the parental kidnapping on both sides but declined to recognize the modified Mescalero Apache decree as jurisdiction was fraudulently obtained. *Id.* at 155–56. Deciding the case on the merits, the court held that because the children had always lived on the Navajo Nation, and said they were afraid to live with the mother because of her drinking, the court ordered custody in the father with reasonable visitation in the mother. *Id.* at 157–58. In *In re Adoption of S.C.M.*, 4 Navajo Rptr. 167 (Navajo D. Ct. 1983), the court denied a Navajo uncle of a Canadian Indian child the right to an adoption and temporary custody order. Although the parents had signed consent to adoption in Canada, it was not clear why the adoption had not been pursued in Canadian court, or that the Navajo Nation courts even had jurisdiction over the child under the applicable rules of domicile and personal jurisdiction. *Id.* at 168–72. Nor could the uncle have the investigation for adoption waived, although a Canadian report appeared to be attached to the affidavits of consent. *Id.* at 172. Instead, the uncle was required to prove that the Navajo Nation court, and not the Canadian courts, was the appropriate forum. *Id.* at 173–74.

281. Few courts publish as wide a variety of cases as does the Navajo Nation. Even where decisions are available online, a search for cases including the terms "nonmember" or "non-Indian" generally produces only those cases concerned primarily with jurisdiction, and not the many cases in which nonmembers are before tribal courts in which jurisdiction is not the issue. To capture these cases, one would need to skim all the cases to determine the status of the parties.

administrative hearings on dismissal as violating due process,[282] and subsequently inferring a waiver of tribal sovereign immunity for ICRA challenges by non-Indian employees.[283] The Mohegan Tribal Gaming Court of Appeals similarly has found an implied property right in employment by employees of its gaming facilities, and ordered a rehearing for a non-Indian employee who had been dismissed on charges of drug dealing after finding that the evidence at the previous administrative hearing did not satisfy due process standards.[284] In the custody context, the Delaware Court of Indian Offenses ordered visitation rights for the Kiowa grandmother of her grandchildren against the wishes of the children's Delaware mother.[285]

Mark Rosen, in a broader study of tribal court decisions concerning the Indian Civil Rights Act,[286] evaluated the ten decisions within his sample involving nonmembers.[287] Of the ten decisions, he found that eight showed "responsible and good faith interpretation of ICRA," and that none of the ten involved "patently outrageous reasoning or outcomes."[288] He found that one case, which concerned the jurisdiction of the tribal court, resulted in a fair outcome, but perhaps "activist" reasoning in finding jurisdiction.[289] The final case he found resulted in an arguably harsh outcome for parties challenging a possessory interest tax, one of whom was an outsider.[290] He found that the result was the product of "Stock Incorporation" of federal law providing that the law prohibits equal protection challenges based on residence,[291] but he wondered whether the adoption of an essentially toothless standard was encouraged by the fact that one of the parties was a nonmember.[292] Within the limits of the sample, however, Rosen concluded, "there is no indication that tribal courts have succumbed to the temptation to favor the insider at the expense of outsiders."[293]

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282. Johnson v. Mashantucket Pequot Gaming Enter., 1 Mash. Pequot R. 15 (1996).

283. Healy v. Mashantucket Pequot Gaming Enter., 1 Mash. Pequot R. 63 (1999).

284. Pineiro v. Office of the Dir. of Regulation, No. GDTC-T-99-102, 1999 NAMG 0000001, ¶¶ 18–28 (Mohegan Oct. 14, 1999) (VersusLaw).

285. *In re* C.D.S., 1 Okla. Trib. 200, 207 (W. Del. Ct. Indian Offenses 1988).

286. Rosen, *supra* note 8. Rosen's study was based on decisions published in the Indian Law Reporter between 1986 and 1998. *Id.* at 510. The Indian Law Reporter publishes in hard copy selected decisions submitted to it by about twenty-five tribal courts. *Id.*

287. *Id.* at 573–78.

288. *Id.*

289. *Id.* at 576. As I argue below, such insistence on jurisdiction of the court is clear in the Navajo decisions as well, and may in fact be tied to a broader sense of the importance of the judicial role that leads the courts to resist temptations to favor insiders and engage instead in good faith judging.

290. *Id.* at 576–77.

291. *Id.* at 577.

292. *Id.*

293. *Id.* at 578.

The U.S. Civil Rights Commission also conducted a study, collecting information over several years and including testimony from numerous witnesses in several states, to investigate tribal court implementation of the ICRA.[294] Although the report did not specifically discuss judicial treatment of nonmembers, the Commission was created during the Reagan administration in part to address concerns of non-Indian businessmen, and was directed to consider the *Duro* Fix affirming criminal jurisdiction over nonmember Indians, which had been passed as a temporary measure in 1990 and was due to expire in a few months.[295] The Commission found that while there were problems in tribal courts, they were primarily due to insufficient funds and the problems of any new court system in establishing its role and the scope of its authority.[296] Significantly, the Commission supported permanent legislation ensuring tribal jurisdiction over nonmember Indians,[297] and expressed its "hopes that the current trend towards the narrowing of tribal jurisdiction will be reversed."[298]

The Commission also discussed one interesting case that nominally involved a nonmember. The case concerned an applicant who had been denied enrollment in the Ute Indian Tribe of the Uintah-Ouray Reservation.[299] The tribal court reversed the denial of enrollment, finding that the applicant was eligible for enrollment under the tribal constitution.[300] In response, the tribal legislature acted to strip the tribal court of its jurisdiction to review enrollment decisions.[301] The court, however, refused to accept this change, holding that until the legislature created another "impartial forum" to hear cases claiming violation of the ICRA, it necessarily had such jurisdiction.[302] This case as well as unreported cases discussed by the Commission,[303] reveal the same pattern shown by the Navajo courts of ruling in accordance with their understandings of the law and the need for an impartial forum to hear disputes, even in the face of resistance by other parts of the tribal government.

Even supplemented by these examples from other tribal courts, my review of Navajo decisions has limitations. There may well be rogue tribal

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294. U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (1991).

295. *Id.* at 68–70.

296. *See id.* at 29–57.

297. *Id.* at 73.

298. *Id.* at 74.

299. Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation, 13 Ind. L. Rep. 6023 (Ute Tribal Ct. 1986).

300. *Id.* at 6024.

301. *Id.*

302. *Id.* at 6025.

303. *See* U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT 51–63 (1991).

courts, just as there are rogue state and local courts,[304] who make decisions in bad faith. But given the disproportionate size and population of the Navajo Nation and the fact that more than most tribal courts it has the characteristics particularly troubling to the U.S. Supreme Court, data regarding the Navajo courts are of particular relevance.

The relative fairness of the courts, however, does not speak to the second assumption of the Supreme Court, that adjudication of outsider rights has little to do with "self-government," or the legal and governmental integrity of tribes. The following sections of the Article will discuss the particular historical position of tribal legal justice systems, additional statistics regarding nonmembers in the Navajo courts, and theoretical insights regarding the role of formal legal institutions to challenge this assumption.

IV. THE ROLE OF THE OUTSIDER IN TRIBAL LEGAL SYSTEMS

The recent United States Supreme Court cases regarding jurisdiction over nonmembers are colored by the assumption that the most important work of justice lies in adjudicating disputes among those that are formally enrolled in the community and that concern matters traditionally of unique importance to the tribe. This assumption accords well with much political theory, which tends to begin with an imagined community with fixed boundaries and has less often grappled with questions of how community boundaries are drawn and the obligations caused by varying levels of community membership. While there are, of course, exceptions,[305] for much political and legal theory, the outsider is an exceptional case, troubling the polity and its rules for distribution of goods and rights but not meaningfully contributing to its development.[306] This section of the Article builds on theoretical work regarding the development of law to argue that, in fact, the outsider is a particularly important figure in the development of formal legal

304. For a catalogue of incidents of bad faith judging in non-tribal courts, see Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432–456 (2004).

305. For a broad-based political theory that has always incorporated questions of membership, see MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983). Feminist theory has also long questioned assumptions that citizenship is a straightforward category of belonging. *See, e.g.*, IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 7–11 (1990) (drawing from feminist and critical race theory to develop a theory questioning categories of inclusion). The increasing mobility of people, jobs, and culture has also generated a wealth of literature on the different kinds of membership in our polities. *See, e.g.*, Rogers Brubaker, *Immigration, Citizenship, and the Nation-State in France and Germany*, *in* THE CITIZENSHIP DEBATES 131–53 (Gershon Shafir ed., 1998); Will Kymlicka, *Multicultural Citizenship*, *in* THE CITIZENSHIP DEBATES, *supra* at 167–85; Yasemin Nuhoğlu Soysal, *Toward a Postnational Model of Membership*, *in* THE CITIZENSHIP DEBATES, *supra* at 189–211.

306. *See* BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 2–3 (2001).

systems. It then draws on my research and the research of other scholars to suggest that this is particularly true for contemporary Indian tribes.

Much of formal law everywhere is the product of conflict,[307] a means to address disputes to which existing norms and relationships do not provide a resolution. Where informal controls, whether the pressure of clan relatives or internalized moral or religious norms, are sufficient to regulate individual behavior, there is little need for formal legal institutions.[308] This is not possible where a community includes diverse groups that do not share common norms or relationships[309] or where external factors create situations for which community norms do not present a clear solution.[310] At this point, formal legal institutions must step in to draw on their institutional legitimacy to resolve disputes in a way that will be respected by the community of which they are part. Thus, despite the assumptions of both opponents and some advocates of tribal jurisdiction, in some ways it is precisely to address the conflicts involving outsiders and, more broadly, changes brought about by outside influences that formal legal institutions exist.

Evidence regarding other tribal court systems supports this thesis. As discussed above, Rennard Strickland discovered in studying the Cherokee legal system of the 1820s and 1830s that courts disproportionately handled cases involving intermarried white men and economic and social disputes arising from contact with Anglo culture, while disputes exclusively between Cherokees arising from familiar tribal activities could more frequently be resolved without resort to the courts.[311] Similarly, a study of the Indian police forces in the late nineteenth century suggests that much of their work involved controlling non-Indians trespassing on Indian lands and game.[312]

The experience of diverse modern tribal courts conforms to this pattern. The courts of the Mashantucket Pequot Tribe of Connecticut had to develop rapidly to handle the various disputes arising from its operation of one of the largest casinos in the United States.[313] The vast majority of reported

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307. *See* FRIEDMAN, *supra* note 151, at 148 ("Formal law presupposes [a] climate of conflict").

308. *Id.* at 144–45.

309. *See* Engel, *supra* note 151, at 23–24.

310. FRIEDMAN, *supra* note 151, at 145.

311. *See* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 75 (1975).

312. *See* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 52–54 (1966).

313. The tribe had virtually no structures of governance left when it received federal recognition as a tribe in 1983. *See generally* Hilary Waldman, *New Life for a Forgotten People*, HARTFORD COURANT, May 22, 1994. In 1992, however, the tribe opened a casino under the

cases from the Mashantucket Pequot courts concern nonmembers of the tribe. [314] Through these cases, however, the court is creating traditions of judicial review and grappling with legislative enactments in ways that enhance its development as an institution. [315]

One can also find examples of the influence of interactions with outsiders on the courts of far more traditional tribes. The Alaska Native Village of Klukwan, for example, created a formal legal system specifically to consider whether a non-Indian's acquisition of rain screens from an individual village member was permitted given the status of the rain screens within the village's customary property system.[316] The process of translating village ideas of property in these sacred objects became a source of reunification of the village and revitalization of its traditions.[317] Similarly, one of the most significant recent cases before the Hopi Appellate Courts concerns a conflict over the application of customary property rights between a woman that had left the reservation and her nieces that remained behind and cared for their grandmothers' land in the traditional way.[318]

Anthropologist Larry Nesper has documented an alternative way in which interaction with outsiders is an important spur to tribal court development.[319] He studies the way in which the Lac de Flambeau Band of Lake Superior Chippewa Indians developed a formal legal system in response to their success in preserving off-reservation hunting and fishing rights, and the threat that the state would regulate the exercise of these rights if there were no tribal institutions to do so.[320] Nepser argues that as an institution which "resides culturally and socially on the border between Indian and non-Indian society," the resulting court is "an important site for

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auspices of the Indian Gaming Regulatory Act, and was quickly faced with the need to adjudicate disputes involving its thousands of employees and customers.

314. The decisions of the court are available at http://www.versuslaw.com.

315. *See, e.g.*, Healy v. Mashantucket Pequot Gaming Enter., 1 Mash. Pequot R. 63 (1999) (establishing judicial review); Husband v. Wife, No. MPCA-2001-1065, 2003 NAMP 0000002, ¶ 32 (Mashantucket Pequot Jan. 24, 2003) (VersusLaw) (establishing principles of comity in domestic relations cases).

316. The Village had originally petitioned the federal court to enforce a tribal ordinance prohibiting the removal of the screens. The federal court declared that there was no federal jurisdiction to enforce this claim and the case was remanded to the tribal court. Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989). The village was forced to create a tribal court system in order to resolve this dispute.

317. Discussions with and presentations by Willa Jean Perlmutter, Attorney for the Village in Native Village of Klukwan v. Johnson, in Hartford, Conn. (Apr. 2003).

318. Smith v. James, No. 98AP000011, 1999 NAHT 0000012, ¶¶ 14–15 (Hopi Nov. 16, 1999) (VersusLaw).

319. Nesper, *supra* note 8.

320. *Id.*

the reproduction and transformation of community values and practices."[321] While distinctly ambivalent about the results of this process, Nesper documents ways in which testimony from community members troubles notions of rigid distinctions between members and nonmembers and formal and traditional authority.[322]

My research regarding the Navajo Nation provides more evidence of the importance of nonmembers in tribal legal systems. As discussed in Part III, the Navajo Nation has a high degree of insularity relative to most Indian tribes. Culturally, demographically, and geographically, it is one of the tribes that most closely matches the archetype of the homogenous and traditional tribe. Despite this, 22.8% of the decisions issued by the Navajo Nation appellate court over the last thirty-five years have involved non-Navajo litigants.[323] This figure has little to do with the numbers of non-Navajos residing on the Navajo reservation. This is evident in the fact that although non-Navajo Indians compose about 6.5% of the reservation population and non-Indians compose only 3.5%, 91.8% of the cases involving outsiders, or 20.9% of the total cases decided by the Navajo appellate courts, involve non-Indians. Cases involving non-Navajo Indians, on the other hand, compose only 1.8% of all decisions.[324]

Table III: Percentage of Cases Involving Nonmembers

	1969-74	1974-79	1979-84	1984-89	1989-94	1994-99	1999-2004	Total
Total cases involving nonmembers	4	12	33	17	17	18	21	122
Total cases in period	21	72	186	57	79	59	60	534
Percent of cases involving nonmembers	19%	16.7%	17.7%	29.8%	21.5%	30.5%	35%	22.8%

321. *Id.*

322. *Id.*

323. This figure would likely not be replicated in trial court filings, as a majority of cases filed in the courts are criminal, and tribes have no criminal jurisdiction over non-Indians.

324. Interestingly, most of the non-Navajo Indian cases arise from family relations with Navajos, such as custody and domestic violence, while relatively few of the non-Indian cases do. This appears to confirm the assertion of advocates of the *Duro* Fix legislation, that nonmember Indians often occupy a different role on reservations than do non-Indians, and are more integrated in the social life of tribal communities. *See* Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Nonmember Indians*, 38 FED. B. NEWS & J. 70 (1991).

If one looks at cases over only the last ten years, the figures become even more striking. Since 1994, non-Navajos have been parties in 32.7% of the cases decided by the Navajo Supreme Court. It is not clear that this figure represents an increase in the number of cases involving nonmembers, as during the same period the court stopped publishing opinions decided on a summary basis,[325] which might increase the percentage simply by reducing the number of cases for which identification of the parties is not possible or filter out cases that do not raise novel questions of law. It does indicate, however, that over the last ten years almost one in three of the cases significant enough to require a publishable opinion have involved non-Indians.

These statistics are a reflection of the reality of Navajo life. Even on the Navajo Nation, the tribal community that looks most, in some ways, like an independent state, neither the tribe nor the people are isolated from outside influences. This interaction is reflected even in the clan system that is perhaps the most central aspect of Navajo culture.[326] Each Navajo child is "born to" his mother's clan and "born for" his father's clan, and these clan memberships are a crucial part of one's identity, dictate who one may appropriately marry, and form family bonds even among relative strangers that entitle clan members to call on each other for support and assistance.[327] The Navajo clans include the Nakai or Mexican clan, and other clans named after the Utes, the Zunis, and the Flat Foot Paiutes, each named after members of these different peoples that incorporated with and became important parts of the Navajo social structure.[328] These clans provide evidence of the long history of non-Navajos becoming integral elements of Navajo life.

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325. The cases omitted include, for example, appeals dismissed for failure to timely file or dismissed according to a stipulation of the parties. They also include several cases that would otherwise have added to the proportion of cases involving nonmembers before the court, such as decisions formally admitting attorneys to the Navajo bar, as well as a case I filed on my own behalf, successfully challenging the Crownpoint District Court's power to appoint me to represent parties outside my judicial district.

326. *See* Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 182–84 (1994) [hereinafter Yazzie, *Life Comes From It*] (discussing significance of clanship system in traditional Navajo law).

327. *Id.* at 182–83 & n.41.

328. C.E. Vandever, Report of Navajo Agency (Aug. 22, 1890), *in* ROBERT A. ROESSEL, JR., PICTORIAL HISTORY OF THE NAVAJO FROM 1860 TO 1910, at 146–47 (1980); *see also* Means v. Dist. Court of the Chinle Judicial Dist., 7 Navajo Rptr. 382 (1999) (listing clans); *In re* Marriage of Garcia, 5 Navajo Rptr. 30, 30–31 (1985) (discussing contributions of intermarried Mexicans).

The Navajo people have incorporated elements borrowed from Europeans and Americans deep within their culture in other areas as well.[329] The result is not a watered down culture, but instead one that is still uniquely Navajo and that has enabled the Navajo Nation to survive and even thrive. For example, although Spanish settlers originally introduced sheep to Navajo agriculture, sheep have become an essential part of Navajo society.[330] The federal program of stock reduction in the early part of this century was a flashpoint for anger at federal interference with Navajo culture.[331] While today overgrazing prohibits most people from making a living entirely off sheep herding, many Navajos keep some sheep to supplement their income,[332] mutton is part of a traditional Navajo meal,[333] and sheep wool is necessary for the woven rugs for which Navajos are famous. Ownership and care of the sheep herd are deeply integrated in Navajo understandings of the world. Sheep are used, for example, to teach children values of responsibility and survival, and patterns of inheritance and division of sheep reflect and shape Navajo ideas of property and descent.[334] One of the required portions of the annual Miss Navajo Nation contest (which, in contrast to non-Indian beauty contests, does not include a bathing suit contest and emphasizes academic and cultural accomplishment) includes sheep butchering.[335] These and other fusions of culture have

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329. In the words of former Chief Justice Tom Tso, "Navajos are . . . [a] flexible and adaptable people. We find there are many things which we can incorporate into our lives that do not change our concept of ourselves as Navajo." Tso, *The Process of Decision Making*, *supra* note 134, at 227.

330. *See* JOHN J. WOOD ET AL., "SHEEP IS LIFE": AN ASSESSMENT OF LIVESTOCK REDUCTION IN THE FORMER NAVAJO-HOPI JOINT USE AREA 25–26 (1982). While the 20 years between this study and the present have probably reduced the percentage of Navajos involved in sheep herding, my experience confirms that sheep remain an integral part of Navajo culture, even for people that do not keep sheep themselves.

331. DONALD L. PARMAN, THE NAVAJOS AND THE NEW DEAL 65–66, 77 (1976).

332. WOOD ET AL., *supra* note 330, at 26 (noting that 36% of Navajos used sheep as a source of income).

333. *Id.* (44% used livestock in ceremonies both as part of a meal for participants and in a symbolic role). During my time in the Navajo Nation, holding a mutton feast was the common way to raise money for a colleague hit by hard times, and the weekly mutton buffet was a well-attended event at the Navajo Nation Inn.

334. *Id.* at 25–26. The importance of sheep keeping is also reflected in the bitter legal disputes over grazing land.

335. *See* LeRoy DeJolie, *Navajoland: A Trip to the Fair*, IMAGES OF ARIZONA, http://www.imagesofarizona.com/dejolie/fair02.shtml (last visited Oct. 26, 2005). In one online discussion regarding whether the tribe should take back the crown of a past Miss Navajo Nation, who had later been convicted for participating in her boyfriend's drug business, a participant said, "She had the talents and the skills not to mention that she did butcher the sheep." Posting of Nah to Gathering, http://www.powwows.com/gathering/showthread.php?t=6987&goto=nextoldest (Dec. 12, 2000, 11:15 EST).

enhanced rather than diluted the distinctiveness and cohesion of Navajo society.[336]

This interaction continues today. As the above statistics suggest, a large number of Navajo business relationships are with non-Indians. Many Navajo people living on reservations have been educated, lived, or worked in off-reservation communities.[337] Even when they live and work on the reservation, Navajos will frequently interact with non-Navajos. Non-Indian mining companies, such as Peabody Coal, and stores and customer service industries, such as Basha's Supermarket and Cameron Trading Post, are among the most significant on-reservation employers. Given the lack of economic development on the Navajo Nation, moreover, most Navajos rely on off-reservation businesses for their consumer needs. Navajo people and those from other nearby reservations flood the off-reservation town of Gallup, New Mexico on weekends, making its mammoth Super Wal-Mart one of the most successful in the United States.

Similarly, although the tribe is very aware and proud of its sovereignty and separateness from the United States, serving in the U.S. military is an important and honored part of Navajo life.[338] As on most reservations, a procession of veterans carrying the U.S. flag is a solemn opening to public celebrations and fairs. Again, military service does not represent only a capitulation to Anglo culture, but a celebration of Navajo accomplishments.[339] Navajo code-talkers, who played an important role in World War II by using the Navajo language to form an unbreakable code, are heroes not simply because of their military service, but because that service valued the unique and formerly oppressed Navajo language.

The outside world influences ideas of law as well. As I know from experience, if you ask a class of Navajo students about the Navajo Nation Bill of Rights, you'll get blank looks; but ask them what the cops on TV say when they arrest someone, and you'll get a chorus: "You have the right to remain silent, if you choose to give up that right anything you say or do can

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336. *See* WILLIAMS, *supra* note 181, at 2 ("The cultural history of the Navajo is replete with references concerning the various cultural items and techniques borrowed and incorporated from other people. Yet each of the historical and cultural accounts . . . mentions the distinctive character of Navajo culture through time, in spite of the influx of ideas from different cultures.") (citations omitted).

337. *See, e.g.*, ARIZONA COURT FORUM, STATE AND TRIBAL COURT INTERACTION: BUILDING COOPERATION: AN ARIZONA PERSPECTIVE 29–30 (1991).

338. The role of veterans on the Navajo reservation is poignantly depicted in the film WINDS OF CHANGE: A MATTER OF PROMISES (PBS 1990).

339. While many Indians voluntarily sign up for military service, the mandatory draft has been objected to as a violation of sovereignty rights. *See Ex parte* Green, 123 F.2d 862 (2d Cir. 1941).

be used against you in a court of law . . . ."[340] And while the clan system retains significant importance in Navajo life, it is no longer the primary source of property or economic support. Property formerly descended through the maternal clan and individuals depended on matrilineal relatives for support in cases of divorce or death rather than on what Anglo society calls the immediate family. Today, however, many Navajo people expect to inherit from their spouses and expect an equitable division of property in the event of divorce.[341]

Mark Rosen's study of the ICRA decisions suggests that a similar influence can be seen in judicial decisions.[342] ICRA imposes most of the provisions of the U.S. Bill of Rights on Indian tribes but ensures that tribes are often the sole forum to review and enforce its guarantees.[343] Although tribal courts tailor ICRA guarantees to tribal traditions and circumstances, they typically rely on federal decisions as guidance in this process, and even when they do not cite federal decisions or law, their interpretations often use federal constitutional terms, such as "due process," "fundamental rights," or "equal protection," suggesting a deep integration of federal understandings of these rights.[344] Rosen notes that even in Navajo Nation decisions that rely heavily on customary ways to interpret ICRA guarantees, traditions are read through a lens colored by Anglo legal understandings.[345] Thus, in interpreting the due process guarantee, the Navajo court held that Navajo common law included the right to notice and a hearing because traditional practices included resolving disputes by a collective decision at a public gathering led by an elder statesman and attended by the wrongdoer.[346] As Rosen points out, the tradition might equally easily have been interpreted to require collective decision-making by the public, or arbitration by an elder statesman and argues that the constitutional right to

340. I learned this in speaking at Navajo schools about the law and trying to teach them to use it in their lives between 1996 and 1999.

341. There are forty-six cases online discussing the effect of divorce on the parties' property and sixty concerning child support, all departing from the traditional rules for divorce and separation. *See, e.g.*, Johnson v. Johnson, 3 Navajo Rptr. 9 (1980) (Navajo courts may award alimony in divorce); Shorty v. Shorty, 3 Navajo Rptr. 151 (1982) (equitable division of property after divorce); Yazzie v. Yazzie, SC-CV-08-98, 2000 NANN 0000001, ¶¶ 29–383 (Navajo Aug. 16, 2000) (VersusLaw) (considering whether a house is community or separate property).

342. Rosen, *supra* note 8, at 526.

343. *See* 25 U.S.C. §§ 1301–1303 (2004); Rosen, *supra* note 8, at 486–88.

344. Rosen, *supra* note 8, at 486–88.

345. *Id.* at 525–27.

346. *Id.* (discussing Begay v. Navajo Nation, 6 Navajo Rptr. 20 (1988)).

notice of a hearing influenced the court's interpretation of Navajo common law.[347]

Mobility between on- and off-reservation communities has also shaped the legal problems faced by the tribe. In the 1990s, for example, as the influence of gangs and drugs was decreasing in urban centers, it was increasing on the Navajo Nation as returning residents brought these things back from the cities. The Navajo Nation is dotted with hundreds of open uranium mines, leftovers from days when the BIA granted mining companies almost unfettered access to Navajo lands. The extended families that formerly supported Navajo children are often scattered by the need to find work elsewhere and by partial adoption of the Anglo emphasis on the nuclear family. Federal policies of removing children from their homes and sending them to schools that sought to generate shame of Navajo culture and language have created generations that lack either appropriate family skills or education, and that are firmly grounded neither in Anglo nor Navajo tradition. Exposure to Anglo ideas of "the good life" have also created conflict within Navajo society regarding the extent to which Navajo ideals should be pursued above the material goods valued by mainstream society. European American culture, in other words, has importantly shaped the legal and social issues facing the Navajo Nation and the range of culturally acceptable solutions for resolving them.

A. Jurisdiction over Nonmembers and Institutional Legitimacy

Given this importance of outsiders to contemporary tribes, jurisdiction over nonmembers becomes crucial in shoring up tribal legitimacy for two reasons: first, so that tribal legal systems can address the everyday legal and social problems of concern to Indian people; second, so that tribal legal systems are perceived as respected legal institutions.

1. Jurisdiction over Nonmembers and Utility of Tribal Legal Systems

Given the interrelationships between Navajo and non-Navajo society, jurisdiction over nonmembers is crucial in preserving the practical utility of tribal legal systems. Even on a reservation as large and homogenous as the Navajo Nation, a large portion of the commercial actors are non-Indian. Non-Indians are the employers, the insurers, and the merchants. They are the building contractors and the mining companies. While the Navajo

347. *Id.* at 527.

Nation, like other tribes, is actively pursuing economic development, given the disparity in capital, experience, and education between Indian and non-Indian people, this need to turn to non-Indian businesses is not likely to change any time soon. Nor should tribes or their members be forced to rely solely on tribal businesses in order to ensure tribal jurisdiction. This would impair tribal economies, discourage cooperation between tribes, states, and non-Indian businesses, and increase non-Indian concern that tribes unfairly grant preference to their members.[348]

Without jurisdiction over non-Indian businesses, however, tribes lose the ability to pursue uniform economic policies on their reservations or protect their members in their interactions with outsiders. The Court's decision in *Atkinson Trading Co. v. Shirley*,[349] which held that the tribe could not impose a hotel tax on nonmembers at hotels located on fee land,[350] provides a good example of this. The decision did not undermine the taxing ability or revenues of the Navajo Nation as greatly as it would for other Indian nations, as the Nation is primarily composed of tribal and member owned land. Despite this, Navajo hotel occupancy tax revenues dropped 43%, by $502,717, between fiscal year 2000, before *Atkinson*, and fiscal year 2003.[351]

Atkinson's impact will be much more severe on most other reservations, where much more land is in non-Indian hands, and where these lands are the most significant sites of economic activity.[352] Eliminating taxing and other economic regulatory jurisdiction over these lands would deprive the tribe of the ability to set taxes with sufficient uniformity to be meaningfully enforced. Governments have enough trouble getting compliance with their tax laws and overcoming the perception that evading taxes is common and just. Imagine the multiplication of this difficulty if your neighbors had no need to pay taxes simply because of who they were and who owned title to their land. And while tribes seek to invest in infrastructure to create a favorable climate for economic development, without taxing jurisdiction

348. While many tribes, including the Navajo Nation, granted preferences to tribally owned businesses, and these preferences have the approval of the federal government, 25 U.S.C. § 450e(c) (2000), these preferences are only for qualified tribal businesses, and in practice, tribes must often rely on the businesses of nonmembers.

349. 532 U.S. 645 (2001).

350. *Id.* at 659.

351. *See* NAVAJO TAX COMM'N, FY 1998 THRU FY 2003 ACTUAL TAX REVENUES, FY 2004 PROJECTED REVENUES, http://www.navajotax.org/new_page_7.htm (last visited Oct. 20, 2005) (reporting revenues collected).

352. Think, for example, of the impact of *Atkinson* on the Yakima Reservation discussed in the *Brendale* case, in which no one lived on the portion of the reservation without significant non-Indian ownership. *See supra* text accompanying notes 59–74.

they cannot force businesses on fee land to contribute to the costs of this infrastructure. In the words of Navajo Nation Chief Justice Robert Yazzie, "[t]he fee land businesses, for all practical purposes, receive a free ride."[353]

In addition, jurisdiction over nonmember businesses is crucial to protect tribal members. Jurisdiction over contracts between tribal members and nonmember businesses, whether those contracts are for employment or for purchases of goods and services, seems firmly protected by *Montana*'s consensual relationship exception. Encouraged by the Court's recent cases, however, non-Indian employers are increasingly challenging tribal exercises of jurisdiction over them.[354] Even if the consensual relationship exception ensures jurisdiction where non-Indians employ tribal members, to the extent that it denies similar jurisdiction over nonmembers, it will encourage invidious distinctions by both nonmembers and tribes. Non-Indian employers will have incentives to avoid hiring or entering into business relationships with tribal members to avoid tribal jurisdiction. Tribes, moreover, will be encouraged to see themselves as legislating only for the protection of tribal members, as it is only they and not the broader community of reservation residents for whom their laws can be enforced.

The absence of jurisdiction also undermines tribal efforts to address crime on Indian reservations. Lack of jurisdiction encourages non-Indians to perceive reservations as places to flaunt disdain for the law and hostility to Indian people. Oliphant and Belgarde's actions—punching a tribal police officer that tried to stop a brawl, engaging tribal police in a high speed chase across the reservation rather than pull over—might be seen as examples of this. Today, non-Indians engage in flagrant motor vehicle violations on tribal lands, apparently relishing the perceived lack of jurisdiction over them.[355]

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353. *Hearing*, *supra* note 4, at 92 (written testimony of Robert Yazzie, Chief Justice of the Navajo Nation).

354. *See, e.g.*, Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1130, 1134–35 (9th Cir. 1995) (successfully challenging tribal jurisdiction to strike down company anti-nepotism law); Manygoats v. Cameron Trading Post, No. SC-CV-50-98, 2000 NANN 0000003, ¶¶ 22, 37–38 (Navajo Jan. 14, 2000) (VersusLaw) (challenging tribal jurisdiction over action by terminated employee).

355. *Hearing*, *supra* note 4, at 26–27 (testimony of Robert Yazzie, Chief Justice of the Navajo Nation). This perception is not necessarily accurate. Many tribes, including the Navajo Nation, have cross-deputization agreements with their surrounding states, under which tribal police have authority to stop and ticket non-Indians for traffic violations on behalf of the state. *See, e.g.*, ARIZ. REV. STAT. § 13-3874 (discussing cross deputization of tribal police officers); N.M. STAT § 29-1-11 (2005) (authorizing tribal and pueblo police officers and certain federal officers to enforce state law as New Mexico peace officers); MICH. COMP. LAWS § 28.609(6) (discussing requirements for tribal police officers to be deputized as state peace officers); State v. Manypenny, 662 N.W.2d 183 (Minn. Ct. App. 2003) (discussing status of cross-deputized

A more disturbing example comes from statistics regarding crime against Indians, particularly against Indian women. The average annual rate of rape is more than twice as high among Native women than it is for any other ethnic groups,[356] and one in three Native women will be raped in her lifetime.[357] But while for other ethnic groups, most offenders are of the same race as their victims, almost 90% of Indian women are attacked by an offender of a different race.[358] (In general, about 70% of Indian victims of violent crime are attacked by an offender of a different race, again in sharp contrast with the preponderance of intra-racial violent crimes among other ethnic groups.)[359] The federal government has jurisdiction to prosecute such crimes that occur in Indian country,[360] but rarely does. The U.S. Attorney's Office, by some estimates, declines to prosecute 50 to 85% of the cases that are reported, and many of those it does accept are child sexual abuse cases.[361]

The lack of tribal jurisdiction over non-Indians thus creates a significant practical gap in law enforcement, which may help to create and perpetuate the high rates of interracial violence in Indian country.[362] It appears to contribute to a loss of faith in the efficacy of law on the part of victims as well. While sexual assault is significantly underreported across all ethnic groups, Native women are even less likely to report such crimes.[363] Given the small chance that a successful prosecution will result, the choice not to report is understandable. But it too contributes to the general failure of any legal system to address violent crime on Indian reservations.

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tribal officers); Neb. Op. Att'y Gen. No. 02009 (2002); 27 Okl. Op. Att'y Gen. 66 (1997); 22 Okl. Op. Att'y Gen. 71 (1991); Wash. AGLO 1978 No. 18.

356. PERRY, *supra* note 116, at 5.

357. Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121, 123 (2004).

358. PERRY, *supra* note 116, at 9 & tbl.13.

359. *Id.* at 9 & tbl.12.

360. In Indian country, the federal government has jurisdiction over all crimes committed by a non-Indian against an Indian under the Indian Country Crimes Act, 18 U.S.C. § 1152 (2000), and jurisdiction over Indians committing sixteen "major" crimes, including rape and sexual assault, under the Major Crimes Act. 18 U.S.C. § 1153 (2000). One significant problem with the statistics regarding sexual assault of Indian women is that they do not reflect whether attacks take place in Indian country or outside it, and so lack necessary guidance regarding the jurisdictional regime that applies.

361. Deer, *supra* note 357, at 126.

362. *Id.* at 127–28.

363. *Id.* at 123.

2. Jurisdiction over Nonmembers and Internal Legitimacy

Jurisdiction over outsiders is also integral to the internal legitimacy of tribal legal systems and the extent to which tribal communities accept them as valid institutions. This perceived legitimacy is of significant practical importance to Indian communities, because it helps to dictate the extent to which legal dictates will be complied with absent perfect surveillance or application of force.[364] Scholars have long realized that the most important work of law occurs beyond the eyes of judges and police. As Karl Llewellyn and E. Adamson Hoebel observed in their study of the Cheyenne legal system:

> The success of any legal system depends upon its acceptance by the people to whom it applies. Insofar as the system is an integrated part of the web of social norms developed within a society's culture . . . it will be accepted as a parcel of habit-conduct patterns in the social heritage of the people. . . . Law-in-action exists only because less stringent methods of control have failed to hold all persons in line, or in harmony, on points of moment.[365]

The more that law on the books or law in the courts diverges from popular conceptions of justice, the less efficient it is in regulating human behavior.[366] Individuals will fail to follow the law except when directly observed or coerced by representatives of the state. Few governments can afford the cost of this constant surveillance, and even paid governmental representatives will often diverge from the announced view of the law in their duties.[367] Equally important, the perceived tension between justice and

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364. *See* FRIEDMAN, *supra* note 151, at 113–15 (discussing importance of legitimacy generally); POMMERSHEIM, *supra* note 10, at 66–67 (discussing legitimacy with respect to tribal legal systems).

365. K.N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 239 (1941). Even new legal principles may have their greatest impact outside legal enforcement structures. A recent book on the effect of the Americans with Disabilities Act, for example, found that while new legal rights had a significant impact on the sixty people with disabilities interviewed for the study, the impact was due to transformation of the self- perception of the interviewees and voluntary compliance on the part of their employers and coworkers rather than formal legal assertion or enforcement of rights. DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION 4–13 (2003).

366. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005).

367. This process is apparent, for example, in the implementation of rape reforms of the 1970s and 1980s. While states have generally reformed their laws to remove requirements for corroboration of the victims' testimony, use of force against the victim, and injury to the victim, the laws have not appreciably increased rape convictions because prosecutors, judges, and juries continue to rely on these factors in determining whether to prosecute or convict. *See* Julie

the government leads to corruption and other rent-seeking behavior detrimental to the community as a whole.[368]

This kind of symbolic legitimacy, of course, is not independent of the practical efficacy discussed in the previous section. Perceived legitimacy stems in part from very utilitarian concerns. If a legal system in general is perceived to preserve safety, protect property, and contribute to prosperity, it gains the allegiance of the community it serves.[369] Even where individuals believe the exercise of the law to be ineffective or arbitrary in isolated cases, the reservoir of belief in the overall utility of the legal system helps to ensure compliance and respect. Where, however, a legal system cannot address concerns of significant impact to the community, it loses both its purpose and its legitimacy.[370] To the extent that tribal legal officials cannot address the everyday questions of law and order—to take examples from recent cases, zoning, reckless driving on reservation roads, regulation of on-reservation businesses, or searches of private property by law enforcement—they lose this source of legitimacy.

Power over non-Indians is also crucial for reasons distinct to tribal legal systems. Western-style governmental institutions came to most reservations as a means of controlling Indian people. Policy makers saw acceptance of Anglo law as both necessary and instrumental to acceptance of Anglo civilization.[371] In the 1860s, federal agents on Indian reservations began to experiment with using Indian people as tools for imposition of legal order on reservations.[372] In 1883, the Indian Department established regulations for formal Courts of Indian Offenses, in which Indian judges were appointed by federal agents to enforce prohibitions against polygamy, use

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Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117, 118–22 (1991).

368. *See, e.g.*, Stephen Cornell & Joseph P. Kalt, *Where Does Economic Development Really Come From? Constitutional Rule Among the Contemporary Sioux and Apache*, 33 ECON. INQUIRY 402, 423–24 (1995). While I believe that Kalt and Cornell wrongly attribute the governmental instability and resulting economic failure of the Oglala Sioux Tribe to the failure of its governmental structure to mimic the traditional tribal structure of the nineteenth century, I believe they are correct in pointing to its problems as an effect of a community that does not respect its government or its representatives.

369. *See, e.g.*, FRIEDMAN, *supra* note 151, at 143 ("Law is right because it is useful.").

370. *See* Merry, *supra* note 151, at 56 (noting that inability of courts to resolve disputes in urban housing project actually increased violence in community).

371. *See generally* HAGAN, *supra* note 312.

372. These tribal members were more effective in enforcing the will of the colonizers than the government itself could ever be. *Id.* at 26–27, 31, 35–37. As the Agent of San Carlos Apache boasted, "our little squad of Indian Police have done more effective scouting. . . than General Kautz has done with all his troops and four companies of Indian scouts." *Id.* at 37.

of medicine men, and policies of mandatory schooling and agricultural labor.[373]

The above themes are repeated in Navajo legal history. The Navajos' first experience with a western legal system came at the time of their most severe domination by the United States. In 1864, after centuries of successful resistance to Spanish, Mexican, and American forces,[374] Navajo leaders finally accepted defeat at the hands of Kit Carson and his troops. Under siege and threat of starvation if they did not leave their canyon strongholds, about half of the Navajo population took the "Long Walk"[375] to Fort Sumner in Bosque Redondo, New Mexico. Once there, heartsick at their separation from *Dinetah*, the Navajo homelands, and dependent on the federal superintendent for inadequate rations,[376] Navajos became subjects in a failed experiment at forced colonization. In this atmosphere of despair the federal government began its first experiments to "introduce" the Navajo people to the rule of law. The people were divided into twelve villages, each with a principal chief charged "to carry out and enforce all laws given him for the government of his village, or any instructions he may receive at any time from the commanding officer."[377] Together with his subchiefs, each chief presided over a trial level court for arbitration of disputes and

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373. *See* H.R. EXEC. DOC. NO. 48-1, pt. 5, at 3-376 (1883) (1883 Report of the Commissioner of Indian Affairs).

374. Although Spain had first begun to colonize the Southwest in the 1500s, RAYMOND FRIDAY LOCKE, THE BOOK OF THE NAVAJO 153–54 (5th ed. 1992), and the Mexicans in their stead had waged a campaign of raiding and slavery against the Navajo for many decades, *id.* at 181–96, when the United States claimed the territory after the Mexican War of 1846, the Navajos still lived independently, and few had entered the depths of their country. *Id.* at 202–07.

375. Like the better known "Trail of Tears" walked by the Five Civilized Tribes across the Mississippi, many died on this four-hundred-mile trip. In the words of one historian:

> [b]y the second day of the march coyotes began to follow the long line of Navajos, marching a few abreast in family groups, and hawks and crows circled overhead, waiting to make a meal of the next body. The horses weakened and stumbled, and as soon as they fell they were slaughtered and the meat divided among the hungry *Dineh*. Without the horses, many of the aged, too weak to keep up, were left behind. Their relatives gave them a little food and marched on with tears in their eyes.

Id. at 363. More than one in ten that began the journey died before its completion. *Id.* at 362–63.

376. Futilely counting on harvests that never materialized, *see* S. EXEC. DOC. NO. 38-36, at 3 (1864) (expectation that reservation would soon become self-sustaining), and too busy with the Civil War and its aftermath to devote enough resources to feed the many Navajos, Congress never appropriated funds for even half of the rations the Navajo needed. LOCKE, *supra* note 374, at 365–67. The rations that were provided were sometimes composed of rancid bacon and weevily flour, supplies that had been declared unfit for the federal soldiers to eat. *Id.* at 372.

377. Proceedings of a Board of Officers at Fort Sumner, New Mexico (Apr. 26, 1865), *reprinted in* ROESSEL, *supra* note 328, at 22 [hereinafter Proceedings]; *see also* James W. Zion, *Civil Rights in Navajo Common Law*, 50 U. KAN. L. REV. 523, 533 (2002).

adjudication of criminal offenses.[378] The offenses the military officers designed were more appropriate to a labor camp than a court of law, and included imprisonment, lashes, or hard labor for such "crimes" as refusing to work, destroying agricultural tools provided by the government, destroying farm produce, absence from the reservation, and absence from one's assigned village between 7 p.m. and 5 a.m. in winter, or 8 p.m. to 4 a.m. in summer.[379]

After four years of imprisonment, the United States finally permitted the Navajos to return to the *Dinehtah*.[380] Soon after their return, the federal agent set up a Navajo police force to control Navajos that were leaving the reservation to raid Mexican livestock.[381] A Navajo Court of Indian Offenses was created in 1892[382] after a federal report that "if conducted it would serve to teach the tribe the white man's manner of dealing out justice and give them an idea of law and legal procedure."[383]

The Navajo court and police quickly became associated with alien federal practices.[384] Shortly before the court was created, Black Horse, the leader of the Rough Rock portion of the Reservation, led a federal siege against the agent and his Navajo police when they came to forcibly collect Navajo children to send to boarding school.[385] The Navajo police and courts also enforced the infamous federal stock reduction programs of the 1930s.[386] By taking away Navajo livestock, these federal attempts to reduce overgrazing on the Navajo Nation .tore at the deep structure of Navajo economic and cultural life.[387]

As on other reservations, however, the Navajo courts also performed much needed law and order functions. Because of the failure of federal officials to adequately prosecute crimes under the Major Crimes Act, a

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378. Proceedings, *supra* note 377, at 23.

379. *Id.* at 24.

380. LOCKE, *supra* note 374, at 383–84.

381. *Id.* at 397.

382. Tom Tso, *Moral Principles, Traditions, and Fairness in the Navajo Nation Code of Judicial Conduct*, 76 JUDICATURE 15, 16 (1992) [hereinafter Tso, *Moral Principles*].

383. DEP'T OF THE INTERIOR, U.S. CENSUS BUREAU, REPORT ON INDIANS TAXED AND INDIANS NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS 1890, at 159 (1894).

384. Stephen Conn, *Mid-Passage—The Navajo Tribe and Its First Legal Revolution*, 6 AM. INDIAN L. REV. 329, 332–33 (1978).

385. HAGAN, *supra* note 312, at 77.

386. Conn, *supra* note 384, at 333.

387. PARMAN, *supra* note 331, at 65–66. Antagonism to this program, and the association of it with John Collier, was the main reason the Navajo people rejected the Indian Reorganization Act and thereby forewent almost one million dollars in federal assistance. *Id.* at 77.

majority of criminal cases were prosecuted in the Navajo courts.[388] In addition, social change had created both problems and segments of the population not amenable to the social control provided by the clan system.[389] Young men returning from military service overseas brought with them problems not easily dealt with by traditional ceremonies,[390] and a disdain for the informality of the Navajo courts and the lack of formal education of their judges.[391] Local communities asked that their members be deputized to control increasing crime.[392] The Navajo Tribal Council therefore lobbied Congress for funds, and when this failed, dedicated scarce tribal resources to expanding their legal system in response to the demands of the Navajo community.[393]

The Navajo Nation also saw a need to develop courts to reassure outsiders and fend off efforts to extend state jurisdiction over its reservation.[394] In 1959, these efforts brought the tribe a tremendous legal victory. In *Williams v. Lee*,[395] the United States Supreme Court reversed the Arizona Supreme Court to hold that the state court had no jurisdiction over an action by a non-Indian trader to collect a debt against Navajos for goods sold on the Navajo Nation. Relying in part on the fact that "[t]he Tribe itself ha[d] in recent years greatly improved its legal system,"[396] the Court held that there could "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."[397]

Despite this triumphant cap on judicial reform, the Navajo Nation, like other tribes, must struggle with the legacy of colonialism in trying to achieve internal legitimacy. On the one hand, their governments and courts may be perceived as tools of the colonizers, implementing a law that is almost by definition illegitimate. On the other hand, seen through eyes colored by years of non-Indian education, they may be perceived as illegitimate because they lack the formality, the resources, or the training of

388. Conn, *supra* note 384, at 334 n.27.

389. *Id.* at 339.

390. *Id.* For an extraordinary literary depiction of the problems of returning Laguna Pueblo veterans, see LESLIE MARMON SILKO, CEREMONY (1977).

391. Conn, *supra* note 384, at 342.

392. *Id.* at 339.

393. *Id.* at 340.

394. S. 1407, 81st Cong. § 9 (1949) (including extension of state jurisdiction in Navajo-Hopi Rehabilitation Act). *See also* Conn, *supra* note 384, at 343–46.

395. 358 U.S. 217, 223 (1959).

396. *Id.* at 222.

397. *Id.* at 223.

non-Indian courts.[398] Frank Pommersheim eloquently lays out this dilemma in his book *Braid of Feathers*:

> Identifiable segments of most tribes have at times refused to consider tribal courts legitimate. In this regard, many tribal courts are vilified as "white men's" creations . . . . The courts are seen as instruments of outside forces and values that are not traditional and therefore not legitimate.
>
> By contrast, some segments of most tribal populations (and local non-Indian populations) view tribal courts as illegitimate because they fall, or appear to fall, far below recognized state and federal standards in such matters ranging from the institutional separation of powers to the provision of civil due process and enforcement of judgments.[399]

Loss of jurisdiction over non-Indians undermines tribal courts in the eyes of both of these segments of reservation society. Indian people, with a foot each in reservation and non-reservation worlds, are not deaf to the message sent by limiting tribal adjudication to them: Indian courts are inferior, good enough for Indians but not for white folks. This message contributes to mistrust and alienation from tribal courts and institutions. As John St. Clair, the Chief Judge of the Shoshone and Arapahoe Tribal Court of the Wind River Indian Reservation, testified to the Senate Indian Affairs Committee, "[t]his double standard of justice creates resentment and projects the image that non-Indians are above the law in the area where they choose to live or choose to enter into."[400] When the federal government declares that the courts of subordinate tribal governments cannot have jurisdiction over members of the dominant society, it cannot help but undermine the legitimacy of the courts in the eyes of the communities they serve.

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398. Two studies of the Navajo courts from the 1970s reveal internal legitimacy problems attributable to these factors. Samuel Brakel examined the Navajo courts in his 1978 book AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE. BRAKEL, *supra* note 8. One of the essential problems that Brakel found with the Navajo courts as with the two other tribal court systems he studied was that a sense of inferiority led the relatively uneducated tribal judges to rely heavily on legal technicalities and on the urging of legally educated counsel. *Id.* at 84–90. This judicial insecurity, he found, deprived the courts both of the ability to administer justice, to hear both sides fairly, or to express any kind of local or customary sense of justice. *Id.* at 95–96. While Brakel argued for the abolishment of tribal courts, Dan Vicenti and his coauthors on the 1972 THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ'ÁANII, argued for their preservation and greater independence from non-tribal law. VICENTI, *supra* note 181. But like Brakel, the authors found that Navajo judges, in their efforts to appear just as good as non-Indian courts, relied too heavily on non-Indian attorneys and practiced a kind of rigid formality that had little to do with justice. *Id.*

399. POMMERSHEIM, *supra* note 11, at 67–68.

400. *Hearing*, *supra* note 4, at 29 (testimony of John St. Clair).

B. Jurisdiction over Outsiders and Institutional Fairness

The previous section focused on the importance of jurisdiction over outsiders in ensuring that tribal legal systems are effective. This section will focus on the importance of jurisdiction over outsiders in ensuring that they are just. If tribal courts did not have power to adjudicate outsider rights, I will argue, they would not be so fair. Despite the recent inroads into tribal jurisdiction over outsiders, in many cases tribal courts will be the only fora in which they can assert their claims. Fairness of tribal court systems, therefore, is of significant concern both for tribal members and nonmembers.

1. Jurisdiction over Outsiders and Conceptions of the Judicial Role

Somewhat counterintuitively, it appears that the best explanation for the evenhandedness of the Navajo courts is the sense of self-importance held by its decision-makers. Political scientists have long examined judicial "role orientations," or judicial understandings of the institutional role of courts and judges,[401] as one factor influencing judicial behavior.[402] Particular conceptions of the judicial role may lead judges to depart in judicial behavior from individual preferences, whether it is to cater to the needs of a particular group,[403] to attempt to strictly follow prior judicial precedent,[404] or

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401. James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 108 (1981).

402. *See* John M. Scheb, II et al., *Judicial Role Orientations, Attitudes and Decision Making: A Research Note*, 42 W. POL. Q. 427, 427–28 (1989) (collecting citations to work on judicial role orientations).

403. Such an orientation could be clearly wrong, as when a judge sees herself as serving the interests of her particular race or class, or more acceptably, as when a judge sees the judicial role as protecting the powerless from oppression by the majority.

404. Much work has been devoted to trying to determine the existence and importance of such "activist" or "restraintist" attitudes toward the appropriate judicial role. *See, e.g.*, Victor Eugene Flango et al., *The Concept of Judicial Role: A Methodological Note*, 19 AM. J. POL. SCI. 277, 279, 281 (1975); J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 922 (1977); Scheb, *supra* note 402, at 427. This work is not of great significance to the inquiry as to tribal judicial treatment of nonmembers. The supposed restraintist-activist divide conceals the general judicial agreement that restraint and creativity both have appropriate roles in decision-making, and the narrow range of cases (about 10% of cases according to one survey of appellate judges) judges consider offer some scope for creativity. Howard, *supra*, at 922. There is general agreement, in other words, that both creativity and interpretation are appropriate judicial behaviors, and the differences are ones of time and place. *Id.* Rather, the concern about tribal courts is that they will be swayed by factors that are generally agreed to be judicially inappropriate, in particular the status of the parties and political pressure by tribal communities. It is the importance of judicial role orientations in resisting these pressures that is more important.

to defer to other governmental institutions.[405] Navajo justices' conception of the court's institutional role appears to be a significant factor behind the court's relatively good track record. This conception, in turn, is importantly connected to the scope of their jurisdiction.

As an institution, the Navajo court thinks a lot of itself. Its decisions are replete with references to the important role of the court in providing a just and distinctly tribal resolution to disputes that come before it, and its judges traverse the country and even the world arguing for the preservation of the courts and for the dissemination of the legal values promulgated by it.[406]

This sense of self-importance is also evident in the one exception to the general evenhandedness of the Navajo Supreme Court. Where a litigant challenges the inherent jurisdiction of the Navajo Nation, the litigant is probably going to lose.[407] In many cases, the Navajo courts will cede jurisdiction to another forum, whether in a child custody case because the child was wrongly taken from another jurisdiction,[408] an employment case against a state school district in which the court deferred to the state courts as a matter of comity,[409] or a tort case where the litigant had already chosen state worker's compensation remedies.[410] But in each case raising the question whether the Navajo Nation courts as a matter of inherent jurisdiction had the power to regulate a particular dispute, the courts held that it did, even in cases in which federal courts might reach a different conclusion.[411]

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405. *See* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Desicionmaking*, 95 NW. U. L. REV. 1437, 1479–80 (2001).

406. One can see this by reviewing a few of the many articles and speeches by Robert Yazzie and Tom Tso, who together were Chief Justices of the Navajo Nation courts during almost the entire period I examine. *See Hearing*, *supra* note 4, at 26–28, 86–103 (testimony of Robert Yazzie, Chief Justice of the Navajo Nation); Tom Tso, *Indian Nations and the Human Right to an Independent Judiciary*, 3. N.Y. CITY L. REV. 105 (1998); Tso, *Moral Principles*, *supra* note 382; Tso, *The Process of Decision Making*, *supra* note 134; Yazzie, *Life Comes From It*, *supra* note 326; Robert Yazzie, *"Watch Your Six": An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 AM. INDIAN L. REV. 497 (1999) [Yazzie, *Watch Your Six*].

407. This does not mean, however, that the court will be biased against the litigant as to the substantive issues. As discussed above, in a 1999 employment case involving an employer that had repeatedly challenged the jurisdiction of the Navajo Nation in a variety of contexts, the court held that the Nation did have jurisdiction to regulate the company's employment practices, but reversed the lower court's holding that those practices violated Navajo law. Manygoats v. Cameron Trading Post, No. SC-CV-50-98, 2000 NANN 0000003, ¶ 59 (Navajo Jan. 14, 2000) (VersusLaw).

408. *See* discussion, *supra* Part III.C.3.

409. Hubbard v. Chinle School Dist. 3 Navajo Rptr. 167, 171 (1982).

410. *See* discussion, *supra* Part III.C.1.

411. *See, e.g.*, Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128, 1134 (9th Cir. 1995) (Navajo court improperly found tribal jurisdiction over non-Indian employer). Of course, as the

This insistence on tribal inherent jurisdiction provides support for the importance of Navajo justices' role orientations in another way, by discounting the importance of strategic motivations in their decision-making. The strategic model for explaining judicial behavior suggests that while judges act primarily to forward their individual preferences, they do so strategically, aware that their behavior is constrained by the power of other institutional actors.[412] The Navajo justices, it might be argued, rule in favor of non-Indians only to avoid federal judicial and legislative restrictions on their jurisdiction. But questions of jurisdiction over outsiders are among the few tribal court decisions that can always be challenged in federal court.[413] While the justices are keenly aware of their vulnerability to federal control,[414] they frequently rule against non-Indians in the one area in which the federal courts may exercise significant control and even respond by restricting their jurisdiction. This suggests that where role orientations and strategic goals conflict, ideas of the institutional importance of the Navajo courts rather than the desire to avoid federal reversal of their actions hold sway.

Rather than create incentives to despotism, this sense of self-importance has only enhanced the institutional imperatives to ensure that all litigants can be heard and that decisions are not unduly influenced by factors perceived as inconsistent with the judicial role, such as political pressures or the membership status of the parties. Other studies regarding judicial behavior have noted the importance of both individual self-esteem and internalized role expectations in leading judges to avoid external pressures and personal biases when deciding cases.[415] In the Navajo case as well, the

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U.S. Supreme Court has increasingly departed from precedent to limit tribal jurisdiction, Navajo Nation decisions may be seen as a more faithful reflection of precedent, and have been upheld by reviewing lower federal courts only to find the decision reversed by the Supreme Court. *See, e.g.*, Atkinson Trading Co. v. Shirley, 210 F.3d 1247, 1261–64 (10th Cir. 2000) (holding, as had the Navajo Nation Supreme Court, that the Navajo Nation had jurisdiction to tax Atkinson), *rev'd*, 532 U.S. 645 (2001).

412. *See* Cross & Nelson, *supra* note 405, at 1445–46.

413. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852–53 (1985) (establishing federal jurisdiction to hear challenges to tribal jurisdiction over nonmembers).

414. It is difficult being a judge when you have to watch your rear to make certain that those folks do not push you into something that can be the basis for review of one of your decisions by a federal court, or meat for testimony in Congress about how bad your court may be.

Yazzie, *Watch Your Six*, *supra* note 406, at 500.

415. *See* Gibson, *supra* note 401, at 123–24 (finding that judges high in self-esteem were more likely to resist external pressures and judge in conformance with the law than those with low self-esteem); LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 65–67 (2000) (discussing ways judicial desire for legal accuracy and concern for doctrine constrain judicial bias).

justices' sense of self-importance is a large part of the reason that the court carefully scrutinizes the facts and law before it and tries to rule justly in response. It is the reason that the court not only often rules in favor of non-Navajo parties, but also a substantial portion of the time rules against the Navajo Nation itself. It has led the court, with no constitutional separation of powers, to construe Navajo common law and the ICRA to create a right of judicial review of governmental actions.[416] It has also led it to threaten to create judicial waivers of tribal sovereign immunity until the Navajo Nation Council created a legislative waiver.[417]

The deliberate effort to incorporate Navajo customary law has only enhanced this concern for justice. In creating a jurisprudence of Navajo common law, the court sees itself as expressing the ideals not of aliens or colonizers, but of the Navajo people. Each articulation of a Navajo common law concept, therefore, is a public declaration not only to Navajo people but to the wider community, "This is the best of who we are." Justice Robert Yazzie once commented that the reaction to one of his speeches was "Yazzie is bashing Anglo justice systems again."[418] But this kind of "bashing" suggests that tribal judges will use the freedom to diverge from Anglo legal standards as an opportunity not to lower but to raise the bar in protecting those that appear before them. While tribal judges likely exaggerate the differences and superiority of tribal over state and federal legal systems, an empirical study of tribal court decisions regarding fundamental rights suggests that the results of tribal court adjudication are at least as fair as those that would be expected in non-tribal courts.[419]

Eliminating the power to adjudicate rights of outsiders, and to do so with a relative degree of independence from outsider legal standards, would greatly diminish this sense of self-importance. The jurisdiction of tribal courts would then be radically less than state and federal courts, and the disputes before them would not include many of those in which, I have argued, law does its real work. The impetus to act in accordance with the

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416. Halona v. MacDonald, 1 Navajo Rptr. 189, 203–06 (1978).

417. Keeswood v. Navajo Tribe, 2 Navajo Rptr. 46, 51–55 (1979) (urging tribe to waive sovereign immunity); Johnson v. Navajo Nation, 5 Navajo Rptr. 192, 195–96 (1987) (holding immunity waived under Navajo Sovereign Immunity Act passed "perhaps at the 'urging' of the Court").

418. Yazzie, *Life Comes From It*, *supra* note 326, at 190.

419. Rosen, *supra* note 8, at 578–81. Rosen found that tribal courts have "interpreted the ICRA in good faith, ... take federal case law seriously[,] and tend to deviate from federal doctrines only for good reasons," and that among the 194 cases he reviewed, "[t]here are no outcomes that flatly violate [the right of] Protection, and only one case's reasoning is clearly problematic." *Id.* at 579.

role of the judge, independent from immediate pressures and prejudices, would be greatly reduced.

2. Jurisdiction over Outsiders and Grappling with Difference

Jurisdiction over outsiders may also enhance the justice of the courts and the broader Navajo community in another way, by forcing judges to consider and resolve real conflicts in Navajo society. Despite the claims of some advocates of tribal courts that tribal traditional dispute resolution is always just, both traditional tribal norms and modern tribal laws, like those of any legal system, may reinforce unequal power structures.[420] The law's distinction between members and nonmembers conceals many of the real sources of disadvantage within tribal legal systems. Tribal communities are not homogenous—they are composed of men and women, of traditionally powerful families and traditionally powerless ones, of those with Anglo education and those with traditional education.[421] Tribal politics and laws, whether they reflect pre-contact traditions or modern developments, may favor one group over another. Separated from the demands of the broader community in which tribes are situated, uncritical valorization of tradition may prevent tribal communities from examining this inequality. By continually facing litigants and contexts involving a wide variety of perspectives, however, judges are forced to reexamine how traditional norms and their modern iterations accord with the ideals and reality of the community.

Anthropologist Bruce Miller notes this effect in his study of courts run by three different tribes composed of the indigenous Coast Salish people of the Northwestern United States.[422] Miller found that the courts functioned best when they had jurisdiction over subjects creating real conflict among tribal members.[423] The Upper Skagit tribal court system, which was created to regulate and adjudicate individual disputes regarding the fishing rights won by the tribe in 1974, functioned much better than the South Island Justice Project or the Stolo Justice Project, both of which were created to provide a forum for supposedly harmonious and consensus based law, rather than to serve a meaningful distributive or punitive function.[424] Miller

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420. *See also* MILLER, *supra* note 8, at 11.

421. Indeed, Stephen Conn has pointed out that the need to address differences along these lines emerging within Navajo society after World War II was a significant motivation to the tribe in enhancing its formal legal system. Conn, *supra* note 384, at 339.

422. MILLER, *supra* note 8.

423. *Id.*

424. *Id.* at 7–9.

concludes that "these three cases suggest that it is a dialectical process, an interchange between abstractions of past practice and specifics of current disputes, rather than simply the contemplation of past practices, that enable tribal justice institutions to become effective and acceptable to community members."[425]

At the same time, the demands of outsiders may provide judges with greater freedom to institute legal change than they might otherwise possess. A potential criticism of tribal legal systems is that the small size of tribal communities and the importance of clan relationships among community members present an obstacle to objective resolution of legal disputes. This obstacle may not be significantly greater than it is in small towns, in which judges, lawyers, and parties typically know each other well.[426] But the presence of individuals not tied to the Navajo Nation by bonds of kinship and familiarity may enable judges to revitalize legal rules to better respond to the disputes before them.

One can see the value of the confrontation with difference in the decisions of the Navajo appellate court. In several cases, judicial review of cases involving outsiders has led to changes that tend to equalize Navajo statutory law. For example, one of the statutes passed as part of the Navajo law "reform" of the 1950s provided that while Navajo couples could legally marry in a traditional Navajo ceremony, Navajos could only marry non-Navajos in accordance with procedures conforming to state law. In two cases, Navajos came before the court seeking validation of their customary marriages to their deceased non-Navajo spouses.[427] In both cases, the court refused to grant the petitions, citing the clear language of the statute. In each case, however, the court expressed its concern with the law. In 1985, in *In re Marriage of Garcia*,[428] while refusing to validate the marriage between a Navajo and a Mexican-American, the court declared that it was:

> impressed by the arguments of counsel for the petitioner which recounted a history of non-Navajos adopting a Navajo way of life and becoming a part of their community. . . . The Court recognizes the contribution and importance of many non-Navajos but finds

425. *Id.* at 12.

426. A young lawyer I worked with on the Navajo Nation, for example, was indignant after the attorney on the other side of a domestic relations case she had filed in Farmington, New Mexico, informed her that he had spoken with the judge and they had decided how to handle the case.

427. *In re* Marriage of Francisco, 6 Navajo Rptr. 134, 134–35 (1989); *In re* Marriage of Garcia, 5 Navajo Rptr. 30, 30–31 (1985).

428. 5 Navajo Rptr. 30.

> that the provisions of the *Navajo Tribal Code* require it to affirm the decision of the trial court.[429]

In 1989, in *In re Marriage of Francisco*,[430] the court called for change of the rule:

> [S]aying that "marriages between Navajos and non-Navajos may be validly contracted only by the parties' complying with applicable state or foreign law," allows outside law to govern domestic relations within Navajo jurisdiction. Such needless relinquishment of sovereignty hurts the Navajo Nation. The Navajo people have always governed their marriage practices, whether the marriage is mixed or not, and must continue to do so to preserve sovereignty. . . .
>
> [The law] enacted in 1957 has outlived its usefulness.[431]

The Navajo Nation Council subsequently changed the law.

In 1999, in *Means v. Dist. Court of the Chinle Judicial Dist.*,[432] the court considered a challenge to its criminal jurisdiction over a non-Navajo Indian.[433] The Navajo Nation sought to prosecute Lakota activist Russell Means for the battery of his father-in-law, Leon Grant, a member of the Omaha tribe, and his brother-in-law, Jeremiah Bitsui, a member of the Navajo Nation.[434] Means alleged that because the tribe could not prosecute a similarly situated non-Indian, jurisdiction over him was founded in race and violated the equal protection provisions of the ICRA, the Navajo Nation Bill of Rights, and the Fifth Amendment to the United States Constitution.[435] The court rejected the challenge.[436] While it could have relied on the federal *Duro* Fix to justify its jurisdiction, it chose not to, and relied instead on the legal relationship with outsiders created by the Navajo Treaty of 1868 and by Navajo common law.[437]

First, the court found that the treaty language, interpreted as the Navajo negotiators would have understood it, granted the tribe jurisdiction over

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429. *Id.* at 30–31.

430. 6 Navajo Rptr. 134.

431. *Id.* at 140 (citations omitted).

432. 7 Navajo Rptr. 382 (1999).

433. *Id* at 383. For a longer discussion of the significance of this case, see Paul Spruhan, *Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, 1 TRIBAL L.J. 3 (2000), *available at* http://tlj.unm.edu/articles/volume_1/spruhan/text.php.

434. 7 Navajo Rptr. at 384–85, 387–88.

435. *Id.* at 383–84.

436. *Id.* at 393–95.

437. *Id.* at 389–91.

nonmember Indians.[438] It pointed to the concern of Navajo treaty negotiators and the reassurance of the treaty commissioners that the tribe would be able to accept nonmembers onto their lands and that those outsiders would be subject to tribal jurisdiction.[439] Second, the court pointed to the Navajo common law concept of membership by voluntary affiliation:

> While there is a formal process to obtain membership as a Navajo, . . . that is not the only kind of "membership" under Navajo Nation law. An individual who marries or has an intimate relationship with a Navajo is a *hadane* (in-law). The Navajo People have *adoone'e* or clans, and many of them are based upon the intermarriage of original Navajo clan members with people of other nations. . . . A *hadane* or in-law assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law. . . .
>
> We find that the petitioner, by reason of his marriage to a Navajo, longtime residence within the Navajo Nation, his activities here, and his status as a *hadane*, consented to Navajo Nation criminal jurisdiction. This is not done by "adoption" in any formal or customary sense, but by assuming tribal relations and establishing familial and community relationships under Navajo common law.[440]

While a loss for the non-Navajo litigant, by overcoming the largely federally-created distinction between enrolled members and non-enrolled residents, the decision created a tribally legitimate basis for incorporating nonmembers into the Navajo community.[441]

More recently, in *Staff Relief, Inc. v. Polacca*,[442] the court judicially amended a Navajo statute to provide remedies to a non-Navajo.[443] There, a non-Indian headhunter had offered a member of the Hopi Tribe a job with the Indian Health Service but then denied him the job after he had accepted and moved to the area. Mr. Polacca sued the headhunter under the Navajo

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438. *Id.* at 390–91. This rule of treaty interpretation is one of the fundamental Indian law canons of construction. 1941 COHEN, *supra* note 30, at 37–38.

439. *Means*, 7 Navajo Rptr. at 390–91.

440. *Id.* at 392–93 (footnote and citations omitted).

441. The Ninth Circuit has recently upheld the decision against equal protection and due process challenges, although it did so on federal Indian law principles rather than the Navajo principles the Navajo Nation Supreme Court emphasized. Means v. Navajo Nation, 420 F.3d 1037, 1044–47 (9th Cir. 2005).

442. No. SC-CV-86-98, 2000 NANN 0000006, (Navajo Aug. 18, 2000) (VersusLaw).

443. No. SC-CV-86-98, 2000 NANN 0000006, at ¶¶ 23–24, 27–30.

Preference in Employment Act ("NPEA"), and the headhunter argued that Polacca had no standing to sue because the Act limited the right to file a complaint to Navajos. The Navajo Supreme Court declared this limitation was enacted "[f]or reasons beyond the knowledge of this court" and "rectif[ied] that shortcoming by ruling that under basic principles of equal protection of law, any person who is injured by a violation of NPEA may file a claim with the Commission."[444] The court relied both on federal constitutional jurisprudence declaring that a court might broaden coverage of a statute otherwise constitutionally defective, and on the Navajo Treaty of 1868 that recognized the power of the Navajo Nation "to admit non-Navajos to its territorial jurisdiction, and thus its protection, or to deny entry. Once an individual obtains the right to enter the Navajo Nation, due process of law requires that the Navajo Nation extend the protection of its law to all individuals."[445] This decision may not have arisen purely from the court's sense of justice. In hearing the case, the Navajo Nation was surely aware of contemporary challenges to tribal jurisdiction and tribal protection of rights.[446] But the decision was chosen by the court and thus became an expression of sovereignty and Navajo values rather than a resented intrusion of outside law.

In each of these decisions, we see that allowing judicial determination of cases involving outsiders enhances the fairness of the law. By considering broad-based statutes as applied to the individual circumstances of nonmembers on the Navajo Nation, the court is moved to criticize and amend aspects of the laws that do not treat them fairly. By struggling to understand the position of outsiders in the Navajo community, the court recovers traditions in which members and nonmembers were not separated by artificial legal rules. Far from permitting arbitrary control to the disadvantage of outsiders, judicial jurisdiction appears to reveal and correct some of the arbitrariness of the position of outsiders in the Navajo community.

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444. *Id.* at ¶¶ 21–22.

445. *Id.* at ¶ 22.

446. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 499 (2000) (invalidating qualifications based on Native Hawaiian ancestry for voting on trustees for land held in trust for Native Hawaiians); Williams v. Babbitt, 115 F.3d 657, 665–66 (9th Cir. 1997) (striking down protections for Alaska Natives in Reindeer Act of 1937 as race-based); Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120–21 (9th Cir. 1998) (invalidating application of Navajo preference in lease agreement to Hopi Indians as discrimination based on national origin). On remand, *Dawavendewa* was dismissed for failure to join the Navajo Nation, an indispensable party. Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150 (9th Cir. 2002).

V. CONCLUSION

In the American imagination, Indian tribes function as the bearers of history for a country uneasy about its lack of history, a symbol of tradition and culture for a country struggling with its aggressive modernity. Supreme Court jurisprudence has reflected and contributed to this image, emphasizing the foreignness of tribal courts, and denying tribes the ability to shape their negotiations with the outside world.

Examination of the role of nonmembers in tribal courts suggests a need to reconceptualize both tribes and what jurisdiction over those labeled outsiders means for them. Just as the Navajo people are importantly intertwined with non-Navajo society, the genius of Indian tribes lies not in being living museums, but rather, in adapting in the face of change to survive without losing their culture or disintegrating as communities. Sovereignty must be understood in this light: not as the right to stand still in a mythicized past, but as the power to change so as to maintain and strengthen one's community when many of the historic bonds between that community have disappeared. The challenge of federal Indian law, then, is to create an arena in which tribes can combine their past, present, and future to create norms and institutions that can sustain tribal communities.

Jurisdiction over those considered outsiders to tribes is crucial in allowing this process to occur. It is precisely cases in which both worlds are brought together that tribal courts best perform their community-building role, by translating traditions eroded by generations of colonization into living rules meaningful to the modern Indian community—a process Nell Newton calls "reversing the politics of erasure."[447] In determining the rules of interaction between tribal members and nonmembers, tribal courts use the institutional forms of the colonizer to reinvigorate the voice of the colonized and make it heard. Were tribal courts limited to adjudicating the rights of their members, they would lose their important role in defining the tribal community sovereignty and ensuring its preservation.

At the same time, jurisdiction over outsiders is crucial in preserving the fairness of tribal courts, both for members and nonmembers. Justice is not created by ensuring that decision-makers have power only over those that are just like them. Rather, it lies in ensuring that judges have enough pride in their judicial role to fairly adjudicate the cases before them, as well as the opportunity to scrutinize laws and practices against a variety of perspectives. In the tribal context, jurisdiction over outsiders, along with a measure of independence in exercising it, preserves both this necessary

447. Nell Newton, (unpublished manuscript, on file with author).

institutional self-importance and the impetus to examine tribal practices and ensure they conform to tribal ideals.

Whether this jurisdiction will be preserved depends, in part, on whether the Supreme Court maintains the assumptions that color its opinions of the last quarter century. Because the Court has proceeded in a haphazard, incremental fashion in depriving tribes of such jurisdiction, there remains much that can be preserved in future cases. If the Justices continue to perceive tribal courts as unfair, unfamiliar places, they will continue to bend the law and ignore the facts to find that tribes have no jurisdiction over tribal nonmembers. If they continue to perceive self-government as the power to protect practices that are untouched by time and the outside world, they will continue to read actions that touch on nonmembers as unrelated to the self-government that the Court is bound to protect.

These questions are equally applicable to Congress. As the Court continues to undermine congressional and executive efforts to support tribal self-determination, tribal advocates will turn to Congress to correct this judicial policy-making cloaked in the mantle of federal common law. Congress, more aware of the contemporary realities of tribal life, has not fallen into the same traps as the Supreme Court. But in considering whether to statutorily protect tribal jurisdiction over non-Indians, Congress will need evidence that this move is necessary and that it will not result in injustice to those affected.

In the past, the Court has made decisions regarding jurisdiction over nonmembers against a backdrop of untested beliefs. This Article is a beginning step in testing those beliefs and raising questions as to their accuracy. It suggests that the Court should be cautious in assuming a broad policy-making role in removing jurisdiction. Further, it suggests that preservation of such jurisdiction, whether by the Court or Congress, is a necessary part of fulfilling the commitment to tribal self-government that is embodied in federal law.

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